NOTES

BALLPARK BEAT-DOWNS: A NEW FRAMEWORK TO PROTECT FANS

MICHAEL CAMPBELL*

I. INTRODUCTION: THE BRYAN STOW BEATING AT DODGER STADIUM

Baseball, America's national pastime for more than 136 years,[1] is romanticized[2] and immortalized.[3] Every season brings a new sense of hope to cities across the nation, where fans debate the potential of their hometown team and dream about winning a World Series.[4] Opening Day of the 2011 Major League Baseball season was no different. The Los Angeles Dodgers opened their season at Dodger Stadium against their longtime rivals, the San Francisco Giants,[5] in front of fifty-six thousand fans.[6] The

* J.D. Candidate 2013, University of Southern California Gould School of Law; B.A. Chapman University, 2008. My love of baseball (and sports in general) was the inspiration for this Note. Special thanks to Professor Gregory C. Keating for all of the amazing guidance and thought-provoking discussion. I would also like to thank my family for the constant support, and the Southern California Interdisciplinary Law Journal board and staff for all of their hard work.

1. In 1876, the first game between teams in the National League, one of the two leagues that now makes up Major League Baseball, was played in front of 3000 fans. Trevor Hays, *When it All Went National*, NAT'L BASEBALL HALL OF FAME AND MUSEUM (Apr. 21, 2011), http://baseballhall.org/news/history/when-it-all-went-national.

2. *Casey at the Bat* is a famous baseball poem that was published in *The San Francisco Examiner* on June 3, 1888. *See* Ernest L. Thayer, *Casey at the Bat*, S.F. EXAM'R, Jun. 3, 1888, *available at* http://www.baseball-almanac.com/poetry/po_case.shtml. In 1988, 100 years later, *Bull Durham*, one of the most successful sports films of all time premiered. *See* BULL DURHAM (Orion Pictures 1988).

3. The National Baseball Hall of Fame and Museum. located in Cooperstown, New York, is "dedicated . . . [to] the historical development of baseball and its impact on [American] culture by collecting, preserving, exhibiting and interpreting its collections." *See* NAT'L BASEBALL HALL OF FAME AND MUSEUM, http://baseballhall.org (last visited Nov. 4, 2012).

4. *See* MAJOR LEAGUE (Paramount Pictures 1989). In a famous montage scene, citizens of Cleveland comment on how bad the Indians are going to be that season.

5. The Dodgers-Giants rivalry dates back to when both teams played in New York City as, respectively, the Brooklyn Dodgers and the New York Giants. *See* Chris Ballard, *Refueling the Hatred in the Heated Giants-Dodger Rivalry*, SPORTS ILLUSTRATED (Aug. 13, 2009, 5:01 PM), http://sportsillustrated.cnn.com/2009/writers/chris_ballard/08/13/giants.dodgers/index.html.

6. *Los Angeles 2, San Francisco 1*, USA TODAY (Apr. 1, 2011, 5:01 PM), http://content.usatoday.com/sportsdata/baseball/mlb/game/Giants_Dodgers/2011/03/31#game-story.

Dodgers beat the then-defending World Series Champions in a 2-1 pitchers' duel.[7]

Giants fan Bryan Stow, a forty-two-year-old paramedic from Santa Cruz, California, was at the game with friends.[8] During the game, Dodgers fans taunted and yelled at Stow; Stow even sent a text message to his family expressing concerns about his safety.[9] As Stow and his friends walked through the stadium parking lot after the game, Stow was suddenly "punched with a haymaker in the side of the head."[10] Stow's friends recounted that "[i]t was a running, huge, sweeping punch" and the "[f]irst thing that hit the ground was the back of his head."[11] The two assailants kicked Stow's head after he fell to the ground.[12] The attack on Stow was the culmination of numerous altercations between the assailants and Giants fans that evening.[13] Although the incident was highly publicized, the two assailants were not identified and arrested until the middle of July.[14] Stow spent months in a medically induced coma and was later moved to a rehabilitation center to regain his ability to move and speak.[15] His recovery is expected to take years.[16]

The brutal beating of Bryan Stow was just the beginning of one of the worst years in Dodgers history: the team struggled on the field and angry

7. *Id.*

8. Compl. for Damages at 2:11-14, Stow v. L.A. Dodgers, LLC, No. BC462127 (Cal. Super. Ct. 2011), *available at* http://www.sfexaminer.com/local/crime/2011/05/family-beaten-giants-fan-bryan-stow-files-lawsuit-against-dodgers.

9. *Id.* at 2:15-21.

10. Kimi Yoshino, *Bryan Stow's Friends Give First Account of Dodger Stadium Beating*, L.A. TIMES (Dec. 20, 2011, 11:04 AM), http://latimesblogs.latimes.com/lanow/2011/12/bryan-stow-friends-dodger-stadium-beating.html.

11. *Id.*

12. Compl. for Damages, *supra* note 8, at 3:10-15.

13. *Beaten Giants Fan Bryan Stow Speaks on Camera for First Time*, S.F. EXAM'R (Dec. 12, 2011, 4:21 PM), http://www.sfexaminer.com/local/2011/12/beaten-giants-fan-bryan-stow-speaks-camera-first-time [hereinafter *Beaten Giants Fan*].

14. Originally, Giovanni Ramirez was arrested in May, 2011. The Los Angeles Police Department held a press conference in front of Dodger Stadium. Ramirez maintained his innocence and was later exonerated. Two suspects, Louie Sanchez and Marvin Norwood, were arrested in July of 2011. *See* Dan Schreiber, *UPDATE: Two Men Charged in Beating of Giants Fan Bryan Stow*, S.F. EXAM'R (July 22, 2011, 1:27 PM), http://www.sfexaminer.com/local/crime/2011/07/ids-new-suspects-giants-fan-beating-revealed. Sanchez and Norwood pleaded not guilty to charges of mayhem, assault by means likely to produce great bodily injury, and battery with serious bodily harm. *Beaten Giants Fan*, *supra* note 13.

15. *Beaten Giants Fan*, *supra* note 13.

16. Dan Schreiber, *Bryan Stow Leaves Hospital for Long-Term Rehabilitation*, S.F. EXAM'R (Oct. 11, 2011, 1:53 PM), http://www.sfexaminer.com/local/2011/10/bryan-stow-leaves-hospital-long-term-rehabilitation.

fans called for embattled, recentlydivorced owner Frank McCourt to sell the bankrupt franchise.[17] Stow's family filed a civil lawsuit against the Dodgers alleging that cutbacks in security and antiquated facilities led to the attack.[18] In the subsequent public relations battle, Stow's lawyer said, "The Dodgers have shown a total disregard for public safety. They've gotten rid of security people. They've had all these incidents at their games . . . . What did they think was going to happen?"[19] In a statement that further angered the irate Dodgers fan base, McCourt's lawyer responded:

> They (the Stow family) are saying we're 100 percent liable. But does that mean (Marvin) Norwood and (Louis) Sanchez, who beat this guy up, have no liability? And, does it mean Mr. Stow himself has no liability? . . . What baffles me is that the level of public outrage at the Dodgers seems to be higher than the level of outrage at the people who inflicted the blows.[20]

The dichotomy presented by those two statements is the impetus for this Note. This Note argues that the current legal framework for determining liability in premises cases involving third-party criminal acts is ill-fitted for sports-stadium violence because it fails to consider the

17. *See* Bill Plaschke, *Bryan Stow's Words Brighten Season of Sorrow at Dodger Stadium*, L.A. TIMES, Sept. 22, 2011, http://articles.latimes.com/2011/sep/22/sports/la-sp-plaschke-dodgers-20110923. The Dodgers attendance dropped 18 percent during the 2011 season. In Bankruptcy Court proceedings, the Dodgers blamed MLB Commissioner, Bud Selig, for the attendance decline, claiming that Selig fabricated the public misperception that security at Dodger Stadium was inadequate to drive Frank McCourt out of the league. Major League Baseball's filing cited alleged deficiencies in stadium security, including: inadequate lighting in the stadium parking lots and a front office that lacked executive experience in ballpark operations. Bill Shaikin, *Bryan Stow Beating May be Cited as Evidence in Dodgers Bankruptcy*, L.A. TIMES, Oct. 25, 2011, http://articles.latimes.com/2011/oct/25/sports/la-sp-dodgers-mccourt-20111026.

18. *Family of Beaten Giants Fan Bryan Stow Files Lawsuit Against the Dodgers*, S.F. EXAM'R (May 24, 2011, 1:36 PM), http://www.sfexaminer.com/local/crime/2011/05/family-beaten-giants-fan-bryan-stow-files-lawsuit-against-dodgers [hereinafter *Family of Beaten Giants Fan*]. *See* Compl. for Damages, *supra* note 8, at 3:20-23.

19. After Stow's beating, the Dodgers increased security with more off-duty police officers, dubbing their effort a "sea of blue" to keep fans safe. *Family of Beaten Giants Fan*, *supra* note 18.

20. Because Stow brought a suit only against the Dodgers, the Dodgers countersued the two incarcerated assailants, Norwood and Sanchez. Stow's attorney estimated that damages could total $50 million if a jury finds McCourt liable. Ramona Shelburne, *Dodgers: Bryan Stow Shares Blame*, ESPN (Oct. 27, 2011), http://espn.go.com/los-angeles/mlb/story/_/id/7155602/los-angeles-dodgers-lawyer-bryan-stow-shares-blame-beating. It is unclear how, or if, Stow's lawsuit against the Dodgers impacted the sale of the team to a new ownership group that included Los Angeles Lakers legend, Magic Johnson, because the Stow family was the largest of Frank McCourt's unsecured creditors. The lawsuit is still on-going. *See id.*; Jon Paul Morosi, *Bryan Stow Case Remains Unsettled*, FOX SPORTS (March 30, 2012, 9:02 PM), http://msn.foxsports.com/mlb/story/Bryan-Stow-Los-Angeles-Dodgers-San-Francisco-Giants-one-year-later-033012.

enabling role of the franchise and the influence of the event on fans. Part II of this Note explains the evolution of, and current approach to, the negligence elements of duty and causation in California. Part III examines the psychological effect sporting events have on the aggression level of fans due to the stadium environment and team identification. Part IV uses the concepts of enabling torts and expanded notions of responsibility to propose how the elements of duty and causation in a sports-stadium premises liability action should be treated. This Note argues for imposing a categorical duty on sports franchises, making causation presumptive, and restoring the proper roles of judges and juries. The proposed framework incorporates the enabling role of the franchise and the psychological effects of the event in evaluating a franchise's liability for fan violence at a sporting event.

II. THE CURRENT LEGAL ANALYSIS OF PROPERTY OWNERS' LIABILITY FOR THE ACTS OF THIRD PARTIES

In order to state a cause of action for negligence, a plaintiff must show four elements: duty, breach, causation, and damages.[21] Premises liability cases involving third-party criminal or tortious conduct focus on two main issues: duty and causation.[22]

A typical premises liability third-party criminal act scenario is as follows. First, a patron invited onto a business' premises is attacked and injured. Regardless of whether the assailant is caught and convicted, the injured patron sues the property owner, the one with the deep pockets. The injured patron argues that the property owner should have known there was a likelihood of an attack and should have taken steps to prevent it, or that the steps the property owner took were inadequate. Then, a court decides whether the property owner owed a duty to the injured patron based upon the "foreseeability" of the attack. If the court rules that there was a duty, the next step is for the trier-of-fact to decide if the property owner breached its duty. If the property owner breached, the analysis moves on to decide if the breach of duty was the cause of the patron's injury.

21. To prevail in a negligence action, "the victim must show that the tortfeasor owed a duty of care, that it breached its duty, that the breach proximately caused the harm, and that the victim is entitled to money damages as a result." Sharon P. v. Arman, Ltd., 989 P.2d 121, 135 (Cal. 1999) (Mosk, J., dissenting).

22. *See infra* subsections A and B.

This section will examine the elements of duty and causation, the core elements in Bryan Stow's lawsuit against the Dodgers.[23] The analysis of those elements has evolved over time in California.[24] Shifts in the way courts analyze duty and causation have impacted the likelihood of an injured patron's success. Although duty and causation are seemingly separate elements of the prima facie case of negligence, courts "frequently use duty-foreseeability cases as precedent to support [causation] holdings and vice versa."[25] Initially, duty had a strict prior similar incident requirement. However, that requirement was relaxed by a shift to a totality of the circumstances approach. Property owners fought back and argued for "no-duty" rulings because of the significant monetary and social burdens associated with additional security precautions. The "no-duty" rulings revived a more stringent prior similar incidents requirement and a need for heightened foreseeability when security precautions would be expensive and onerous. Similarly, causation analysis has undergone a shift as well. The causation standard has risen to a virtually insurmountable barrier that requires much more than mere speculation or conjecture; a plaintiff must show causation with certainty.

A. THE EVOLUTION OF DUTY ANALYSIS IN CALIFORNIA

Generally, the owner of a business premises that is open to the public has a duty of reasonable care to protect individuals from known or foreseeable third-party harm on the premises.[26] Comments "d" and "f" to the Second Restatement of Torts section 344 shed light on what reasonable care means and what the duty of a landowner actually is. Comment "d" provides that a property owner "is not an insurer of the safety of . . . visitors against the acts of third persons."[27] However, a property owner may be "required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons . . . may conduct themselves in a manner which will

23. *See Dodgers Seek to Bar Bryan Stow Claims*, ESPN (Feb. 3, 2012, 9:53 PM), http://espn.go.com/los-angeles/mlb/story/_/id/7538823/bryan-stow-los-angeles-dodgers-ask-bankruptcy-court-disallow-claim-beaten-fan [hereinafter *Dodgers Seek to Bar*].

24. Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 WHITTIER L. REV. 409, 410–11 (2006).

25. *Id.* at 410. "Duty-foreseeability cases center on . . . whether the property owner should have provided security measures that would have reduced the probability of a certain type of criminal attack. Causation-foreseeability cases consider whether the property owners' adoption of the duty-required security measures would have prevented the actual attack." *Id.*

26. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

27. *Id.* § 344 cmt. d.

endanger the safety of the visitor."[28] Similarly, comment "f" provides that while a property owner is "not an insurer of the visitor's safety," the duty of a property owner to adequately police the premises will exist when "[h]e 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."[29] Comment "f" is drawn upon by both the prior similar incidents rule and the totality of the circumstances approach.[30]

As the first element of a plaintiff's prima facie case, duty is supposedly the only element of a negligence action that is a matter of law for the court to decide.[31] A judge decides what duty the defendant owes to a plaintiff, and a jury decides whether the defendant satisfied that duty.[32] However, scholars argue that California courts reach preferred outcomes in particular cases by making duty a live, dispositive issue.[33] Scholars argue it is impossible to draw a distinction between the role of judge and jury when duty is a live issue because judges second-guess decisions about reasonable conduct and care that should properly be allocated to the jury.[34]

1. The Prior Similar Incidents Rule

One way courts evaluate a property owner's duty is to look at prior similar incidents.[35] Whether a property owner has a duty to protect individuals from a third-party's acts depends on whether the third-party acts were foreseeable.[36] Foreseeability is determined by assessing whether prior incidents were either specifically similar to the third-party act in question or whether the prior act was generally similar enough to put the premises' owner on notice of the potential of dangerous third-party conduct.[37]

28. *Id.*

29. *Id.* § 344 cmt. f.

30. *Id. See also* La Fetra, *supra* note 24, at 412 (explaining the difference between "prior similar incidents" analysis and "totality of the circumstances" analysis).

31. Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. CAL. L. REV. 265, 265 (2006).

32. *See id.* at 268.

33. *Id.* at 268–69. A live issue is an issue that turns on the facts and circumstances of an individual case.

34. *Id.* at 269. Ky. Fried Chicken of Cal., Inc., v. Super. Ct., 927 P.2d 1260, 1275 (Cal. 1997) (Kennard, J., dissenting). ("Once the court has formulated the standard of care, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard." (citations omitted)).

35. La Fetra, *supra* note 24, at 412.

36. *See id.*

37. Delgado v. Trax Bar & Grill, 113 P.3d 1159, 1172 (Cal. 2005). *See also* Dennis T. Yokoyama, *The Law of Causation in Actions Involving Third-Party Assaults When the Landowner*

The case *O'Hara v. West Seven Trees Corp. Intercoast Management* illustrates the role of foreseeability in determining duty.[38] In 1975, Ms. Kim Elizabeth O'Hara was raped in her apartment.[39] Had it been a single, isolated rape, the landlord could have argued it had no duty to protect against the unforeseeable rape and may have escaped liability. However, the landlord knew several tenants had been raped in the apartment complex a few months earlier and failed to disclose the incidents to Ms. O'Hara when she asked about them before moving in to the complex.[40] The California Court of Appeals held the prior similar incidents known to the landlord imposed a duty on the landlord to not only warn Ms. O'Hara, but also to protect her and the other tenants from the surely foreseeable rapist.[41] The underlying policy argument was that even though the attack occurred in Ms. O'Hara's apartment, the landowner had an informational advantage and was in a better position to take reasonable precautions to protect her by securing the common areas.[42]

The prior similar incidents rule requires an injured plaintiff to prove that similar acts previously occurred on the premises.[43] The prior similar acts support the conclusion that the property owner should have foreseen that another similar act could occur and, thus should have taken reasonable steps, such as hiring security guards or implementing a revised security plan, to prevent those third-party acts from occurring again.[44]

2. Shift to the Totality of the Circumstances Approach

The prior similar incidents rule de-incentivized property owners from preventing future harm to patrons because property owners got one free incident in which the first victim always lost while subsequent victims were allowed to recover.[45] Additionally, there was widespread uncertainty amongst courts as to how "similar" the prior incidents had to be, and judges rather than juries were deciding too many cases.[46] In a 1985 case, the California Supreme Court abandoned the prior similar incidents rule and

Negligently Fails to Hire Security Guards: A Critical Examination of Saelzler v. Advanced Group 400, 40 CAL. W. L. REV. 79, 88 (2003).

38. O'Hara v. W. Seven Trees Corp. Intercoast Mgmt., 142 Cal. Rptr. 487 (Ct. App. 1977).

39. *Id.* at 489.

40. *Id.*

41. "By not acting affirmatively to protect [Ms. O'Hara], [the landlord] increased the likelihood that she would also be a victim." *Id.* at 490.

42. *See id.*

43. Yokoyama, *supra* note 37, at 88.

44. *Id.*

45. Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658–59 (Cal. 1985).

46. *Id.*

decided foreseeability could be established by evidence other than prior similar incidents.[47] The totality of the circumstances approach[48] is a more expansive approach to duty that is more plaintiff-friendly than the prior similar incidents approach.[49]

In *Isaacs v. Huntington Memorial Hospital*, Dr. Isaacs was shot in a hospital parking lot during an attempted robbery.[50] Although Dr. Isaacs presented overwhelming evidence of poor security,[51] incidents involving weapons wielded by persons under the influence of drugs and alcohol in the emergency room,[52] and had testimony from security experts as to the poor lighting in the parking garage, as well as the overall crime level in the surrounding neighborhood,[53] the trial court granted the hospital's motion for nonsuit because Dr. Isaacs "failed to introduce evidence essential to prove . . . prior crimes of the same or similar nature in the same or similar portion [of the hospital's] premises."[54]

The California Supreme Court in *Isaacs* noted some of the fatal flaws of the rigid prior similar incidents rule supported its abandonment. In particular, the Court focused on results contrary to public policy, such as: preventing future harm (the rule had the effect of discouraging landowners from taking adequate precautionary measures because they got one free incident in which the first victim always lost while subsequent victims were allowed to recover); widespread uncertainty as to how "similar" the prior incidents had to be; and that "too many cases were being removed from the jury's consideration."[55] The Court further stated:

47. *See id.* at 659.

48. *Id.* at 660.

49. Yokoyama, *supra* note 37, at 89.

50. *Isaacs*, 695 P.2d at 655.

51. At the time of the shooting, the hospital had three unarmed security guards on duty. *Id.* at 656. Two security experts testified that the hospital's security on the night of the incident was totally inadequate, basing their conclusion on numerous factors that included the ratio of guards to the size of premises, the inadequate television monitoring of the parking garages, the failure to arm the guards, and the fact that the guards lacked any means to communicate with the police on an emergency basis. *Id.* at 656–57.

52. Another doctor described the emergency room as "scary" and "physically threatening" because "the emergency room area was frequented by persons under the influence of drugs and alcohol." *Id.* at 656.

53. *Id.*

54. *Id.* at 657. The Trial Court also ruled that Dr. Isaac failed to introduce evidence sufficient to prove the "foreseeability of the subject crime occurring . . . [t]he minimum standards of security for premises similar to those of defendant for the period of time and locality involved . . . [and] [a]ny proof of causation." *Id.*

55. *Id.* at 658–59.

> The mere fact that a particular kind of an accident has not happened before does not . . . show that such accident is one which might not reasonably have been anticipated. Thus, the fortuitous absence of prior injury does not justify relieving [the landowner] from responsibility for the foreseeable consequences of its acts.[56]

The California Supreme Court's disapproval of the prior similar incidents rule—because it improperly took cases away from the jury—hinged on the idea that foreseeability "is ordinarily a question of fact."[57] The Court stated, "[foreseeability] may be decided as a question of law only if, under the undisputed facts there is no room for a reasonable difference of opinion."[58] Further, the Court was reluctant to remove foreseeability questions from the province of the jury because foreseeability "is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct."[59] Thus, the Court wanted lay jurors, rather than judges, to draw upon common experiences and personal knowledge to decide if a specific event was foreseeable despite the fact that it may not have previously occurred.

Even though the California Supreme Court adopted the totality of the circumstances approach, prior similar incidents should still be factored into the analysis.[60] Under the totality of the circumstances test, courts balance the following factors established in the seminal case *Rowland v. Christian*,[61] to decide if a property owner had a duty to protect individuals from third-party actions:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the [property owner's] conduct and the injury suffered, the moral blame attached to the [property owner's] conduct, the policy of preventing future harm, the extent of the burden to the [property owner] and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[62]

56. *Id.* at 659 (quotations omitted).
57. *Id.*
58. *Id.* (quotations omitted).
59. *Id.*
60. *Id.*
61. Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968) (eliminating the designations of invitee, licensee, and trespasser in California and establishing that an owner of land owes a general duty of care to all).
62. *Isaacs*, 695 P.2d at 658 (quoting *Rowland*, 443 P.2d at 564).

Considering the *Rowland* factors, the Court in *Issacs* held that because the foreseeability of an assault in the parking lot was high in comparison to the minimal burden on the hospital to take adequate security measures, the hospital had a duty to protect Dr. Isaacs from criminal assaults.[63] Additionally, it was for the jury to decide if the security was adequate and reasonable under the circumstances.[64] The *Isaacs* Court went out of its way to say that foreseeability, a component of duty, should ordinarily be determined by a jury who considers what is reasonably foreseeable in light of all the circumstances.[65] Moreover, as will be discussed later in this Note, the *Isaacs* decision had important implications on causation as well.[66]

3. "No Duty" Rulings and a Return to the Prior Similar Incidents Test

In subsequent cases, the California Court of Appeals sharply criticized the totality of the circumstances approach to duty—set out in *Isaacs*—as "broad brush dicta."[67] It found the numerous factors difficult to balance and wanted "a more equitable rule of foreseeability"[68] because of the undesirable outcomes that the Court of Appeals believed were reached under the *Isaacs* test "in the context of a society which appears unable to effectively stem the tide of violent crime."[69] Subsequently, the California Supreme Court began issuing "no duty" rulings, which constricted foreseeability, increasing the burden on plaintiffs, and revived a prior similar incidents requirement in order to establish duty in certain cases.[70]

In *Ann M. v. Pacific Plaza Shopping Center*, the California Supreme Court used the *Isaacs* balancing test to weigh the costly measure of hiring security guards against the random, endemic violent crime that is a characteristic of today's society.[71] Ann M. was raped at knifepoint while she opened a store in a shopping center at 8:00 AM.[72] At the time of the

63. *Id.* at 662.

64. This determination goes toward deciding breach. *Id.* at 663.

65. *Id.* at 665.

66. *See infra* Part IV.C.2.

67. *E.g.*, Onciano v. Golden Palace Rest., 268 Cal. Rptr. 96, 101 (Ct. App. 1990) (Woods, J., concurring and dissenting).

68. *Id.* Judge Woods "respectfully encourage[d the] Supreme Court to reexamine its expansive dicta on this issue in hopes of devising a more equitable rule of foreseeability to fit cases such as this one."

69. Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97, 109 (Ct. App. 1993). Judge Vogel's majority opinion challenged the California Supreme Court by saying, "[i]f there is a flaw in our analysis, we suggest it may be time for the Supreme Court to reexamine the concept of duty it articulated in *Isaacs v. Huntington Memorial Hospital*." *Id.*

70. Esper & Keating, *supra* note 31, at 319.

71. Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993).

72. *Id.* at 209–10.

attack, the shopping center did not have security guards.[73] Stating that a property owner has an affirmative duty only to protect against the wrongful acts of third parties "where such conduct can be reasonably anticipated" and that "foreseeability is a crucial factor in determining the existence of duty," the Court held that "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards."[74] Most importantly, the Court noted "the requisite degree of foreseeability [to mandate security guards] rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises."[75] Holding otherwise risked "impos[ing] an unfair burden upon landlords."[76] The Court held the shopping center had no duty to provide security guards because the evidence of prior incidents that Ann M. introduced was not similar enough to her rape.[77]

Ann M., and subsequent "no-duty" rulings,[78] elevated the property rights of landowners over physical safety via a balancing of costs.[79] The scope of a landlord's duty was narrowed because of the "significant monetary and social burdens" associated with hiring security.[80] After *Ann M.*, in order for a property owner to have a duty to provide security guards, a heightened foreseeability of violence was required, which necessitated prior similar violent incidents.

73. *Id.*

74. *Id.* at 213–15.

75. *Id.* at 215–16.

76. *Id.*

77. Ann M. presented: evidence about vagrants loitering in common areas, complaints to the police about intimidating persons, and fears expressed by the merchants association about the lack of security. *Id.* at 210, 216. The *Ann M.* Court attempted to draw a distinction between the weak evidence presented in *Ann M.* and the strength of the evidence presented in *Isaacs*. *Id.* at 215. The *Ann M.* Court concluded that the evidence presented in *Isaacs* was more overwhelming, more demonstrative of the overall dangerous nature of the neighborhood and parking garage, and more impactful; thus, the hospital in *Isaacs* had a duty but the shopping mall in *Ann M.* did not. *See id.* at 215 n.6.

78. *See* Sharon P. v. Arman, Ltd., 989 P.2d 121 (Cal. 1999). Sharon P. was sexually assaulted in a parking garage which "had several darkened areas that provided vantage points from which someone lying in wait . . . could observe a lone woman arriving in her car as easy prey." *Id.* at 123–24. The California Supreme Court held that the building owner had no duty to provide security guards in the parking garage because no one had been physically assaulted in the garage during the preceding ten years. *Id.* at 132–33. Also, bank robberies in the building were not sufficiently similar to the parking garage sexual assault so as to establish the necessary "high degree of foreseeability that would justify the imposition of [a duty to provide security guards in the garage]." *Id.* at 127.

79. Esper & Keating, *supra* note 31, at 314.

80. La Fetra, *supra* note 24, at 416.

4. Do "No-Duty" Rulings Infringe Upon the Role of the Jury?

The *Ann M.* "no-duty" ruling is alarming because it takes cases away from a jury when the court believes that no liability should be imposed on a landowner based on the particular facts of a case—even though reasonable jurors may disagree.[81] While the *Isaacs* Court said a jury should decide foreseeability based upon knowledge jurors acquired from "modern life" rather than by the application of a rigid rule,[82] the *Ann M.* Court ruled eight years later that "[f]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court."[83]

Having a judge decide foreseeability demonstrates that many courts do not believe a jury is capable of making a thoughtful judgment about the foreseeability of a crime.[84] This distrust of juries is based upon skepticism of their ability to make a rational, non-reactionary decision.[85] Courts fear that ex-post analysis by a jury will always result in a reactionary, sympathetic decision rather than a reasonable analysis of the facts that considers the circumstances known to the landlord before the incident and the unpredictable nature of crime.[86]

Deciding duty is further complicated because foreseeability requires the application of a reasonable person standard and "reasonable people may reasonably disagree over how to evaluate the significance of particular factors even when they agree on the facts."[87] The reasonable person standard is supposed to be the province of a jury, not a single judge, because it "invokes a common moral conception."[88] Because the reasonably foreseeable acts of a third party draw upon a collective sense of morals and experiences, it is more appropriate for a jury to decide if a third-party act was foreseeable, rather than a judge who draws upon a singular, personal notion of reasonableness.[89]

In Stow's case, reasonable people will likely disagree over how to evaluate the facts and the foreseeability of the harm. This was the point

81. *See* Esper & Keating, supra note 31, at 280.

82. Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 659 (Cal. 1985).

83. Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215 (Cal. 1993).

84. *See* Olin L. Browder, *The Taming of a Duty – the Tort Liability of Landlords*, 81 MICH. L. REV. 99, 154 (1982); Esper & Keating, *supra* note 31, at 279–82.

85. *See* Browder, *supra* note 84, at 154.

86. *See* La Fetra, *supra* note 24, at 418.

87. Esper & Keating, *supra* note 31, at 280.

88. *Id.*

89. *See id.* at 281–82.

raised by Judge Mosk in his dissenting opinion in *Ann M*.[90] Mosk believed that the foreseeability of a criminal assault, and the supposedly unfair and expensive burden of security guards, were factual matters for the jury to decide. For Mosk, "[f]oreseeability 'is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.'"[91] But, after *Ann M.*, heightened foreseeability requirements and no-duty rulings have firmly placed scope of duty decisions within the grips of judges.[92] This allows judges to reach preferred outcomes in certain cases via no-duty rulings, rather than allowing juries to evaluate the facts and circumstances.

5. Duty During an Impending or Ongoing Event

The cases discussed so far involved situations in which there was a clear temporal separation between the violent incident and what the property owner allegedly should have done beforehand to prevent the incident. But what about situations like the Stow beating at Dodger Stadium where the property owner takes some precautions and an incident still occurs?

The California Supreme Court has ruled that once a property owner is aware of a potential or developing incident, the owner has a duty to take further minimally burdensome measures to protect patrons.[93] In 1962, Charlotte Lee Taylor was brutally stabbed in the parking lot of a bowling alley by a man who had earlier asked to "go to bed with [her]."[94] Prior to the attack, Taylor had told a bouncer about the man's rude proposition.[95] Before Taylor left the bowling alley, the bouncer warned her not to "go outside because that goofball is out there."[96] The California Supreme Court ruled that the bouncer's warning was insufficient to meet the property owner's duty of protecting patrons against known or foreseeable dangers.[97] The bouncer could have easily—and with no additional cost—protected Taylor by accompanying her to her car because the bouncer knew the

90. *See* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 216–17 (Cal. 1993) (Mosk, J., dissenting).

91. *Id.* at 217 (Mosk, J., dissenting) (quoting Bigbee v. Pac. Tel. & Tel. Co., 665 P.2d 947, 952 (Cal. 1983)).

92. Esper & Keating, *supra* note 31, at 279–82, 319.

93. Delgado v. Trax Bar & Grill, 113 P.3d 1159, 1172 (Cal. 2005).

94. Taylor v. Centennial Bowl Inc., 416 P.2d 793, 794–96 (Cal. 1966).

95. *Id.* at 795.

96. *Id.*

97. *Id.* at 799.

offender was in the parking lot.[98] Thus, in some situations a mere warning of danger is insufficient, and a business owner is "required to exercise reasonable care to use such means of protection as are available or to provide such means in advance because of the likelihood that third persons . . . may conduct themselves in a manner which will endanger . . . visitor[s]."[99]

More than forty years later, in *Delgado v. Trax Bar & Grill*, the California Supreme Court held that a bar had a special relationship with its customers,[100] and thus had a duty to take reasonable steps to secure common areas against the foreseeable criminal acts of other customers and third parties.[101] Michael Delgado and his wife Linette were having a drink at Trax Bar & Grill when some other patrons, Jacob Joseph and his companions, began staring at Delgado in an intimidating fashion.[102] Linette spoke to a bouncer who "concluded that a fight was imminent."[103] The bouncer asked Delgado and his wife to leave, but the bouncer did not escort them to their car. Joseph and his companions followed Delgado out of the bar, at which point Joseph was joined by an additional twelve to twenty men who had been hiding behind parked cars and a dumpster. Delgado was beaten so severely with a baseball bat that he suffered a fractured skull, a subdural hematoma, spent sixteen days in the hospital, and subsequently suffered from chronic headaches and adverse personality changes.[104] A jury ruled in favor of Delgado by a vote of nine to three that: "(i) [Trax] was negligent; (ii) [Trax's] negligence was a substantial factor causing [Delgado's] injuries; and (iii) [Trax] was 100 percent at fault."[105]

On appeal, Trax argued that under *Ann M.*'s prior similar incidents requirement, "because there was no evidence of prior similar criminal assaults . . . the assault upon [Delgado] was unforeseeable as a matter of law, and that . . . it owed no duty to [Delgado]."[106] The Court of Appeals

98. *Id.*

99. *Id.* at 799–800 (quoting RESTATEMENT (SECOND) OF TORTS, § 344 cmt. d (1965)).

100. The California Supreme Court used the "invitee" status of customers to create a special relationship between business and patron even though the seminal case, *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968), eliminated these status distinctions in California. For the most part, status distinctions have been eliminated, but they still exist in the context of special relationships, which can create a duty. *See* Delgado v. Trax Bar & Grill, 113 P.3d 1159, 1169 (Cal. 2005).

101. *Delgado*, 113 P.3d at 1172.

102. *Id.* at 1162.

103. *Id.*

104. *Id.* at 1162–63. Joseph, the main perpetrator, was convicted of felony assault. *Id.* at 1163.

105. *Id.* Joseph had previously filed for bankruptcy and was no longer a party to the case.

106. *Id.*

ruled in favor of Trax and overturned the jury's decision.[107] The Court of Appeals focused on the "coordinated gang attack" and ruled that under the *Ann M.* requirement of heightened foreseeability and constricted duty, although prior fights had occurred in the Trax parking lot, the prior similar incident criterion was not met because there were no fights involving a large group of assailants whom had been lying in wait.[108] Thus, the coordinated attack upon Delgado was unforeseeable and Trax did not owe Delgado a duty.[109]

The California Supreme Court granted review and held that, even though Delgado produced insufficient evidence to meet the heightened foreseeability required by *Ann M.* to establish a duty to provide security guards to protect against third-party attacks, Trax did owe Delgado a duty under the special-relationship doctrine to take simple, minimally burdensome measures to react to the unfolding incident.[110] But the Court seemed uneasy about finding Trax 100 percent at fault and remanded the case to address "[w]hether there was sufficient evidence to support the jury's determinations of breach of duty and causation."[111] The California Supreme Court again adjusted the framework for duty analysis:

> In circumstances in which the burden of preventing future harm caused by third party criminal conduct is great or onerous (as when a plaintiff, such as in Ann M., asserts the defendant had a legal duty to provide guards or undertake equally onerous measures, or . . . asserts the defendant had a legal duty to provide bright lighting, activate and monitor security cameras, provide periodic "walk-throughs" by existing personnel, or provide stronger fencing), heightened foreseeability—shown by prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—will be required. By contrast, in cases in which harm can be prevented by simple means or by imposing merely minimal burdens, only "regular" reasonable foreseeability as opposed to heightened foreseeability is required.[112]

Although the Court addressed the heightened foreseeability precedent from *Ann M.*, the dissent and some commentators argue that the *Delgado* opinion

107. *Id.* at 1164.

108. *Id.*

109. *Id.*

110. *Id.* at 1172, 1176. The California Supreme Court also reprimanded the Court of Appeals because "[h]eightened foreseeability is satisfied by a showing of prior similar incidents . . . and does not require a showing of prior nearly identical criminal incidents." *Id.* at 1172.

111. *Id.* at 1176.

112. *Id.* at 1171 n.24.

failed to address all of the *Rowland* factors and, thus, made determining duty even more convoluted and difficult.[113]

Delgado demonstrates both the evolving nature of the duty to protect patrons from third-party criminal acts and how situational factors influence duty. Because Trax's bouncers were aware of the impending violence and took, at least in the California Supreme Court's opinion, partial measures to prevent the incident, Trax had a duty to take further "minimally burdensome measures" to protect Delgado from a parking lot beating.[114]

B. THE EVOLUTION OF CAUSATION ANALYSIS IN CALIFORNIA

To establish a prima facie case of negligence, the injured patron must also prove that the negligence of the property owner was the legal cause of harm.[115] Negligent conduct is the legal cause of harm if it is a "substantial factor" in bringing about the harm.[116] Questions of causation are "normally for the jury, and the court may seldom rule on them as matters of law."[117] Jurors may draw upon common experience in determining if a causal connection exists.[118]

When California courts were expanding duty under the totality of the circumstances approach,[119] property owners sought summary judgment in third-party criminal act cases by arguing that the injured parties could not satisfy the causation requirement.[120] The causation line of cases holds that "'abstract negligence,' without proof of a causal connection between the defendant's negligence and the plaintiff's injury, is insufficient" to impose

113. Justice Kennard, in her dissent in *Delgado*, would have held that Trax "could not have foreseen this vicious assault and thus did not owe a duty to protect [Delgado] from such an attack." *Id.* at 1176 (Kennard, J., dissenting). Kennard said that the Court failed to consider all the *Rowland* factors such as the "adverse consequences to the community" and the financial costs to businesses that are likely to be passed along to customers in already economically disadvantaged areas. *Id.* at 1180–81 (Kennard, J., dissenting). Additionally, Kennard cautioned that "the majority's approach is perilously close to imposing liability that has no limits." *Id.* at 1179 (Kennard, J., dissenting). *See* Stephen M. Sullivan, Note, *Of Thrill Rides and Bar Fights:* Gomez v. Superior Court*,* Delgado v. Trax Bar & Grill*, and the Expanding Duty of Care in California*, 36 SW. U. L. REV. 59, 81–82 (2007).

114. *Delgado*, 113 P.3d at 1172. "[I]n light of the clear foreseeability of an imminent assault absent separation of Joseph and his group from [Delgado], [Trax's] duty was to *attempt* to dissuade Joseph and his group from following [Delgado]. . . . [W]e do not suggest that [Trax] had a duty to guarantee that separation, or, for that matter, to prevent any resulting attack and injury." *Id.* at 1173 n.26.

115. RESTATEMENT (SECOND) OF TORTS § 430 (1965).

116. *Id.* § 431.

117. *Id.* § 433B cmt. b.

118. *See id.*

119. *See supra* Part II.A.1.2.

120. *See* Yokoyama, supra note 37, at 95.

liability.[121] Abstract negligence is when the plaintiff argues the defendant was negligent because the plaintiff was hurt, but the plaintiff is unable to point to specific things that caused or would have prevented the plaintiff's harm. Instead, the plaintiff relies on the mere possibility that the defendant's actions, or lack thereof, caused the plaintiff's injuries and relies on the jury to fill in the gaps. In these cases, juries often ruled in favor of the injured plaintiffs and awarded monetary damages, but on appeal, the juries' decisions, which presumably drew upon their common experiences and shared morals, were overturned as a matter of law.[122]

Noble v. Los Angeles Dodgers, Inc., is the classic example of "abstract negligence" and is eerily similar to the Bryan Stow incident.[123] After a Dodgers game, Philip Noble, his wife Marlene, and a friend returned to their car in the Dodger Stadium parking lot.[124] They encountered two drunken men; one was vomiting and the other was urinating on Noble's car.[125] A fight ensued and Noble was injured.[126] Noble sued the Dodgers under a premises liability theory, and the jury awarded Noble compensatory damages, but found that Noble was 55 percent responsible for his own injuries.[127]

On appeal, the California Court of Appeals considered causation to be the critical question.[128] Noble "[did] not contend that the Dodgers had actual advance knowledge of the conduct of the assailants or of their presence in the parking lot. [Noble's] theory [was] . . . simply that the Dodgers were negligent in failing to effectively *deter* any and everyone from acting in such a manner."[129] Noble's security expert testified the "security was inadequate" and that the Dodgers should have had seven more security personnel deployed differently.[130] Unconvinced, the Court of Appeals focused on how "[the security expert] did not, and of course could

121. Julie Davies, *Undercutting Premises Liability: Reflections on the Use and Abuse of Causation Doctrine*, 40 SAN DIEGO L. REV. 971, 978 (2003).

122. *See* Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97, 100, 109 (Ct. App. 1993); Noble v. L.A. Dodgers, Inc., 214 Cal. Rptr. 395, 396 (Ct. App. 1985).

123. *Noble*, 214 Cal. Rptr. At 395. *See also* Bob Egelko, *What Stow Family Faces in Suit Against Dodgers*, S.F. CHRONICLE (June 5, 2011, 4:00 AM), http://www.sfgate.com/crime/article/What-Stow-family-faces-in-suit-against-Dodgers-2369371.php.

124. *Noble*, 214 Cal. Rptr. at 396.

125. *Id.*

126. *Id.*

127. The Court of Appeals addressed the jury's verdict: "These verdicts indicate to us that the jury was hopelessly confused on the issue of liability." *Id.* at 396 n.1.

128. *Id.* at 398.

129. *Id.*

130. *Id.*

not, say that these additional seven [security personnel] or a different deployment pattern would have prevented [Noble's] injury."[131]

The Court of Appeals called this a "classic example" of "abstract negligence" because Noble argued the security was negligent, but failed "to prove any causal connection between that negligence and the injury."[132] The Court of Appeals compared the ratio of security personnel to fans—roughly one security guard to every 900 patrons at Dodger Stadium—to the ratio of on-duty police officers to citizens in Los Angeles—roughly one officer to every 1200 inhabitants.[133] The comparison demonstrated the inherent weakness of Noble's argument in the Court of Appeals' eyes because, based on the numbers, Dodger Stadium was patrolled more thoroughly than Los Angeles.[134] Thus, after *Noble*, in order to avoid abstract negligence and prevail on causation, "a plaintiff must establish more than just lack of reasonable security measures; the plaintiff must prove a causal connection between the lack of reasonable security measures and the plaintiff's harm."[135]

The link, or lack thereof, between security guard deployment and causal connection was further expounded in *Nola M. v. University of Southern California*.[136] Nola M. was "grabbed from behind . . . stabbed, beaten, . . . dragged to some bushes . . . and raped" in front of the USC Human Resources Center.[137] She sued USC under a premises liability theory. A security expert criticized USC's security measures and said that the foliage surrounding the building compounded problems in an area that already suffered from inadequate lighting.[138] The jury found for Nola M. and awarded her $800,000 in compensatory damages and $988,000 in punitive damages.[139]

USC appealed, arguing that there was "no proof of any causal connection between its negligence and Nola's injury."[140] The California Court of Appeals agreed and reversed the jury's verdict because "USC's

131. *Id.*
132. *Id.* at 399.
133. *Id.* at 398–99.
134. *See id.*
135. Yokoyama, *supra* note 37, at 97.
136. Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97 (Ct. App. 1993).
137. *Id.* at 99.
138. *Id.* at 100.
139. *Id.* The trial court reduced the compensatory damages to $300,000.
140. *Id.*

failure to deter the attack on Nola was not the cause of her injuries,"[141] and "where reasonable minds will not dispute the absence of causation, the question is one of law" and thus, not for the jury to decide.[142] The opinion echoed the fear that lay jurors are unable to separate an ex post reactionary analysis from a reasonable consideration of what was known ex ante, especially because of testimony by so-called security experts.[143] Ultimately, Nola M. lost on causation because her security expert could only criticize USC's security and could not affirmatively state that the additional proposed measures would absolutely have prevented the rape.[144]

The Court of Appeals then set out a policy-influenced argument, much like the policy factors influencing duty-foreseeability,[145] which attempted to establish a bright line rule:

> When an injury can be prevented by a lock or a fence or a chain across a driveway . . . a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. . . . But where . . . we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented. . . . Otherwise, where do we draw the line? How many guards are enough?[146]

The majority's biggest concern was who would ultimately pay for the additional security; the court felt it should not be USC's students, who already pay a premium on tuition.[147] Consequently, the Court of Appeals followed the *Noble* precedent and held abstract negligence without proof of causation did not support holding the property owner liable.[148] The majority further defended its opinion, stating that it was not "using causation as a smokescreen for a policy judgment on whether USC ought to be liable to Nola under the circumstances of [the] case."[149]

Justice Spencer's dissent in *Nola M.* expressed concern about abstract negligence and the near-impossible causation standard the majority

141. *Id.* at 100, 109.
142. *Id.* at 101–02.
143. *Id.* at 103. The court stated it is "grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were 'inadequate,' particularly in light of the fact that the decision would always be rendered in a case where the security had, in fact, proved inadequate." *Id.* at 102.
144. *Id.* at 107.
145. *See supra* text accompanying note 112.
146. *Nola M.*, 20 Cal. Rptr. 2d. at 107–08.
147. *Id.* at 108 ("How much more tuition can they afford?").
148. *Id.* at 109.
149. *Id.* at 108–09.

embraced.[150] Because causation is an issue for the jury, especially when "[r]easonable minds can differ as to the inferences to be drawn from the facts,"[151] the dissent would have ruled the substantial factor causation test was met whenever the property owner "provided an enhanced opportunity for the harm to occur."[152]

The California Supreme Court addressed causation in *Saelzler v. Advanced Group 400*.[153] The Court essentially adopted the majority's approach in *Nola M.* and balanced "two important and competing policy concerns: society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises."[154] The Court held that "[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant*."[155] Thus, unless an injured patron can show it was more likely than not that additional security precautions would have prevented an attack, a judge must direct a verdict for the defendant because a "mere possibility of such causation is not enough."[156]

In a passionate dissent, Justice Kennard echoed the fears expressed in the *Nola M.* dissent about "a virtually insurmountable barrier" facing plaintiffs because the Court "impose[d] on plaintiff[s] the burden of showing causation with certainty."[157] Kennard further criticized the Court for intruding on the role of the jury by making it more difficult for

150. The majority "in essence [has] created a purely theoretical cause of action for the victims of assaultive crime, one on which a plaintiff never can prevail." *Id.* at 112 (Spencer, J., dissenting).

151. *Id.* at 111 (Spencer, J., dissenting).

152. *Id.* at 110 (Spencer, J., dissenting).

153. Saelzler v. Advanced Grp. 400, 23 P.3d 1143 (Cal. 2001). In *Saelzler*, a delivery woman sued the owners of a large apartment complex after she was sexually assaulted and seriously injured while trying to complete a delivery. She alleged that the owners knew dangerous non-residents loitered in the complex, failed to warn others of the unsafe conditions, and failed to provide adequate security. The complex occasionally, on a random basis, employed security patrols on the premises and the apartment manager used security personnel to escort her to her vehicle whenever she left the complex. Additionally, the police had advised the complex manager to hire daytime and nighttime security patrols. Ultimately, however, the delivery woman was unable to prove that she would not have been assaulted had the property owner provided additional security precautions. The trial court granted summary judgment in favor of the property owner because the delivery woman "failed to show defendants' breach of duty to safeguard her was a proximate cause of her assault." *See id.*

154. *Id.* at 1145.

155. *Id.* at 1151.

156. *Id.* at 1152. Plaintiff could not "show that roving guards would have encountered her assailants or prevented the attack." *Id.*

157. *Id.* at 1156 (Kennard, J., dissenting).

plaintiffs to survive summary judgment because early in the litigation process the injured plaintiff is only supposed to have "produced evidence from which a *reasonable trier of fact* could conclude that the evidence is sufficient to establish that an element of the cause of action is more probable than not."[158] Imposing such a strict barrier at an early stage could prevent many plaintiffs from reaching the jury with their claims.

C. DUTY AND CAUSATION ANALYSIS APPLIED TO THE STOW BEATING

To evaluate whether the Dodgers owed Bryan Stow a duty to protect him from the parking lot attack, a court will look to the *Rowland* factors as set out in *Isaacs*,[159] the *Ann M*. heightened-foreseeability requirement,[160] and the *Delgado* case for a business owner's duty during an on-going event.[161]

The Dodgers will argue that they did not owe Stow a duty because they "had no knowledge of any inappropriate conduct by Stow's assailants prior to the time that Stow suffered his injuries and that, as a matter of law, are not liable for failure to anticipate criminal acts of third parties."[162] The Dodgers have favorable authority to seek a no-duty ruling under *Ann M.* by arguing that the Stow attack was unforeseeable and, therefore, outside their scope of duty.[163] The Dodgers may argue that while minor fights are foreseeable in the stands—which is why they provide security in the stadium—the gruesome beating of Bryan Stow in the parking lot was unforeseeable. The Dodgers will point to an absence of parking lot attacks and argue that because there were no prior similar incidents, the *Ann M.* heightened foreseeability requirement for additional security measures is not met. The Dodgers will argue that the additional security necessary to protect each fan from a one-of-a-kind tragic incident in the huge stadium parking lot is too costly and burdensome, especially because the attack on Stow was unforeseeable. While Stow can point to *Noble* as a prior similar incident, the Dodgers can distinguish the case on the known facts. Noble engaged in a fight at his parked car when he encountered the two drunks urinating and vomiting. In Stow's case, he was struck by a haymaker to the head out of nowhere. The Dodgers could argue they were just as surprised by the attack as Stow. Similarly, the Dodgers may point to *Delgado* and

158. *Id.* at 1157 (Kennard, J., dissenting). *See* Davies, *supra* note 121, at 979.
159. *See supra* text accompanying note 62.
160. *See supra* text accompanying note 71.
161. *See supra* text accompanying note 112.
162. *Dodgers Seek to Bar*, *supra* note 23.
163. *See supra* Part II.A.1.3.

argue that even though they provided security staff, because they were not aware of any prior violent acts by the two assailants or any specific threats to Stow individually, they did not owe Stow a duty to take additional minimally burdensome measures to protect him from unforeseeable danger.[164] The most important factor for each of the above-mentioned tests is the foreseeability of the attack. Under current California law, the judge, and not a jury drawing upon collective experiences and morals, will determine the foreseeability of the attack and, thus, whether the Dodgers owed Stow a duty.[165]

Even if Stow could establish duty on the basis that *Noble* is a prior similar incident, precedent suggests there will be a problem proving causation. Under *Noble*, *Nola M.*, and *Saelzler*, Stow will need to demonstrate more than abstract negligence.[166] Stow will have to "[show] causation with certainty" to overcome a "virtually insurmountable barrier," because the "mere possibility of such causation is not enough."[167] Under current law, if Stow cannot prove causation beyond "pure speculation or conjecture," the court would have no choice but to direct a verdict for the Dodgers.[168] Stow will have to do more than merely criticize the Dodgers' security practices. Additionally, drawing upon the policy-influenced argument from *Nola M.*, because the Dodger Stadium parking lot is a huge open space, the Dodgers may argue that not even a "Berlin Wall" could have protected Stow from the attack; thus, the Dodgers could not have reasonably prevented the attack.[169]

Ultimately, because of the obstacles presented by duty and causation, as well as the public relations nightmare the Dodgers likely want to avoid, Bryan Stow's lawsuit will probably settle.[170] Unfortunately, this will leave the next victim of stadium violence with the same problems: first establishing a duty on the part of the team to protect patrons from fan violence, and second proving that the breach of the duty was in fact the cause of the injuries and not mere speculation.[171] While the current

164. *See supra* Part II.A.1.5.

165. *See supra* Part II.A.1.3.

166. *See supra* Part II.B.1.

167. Saelzler v. Advanced Grp. 400, 23 P.3d 1143, 1152, 1155–56 (Cal. 2001).

168. *Id.* at 1151.

169. *See supra* text accompanying note 146.

170. *See* Bill Shaikin, *Bankruptcy Judge Urges Settlement in Bryan Stow-Dodgers Lawsuit*, L.A. TIMES (Mar. 8, 2012, 11:00 AM), http://latimesblogs.latimes.com/lanow/2012/03/bankruptcy-judge-urges-settlement-in-bryan-stow-dodgers-lawsuit.html.

171. Cases from other jurisdictions demonstrate injured plaintiffs face the same legal hurdles elsewhere too. *See* Bearman v. Univ. Notre Dame, 453 N.E.2d 1196 (Ind. Ct. App. 1983) (holding

framework may be good for cases involving landlords and tenants, parking garages, small businesses with limited economic resources, and private universities in rough neighborhoods, it is ill-fitted for the stadium environment. Unlike those other settings, sports franchises purposefully enable aggressive fan behavior. The current framework for premises liability ignores the influence of the stadium event on patrons' behavior and does not give enough weight to the moral responsibility the sports franchise should bear for its role in promoting this environment. Liability for third-party acts committed on sports fans must consider the enabling role of the team and the influence of the event.

III. THE INFLUENCE OF THE STADIUM ENVIRONMENT ON VIOLENCE

No one can dispute the central role sporting events play in American society.[172] The main sports leagues in the United States include: the National Football League ("NFL"); Major League Baseball ("MLB"); the National Basketball Association ("NBA"); the National Hockey League ("NHL"); and Major League Soccer ("MLS"), along with college equivalents of those sports and many others. While Europe has the "soccer hooliganism" phenomenon, sports-related violence in the United States is more individual and small-group centered.[173]

This section discusses the influence of the stadium environment and the sporting event on violence, and thus why sports franchises should have

Notre Dame had a duty to take reasonable precautions to protect patrons from third party injuries because Notre Dame was both aware that alcoholic beverages were consumed on the premises and knew that some people get intoxicated and pose a general safety threat to others); McKee v. Gilg, 645 N.E.2d 1320 (Ohio Ct. App. 1994) (affirming summary judgment in favor of a minor league baseball team because there were no prior similar incidents of fan violence, and under the totality of the circumstances, fan violence was not foreseeable so as to impose a duty on the team); Townsley v. Cincinnati Gardens, Inc., 314 N.E.2d 409 (Ohio Ct. App. 1974) (holding that because a sports arena had no knowledge of prior similar incidents, arena had no duty to protect fan from robbery in arena restroom); Johnson v. Mid-S. Sports, Inc., 806 P.2d 1107 (Okla. 1991) (holding an arena was not liable for an injury suffered by a handicapped fan that resulted from an unforeseeable act of violence by an unknown patron because an usher was not required to foresee a post-match assault by a rowdy group of fans); Telega v. Sec. Bureau, Inc., 719 A.2d 372 (Pa. Super. Ct. 1998) (reversing a trial court's "no-duty" ruling and holding that being trampled by aggressive fans chasing a football kicked into the stands was not an inherent risk of attending a football game).

172. For example, 111.3 million people watched Super Bowl XLVI between the New England Patriots and the New York Giants. Richard Deitsch, *Super Bowl XLVI Sets Viewership Records*, SPORTS ILLUSTRATED (Feb. 6, 2012, 3:33 PM), http://sportsillustrated.cnn.com/2012/football/nfl/02/06/tvratings.record/index.html.

173. *See generally* Julian V. Roberts & Cynthia J. Benjamin, *Spectator Violence in Sports: A North American Perspective*, 8 EUR. J. ON CRIM. POL'Y AND RES. 163 (2000).

a different obligation to their fans than other premises-owners owe to their patrons. The franchise-fan relationship is not a mere business exchange; it is a complete experience in which behavior and expectations are transformed. Numerous theories and psychological studies attempt to explain the transformations and, although different terms are used to describe the phenomenon, the central idea is that there is a connection between the atmosphere of a sporting event, fan allegiance, and aggression levels. Because of the individualistic nature of sports-related violence in the United States, it is necessary to examine two factors that influence individual behavior: the relationship between the actual sporting event and aggression, and the relationship between fan identification and aggression. To examine these two relationships, this section looks at the carnival norms of sporting events, spectator identification as an influence on aggression, arousal levels during a game, the impact of cheering and chanting on aggression levels, the influence of alcohol, and many examples of fan misbehavior.

A. THE INFLUENCE OF SPORTING EVENTS ON FAN BEHAVIOR

1. Sporting Events Have Carnival Norms

At a sporting event, there are really two events happening: the game event and the stadium event.[174] The game event is what happens on the field.[175] Some spectators attend simply for the "unscripted drama and tension" that plays out on the field over the course of the game.[176] The stadium event is the cumulative nature of everything occurring, including both the on-field game and the crowd participation.[177] In this sense, sports are a social, community experience.[178] Numerous factors influence the stadium event and the arousal level of fans including: the game event; the size and density of the crowd; the intensity and volume of the crowd; the design of the stadium; and the potential sense of anonymity that fans may feel in the crowd.[179]

174. John E. Hocking, *Sports and Spectators: Intra-Audience Effects*, 32 J. COMM. 100, 100 (1982).

175. *Id.*

176. R. Todd Jewell, Afsheen Moti & Dennis Coates, *A Brief History of Violence and Aggression in Spectator Sports*, *in* VIOLENCE AND AGGRESSION IN SPORTING CONTESTS: ECONOMICS, HISTORY AND POLICY 11, 14 (R. Todd Jewell ed., 2012).

177. Hocking, *supra* note 174, at 100.

178. Jewell, Moti & Coates, *supra* note 176, at 14.

179. Hocking, *supra* note 174, at 106.

A sporting event is a recurring, sanctioned event where "the normal rules and conventions of behavior for everyday living are set aside and new ones emerge."[180] As one scholar has described, it is a "carnival" "of socially approved deviance."[181] Game-days can include hours of tailgating as part of a carnival atmosphere, which provides "a brief respite from the mundane . . . constraints of everday [sic] living and working."[182] It is difficult to imagine an Oakland Raiders game without fans painted in silver and black, wearing jerseys and spikes.[183] As for the actual competition between the teams, "[i]t provides a situation where legitimate authority, in the form of game officials and coaches, can be immediately challenged, even to the point of insult and verbal abuse."[184] Sportsmanship and decorum no longer exist in the grandstands because fans are free to yell profanities at players and spectators.[185]

One explanation for this is that "owners and promoters of sport deliberately encourage and abet the carnival aspects to draw more consumers to the gate."[186] Franchises sell various season ticket packages that allow fans to choose more desirable games and dates.[187] Teams have numerous promotions such as firework displays or one-dollar hot dogs, and memorabilia giveaways such as player bobble-heads and replica jerseys.[188] During the 2002 MLB World Series, the Los Angeles Angels of Anaheim gave each fan "thundersticks"—balloon-like noisemakers that make a loud

---

180. Louis Kutcher, *The American Sport Event as Carnival: An Emergent Norm Approach to Crowd Behavior*, 16 J. POPULAR CULTURE 34, 38 (1983).

181. *Id.*

182. *Id.* at 39.

183. *See* Elias Trejo, *Oakland Raiders: Why Raider Fans' Image Is Hurting Their Home Game Attendance*, BLEACHERREPORT.COM (Mar. 21, 2011), http://bleacherreport.com/articles/641360-oakland-raiders-why-raider-fans-image-is-hurting-their-home-game-attendance.

184. Kutcher, *supra* note 180, at 39.

185. *Id. See* Bill Plaschke, *Dodgers Players, Coaches Suspended for Roles in Fight with Fans at Wrigley Field*, L.A. TIMES, May 25, 2000, http://articles.latimes.com/2000/may/25/sports/sp-33991. Plaschke details the reactions of Dodgers fans to relief pitcher John Rocker after Rocker made racist comments in a magazine article. Plaschke mentions how disappointed he was in himself for getting caught up in the atmosphere of the stadium that included boos, jeers, fans throwing trash, and "some idiot" running on the field and pulling down his pants. *Id.*

186. Kutcher, *supra* note 180, at 40.

187. *See Ticket Information Center*, DODGERS.COM, http://mlb.mlb.com/ticketing/index.jsp?c_id=la (last visited Nov. 7, 2012). Teams offer various "mini plans" that allow a fan to choose between ten and thirty games they would like to attend, subject to some limitations. *Id.*

188. *See Promotions and Giveaways*, DODGERS.COM, http://losangeles.dodgers.mlb.com/schedule/promotions.jsp?c_id=la&y=2013 (last visited Nov. 7, 2012).

clanging noise when smacked together.[189] The NFL's Pittsburgh Steelers are famous for the "Terrible Towel," a yellow towel Steelers fans whip around in the air to annoy and distract opposing fans and players.[190] Teams also allow fans to make and display creative banners inside the stadium that are often featured on television broadcasts.[191] In fact, a University of Alabama student is an internet celebrity because of a gigantic sign—a photo of himself making a funny face—he holds up at Alabama basketball games.[192]

In addition to the excitement of the game, stadium parking lots open early for tailgating. At San Diego Chargers games, fans are allowed to bring kegs as long as they have proof of liability insurance and obtain a permit from the stadium.[193] Tailgating is also a huge part of college football culture. Before University of Southern California home football games, tens of thousands of fans set up tents on campus and around the football stadium to barbeque, drink beer, and party with other fans.[194] While each team uses different techniques, the purpose is to draw consumers to the gate and create a memorable experience.

2. Spectator Identification as an Influence on Aggression

"Fan identification" is a description of how much an individual is emotionally invested in a team and views the team's performance as a reflection of self-worth.[195] An individual's identification level is a key factor that influences the likelihood that a fan will act aggressively.[196] A

189. *Sorry, Thundersticks - The Vuvuzela Tops the Canon of Annoying Sports Noises*, ESPN (June 16, 2010, 8:44 AM), http://espn.go.com/blog/sportscenter/post/_/id/59670/sorry-thundersticks-the-vuvuzela-tops-the-cannon-of-annoying-sports-noises. The author of this Note was at game seven of the World Series and got a set of thundersticks.

190. *Pittsburgh Steelers' Terrible Towel Travels the World in ESPN Campaign*, STEELERS MOBILE (Nov. 10, 2011, 7:53 PM), http://steelersmobile.com/wp/17466.

191. *A-Z Fan Guide*, CHARGERS.COM (2012), http://www.chargers.com/tickets/stadium/fan-guide.html. The Dodgers website says they do not allow fans to display signs or banners of any kind inside the stadium, but anyone who has been to a Dodgers game knows that is not regularly enforced. *A to Z Guide*, DODGERS.COM, http://losangeles.dodgers.mlb.com/la/ballpark/information/index.jsp?content=guide#S (last visited Nov. 7, 2012).

192. Dave Wilson, *Alabama Fan Uses "The Face" to Distract Opponents*, ESPN (Feb. 15, 2012, 3:01 PM), http://espn.go.com/espn/page2/index?id=7578845.

193. *San Diego Chargers A-Z Fan Guide*, *supra* note 191.

194. Andrew Reed, *Tailgate Report Card: USC*, SPORTS ILLUSTRATED (Dec. 11, 2007, 4:22 PM), http://sportsillustrated.cnn.com/2007/sioncampus/12/07/tailgate.report.usc/index.html.

195. Daniel L. Wann, *Aggression Among Highly Identified Spectators as a Function of Their Need to Maintain Positive Social Identity*, 17 J. SPORT & SOC. ISSUES 134, 134 (1993).

196. Daniel L. Wann et al., *Sport Team Identification and Willingness to Consider Anonymous Acts of Hostile Aggression*, 29 AGGRESSIVE BEHAVIOR 406, 411 (2003). A study found that fans who

highly-identified fan is more invested in the team, more biased in the assessment of the team's performance, and more favorable toward fans of their own team than to opposing fans.[197] Highly-identified fans are also more likely to experience negative reactions after a loss because of reduced feelings of self-worth.[198] Feelings of reduced self-worth can also occur throughout the game depending upon the on-field action.[199] While less-identified fans distance themselves from their team after a bad play or bad loss as a way to protect their ego, highly-identified fans have a more difficult time distancing themselves because of their emotional investment in their team.[200] Thus, highly-identified fans are more likely to convert their negative emotional reaction into hostility toward others in an attempt to restore their own self-worth.[201] Highly-identified fans may try to restore their self-esteem by "blasting."[202] Blasting can include verbal assaults and physical violence.[203] A highly-identified fan whose self-worth is damaged may blast the other team, or a follower of the other team, in order to rebuild his or her own self-esteem and the perception that he or she is better than the other party.[204] Thus, a highly-identified fan may act aggressively toward the fans and players of the other team depending upon the ebb and flow of the game or the game's outcome.[205]

There are numerous theories about why spectators find violence and aggression in sports entertaining, and one of them particularly helps to explain why highly-identified fans may engage in blasting.[206] The "asserting dominance theory" predicts that fans "live vicariously through athletes, so that when a player slams the quarterback, it is as if the spectator accomplished the play."[207] Accordingly, if a highly-identified fan lives

---

were highly identified with the University of Kentucky men's basketball team were more likely to consider committing an anonymous act of violence that would help the basketball team win a game than were fans with low identification levels. *Id.* The study asked fans about their willingness to trip, break a leg, and even murder an opposing team's players or coach.

197. Wann, *supra* note 195, at 134.

198. *Id.* at 135.

199. *See id.* at 136.

200. *See id.*; Daniel L. Wann & Nyla R. Branscombe, *Die-Hard and Fair-Weather Fans: Effects of Identification on BIRGing and CORFing Tendencies*, 14 J. SPORT & SOC. ISSUES 103, 105 (1990).

201. Wann, *supra* note 195, at 136.

202. *Id.*

203. *See id.* at 136, 140.

204. *Id.* Highly-identified fans may engage in blasting because they are less likely to sever their emotional connection with their team than fans who are less identified. *See* Wann & Branscombe, *supra* note 200, at 105.

205. Wann, *supra* note 195, at 138.

206. *See* Jewell, Moti & Coates, *supra* note 176, at 15.

207. *Id.*

vicariously through an aggressive, violent game, the fan may suffer damage to his self-worth and blast another fan to counteract a poor play on the field or an upsetting loss. It is as if by blasting another fan, the highly-identified fan corrected the on-field mistake.

3. Arousal During a Game

Highly-identified fans become more aroused during a game in which their identity is at stake because they are more emotionally invested than a less identified fan.[208] Exposure to violent, competitive sports increases the arousal level of highly-identified fans.[209] Aroused individuals are less likely to make thoughtful social judgments, and are more likely to act aggressively toward members of other groups.[210] There are several different elements of a stadium event that can trigger fan arousal.

First, the actual sporting event impacts the arousal level of fans. Aggressive behavior by players is inherent in many sports and can influence fans that experience the game vicariously, as the asserting dominance theory predicts.[211] Also, the arousal level of highly-identified fans increases when they are exposed to violent, aggressive sports.[212] A study found that highly-identified persons were more likely to derogate members of the opposing group due to arousal from a sporting event.[213] A separate study of hockey games found that the number of penalty minutes and power plays for the home team was significantly correlated with fan enjoyment.[214] Many power plays in the NHL are a result of fouls involving aggressive player behavior. Similarly, in the NFL, most plays end when the player with the ball is tackled to the ground.

In addition to the arousal caused by the game itself, sports teams use many different methods to arouse fans, keep them engaged in the game,

208. Wann & Branscombe, *supra* note 200, at 105.

209. Nyla R. Branscombe & Daniel L. Wann, *Physiological Arousal and Reactions to Outgroup Members During Competitions that Implicate an Important Social Identity*, 18 AGGRESSIVE BEHAVIOR 85, 91 (1992) [hereinafter *Physiological Reactions*].

210. Nyla R. Branscombe & Daniel L. Wann, *Role of Identification with a Group, Arousal, Categorization Processes, and Self-Esteem in Sports Spectator Aggression*, 45 HUMAN RELATIONS 1013, 1020 (1992) [hereinafter *Role of Identification*].

211. *See supra* text accompanying note 207.

212. *Physiological Reactions*, *supra* note 209, at 91.

213. The study showed the movie *Rocky IV* to individuals who self-identified as either proud in their American identity or individuals who reported a low frequency of experiencing pride in being American. It found that highly-identified individuals experienced more arousal during the film and were more likely to derogate non-Americans and specifically Russians after viewing the film. *Id.* at 87, 91.

214. Daniel L. DeNeui & Daniel A. Sachau, *Spectator Enjoyment of Aggression in Intercollegiate Hockey Games*, 20 J. SPORT & SOC. ISSUES 69, 74 (1996).

and create an electric atmosphere. One prevalent method is a marching band or cued music. For instance, the White Stripes song "Seven Nation Army" is a stadium anthem that keeps the energy of the crowd up and often results in entire rows of fans swaying back and forth as they chant the catchy guitar riff in deafening unison.[215] College marching bands started playing it because it is "simple to play, angry, very loud, and kind of aggressive."[216] Teams encourage the loud stadium atmosphere in order to create a home field advantage for themselves.[217] In the NFL and college football, the home team's defense encourages fans to make noise to disrupt the opposing offense's timing to cause false start penalties.[218] The NFL's Seattle Seahawks refer to their fans as the "twelfth-man," and boast about how loud their stadium is while the opposing team's offense is on the field.[219] The twelfth-man reference demonstrates how teams encourage fan participation in the game and benefit from a loud, rowdy stadium environment. Additionally, "bad calls" by officials are often a precipitant to a negative crowd reaction.[220] Ultimately, a fan's arousal level can be influenced by both the on-field game event and the broader stadium atmosphere.

"Emergent-norm theory" predicts people in a crowd modify their reactions and behavior to align with the norms or the perceived norms of the crowd.[221] Thus, if the norm inside a stadium is to vigorously boo or taunt an official for a questionable call, some fans will modify their behavior to align with the perceived norm. Because the carnival norms inside a stadium are different from the norms of everyday life, emergent-norm theory predicts that fans who are rational actors outside the stadium may shout profanities, taunt opposing players and fans, and act in a rowdy, unsportsmanlike way when immersed in the atmosphere inside the stadium. Similarly, "deindivuation theory" predicts that "[d]eindividuated fans are

215. *See* Alan Siegel, *How The Song "Seven Nation Army" Conquered the Sports World*, DEADSPIN.COM (Jan. 13, 2012, 3:23 PM), http://deadspin.com/5875933/how-the-song-seven-nation-army-conquered-the-sports-world.

216. *Id.*

217. *See* Stephen J. Dubner, *Football Freakonomics: Home-Field Advantage*, NFL.COM, http://www.nfl.com/features/freakonomics/episode-7 (last visited Nov. 7, 2012).

218. *See id.*

219. *History of the 12th Man*, SEATTLE SEAHAWKS, http://www.seahawks.com/gameday/12th-man/history.html (last visited Nov. 7, 2012). The "12th Man" is actually a registered trademark of Texas A&M University and represents the devotion Texas A&M fans have for the football team. *Traditions: 12th Man*, TEX. A&M UNIV., http://traditions.tamu.edu/traditions (last visited Nov. 7, 2012).

220. Michael D. Smith, *Precipitants of Crowd Violence*, 48 SOC. INQUIRY 121, 128 (1976).

221. Hocking, *supra* note 174, at 104.

more likely to experience a sense of lost behavioral control at games due to their tendency to abandon personal responsibilities, weaken personal and social restraints, and react to immediate cues, motivations, and emotions."[222] Because of the carnival norms inside the stadium, deindivuation theory predicts that a rational person will lose his or her sense of personal responsibility and will get caught up in the consequence-free carnival atmosphere.

Together, emergent norm theory and deindivuation theory predict that fans abandon their normal sense of personal restraint and are transformed by the carnival atmosphere of a sporting event; the transformation conforms behavior to the perceived norms in the stadium. There have been many examples of these theories in real life. A Chargers-Giants NFL game in 1995 had to be temporarily stopped to restore order in the stadium because Giants fans were pelting Chargers players and coaches on the sideline with snowballs.[223] Similarly, in 1999, Philadelphia Eagles fans cheered when Dallas Cowboys wide receiver Michael Irvin injured his neck and was carted off the field by paramedics.[224] After the game, newspaper headlines and sports-talk radio expressed shock at the poor sportsmanship exhibited by Eagles fans.[225] More recently, in the wild-card playoff game between the Atlanta Braves and St. Louis Cardinals on October 5, 2012, Atlanta fans reacted to a controversial application of baseball's "infield fly rule" by throwing trash onto the field, causing a nineteen-minute stoppage of play.[226] Just two days later, during a week five NFL game between the Kansas City Chiefs and the Baltimore Ravens, Kansas City's own fans cheered when maligned quarterback Matt Cassel suffered a concussion and was knocked out of the game by an opposing player.[227] All of these incidents, as well as countless more, demonstrate

222. James A. Dimmock & J. Robert Grove, *Relationship of Fan Identification to Determinants of Aggression*, 17 J. APPLIED SPORT PSYCHOL. 37, 38 (2005).

223. Mike Freeman, *Pro Football; Giants Express Regrets Over Snowball Throwers*, N.Y. TIMES, Dec. 28, 1995, http://www.nytimes.com/1995/12/28/sports/pro-football-giants-express-regrets-over-snowball-throwers.html.

224. *Philadelphia Fans Criticized for Reaction to Irvin Injury*, SPORTS ILLUSTRATED (Oct. 14, 1999, 7:21 PM), http://sportsillustrated.cnn.com/football/nfl/news/1999/10/11/philly_fans_ap/.

225. *Id.*

226. Jason Stark, *The Pop-Up Heard 'Round the World*, ESPN (Oct. 7, 2012, 9:35 AM), http://espn.go.com/mlb/playoffs/2012/story/_/id/8467979/mlb-infield-fly-rule-call-tarnishes-st-louis-cardinals-nl-wild-card-win.

227. *Source: Matt Cassel Concussed*, ESPN (Oct. 8, 2012, 10:07 AM), http://espn.go.com/nfl/story/_/id/8474895/kansas-city-chiefs-qb-matt-cassel-leaves-taking-haloti-ngata-hit-baltimore-ravens. Prior to the game, an airplane flew over the stadium towing a banner calling for Cassel's benching. The fan's reaction to Cassel's injury drew fierce responses from some Chiefs

how fans can lose their sense of personal restraint and are transformed by the stadium's carnival norms.

4. The Impact of Chanting on Aggression Levels

Two theories attempt to explain how chanting and a rowdy surrounding crowd can transform an individual into a more aggressive person who considers the consequences of his or her actions less. "Contagion theory" predicts individuals in a crowd are transformed from rational individual actors into a mob, in which an individual loses the sense of individuality.[228] It is very similar to deindividuation theory.[229] The loss of individuality reduces a person's sense of responsibility and subsequently means he or she considers the consequences of his or her actions less than if they were simply acting alone.[230] Thus, individuals in a rowdy crowd are more likely to engage in destructive behavior as a result of external emotional cues.[231] A study of soccer fans found that fans engaged in chanting during the match had higher levels of aggression during and after the game than individuals who did not chant.[232]

While some chanting and cheering that occurs at sporting events is simply singing along with a stadium anthem like "Seven Nation Army," other chanting involves offensive language targeted at opposing players and fans.[233] Offensive language and taunting can incite aggression and tense situations can escalate quickly.[234] However, some fans enjoy this type of atmosphere, and actually expect it, because a sporting event has a different set of norms under which rude, rowdy behavior is tolerated and sometimes encouraged.[235] As previously discussed, the emergent-norm theory offers an explanation as to why this atmosphere may be tolerated in

---

players, including offensive lineman Eric Winston, who called the fans' reaction "100 percent sickening." *Id.*

228. Moshe Bensimon & Ehud Bodner, *Playing With Fire: The Impact of Football Game Chanting on Level of Aggression*, 41 J. APPLIED SOC. PSYCHOL. 2421, 2422 (2011). Gustave LeBon originally developed contagion theory during the French Revolution, which was later both criticized and then refined by numerous scholars. *See* Linda Levy, *A Study of Sports Crowd Behavior: The Case of the Great Pumpkin Incident*, 13 J. SPORT & SOC. ISSUES 69, 69–70 (1989).

229. *See supra* text accompanying note 222.

230. Bensimon & Bodner, *supra* note 228, at 2422–23.

231. *Id.* at 2423.

232. *Id.* at 2429.

233. *See* Sarah Lyall, *Taking on Soccer Violence, One Derogatory Chant at a Time*, N.Y. TIMES, Jan. 27, 2012, http://www.nytimes.com/2012/01/28/sports/soccer/taking-on-soccer-violence-one-derogatory-chant-at-a-time.html.

234. *Id.*

235. Lindsay M. Korey Lefteroff, *Excessive Heckling and Violent Behavior at Sporting Events: A Legal Solution?*, 14 U. MIAMI BUS. L. REV. 119, 119–22 (2005).

a stadium: fans who engage in heckling, use racial slurs, and exhibit obnoxious behavior, are rarely punished.[236] Despite fan codes of conduct, many fans believe heckling players and taunting other spectators is their right as a paying customer because of the established stadium norms.[237]

5. The Influence of Alcohol

Although alcohol consumption does not make everyone more aggressive, alcohol consumption and intoxication have an effect on aggressive behavior and crowd dynamics.[238] The aggressive propensities of fans may increase because an "intoxicated person may not correctly perceive the reasons for other people's behavior, making the actions of others appear more arbitrary and provocative than they would to a sober perceiver."[239]

Professional sports franchises are not likely to stop selling alcohol in stadiums because of the money they make; however, because they recognize the influence alcohol often plays in violent situations, teams and leagues have taken steps to limit alcohol sales. Examples include a ban on alcohol sales in the fourth quarter of NBA games, and a limit on the size and number of drinks individual fans can buy at once.[240] Alcohol sales are also banned at many college athletic events, even though the National Collegiate Athletic Association ("NCAA") does not mandate the prohibition of alcohol except at the championship events it controls.[241] However, because of the economic downturn in recent years, some universities have decided to sell alcohol in order to make up for lost revenue.[242] Although this Note is not about dram-shop liability, one way teams enable aggressive fan behavior is by allowing alcohol consumption at sporting events.

6. Examples of Fan Misbehavior

Some highly-publicized incidents demonstrate that the mixture of increased levels of aggression stemming from the stadium environment and

236. *Id.*

237. *Id.* at 120.

238. *See* Tiffany A. Ito, Norman Miller & Vicki E. Pollock, *Alcohol and Aggression: A Meta-Analysis on the Moderating Effects of Inhibitory Cues, Triggering Events, and Self-Focused Attention*, 120 PSYCHOL. BULL. 60, 77 (1996).

239. *Id.* at 61.

240. *See NBA Establishes Revised Arena Guidelines for all NBA Teams*, NBA.COM (Feb. 17, 2005; 1:26 PM), http://www.nba.com/news/arena_guidelines_050217.html.

241. Jeff D. Opdyke & David Kesmodel, *Beer Sales Make a Comeback at College Stadiums*, WALL ST. J., Sept. 12, 2009, http://online.wsj.com/article/SB125271416817105157.html.

242. *Id.*

the on-field competition, heckling fans, and alcoholic intoxication can cause regretful behavior by fans of all sports. During the ninth inning of a 2000 Cubs-Dodgers game at Wrigley Field in Chicago, a Cubs fan grabbed the hat off of a Dodgers player sitting in the bullpen.[243] Numerous Dodgers players and coaches climbed into the stands in defense of their hatless teammate.[244] Ultimately, sixteen Dodgers players and three Dodgers coaches were fined and suspended by Major League Baseball.[245] In 2004, a Texas Rangers relief pitcher was charged with felony battery after he threw a chair into the stands that broke a woman's nose.[246]

The most shocking display of aggressive behavior, the "Malice at the Palace," occurred in Detroit at an NBA game between the Detroit Pistons and Indiana Pacers.[247] After one player shoved another on the court and a scuffle erupted between the two teams, a fan threw a beverage at Pacers forward Ron Artest.[248] Artest and other Pacers players went into the stands and started throwing punches at fans.[249] Prosecutors subsequently filed criminal charges against five Pacers players and seven Detroit fans.[250] The Pistons fan who started the brawl was barred from Detroit Pistons games for life.[251] After the "Malice at the Palace," the NBA issued revised security standards for all of its arenas that included a fan code of conduct and banned the sale of alcohol after the third quarter.[252]

There are also many incidents of fan-on-fan violence, like the Bryan Stow beating, inside and around stadiums across America. In 2011, after the NFL's New York Jets beat the Kansas City Chiefs by a score of thirty-

243. *Nineteen Dodgers Suspended for Wrigley Brawl*, SPORTS ILLUSTRATED (May 25, 2000, 1:37 PM), http://sportsillustrated.cnn.com/baseball/mlb/news/2000/05/24/dodgers_suspensions_ap.

244. *Id.*

245. *Id.*

246. *Reliever Charged with Felony Battery*, ESPN (Sept. 14, 2004), http://sports.espn.go.com/mlb/news/story?id=1881073. The Oakland Athletics claimed the "fans' behavior wasn't over the line according to baseball's rules of conduct that are posted at every ballpark entrance." *Id.*

247. *Fan Details Strides Made Since Brawl*, ESPN (Nov. 19, 2009, 2:33 AM), http://sports.espn.go.com/nba/news/story?id=4670842.

248. *Artest, Jackson Charge Palace Stands*, ESPN (Nov. 21, 2004, 2:57 AM), http://sports.espn.go.com/nba/news/story?id=1927380.

249. *Id.*

250. *Id.* In addition, Artest was suspended for the remainder of the season and several other player were also suspended for various lengths of time. *Id.*

251. Michael McCarthy, *Fan Who Ignited Brawl Forever Banned from Pistons' Home Games*, USA TODAY (Nov. 17, 2006, 1:24 AM), http://www.usatoday.com/sports/basketball/nba/2006-11-16-brawl-fan_x.htm.

252. *Fans Subject to Conduct Code*, ESPN (Feb. 17, 2005, 6:47 PM), http://sports.espn.go.com/nba/news/story?id=1993569.

seven to ten, a group of Chiefs fans beat up a twenty-three-year-old Jets fan in the stadium parking lot.[253] The Chiefs fans broke the young Jets fan's jaw, cheekbone, eye socket, induced bleeding of the brain, and taunted him by shouting "F-k New York" and "you all deserved what happened on 9/11!"[254] Similarly after the Rangers beat the Flyers in the NHL's Winter Classic outdoor hockey game in January of 2012, three suspects wearing Philadelphia Flyers jerseys beat up two men wearing New York Rangers jerseys outside of a restaurant in Philadelphia.[255] A sixteen-year-old girl, a Vancouver Canucks fan, suffered a concussion at a San Jose Sharks game when a drunken female fan smacked her in the head.[256] The drunken fan had been cursing and bumping the young girl and her sister throughout the entirety of the game because the young girl was wearing a Vancouver Canucks shirt.[257] Finally, a Dallas Cowboys fan was arrested after he used a stun gun on other fans in the stands at a Jets-Cowboys game.[258]

These are extreme examples of blasting;[259] one method by which highly-identified fans who suffer damage to their self-worth regain their feelings of superiority to the other team. These incidents and the various psychological theories demonstrate there is a universal change in behavior once fans enter a sports stadium. The atmosphere the team creates in the stadium, as well as the identification level of the fans influences this underlying change in behavior. Because of the behavioral change, fans may act in a more aggressive manner than they normally would. Thus, the team and the event play an enabling role in fan-on-fan violence.

---

253. Stephan Douglas, *Kansas City Chiefs' Fans Attack Jets' Fan Outside MetLife Stadium, Put Him in a Hospital*, BIGLEADSPORTS (Dec. 15, 2011, 5:00 PM), http://thebiglead.com/index.php/2011/12/15/kansas-city-chiefs-fans-attack-jets-fan-outside-metlife-stadium-put-him-in-a-hospital.

254. *Id.*

255. Katie Strang, *Video: Flyers Fans Attack Rangers Fans*, ESPN (Jan. 5, 2012, 2:01 PM), http://espn.go.com/new-york/nhl/story/_/id/7426297/video-shows-philadelphia-flyers-fans-attacking-new-york-rangers-fans.

256. Mike Rosenberg, *Teenage Girl Who Had Brain Surgery Says She Was Attacked by Sharks Fan at HP Pavilion*, MERCURY NEWS (Dec. 30, 2011, 11:52 PM) (article no longer available online, digital copy on file with author).

257. *Id.*

258. The NFL subsequently asked all teams to pat down fans from the waist up and from the ankles to the knees before fans enter the stadium. Michael McCarthy, *NFL Wants Pat-Downs from Ankles Up at All Stadiums*, USA TODAY (Sept. 16, 2011, 9:49 AM), http://content.usatoday.com/communities/gameon/post/2011/09/nfl-orders-ankles-up-frisks-for-16-million-fans-entering-stadiums-security-buffalo-bills/1.

259. *See supra* Part II.B.

B. TEAMS' RESPONSES TO FAN VIOLENCE

1. Current Reactions to Problems in Stadiums

Some franchises have implemented creative solutions to deal with fan violence and drunkenness. In 1997, the Philadelphia Eagles placed a courtroom—complete with a real judge—in the basement of Veterans Stadium, where they play their home games.[260] The first game it was used, twenty rowdy fans were brought before the court.[261] Over a six-year span, "Eagles Court" helped to repair the image of Philadelphia by "cracking down on the rowdy and lewd behavior" for which Philadelphia sports fans were infamous.[262] Other franchises say they will revoke the ticket privileges of fans that engage in inappropriate behavior.[263]

Similarly, in an effort to prevent violence at Scottish football matches, the Scottish government outlawed chants, songs, and even internet posts that featured religious or ethnic slurs, as well as slurs associated with violent historical incidents, targeted at other fans.[264] While penalties are stiff—unlimited fines and up to five years in prison—Scottish fans are skeptical, including one who noted: "I don't think the law will make any difference. The hatred is so deep."[265] For example, a 2012 rivalry game featured three players ejected, thirteen warnings to overly aggressive players, a post-game shouting match between the managers of the two teams, and the arrests of thirty-four fans.[266] Regardless, Scottish legislators felt the need to confront the issue of violent sports fans and aggressive cheers directly.

2. Teams Will not Reduce the Identification Level of Fans

It is unlikely that teams would ever seriously attempt to reduce the identification level of their fans because sports teams are for-profit businesses that benefit financially from passionate, highly-identified

260. Lefteroff, *supra* note 235, at 133.

261. *Id.*

262. *Id.* at 133–34. Philadelphia fans famously booed Santa Claus and taunted Dallas Cowboys wide receiver Michael Irvine with profanities as he was carted off the field after he suffered a career-ending neck injury. Michael David Smith, *Eagles Fans Rated as Worst in America*, NBC SPORTS (Mar. 18, 2011, 8:32 AM), http://profootballtalk.nbcsports.com/2011/03/18/eagles-fans-rated-as-worst-in-america.

263. *Fan Code of Conduct*, DODGERS.COM, http://losangeles.dodgers.mlb.com/la/ballpark/information/index.jsp?content=coc (last visited Nov. 7, 2012).

264. Lyall, *supra* note 233.

265. *Id.*

266. *Id.*

fans.[267] In 2010, the big four American sports leagues—the NFL, MLB, NBA, and NHL—generated almost $22 billion in revenue.[268] The NFL appears to have suffered no negative effects from its 2011 labor dispute, and recently extended its television broadcasting rights through 2022 for roughly $3.1 billion per year.[269] The fact that television networks are willing to spend so much money on broadcast rights demonstrates the financial potential of sporting events.[270] In 2011, twenty-three of the twenty-five most watched shows on television were NFL games.[271]

However, television is just one revenue stream for sports franchises and leagues. Teams make money from tickets, parking, food, beer, merchandise licensing, memorabilia, corporate sponsorship deals, stadium-naming rights, and in-stadium advertising, amongst others. Many of those revenue streams are essential elements of the exciting stadium atmosphere the team creates for fans. Even with the economic decline over the past few years, sporting event attendance has remained steady, and the average ticket price has increased.[272] While it may be impossible to explain exactly why fans flock to sporting events, both in person and on television, it is likely due in part to the identification level of fans and to the exciting carnival atmosphere the team creates. Therefore, if franchises are allowed to reap the financial benefit of the transformative change in behavior that occurs when fans enter the stadium grounds, franchises should bear more moral responsibility for what happens to fans as a result of that behavioral shift.

IV. A NEW FRAMEWORK FOR STADIUM VIOLENCE CONSIDERING ENABLING TORTS AND PSYCHOLOGICAL FACTORS

As the numerous psychological theories attempt to explain, there is something unique about a sporting event that changes the behavioral norms of fans. Because the sports franchise enables this behavioral transformation

267. *Role of Identification*, *supra* note 210, at 1027.

268. Jewell, Moti & Coates, *supra* note 176, at 11.

269. Lisa Richwine, *NFL Extends TV Deals with CBS, Fox, NBC*, REUTERS (Dec. 14, 2011, 7:50 PM), http://www.reuters.com/article/2011/12/15/us-nfl-deal-idUSTRE7BD2EO20111215.

270. *Id.*

271. Bill Gorman, *NFL 2011 TV Recap: Record 37 Shows Earn More than 20 Million Viewers*, ZAP2IT.COM (Jan. 5, 2012), http://tvbythenumbers.zap2it.com/2012/01/05/nfl-2011-tv-recap-record-37-shows-earn-more-than-20-million-viewers/115523.

272. WR HAMBRECHT + CO, THE U.S. PROFESSIONAL SPORTS MARKET & FRANCHISE VALUE REPORT 41–48 (2012), http://www.wrhambrecht.com/pdf/SportsMarketReport_2012.pdf (reporting figures for all teams in the four major American sports leagues).

by fostering an environment in which the norms differ from everyday life, the legal framework needs to reflect the team's enabling role. At a sporting event, fifty-thousand or more passionate, rowdy fans gather together to experience a sporting event that asks fans to invest themselves in a game, to cheer, to boo, to hate the opposing team; but those fans are required to act differently the instant they leave through the turnstile. If fans commit criminal acts upon leaving the stadium, a sports franchise should bear greater responsibility for that criminal act because the franchise enables the carnival norms of behavior within the stadium and encourages the fan identification that leads to the carnival atmosphere. The responsibility of a sports team for third-party criminal acts is therefore inherently different from an apartment complex that failed to notify a prospective tenant about a rapist, from a parking garage operator who failed to provide a security guard, or from a private university that selected a certain security patrol on campus. The framework for analyzing a sports franchise's liability for third-party criminal acts committed on fans needs to put more emphasis on moral responsibility because of the enabling role of the team.

A. ENABLING TORTS

In examining the liability of a sports franchise for the criminal or tortious acts of its fans committed on other fans, it is helpful to find a connection between the atmosphere created by the team's event and the individual behavior of the violent actor. Robert Rabin, professor of law at Stanford University, provides this connection via an "enabling tort."[273] Rabin suggests that, "[b]eyond the immediate perpetrator of the harm, the victim perceives the individual, or more often, the enterprise, that set the stage for the suffering that unfolded [as t]he Enabler."[274] Enabling is essentially "risk facilitation."[275] Most importantly, "'enabling' has a proactive connotation" that separates it from scenarios in which a person simply fails to act.[276] Thus, an enabling tort requires some action or facilitation by the party who did not actually commit the crime or tort. This notion of enabling torts captures the evolution of "moral sensibilities from a more individualistic era to one in which tort law . . . increasingly reflects more expansive notions of responsibility for the conduct of others."[277]

273. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

274. *Id.* at 437–38.

275. *Id.* at 439.

276. *Id.* at 442.

277. *Id.* at 441–42; Rabin discusses how Oliver Wendell Holmes clearly would disapprove of this idea. *Id.* at 438 n.14. Holmes wrote about why a man who sells a firearm should not be liable for the eventual crime the buyer at some point is likely to commit: "The principle seems to be pretty well

Professor Rabin uses two classic examples to demonstrate the evolution of the enabling concept.[278] First is negligent entrustment.[279] Courts hold a car owner liable when the car owner allows an unlicensed driver to operate his car and the unlicensed driver then injures a pedestrian.[280] The important notion implicit in negligent entrustment (and, for the sake of this Note's argument, about teams being enablers) is "that [the] defendant paved the way for a truly reckless individual to . . . [impose] serious risks of injury on the public at large."[281] Second, Rabin discusses dram-shop and social-host liability.[282] Originally, no liability was imposed beyond the intoxicated person; however, over time, responsibility expanded to include those serving alcohol.[283]

In Rabin's opinion, California's premises liability cases "are a selective extension of the enabling concept" to "ordinary entrepreneurial activity."[284] Viewed categorically, the cases "involve commercial activity systematically conducted in circumstances that heighten third-party risks of serious injury to others."[285] California courts foresaw the expansion of the

established, in this country at least, that everyone has a right to rely upon his fellow-men acting lawfully, and therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be." Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 10 (1894).

278. *See* Rabin, *supra* note 273, at 438–44. Rabin draws on these simple examples to explore more creative enabling theories involving handgun manufacturers and cigarette companies. *Id.* at 436–37, 449–50.

279. *See id.* at 438.

280. *Id.* This argument is based on RESTATEMENT (SECOND) OF TORTS § 390 (1965):

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

A Vermont jury even found an old woman who gave money to her grand-nephew for a car—knowing he had no driver's license and had failed the driver's test several times—guilty of negligent entrustment. Vince v. Wilson, 561 A.2d 103, 104–06 (Vt. 1989).

281. Rabin, *supra* note 273, at 439.

282. *Id.* at 441.

283. *Id.* California has severely reduced the possible liability of those who serve alcohol. Specifically, "the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person." CAL. CIV. CODE § 1714(b) (West 2012). *See also* CAL. BUS. & PROF. CODE § 25602 (West 2012) (making it a misdemeanor to provide alcohol to "any habitual or common drunkard or to any obviously intoxicated person," but absolving the server from civil liability).

284. *See* Rabin, *supra* note 273, at 446. Rabin discusses *Ann M. v. Pacific Plaza Shopping Center*, 863 P.2d 207 (Cal. 1993) and *Sharon P. v. Arman, Ltd.*, 989 P.2d 121 (Cal. 1999). *Id.* at 445–46.

285. *See id.* at 446.

doctrine and balanced the violent acts of the third-party aggressor against the enabling commercial activity; the California courts ruled in favor of the commercial activity via no-duty rulings.[286] Rabin's enabling idea is perhaps most applicable to a sports stadium because the sporting event "contributes in a collective, nonsegregable way to the overall harm."[287] As this Note has discussed, sports franchises have a unique relationship with fans in which the sporting event enables a transformation in fan behavior. Because of the enabling role franchises play in this behavioral transformation, teams should be held to a higher standard of moral responsibility.

B. MORAL RESPONSIBILITY FOR THE ENVIRONMENT THE TEAM CREATES

Although moral responsibility is a factor that courts supposedly weigh in deciding duty,[288] in a stadium situation, the franchise is a proactive enabler that benefits financially from a zealous fan-base and the raucous carnival atmosphere the team encourages. Thus, as a risk facilitator, the team should be held to a higher standard of moral responsibility.

The moral responsibility a team bears for acts of violence between fans should take into account the different behavioral norms that are acceptable inside of a stadium, as well as the influence that identification and arousal have on fans. Fans have a reasonable expectation of safety inside a stadium and, because they relinquish some of their rights at the stadium gate, the team is in the best position to provide protection for them. While the traditional approach would be to weigh the costs of additional security against the perceived benefits, moral responsibility should avoid appeals to costs and questions of exactly how much security is enough. The question of "how much security is enough?" was what the California Court of Appeals focused on in *Noble v. Los Angeles Dodgers, Inc*.[289] Because causation can never be proven with mathematical certainty—especially when trying to determine if five additional security guards would have prevented a specific injury in a crowd of fifty-thousand or more fans—moral responsibility should be a more prominent factor in the legal analysis.

286. *See id.* at 443.

287. *See id.* at 451.

288. Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 658 (Cal. 1985) (quoting Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968)) (noting that one of the *Rowland* factors is "the moral blame attached to the [property owner's] conduct").

289. *See* Noble v. L.A. Dodgers, Inc., 214 Cal. Rptr. 395, 398 (Ct. App. 1985).

Giving moral responsibility greater consideration will also better reflect the tacit expectations of fans, who look forward to exciting and safe sporting events. This expectation of safety comes partially from how teams present and market themselves. Sporting events are marketed as thrilling competitions that can be enjoyed with friends and family.[290] Both a team's marketing and its desire to make a profit reinforce this expectation of safety and event enjoyment. If teams instead marketed a sporting event as an opportunity to drink beer, taunt opposing fans and players with utter disregard for societal norms, and then beat-up an opposing fan when your team loses, fans would have different expectations upon entering the stadium. Focusing on the moral implications of how teams enable the behavior of fans would better reflect the risk facilitator role teams play in fan violence. Thus, lawsuits involving sports teams and fan violence should embrace the enabling torts concepts and consider the team's moral responsibility to a great degree.

C. MAKE DUTY AND CAUSATION ELEMENTS EASIER TO FULFILL

One way to give the team's enabling role and moral responsibility greater weight is to make both the duty and causation elements easier to establish when a fan is injured at a sporting event. This could be accomplished via statute passed by the California Legislature,[291] a restoration of the proper roles of judge and jury, and burden shifting.

1. Duty Should be Categorically Imposed

Judges should not decide duty on a case-by-case basis. Instead, duty should be categorically imposed,[292] especially in the stadium context. The enabling role of the team, and the psychological influence of the stadium event on fans, should create a categorical duty for sports franchises to protect patrons from violent third-party acts. This categorical duty should be imposed on teams that enable, arouse, or contribute to fan behavior in any way. Theoretically, this would apply to every sports team in California. The categorical duty would avoid blanket no-duty rulings—decided by a judge—that hinge on the foreseeability of a specific incident to exonerate a team. This would restore the proper roles of both judge and jury. A categorical duty would avoid "recast[ing] any question of whether the

290. *See Ticket Information Center*, *supra* note 187.

291. *See, e.g.*, CAL. CIV. CODE § 1714(a) (West 2012) (imposing a general duty of care on everyone in the management of their own property); COLO. REV. STAT. § 13-21-120(4) (West 2012) (limiting the civil liability of baseball team owners by making assumption of the risk a complete defense to suits brought by fans injured by flying balls and bats).

292. *See* Esper & Keating, *supra* note 31, at 326.

standard of care has been breached as a question of 'duty'" and would instead leave the question of breach to the jury, rather than to a judge imposing a policy influenced "no-duty" ruling.[293] Then, whether the team breached its duty, affirmative defenses, comparative negligence, and joint and several liability should be used to limit a team's liability.[294] Imposing a categorical duty to protect fans from the violent acts of other fans acknowledges the underlying change in behavior and norms that occur in a stadium and should make franchises more accountable for the fan behavior they enable via the exciting stadium environment.

The first question is what size sporting events would qualify? Surely, a Little League game should not qualify, but a Major League Baseball game should. An argument could be made that a minor league game with 300 people in attendance should, or should not, qualify. Rather than focusing on a threshold level of attendance, however, the California legislature should draft a statute that considers how much the team excites the crowd via the on-field event and the stadium environment, as well as the psychological effects of arousal, aggression, and fan identification. A possible statute could state: Any sports entity that participates in competition with another sports entity during which one or both entities excite or encourage spectators to cheer or engage in the competition via stadium video screens, sounds and music, or other methods of crowd incitement including the behavior of individual competitors, has a duty to protect patrons from the acts of other patrons who may be influenced by the sporting event. The Legislature should then write a narrow exemption for youth sports leagues.

The second question is: how to handle fans that attend the event intending to engage in violence, or gang-related activity completely unrelated to the sporting event? For instance, at a 2011 Chargers-Raiders game, a twenty-five-year-old man was stabbed during a fight in the parking lot.[295] The victim refused to give a description of the assailant to the

293. *See* Ky. Fried Chicken of Cal., Inc., v. Super. Ct., 927 P.2d 1260, 1276 (Cal. 1997) (Kennard, J., dissenting).

294. *See* Am. Motorcycle Ass'n v. Super. Ct., 578 P.2d 899, 905 (Cal. 1978) (noting that California is a comparative negligence state and that under this doctrine, a tortfeasor may seek indemnification from other parties whose fault contributed to the plaintiff's injury in proportion to their responsibility for the loss). *See also* CAL. CIV. CODE §1431.2 (West 2012) (noting that each defendant in an action for personal injury shall be liable "only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault").

295. Susan Shroder, *Stabbing in Qualcomm Lot During Chargers' Game*, U-T SAN DIEGO (Nov. 10, 2011, 9:26 PM), http://www.utsandiego.com/news/2011/nov/10/stabbing-in-qualcomm-lot-during-chargers-game. *See also* Tony Perry, *Raiders-Chargers Game Marred by Stabbing, 2 Assaults*, L.A.

police.[296] The fan's refusal to assist the police raised suspicion that this was not a random act of fan on fan violence; rather, the assailant may have stabbed the victim over something completely unrelated to the football game. Two similar incidents at a 2011 49ers-Raiders NFL game showed how the distinction between violence sparked by the stadium event and premeditated violence can be blurred. At the 49ers-Raiders game, a twenty-six-year-old man was beaten unconscious inside a stadium restroom during the game, and then just after the game ended, two twenty-year-old men, one of whom was wearing a shirt that said "Fuck the Niners," were shot several times.[297] The fact that the beating occurred in a stadium bathroom and the shooting victim was wearing a shirt identifying him with a team seem more intrinsically linked to the game and the stadium atmosphere than the Chargers-Raiders incident.

Even though many situations may appear to be unrelated to the stadium event created by the team, all of these situations would be covered by the categorical duty, and a jury would evaluate them as matters of breach of duty and causation; not as no-duty rulings decided by a judge. The jury would hear evidence about the stadium security measures in place at the time of the event and would decide if the team breached its duty. This is where comparative negligence, and joint and several liability, could be utilized to limit a team's liability. A jury should be allowed to allocate comparative fault after a full development of the facts and the jury's role should not be usurped, especially in a stadium violence case, by a judge's no-duty ruling.

2. Causation Should be Presumptive

Because of the affirmative duty imposed on a sports franchise, causation should be presumptive for the injured party if a jury finds that the team breached its categorical duty. In *Isaacs v. Huntington Memorial Hospital*, duty and causation were confused and complicated by a footnote linking the two elements.[298] It suggested that an affirmative finding of foreseeability, which establishes a duty, would necessarily establish

TIMES, Nov. 11, 2011, http://latimesblogs.latimes.com/lanow/2011/11/raiders-chargers-game-marred-by-stabbing-2-assaults.html (noting that two other fights also occurred during the game).

296. *See* Shroder, *supra* note 295.

297. Ari Burack, *Victims of Violence After 49ers-Raiders Game in Serious Condition*, S.F. EXAMINER (Aug. 8, 2011, 4:00 AM), http://www.sfexaminer.com/local/crime/2011/08/victims-violence-after-49ers-raiders-game-serious-condition.

298. *See* Isaacs v. Huntington Mem'l Hospital, 695 P.2d 653, 662 n.8 (Cal. 1985). *See also* Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97, 102 n.5 (Ct. App. 1993) (pointing out the confusion caused by the footnote in *Isaacs* and ignoring the comment as dictum).

causation.[299] This provided ammunition for plaintiffs attempting to overcome the summary judgment causation obstacle.[300] However, the California Supreme Court has since repeatedly stated that duty and causation are "separate and independent element[s] . . . of negligence."[301]

Intuitively, however, there is logic behind the linking argument. If a violent event is reasonably foreseeable such that a property owner has a duty to protect against it—or, in the case of this Note, a categorically imposed duty because of the enabling role of the sports team—the property owner's failure to fulfill that duty and the subsequent occurrence of the violent event should be sufficient to establish that the breach of the duty was a substantial cause of the harm. This is likely the thought process jurors use when drawing upon ordinary experiences to decide causation.[302] Similarly, the role of the jury in evaluating causation as related to duty was addressed by leading tort scholar and U.C. Berkeley Dean, William Prosser:

> [Proof of causation] is of course incapable of mathematical proof, and a certain element of guesswork is always involved. Proof of the relation of cause and effect can never be more than "the projection of our habit of expecting certain consequents to follow certain antecedents merely because we have observed those sequences on previous occasions." When a child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved him; but the experience of the community is that with guards present people are commonly saved, and this affords a sufficient basis for the conclusion that it is more likely than not that the absence of the guard played a significant part in the drowning. *Such questions are peculiarly for the jury.*[303]

The hypothetical child drowning in the pool was almost the exact scenario the California Supreme Court faced in *Haft v. Lone Palm Hotel*.[304] The major issue in *Haft* was determining which party had the burden of establishing or refuting causation when there was an absence of evidence that would normally establish or refute causation.[305] A wrongful death lawsuit was brought against the Lone Palm Hotel because it breached its

---

299. Saelzler v. Advanced Grp. 400, 23 P.3d 1143, 1152–53 (Cal. 2001).

300. *See id.*

301. *Id.* at 1153. *See also Nola M.*, 20 Cal. Rptr. at 102 n.5 (noting that the California Court of Appeals said that it treats the infamous footnote "as a simple slip of the pen").

302. *See* Yokoyama, *supra* note 37, at 114.

303. *Saelzler*, 23 P.3d at 1156 (Kennard, J., dissenting) (quoting Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 382–83 (1950)).

304. Haft v. Lone Palm Hotel, 478 P.2d 465 (Cal. 1970).

305. *See id.* at 474–75.

statutory duty to provide a lifeguard at the hotel's pool.[306] The Court stated that ordinarily, plaintiffs bear the initial burden of showing that a defendant's negligence was the proximate cause of the harm and that the breach of duty can "give rise to an inference from which a jury may find that a given injury was the actual and proximate result of the violation."[307] However, because the Hotel's breach of duty—not providing a lifeguard—created the absence of evidence which would have allowed the plaintiffs to meet the causation burden, the Court shifted the burden of proof of causation to the Hotel.[308]

While burden shifting is not appropriate in typical cases due to the fact that evidence and testimony often does exist to prove that a breach of duty was a substantial factor in causing the harm, burden shifting has value in situations where breach of duty and causation seem intrinsically linked. One scenario in which breach of duty and causation seem intrinsically linked is sports stadium violence. However, like the plaintiffs in *Haft* who struggled to prove causation, plaintiffs like Bryan Stow may also struggle to prove causation in stadium violence cases if they cannot "prove a causal connection between the lack of reasonable security measures and the plaintiff's harm."[309]

One way to make the causation element easier to fulfill, and to avoid abstract negligence rulings by judges, would be a burden-shifting approach like that utilized by the California Supreme Court in *Haft*. Rather than requiring an injured fan to prove that a team's poor security measures were the cause of the injury, the breach of the categorical duty—decided by a jury—should create a presumption of causation. This would create a presumptive rule of causation, like the footnote in *Isaacs v. Huntington Memorial Hospital*, suggesting that an affirmative finding of foreseeability, thus establishing a duty, would necessarily establish causation.[310] This would shift the burden of proof to the team, and force it to convince a jury that even though it facilitated the risk of injury to the fan, factors other than its own negligence caused the injury.

To keep wild fans in check, there should also be a provocation exception that would eliminate the availability of comparative negligence recoveries. If the injured fan in any way provoked the violence or willingly

306. *Id.* at 467–68.
307. *Id.* at 469.
308. *Id.* at 474–75.
309. Yokoyama, *supra* note 37, at 97.
310. *See supra* text accompanying note 298.

entered a fight, he or she should lose the benefit of the burden shifting. Thus, provocation and mutual combat would be affirmative defenses for a team.

D. STADIUM VIOLENCE CASES SHOULD GO TO JURIES

Stadium violence cases should be decided by a jury, not a judge, because a jury composed of different people with different experiences is more likely to understand and relate to the atmosphere of a sporting event where the behavioral norms differ from everyday life. Juries should decide, after a full development of the facts, whether the team breached its categorical duty and whether the breach caused the harm in question. Ideally, a jury would have at least a few jurors who have attended sporting events and have witnessed the excitement and altered behavioral norms themselves. Under the framework suggested by this Note, those jurors would be able to draw upon their own experiences and expectations in deciding the liability of a team for a fan's injury.

Imposing a categorical duty on teams in stadium violence cases and then having jurors decide breach of duty and causation, rather than judges issuing "no-duty" and abstract negligence rulings, would comport with three important notions of tort law. First, a categorical duty, followed by a jury deciding breach, takes into account the infinite variety of situations that are too specific to include in an enunciation of duty.[311] Because juries use the reasonable person standard, jury verdicts "advanc[e] the economic function of tort law."[312] A jury intuitively increases efficiency by making decisions about "the optimal level of care . . . [considering] the circumstances of each case."[313] Second, sending stadium violence cases to juries "allows successive juries to reassess what precautions are reasonable as social, economic, and technological conditions change over time."[314] Jury decisions should incentivize innovation and new techniques for handling security and fan safety inside and around the stadium.[315] Third, jury decisions, rather than judge decisions, draw on a wider array of experiences and expectations.[316] Juries represent the shared morals of a community and the fan base of a team. Thus, the jury should hold a

311. *See* Ky. Fried Chicken of Cal., Inc., v. Super. Ct., 927 P.2d 1260, 1276–77 (Cal. 1997) (Kennard, J., dissenting).

312. *Id.* at 1277 (Kennard, J., dissenting).

313. *Id.*

314. *Id.* at 1278 (Kennard, J., dissenting).

315. *See id.*

316. *Id.*

franchise accountable for the behavior it enables via the stadium environment.

V. CONCLUSION

The Bryan Stow beating at Dodger Stadium was tragic not only for the Stow family, but also for Dodgers fans who were spooked by the incident. Many fans that refused to go to Dodger Stadium because they loathed embattled owner Frank McCourt missed out on Dodgers' pitcher Clayton Kershaw's impressive Cy Young Award winning season.[317] The fans' refusal to attend games illustrates their displeasure with the handling of the Stow incident by the controversial owner.[318] It may also lend credence to this Note's advocacy of a new framework for stadium violence liability. The current framework for premises liability cases involving third-party acts is not designed for the stadium environment. It fails to consider the enabling role of the team and the psychological influences of the stadium event on fans. Ultimately, because a sports team creates an exciting atmosphere for tens of thousands of fans, they should bear a greater burden of responsibility when fans are injured. This Note's proposed framework more fully reflects the enabling role of a team and the relationship between franchise and fans. Imposing a categorical duty on sports franchises, making causation presumptive, and restoring the proper roles of judges and juries in the judicial process is a more effective way to analyze stadium violence because it puts more responsibility on the team who enables, and benefits from, the carnival norms of a sporting event and the identification level of fans.

317. *See* Plaschke, *supra* note 17; Dylan Hernandez, *Clayton Kershaw Joins Elite Dodgers Company by Winning Cy Young Award*, L.A. TIMES, Nov. 17, 2011, http://articles.latimes.com/2011/nov/17/sports/la-sp-1118-nl-cy-young-kershaw-20111118.

318. *See* Bill Plaschke, *His Los Angeles Sports MVPs for 2011: Dodgers Fans*, L.A. TIMES, Dec. 27, 2011, http://articles.latimes.com/2011/dec/27/sports/la-sp-1228-plaschke-20111228. *See generally* Bill Shaikin & David Wharton, *Magic Johnson-Led Group is Picked as Dodgers' Next Owner*, L.A. TIMES, Mar. 27, 2012, http://articles.latimes.com/2012/mar/27/sports/la-sp-0329-dodgers-magic-20120329 (noting that a group of investors including Los Angeles Lakers legend Magic Johnson purchased the Dodgers for two billion dollars and that it is unknown what effect the change in ownership will have on the Stow lawsuit).