

DEFINING THE RISKS OF TERRORISM TO AMERICAN HOTELS

William B. Werner

Christian E. Hardigree

Shannon Okada

University of Nevada Las Vegas

It is well known that the American hotel industry was greatly affected by the events of the September 11th terrorist attacks. The effects of those tragic acts have not been fully identified on a long-term basis, but continue to have repercussions on the hotel industry as a ripple effect. Terrorism poses a number of significant risks to the hotel industry, which are outlined. This paper explores in more detail a hotel's potential legal liability for damages caused by a terrorist attack and the related problem with insuring that risk. This study is limited to risks within the hotel industry, but some of the reference materials and conclusions relate to the entire hospitality industry and others as well.

KEYWORDS: terrorism, hotel security, hotel safety, premises liability, insurance

Undoubtedly, the events of September 11th had an immediate and longstanding effect on the hospitality industry (Stafford , Yu, & Armoo, 2002). But the immediate impact of decreased business volume is not the only threat terrorism poses to American hotels (Werner, Chen, & Kroeze, 2002). The industry is still struggling to identify the short-term and long-term effects of those tragic events, including a decrease in tourism, changing of markets, as well as the changing expectations of guests in regards to service and security.

In order to determine the most informed response to the threat of terrorism, the industry must first identify the risks relating to terrorism and determine their potential impact of each risk. Continuing terrorist attacks threaten to erode, if not completely destroy, the very foundation of the hospitality industry. The risks to hotels in the aftermath of 9/11, however, are much more extensive than the general business downturn the entire industry is currently experiencing.

DIRECT RISK

Many hotels, at least to some degree, face the much more direct risk that a terrorist attack will be carried out at the hotel itself. Since shortly after the 9/11 attacks, some experts have identified American hotels as potential terrorist targets ("What Hotel Management," 2001). Las Vegas , for example, has been identified as being among the few cities that "will always be [a] terrorist target" (Puit, 2002). Hotels had not been cited by government authorities as potential targets until February 2003, when the U.S. State Department issued a "Worldwide Caution" directly identifying hotels, clubs and restaurants as possible targets ("What Hotel Management," 2003). This shift in official policy may reflect an assumption that terrorists will avoid closely-protected public targets and to look toward smaller scale "soft" targets.

The recent attack at a Kenya hotel highlights the direct risk some hotels now face. Ten Kenyans and three Israelis were killed on November 29, 2002 when suicide bombers destroyed the 200-room Paradise Hotel in the beach resort city of Mombasa . A statement attributed to al Qaeda claimed responsibility for the attack and for the failed missile attack on an Israeli charter jet leaving Mombasa the same day ("Al Qaeda Claims Responsibility," 2002).

BUSINESS RISK

In addition to the general loss of business attributable to the threat of terrorism, each hotel to some degree faces the risk that the threat will directly affect its relationship with its customers. Estimates of the relative importance of hotel safety and security to customer satisfaction, loyalty and repeat visit intention have been mixed. Studies conducted before 9/11 generally reported that safety and security were very important factors for consumers in their hotel selection (Pizam, Tarlow & Bloom, 1997). In a recent poll of Hospitality Sales & Marketing Association International members, fear and safety concerns in relation to acts of terrorism were one of the top issues facing industry sales and marketing professionals ("Terrorism, economy, human resource issues," 2002). A recent SafePlace survey reported that ninety-four percent of frequent business travelers consider safety an important factor in hotel selection (Diamond, 2002).

Despite these widely-held assumptions, it is reported that American hotels have actually done little in response to the new risk of terrorism. A study recently published by the Center for Hospitality Research (Enz & Taylor, 2002) indicated that most American hotels have done little to increase guest security in the aftermath of the terrorist attacks. Nearly seventy percent of the hotel managers interviewed in the study said they had added no safety and security staff since the attacks, and most indicated they had done "not much" or "nothing at all" in the way of changing security procedures or tightening security (Enz & Taylor). When *Hotel Business* magazine surveyed hotel owners, developers and management companies, however, a different result was reported. In that study, fifty percent reported that they had increased security personnel since last September 11 while sixty-two percent said security had become a "more pressing issue" ("Hotels Make Guest Security Top Priority," 2002).

This may or may not be an important risk for some hotels to consider, but a recent study of Las Vegas hotel customers revealed a wide gap between their expectations of hotels since 9/11 and their perceptions of what the hotels have actually done (Werner, Chen, & Kroeze, 2002). Some scholars have found that relationships between risk perceptions and travel behavior appear to be situation-specific, making generalization about travel decisions difficult (Roehl & Fessenmaier, 1992).

LEGAL LIABILITY RISK

There presently exists very little legal precedent directly relating to civil tort liability for acts of terrorism, but it is already clear in the cases summarized below that the law generally applicable to criminal acts will serve as the model. For more than fifty years, hotels have faced potential tort liability for crimes committed against their guests (Jefferies & Brown, 2001). Under the law, a property owner has no duty to act as an absolute insurer of the safety of persons invited to enter the premises (Prosser & Keeton, 1984). Property owners are required, however, to provide reasonable care against foreseeable risks of harm, which may include protection from regular criminal activity occurring at a hotel (Prosser & Keeton). The Restatement (Second) of Torts §343 describes the liability as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger (Restatement Second, 1965).

To find that a property owner's negligent security was a substantial factor in bringing about a plaintiff's injuries, a plaintiff must provide evidence that the harm was somehow foreseeable (Prosser & Keaton, 1984). In the realm of liability for criminal acts occurring on property, juries look

to evidence of past crimes, frequency of past crimes, the history of crimes of a particular nature, recent increases in crime, reported vs. unreported crimes occurring on property, security manpower in light of criminal activity, etc.

The first defense for a hotel to avoid liability in the event of an act of terrorism is to show that the terrorist act was not reasonably foreseeable. If an attack is not foreseeable, then the hotel owes no duty to prevent it or to protect its guests from it (Werner, Chen, & Kroeze, 2002). The legal standard for what constitutes "reasonable care" by a property owner has not changed since 9/11. What likely has changed is the public's perception of what constitutes a "foreseeable risk of harm." Fifteen years ago, for example, a truck bombing would not be considered a foreseeable risk since it had so rarely occurred on American soil. But after the Oklahoma City and 1993 World Trade Center attacks, the public and thus a jury will look much differently at another similar case.

Reynolds (1996) demonstrated that landowner liability for the consequences of an act of terrorism is possible under American tort law. Moreover, even if the act itself was deemed unforeseeable, the hotel's reaction (or failure to react) in the aftermath of the attack may create liability. Once such an event occurs, the hotel has a duty to take reasonable care for the safety and security of its guests (Barth, 2001). Thus, a hotel must ensure that emergency plans are in place, are practiced, and are properly implemented in the event of an attack (Reynolds). If a hotel does not have an emergency plan in place, does not train its employees in how to implement the emergency plan, and/or fails to reasonably act in the aftermath of an attack, the hotel may be held liable for negligence.

If a terrorist act is deemed foreseeable, then the hotel will likely bear a larger responsibility in the eyes of the jury since the attack may have been preventable had the hotel taken additional security measures (Reynolds). Therefore, a hotel cannot turn a blind eye to indications that terrorism may occur on their property. A hotel must explore methods to improve their detection of errant behavior that may later be deemed "foreseeable terrorist activity" by a jury.

Although there is very little legal precedent regarding liability for acts of terrorism, there are a number of cases pending that will surely impact the development of the law in this area. They are summarized below.

CURRENT TERRORISM LIABILITY LITIGATION

Several hundred survivors and families of victims of the 1993 World Trade Center bombing filed a premises liability case against the Port Authority of New York and New Jersey in 1994 (Steering Committee v. Port Authority, 1994.) They claim the Port Authority knew the WTC was an attractive terrorist target and negligently failed to prevent the attack and to mitigate injuries and damages after it occurred (Van Voris, 2001). Thus, recent discovery disputes in the case have centered on the Port Authority's security intelligence files and security plans, which the Authority has attempted to protect claiming confidentiality and ongoing security interests (Steering Committee v. Port Authority, 1999). Written security policies and procedures, whether they are strictly followed or entirely ignored, are critical and sometimes determinative in an evaluation of the objective reasonableness of the defendant's conduct prior to and after the attack (McGoey, 2001).

The destruction of the World Trade Center in 2001 has had an important impact on the 1993 bombing litigation, not only due to the destruction of some the evidence and deaths of some of the lawyers involved in the case. Now that the structure is gone, the Port Authority's concerns for the confidentiality of its security plans is now also gone. Thus, the trial judge in 2002 lifted a previous ban and allowed the plaintiffs much greater access to the previously protected security materials ("Plaintiffs may talk to WTC detective," 2002). The materials reportedly include a terrorism assessment commissioned by the Port Authority in 1984, which listed several security vulnerabilities, including a scenario nearly identical to the 1993 bombing (Steering Committee v. Port Authority, 1999). Such evidence would tend to prove not only that the 1993 attack was foreseeable, but also that the Port Authority's action in response to the threat were inadequate. Regardless of the

ultimate outcome of the case, publicity surrounding the upcoming trial (or settlement) will surely raise public awareness of the potential legal liabilities applicable to terrorism.

Similar litigation arising out of the 9/11 attacks is much less likely to occur. The Victims' Compensation Fund Act, passed on September 22, 2001, established the widely-publicized fund from which the families of victims may receive compensation for their losses. The act further provides, however, that before receiving any compensation from the fund, the families must waive any and all legal claims they may have relating to the attacks (Kreindler, 2002). The compensation fund's summary procedures and restrictions on awards have resulted in some criticism by families who feel constrained by the circumstances to waive their potential legal claims and uncertain about the fairness and reliability of the award process (Chen, 2002; Falk, 2001). Some of those concerns have since been allayed as the initial awards from the fund have averaged over \$1 million. Still, as of October 2002 only 724 families (out of nearly 3000) had filed claims with the fund ("Sept. 11 Fund Offers More," 2002).

Dissatisfaction with or distrust of the compensation fund procedures may persuade some victims' families to proceed with litigation (Eig, 2002). Any motivation to sue, however, will be further dampened by the Victims' Compensation Fund Act's not-so-well-publicized provision capping the aggregate loss in all such lawsuits at the amount of insurance that was in place at the time (Kreindler, 2002). Although the constitutionality of this provision has been called into question, it is likely to deter most potential claimants because the losses resulting from 9/11 far exceeded the insurance coverage available to the victims (Van Voris, 2001).

Nonetheless, hundreds of families have filed lawsuits against the Port Authority, the airlines and the airport security agencies alleging civil liability for the September 11 attacks (Belkin, 2002; Hamblett, 2002). A similar case has been filed by victims of the 2001 anthrax attacks, who claim the deaths resulted from inadequate security at Fort Detrick, where the anthrax used in the attacks was allegedly stolen ("Widow of Florida Anthrax Victim," 2003). Although the outcomes of these and other similar cases may provide more definition to the potential for tort liability for terrorist acts, hotels are left for the time being with a risk that is both difficult to quantify and difficult to insure.

TERRORISM INSURANCE

For most other forms of liability, insurance provides an easy answer to the legal risks a hotel faces. Insurance for claims relating to an act of terrorism, however, has undergone a radical change in recent months, leaving hotels with a very difficult decision whether to purchase the insurance.

The first insurance issue raised following the September 11 attacks was the potential applicability of the typical "act of war" exclusions in property and casualty policies. The insurance industry was pressured by Congress almost immediately to forego the exclusion in the case of the 9/11 attacks and the industry complied, leaving the question to be decided in a future case (Massmann, 2001).

The insurance industry will suffer losses on account of the 9/11 attacks estimated between \$50 billion and \$80 billion (Alexander & Alexander, 2002). The attacks brought a number of different insurance coverages into play, including life, property, casualty, workers' compensation, business interruption, and disability insurance. As a result, some large commercial property owners have already experienced 50 to 100 per cent increases in their insurance premiums and have received notice of the express exclusion of acts of terrorism under other policies (Alexander & Alexander).

The difficulty with terrorism insurance culminated last year in the passage of the Terrorism Risk Insurance Act of 2002, which provides federal assistance in the event of insured losses caused by terrorism and requires insurers to offer coverage for such losses that is substantially similar in terms, conditions and limitations applicable to other types of loss (Terrorism Risk Insurance Act, 2002). The immediate effects of the act are just now surfacing, but it is clear that the high cost of the new terrorism insurance coverage is causing many businesses to forego the coverage (Spinner,

2003). Without insurance coverage, of course, a hotel is left with the entire risk of liability for a terrorist attack at its property.

CONCLUSION

The current potential for catastrophic uninsured losses caused by terrorism calls for some measure of security response from every hotel, if not to control a credible risk of an attack, then at least to minimize the hotel's potential liability if one should occur. The particular security measures most likely to impact any liability analysis in a terrorism case are the planning, training and implementation of the hotels' crisis management plan and extent of the hotel's efforts to understand the degree and nature of the threat of terrorism (Reynolds, 1996). Certainly in such a future case, no security director would want to testify that he or she made no efforts after September 11 to learn more about the threat of terrorism or that the hotel's crisis management plan was not a high enough priority to warrant increased attention and resources. In fact, all of the risks associated with terrorism point to a solution that is internal rather than external: a hotel's best protection against the risks of terrorism is the protection it provides itself.

REFERENCES

- Al Qaeda claims responsibility for Kenya attacks (2002, December 3). CNN.com Retrieved January 14, 2003 from <http://www.cnn.com/2002/WORLD/africa/12/02/kenya.probe>
- Alexander, D.C. & Alexander, Y. (2002). Terrorism and Business: The Impact of September 11, 2001. Ardsley, N.Y.: Transnational Publishers.
- Barth, S. (2001). Hospitality Law. New York: John Wiley & Sons, Inc.
- Belkin, L. (2002, December 8). Just money. *The New York Times Magazine*, p. 6.92.
- Chen, D.W. (2002, November 13). Victims' kin find fault with overseer of 9/11 fund. *The New York Times*, 1.
- Diamond, R. (2002). Hotel guests have new perspectives on where to stay after Sept. 11. *Hotel Online*, June 28, 2002. Retrieved July 2, 2002 from http://www.hotel-online.com/Neo/News/PR2002_2nd/June02_GuestPerspective.html
- Eig, J. (2002, September 11). Litigating grief: Affixing blame for Sept. 11 loss: A widow's choice. *The Wall Street Journal*, p. A1
- Enz, C.A. & Taylor, M.S. (2002). The safety and security of U.S. hotels: A post-September 11 report. New York: The Center for Hospitality Research at Cornell University.
- Falk, P.S. (2001). Families of Missing Have Three Options. *New York Law Journal*
- Hamblett, M. (2002, September 11). N.Y. court barraged with suits against Port Authority. *The Recorder*, p.3.
- Jefferies, J.P. & Brown, B. (2001). Understanding Hospitality Law (4th Ed.). Lansing, MI: Educational Institute of the American Hotel & Lodging Association.
- Kreindler, L.S. (2002, July 31). Pros and cons of victims' fund: Compensation provisions may bring salvation or frustration. *New York Law Journal*.
- Massmann, S. (2001, September 24). War risk exclusion legal history outlined. *National Underwriter*, p.40.
- McGoey, C.E. (2001). Terrorism: Security at all costs? Retrieved November 11, 2002 from www.crimedoctor.com/terrorism_1.htm
- Pizam, A., Tarlow, P.E. & Bloom, J. (1997). Making tourists feel safe: whose responsibility is it? *Journal of Travel Research*, 36(1), 23-28.
- Plaintiffs may talk to WTC detective (2002, June 12). *New York Law Journal*, 227, 28.
- Prosser, W. & Keeton, W. (1984). Torts. (5th Ed.) §61, p. 425.
- Puit, G. (2002, January 27). Las Vegas security: Las Vegas authorities to remain vigilant. *Las Vegas Review-Journal*, B1.
- Restatement of the Law of Torts, 2nd Ed. (1965). St. Paul, Minnesota: American Law Institute Publishers, section 343.
- Reynolds, M.L. (1996). Note: Landowner liability for terrorist acts. *Case Western Reserve Law Review*, 47(1), 155-206.
- Roehl, W.S. & Fesenmaier, D.R. (1992). Risk Perceptions and Pleasure Travel: An Exploratory Analysis. *Journal of Travel Research*, 30(4), 17-26.
- Sept. 11 fund offers more than expected, lawyers say (2002, October 1). *The Washington Post*, A9.
- Spinner, J. (2003, February 25). Firms rejecting terrorism coverage: Insurers say few companies feel risk, accept costs. *The Washington Post*, final edition, p. E1.
- Stafford, G., Yu, L. & Armoo, A.K. (2002, October). Crisis management and recovery: How Washington, D.C. hotels responded to terrorism. *Cornell Hotel and Restaurant Administration Quarterly*, 43(5), 27-40.
- Steering Committee v. Port Authority of New York and New Jersey, Case No. 600000/1994 (Supreme Court of New York, New York County).
- Steering Committee v. Port Authority of New York and New Jersey, 93 N.Y.2d 1, 709 N.E.2d 452 (Ct. App. 1999).
- Terrorism, economy, human resource issues top concerns of HSMIA membership in survey (2002). Hospitality Sales and Marketing Association International press release, October 28, 2002. Retrieved October 30, 2002 from <http://www.hsmia.org/releaseDetail.cfm?id=104>
- Terrorism Risk Insurance Act of 2002, H.R. 3210, 107th Congress.
- U.S. Department of State, Worldwide Caution, February 6, 2003.

- Van Voris, B. (2001, October 2). Suits still pending from 1993 trade center blast. *The National Law Journal*.
- Werner W.B., Chen, S.C. & Kroeze, C. (2002). An investigation of the impacts of terrorism on the hotel industry. In H. Qu & P.J. Moreo, (Eds.), *Advances in hospitality and tourism research: Proceedings of the Eighth Annual Graduate Education and Graduate Students Research Conference in Hospitality and Tourism* (pp. 712-715). Stillwater, Oklahoma: Oklahoma State University.
- What hotel management and security should be doing now about the real terrorism. (1991, October). *Hotel Security Report*, 19(11), 1.
- Widow of Florida anthrax victim files \$50 million claim, alleging lax base security (2003, February 15). Associated Press, BC cycle.
- Withiam, G. (1998). Studying women business travelers. *Cornell Hotel & Restaurant Administration Quarterly*, 39(4), 8.

Submitted March 1, 2003

Accepted July 16, 2003

Refereed Anonymously

William B. Werner, J.D. (e-mail: william.werner.ccmail.nevada.edu) and **Christian E. Hardigree**, J.D. (e-mail: christian.hardigree@ccmail.nevada.edu), are assistant professors in the William F. Harrah College of Hotel Administration at the University of Nevada Las Vegas. **Shannon Okada**, J.D. (e-mail: okadas@unlv.edu) is a graduate student in the William F. Harrah College of Hotel Administration at the University of Nevada Las Vegas (4505 Maryland Parkway , Las Vegas , NV 89154).