

NEW YORK COURT OF APPEALS ROUNDUP

**1993 WORLD TRADE CENTER BOMBING LITIGATION
AND GOVERNMENTAL IMMUNITY**

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As we noted in our column on Aug. 31, 2011, the Court of Appeals held an unusual reargument in a tort action against The Port Authority of New York and New Jersey that arose out of the 1993 bombing of the World Trade Center (WTC). Chief Judge Jonathan Lippman and Judge Robert S. Smith had recused themselves, and argument before the remaining five members of the Court was held on June 1, 2011. Without explanation, the Court availed itself of a procedure permitted by Article VI, Section 2(a) of the State Constitution – to "vouch in" two judges to sit as members of the Court, and ordered reargument. One of those judges, Third Department Presiding Justice Thomas E. Mercure, joined the majority opinion in the decision handed down on Sept. 22, and the other, Second Department Presiding Justice A. Gail Prudenti, joined the three-member dissent.

This month we discuss the decision in the WTC appeal.

Security Risks

The public policy rationale for the common law defense of governmental immunity is particularly relevant in the current environment of government budget cutting. The risk of terrorist attack calls for increased security in the face of decreased resources, requiring difficult decisions over how funds for security and other needs are allocated. These issues were discussed by the Court in *Matter of World Trade Center Bombing Litigation v. The Port Authority of New York and New Jersey*.

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This coordinated litigation arose out of the 1993 terrorist attack on the WTC in which two men left a rented van on a ramp in the WTC underground garage, lit the fuse of a fertilizer bomb inside the van, and walked away from the scene.¹ Ten minutes later, the bomb went off and created a crater six stories deep, killing six people, wounding nearly 1,000 others, and causing massive property damage.

One hundred and seventy four actions were filed on behalf of 648 plaintiffs against the Port Authority, owner and operator of the WTC. In the first phase of a bifurcated trial, the jury held the Port Authority liable and apportioned to it 68 percent of the fault, with only 32 percent of the fault apportioned to the terrorists. The liability verdict, including the rather startling (in our view) apportionment determination, was upheld in the Appellate Division, First Department,² after which the matter returned to the Supreme Court for separate damages trials. In the particular case before the Court of Appeals, brought by Antonio Ruiz, plaintiff was awarded \$824,100 in damages. In another of the cases, plaintiff Cantor Fitzgerald won a jury verdict that, in light of the decision on Ruiz's appeal, cannot stand.

The mixed public/private nature of the Port Authority played a central role in the dispute. The Port Authority was created in 1921 by a compact between New York and New Jersey for the purposes of overseeing and operating centers of trade and transportation.³ Although a public entity, the Port Authority is funded not by tax revenue, but by its own sources of income such as tolls, as those who travel in and out of New York City are well aware. It also derives income from its proprietary activities. The Authority has its own police force and is a member of state and federal terrorism task forces.

The Port Authority operated the 16 acres, seven office towers, and six underground levels of the WTC that included public spaces, PATH train and subway stations, shops, a hotel, offices, and a parking garage on four of the underground levels. Beginning in 1983, it began a thorough, ongoing counter-terrorism planning process.

The majority opinion, by Judge Theodore T. Jones, reviewed in detail the numerous internal and external consultant studies that evaluated various security risks to the WTC. The results of the studies varied. Some studies concluded that the WTC was a high-risk target and others that it was not, some recognizing a significant risk from public access to the parking levels and others characterizing such access as posing a low risk. One study ranked vulnerable areas of the complex on a scale of zero to 350 and, in contrast to the 350 rating given to the concourse, gave a 7 risk rating to the garage.

The Port Authority considered ways in which to handle garage security. The option of eliminating public parking was rejected due to considerations of cost, operational

impact and public acceptance. Instead, greater surveillance was adopted and the presence of security personnel in the area was increased. The degree to which the security was strengthened reflected the risks posed by the garage, and also the perceived risks of other areas of the WTC in which security personnel were needed.

Government or Landlord?

The crux of the appeal focused upon the capacity in which the Port Authority made its decision not to close the parking garage to the public or employ certain other security measures—as a landlord, or in the performance of a government function. Case law establishes that with entities that provide dual proprietary/government functions, the specific injury-causing act or omission (as opposed to the nature of the entity's overall activities) must be placed along a "continuum of responsibility" ranging from basic proprietary obligations to the most complex governmental functions.⁴ The Court held that the injury-causing conduct at issue belonged at the government function end of that continuum, stating, "the Port Authority acted within its governmental capacity because its security operations at the WTC constituted police protection."

The dissent, by Judge Carmen Beauchamp Ciparick, joined by Judges Victoria A. Graffeo and A. Gail Prudenti, maintained that the question had been framed incorrectly by the majority. It asserted that the focus of the inquiry should be the Port Authority's provision of security to the garage—a commercial facility—in its role as landlord. Decisions over garage security were made by civilian managers rather than security personnel and were based upon commercial considerations, the dissent argued, placing such decisions at the proprietary end of the continuum.

Discretion

The final issue before the Court was whether the Port Authority had been involved in discretionary decision-making when it determined the security plan for the WTC. The Court found that it had, and therefore was entitled to governmental immunity, protecting it from tortious liability for its actions in the absence of malice. The majority lauded the Port Authority for having evaluated terrorism risk repeatedly over the years, engaging in the "assiduous behavior that governmental agencies should be encouraged to undertake in rendering informed decisions that involve the balancing of burdens and risk, competing interests, and allocation of resources." Although the results of its decision-making were calamitous, that did not take away from the fact that the Port Authority reached a "reasoned discretionary conclusion" in allocating security resources at the WTC.

Endnotes:

1. The bombers and their co-conspirators are each serving 240-year sentences.
2. Although the jury's apportionment of fault was featured during the initial oral argument before the Court of Appeals, even if the Court had not overturned the imposition of liability, that apportionment likely would not have been subject to review for jurisdictional reasons.
3. Plaintiff argued that the Port Authority could not invoke governmental immunity as a result of statutory provisions waiving sovereign immunity, New York Consolidated Laws §§7101, 7106, but the Court rejected that argument, finding governmental and sovereign immunity to be distinct defenses.
4. See, e.g., [*Miller v. New York*](#), 62 N.Y.2d 506 (1984); [*Weiner v. Metro. Transp. Auth.*](#), 55 N.Y.2d 175 (1982).

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