

PROSECUTING A FESTIVAL: HOLDING ELECTRIC DANCE MUSIC FESTIVALS LIABLE FOR DRUG-RELATED DEATHS OCCURRING THEREIN

*Rebecca Lomazow**

INTRODUCTION.....	303
I. WHY SHOULD THE FESTIVALS BE LIABLE?	306
A. <i>The Dangers of Molly</i>	306
B. <i>The Role of the Festivals</i>	309
II. LIABILITY AS A MATTER OF LAW	310
A. <i>Negligence Doctrine</i>	310
B. <i>Duty of the Festivals</i>	311
C. <i>Duties Arising at Live Music Performances</i>	312
D. <i>A Summary of the Duty Owed</i>	315
E. <i>Assumption of Risk</i>	316
F. <i>Breach</i>	318
G. <i>Causation</i>	323
H. <i>Social Host Liability</i>	325
III. LIABILITY AS A MATTER OF POLICY	327
A. <i>Policy Advanced by Holding the Festivals Liable</i>	327
B. <i>Reasonable Measures Festivals Can Take</i>	330
CONCLUSION.....	331

INTRODUCTION

Jeffrey Russ was 23 years old.¹ He was from Rochester, New York, and had recently graduated from Syracuse University.² He was

* J.D. Candidate, 2015, Benjamin N. Cardozo School of Law; B.A., magna cum laude, 2012, University of Pennsylvania. I would like to thank the journal editors and staff for their diligence and contributions to this Note. Thanks also to Professor Anthony Sebok for his guidance. To Mom, Dad, Ben, Doug and the rest of my family and friends, thank you for your love, support, and patience throughout law school and the Note-writing process.

¹ Vivian Lee & William Rashbaum, *Weekend Revelry cut short after 2 die at Electronic Music Festival*, N.Y. TIMES (Sept. 1, 2013), http://www.nytimes.com/2013/09/02/nyregion/electric-zoo-music-festival-is-canceled-after-2-deaths.html?_r=0.

² *Id.*

an ardent Buffalo Bills fan and an enthusiastic house music follower. Jeff was described by his family as a “very good son” and adored by his friends for his ability to always make them smile.³ Olivia Rotondo was 20 years old.⁴ She was from Providence, Rhode Island, and had been studying communications at the University of New Hampshire.⁵ Olivia was a dancer whose friends were touched by her “infectious” personality.⁶ These two young adults were among about one hundred thousand who attended Electric Zoo, a house music festival on Randall’s Island in late August 2013.

Imagine 27 acres of wide-open grass.⁷ Now implant a few stages and huge speaker systems at several points along the perimeter. Set the scene with bright lights and large screens that project psychedelic images. Finally, pour in the aforementioned 100,000 “fun fur-clad hoop dancers, shirtless frat boys, wayfarer-wearing hipsters, and former club kids,” and the festival is ready to take place.⁸ Over a course of three days, the most popular electronic dance music (otherwise known as electric dance music, EDM or house music) disc jockeys (hereinafter DJs) take these stages and perform for several hour-long sets.⁹ Usually festival attendees have the option of purchasing passes for their preferred amount of time in attendance.¹⁰

Culture could not exist without music. In fact, each decade’s young adult generation has preferred a distinct genre of music. Throughout history, this preference has caused the particular music genres to meld into the identities of each respective ten-year span. For example, while we unequivocally associate the sixties with rock, the

³ *Id.* Jeff Russ, <https://www.facebook.com/JRuss90>.

⁴ Lee & Rashbaum, *supra* note 1.

⁵ *Id.*

⁶ Jeremy C. Fox, *UNH Students Remember Olivia Rotondo’s Humor, Passion for Dance*, THE BOSTON GLOBE (Sept. 2, 2013), <http://www.boston.com/news/local/massachusetts/2013/09/02/unh-students-remember-olivia-rotondo-humor-passion-for-dance/6EK0rrzoWieVwKa7hPSbTI/story.html>.

⁷ ELECTRIC ZOO: NEW YORK’S ELECTRONIC MUSIC FESTIVAL, <http://electriczoo festival.com/venue>. (last visited Nov. 5, 2014), *see also id.*, <http://electriczoo festival.com/gallery>. (last visited Nov. 5, 2014).

⁸ Matt Sussman, *Photo Gallery and Recap: Electric Zoo at Randall’s Island*, FLAVORWIRE (Sept. 15, 2009, 9:54 AM), <http://flavorwire.com/38489/photo-gallery-and-recap-electric-zoo-at-randalls-island>.

⁹ ELECTRIC ZOO: NEW YORK’S ELECTRONIC MUSIC FESTIVAL, <http://electriczoo festival.com/faq>. (last visited Nov. 5, 2014).

¹⁰ *Id.*

seventies are matched with the rise of disco. Today, this pattern continues as the current decade readily becomes synonymous with electronic dance music.

But this link between time period and music has never been so innocent. Just as every decade is tied to a musical genre, every music genre is tied to the use of particular drugs. “[I]n the 1960s, . . . people searched for spirituality and found LSD; in the ‘70s as hippie culture became mainstream, marijuana entered the suburban household; in the ‘80s, cocaine complemented the extravagance and selfishness of the greed decade”¹¹ Similarly, the recent surge in popularity of EDM has been complemented by the use of illegal drugs MDMA, or Ecstasy, and Molly,¹² as it is known in its pure form.¹³ These drugs allow for an “improvement” in the experience of listening to EDM because of the “feelings of euphoria, closeness and diminished anxiety” they are said to provoke.¹⁴

Thus, house music and its festivals, such as each annual installment of Electric Zoo,¹⁵ go hand in hand with the use of Molly.¹⁶ So much so that many festivalgoers feel house music festivals could not exist without it. Unfortunately for Jeffrey Russ, Olivia Rotondo, and their respective families and friends, that much was true. At the 2013 installment of Electric Zoo, these two young adults died of drug overdoses.¹⁷ More specifically, they overdosed on Molly.¹⁸

With that, a question of liability emerges as to who should be held responsible for the tragic consequences of these festivals. This Note sets out to determine the answer. In light of the recent deaths and other similar occurrences, this Note will argue that festivals such as these should incur liability for deaths resulting from drug overdoses

¹¹ Irina Aleksander, *Molly: Pure, but Not So Simple*, N.Y. TIMES (June 21, 2013), <http://www.nytimes.com/2013/06/23/fashion/molly-pure-but-not-so-simple.html>.

¹² These terms will be used interchangeably throughout this Note.

¹³ Aleksander, *supra* note 11.

¹⁴ *Id.*

¹⁵ Other popular house music festivals include Ultra Music Festival, Electric Daisy Carnival and Sensation, which also occur annually. Nikita Mukherjee, *10 Biggest EDM Festivals in the World*, MENSXP, <http://www.mensxp.com/special-features/top-10/9093-10-biggest-edm-festivals-in-the-world-p2.html> (last visited Nov. 5, 2014).

¹⁶ See Discussion, *infra* Part II.

¹⁷ Mark Morales, *Molly' Overdose Caused Two Deaths at Electric Zoo: City Medical Examiner*, N.Y. DAILY NEWS (Sept. 12, 2013), <http://www.nydailynews.com/new-york/molly-overdose-caused-electric-zoo-deaths-city-article-1.1454517>.

¹⁸ *Id.*

therein, as matters of law and policy. Part II will argue that the liability that should be imposed is based on negligence principles. It is different from, but resembles the recently developed doctrine of social host liability. Liability may even rest on an applicable statute. Parts II(A)-(E) and (G) will address and overcome the obstacles of duty, (whether the festivals are obligated to protect against these deaths in the first instance), and causation, (whether the festivals can be said to have “caused” the deaths), respectively. Part II(F), dealing with breach, will also declare insufficient the steps already taken by the festivals to ensure the safety of the festival attendees against fatality. Finally, Part III of this Note will suggest, as a matter of policy, that the festival hosts and performers need to more actively discourage drug use at their events. In fact, should the proposed liability scheme become functional, this policy goal of discouraging drug use will result naturally as the scheme’s normative effect. Hopefully, once house music festivals adopt certain measures and meet a specified standard of care, the likelihood of drug-related deaths therein will decrease.

I. WHY SHOULD THE FESTIVALS BE LIABLE?

A. *The Dangers of Molly*

At the literal forefront of American law is the objective of protecting our safety and our individual liberties, as demonstrated by the language of the Preamble to the United States Constitution.¹⁹ The law partly carries out this objective through the First Amendment of the Constitution, which guarantees, among other things, the freedoms of speech and expression.²⁰ When acted upon, these two freedoms ultimately result in culture. Culture is defined as “the beliefs, customs, arts, etc., of a particular society, group, place, or time.”²¹ It is important that a democratic society such as ours, so committed to freedom of expression, allows for and encourages a healthy, vibrant culture around which citizens can unite and with which citizens can identify. It is beneficial for society to promote and maintain culture as an extension

¹⁹ U.S. CONST. pmb. (stating, “We the People of the United States, in order to . . . promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

²⁰ U.S. CONST. amend. I § 1.

²¹ MERRIAM-WEBSTER’S DICTIONARY, n.d. Web (last visited Nov. 5, 2014) *available at* <http://www.merriam-webster.com/dictionary/culture>.

of our natural rights. Accordingly, since house music is the current fad, it is important that we promote the existence of house music festivals as a forum for artistic expression and appreciation.

The importance of the law protecting house music and its culture is offset by the fact that it shares space with illicit drug use.²² In furtherance of promotion of general welfare, the law must guard its citizens against the dangers these drugs entail. MDMA, or Ecstasy, is otherwise known as the compound 3,4-methylenedioxy-methamphetamine.²³ It emerged originally as a club drug in the late 1980s and early 1990s, and eventually became disreputable as it was laced with other drugs such as Lysergic acid Diethylamide (LSD), speed, and caffeine.²⁴ Recently, MDMA has resurfaced in its “pure” form, Molly; its purity is supposedly indicated by the drug’s white powder appearance.²⁵ In its completely untainted form, Molly is not physically addictive, nor does it damage brain cells.²⁶

However, since Molly is a stimulant, it can cause “confusion, anxiety, depression, paranoia, sleep problems, and drug craving.”²⁷ It may also cause “involuntary teeth clenching, a loss of inhibitions, transfixion on sights and sounds, nausea, blurred vision, . . . chills and/or sweating[,] . . . increased heart rate and blood pressure and seizures.”²⁸ Moreover, “Molly is easily contaminated with other more dangerous substances, and easily counterfeited.”²⁹ In fact, experts say what passes as Molly is actually comprised of various chemicals such as 6-APB, (or Benzo Fury), MDPV, methylone, mephedrone, and butylone.³⁰ Missi Wooldridge of DanceSafe, a non-profit organization that focuses on drug-related education, acknowledges, “Molly is a term

²² SIMON REYNOLDS, *ENERGY FLASH: A JOURNEY THROUGH RAVE MUSIC AND DANCE CULTURE*, (2012). See also Aleksander, *supra* note 11, (“Indeed, many attribute MDMA’s resurgence to the return of Electronic Dance Music . . .”).

²³ NIDA FOR TEENS: THE SCIENCE BEHIND DRUG ABUSE, *MDMA (Ecstasy or Molly)*, <http://teens.drugabuse.gov/drug-facts/mdma-ecstasy-or-molly> (last visited Nov. 5, 2014).

²⁴ Aleksander, *supra* note 11.

²⁵ *Id.*

²⁶ Candice Besson, *What is Molly?*, THE PARTNERSHIP AT DRUGFREE.ORG, (Aug. 2, 2013), <http://www.drugfree.org/newsroom/what-is-molly>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Lee & Rashbaum, *supra* note 1. See also Marina Csomor, *There’s Something (Potentially Dangerous) about Molly*, CNN HEALTH, (Aug. 16, 2012, 1:48 PM), <http://www.cnn.com/2012/08/16/health/molly-mdma-drug>.

³⁰ Csomor, *supra* note 29.

for an adulterated mystery chemical you're putting into your body with the intent to roll."³¹ Further, when Molly is taken in the festival setting, the health risks amass. In the severe heat usually found in the festival setting, Molly's propensity to cause loss of control and increased heart rate and blood pressure leads to dehydration and high fever. These effects may ultimately result in failures of one's muscles, heart, lungs, liver, and kidneys.³² To possess and sell Molly are illegal under federal law;³³ the Drug Enforcement Administration labels Molly a Schedule I controlled substance, which means it has no accepted medicinal value and is highly likely to be abused by its users.³⁴ It follows that the law recognizes Molly's danger and seeks to protect individual users by criminalizing its use.

At house music festivals, however, its use is ubiquitous. Evidence of the drug's presence in popular culture is abounding. First, the deaths of Jeffrey Russ and Olivia Rotondo are demonstrative. Olivia even told an EMS worker that she had just taken "six hits" of the drug before she died.³⁵ And these are not the only incidences of this type that have occurred. A 15-year-old girl named Sasha Rodriguez died of a drug overdose while attending Electric Daisy Carnival in 2010.³⁶ Statistically, according to the 2012 Results of the National Survey on Drug Use and Health, Ecstasy had 869,000 new users, 70.7% of which were 18 or older.³⁷ This age group encompasses those who attend EDM festivals. In addition, a CNN journalist was asked if she had "heard of Molly"

³¹ Kerri Mason & Zel McCarthy, *Dancing with Molly: The EDM Community Has an Honest Conversation About Drugs*, BILLBOARD, (Sept. 20, 2013, 1:06 PM), <http://www.billboard.com/articles/columns/code/5719296/dancing-with-molly-the-edm-community-has-an-honest-conversation-about>.

³² Besson, *supra* note 26.

³³ 21 U.S.C.A. §§ 844 & 841 (2014).

³⁴ See Csomor, *supra* note 29.

³⁵ Max Rivlin-Nadler, *Woman Told EMS She Took Six Hits of Molly Before Dying at Electric Zoo*, GAWKER (Sept. 2, 2013, 3:46 PM), <http://gawker.com/woman-told-ems-she-took-six-hits-of-molly-before-dying-1240895308>.

³⁶ Rong-Gong Lin II & Sarah Ardalani, *Girl, 15, dies after weekend rave at L.A. Coliseum*, L.A. TIMES (June 30, 2010), <http://articles.latimes.com/2010/jun/30/local/la-me-rave-death-20100630>.

³⁷ Substance Abuse and Mental Health Services Administration, Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings, NSDUH Series H-46, HHS Publication No. (SMA) 13-4795. Rockville, MD: Substance Abuse and Mental Health Services Administration (2013), <http://www.samhsa.gov/data/NSDUH/2012SummNatFindDeTables/NationalFindings/NSDUHresults2012.pdf>.

upon entering the concert venue on which she reported.³⁸ Moreover, at Ultra Music Festival in Miami there were fliers strewn about the site directed towards finding Molly within the venue.³⁹

Even mainstream popular music artists make references to Molly in their behavior and songs. For example, at Ultra Music Festival in 2012, Madonna interactively asked the audience, “How many people in this crowd have seen Molly?”⁴⁰ (Madonna additionally named one of her most recent albums “MDNA,” which she acknowledged was a play on words partly referring to MDMA).⁴¹ Miley Cyrus’s hit song “We Can’t Stop” includes lyrics, “we like to party, dancing with Molly;”⁴² Kanye West’s “Mercy” includes lyrics, “Something about Mary, she gone off that Molly / now the whole party is melted like Dalí;” and Rihanna’s “Diamonds” includes lyrics, “palms rise to the universe / As we moonshine and Molly / Feel the warmth, we’ll never die / We’re like diamonds in the sky.”⁴³ The prevalence of Molly in popular culture serves as an indicator of the drug’s popularity. When pop culture references Molly this nonchalantly, it removes the mystique so that Molly becomes something ordinary. The more ordinary Molly becomes, the less harmless consumers believe it to be. In addition to the physical dangers of the drug, the overwhelming casualness and popularity surrounding Molly constitute other dangers of the substance.

B. *The Role of the Festivals*

Over the past few years, EDM and Molly have become inextricably linked.⁴⁴ This is shown in part by Molly’s prevalence in popular culture and its accessibility at EDM festivals.⁴⁵ Additionally, MDMA and Molly are so closely linked to rave culture⁴⁶ because of the

³⁸ Csomor, *supra* note 29.

³⁹ *Id.*

⁴⁰ *Id.* See also Aleksander, *supra* note 11.

⁴¹ Nick Levine, *The Agony and the Ecstasy of Madonna’s MDNA*, THE NATIONAL (Mar. 14, 2012), <http://www.thenational.ae/arts-culture/music/the-agony-and-the-ecstasy-of-madonnas-mdna>.

⁴² *Miley Cyrus Lyrics*, <http://www.azlyrics.com/lyrics/mileycyrus/wecantstop.html> (last visited Nov. 5, 2014).

⁴³ *Molly Is A Drug & There Are A Lot Of Songs About Molly*, HUFFPOST ENTERTAINMENT (Sept. 8, 2013, 7:04 PM), http://www.huffingtonpost.com/2013/09/05/molly-drug-songs_n_3874047.html.

⁴⁴ See *supra* Part II(A); see also *infra* Part II(B).

⁴⁵ See *supra* Part I(A).

⁴⁶ Generally, house music festivals are the progeny of raves. For the purposes of Part II of

feelings they elicit. MDMA has been described as inducing ““ECSTASY,””⁴⁷ or a “sense of interpersonal closeness, acceptance of self and others, feelings of ‘oneness,’ and a potent sense of well-being.”⁴⁸ ““As we move more and more electronic, people are extremely hungry for the opposite: human interaction on a deeper level where you’re not rushing around,’ Mr. Doblin said, ‘the rise of Molly is in tune with how people are feeling emotionally.””⁴⁹ EDM bloggers even draw attention to this fact; we should listen to Shane Morris as he proclaims, “you need to understand that Molly and EDM are hopelessly intertwined.”⁵⁰

Essentially, use of Molly is part of EDM culture. Therefore, by inviting EDM performers to their premises and presenting three straight days of house music, festivals are also inviting illegal drug use.

II. LIABILITY AS A MATTER OF LAW

A. *Negligence Doctrine*

The first step in determining liability of the festivals is establishing the duty the festivals owe their patrons. This necessitates an overview of basic negligence principles. Negligence is defined as:

conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. There are generally four essential elements that must be satisfied to state a prima facie claim of negligence; they are: (1) the existence of a duty; (2) breach of that duty; (3) breach was the cause of the resultant injury; and (4) damages.⁵¹

Additionally, while proximate cause is necessary to prove causation, some believe proximate cause even constitutes a fifth

this Note, I equate “rave culture” of the 1990s to the house music festival culture at issue today.

⁴⁷ JULIE HOLLAND, M.D., *ECSTASY: THE COMPLETE GUIDE: A COMPREHENSIVE REVIEW OF THE RISKS AND BENEFITS OF MDMA* 21 (Park Street Press 2001) (emphasis in original).

⁴⁸ *Id.* at 28.

⁴⁹ Aleksander, *supra* note 11.

⁵⁰ Shane Morris, *Finding Molly: Drugs, Dancing and Death*, BRO JACKSON (Sept. 3, 2013), <http://brojackson.com/long-reads/finding-molly-drugs-dancing-and-death>

⁵¹ *Green v. State*, 222 A.D.2d 553, 554 (N.Y. App. Div. 2nd Dept. 1995) *see also* *Turcotte v. Fell*, 68 N.Y.2d 432 (N.Y. 1986); *Akins v. Glens Fall City School Dist.*, 53 N.Y.2d 325 (N.Y. 1981).

element of prima facie negligence.⁵² A person is said to have acted negligently if he or she failed to exercise reasonable care under the circumstances.⁵³ Reasonableness is determined by assessing “the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue,” balanced against “the burden of precautions to eliminate or reduce the risk of harm.”⁵⁴ Whether a legal duty exists “depends upon the foreseeability of the risk and a weighing of policy consideration for and against imposition of liability.”⁵⁵ Part B demonstrates the information necessary to conclude “the existence of a duty” on the part of the festivals toward the attendees.

B. *Duty of the Festivals*

Even under the most general duty analysis, “an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates risk of physical harm.”⁵⁶ In the case at hand, where festival promoters are the actors who create risk of physical harm by presenting the EDM festivals, the festivals have a duty to exercise reasonable care. The Restatement also provides that this duty can be modified to limit liability where there are “countervailing principle[s] or polic[ies].”⁵⁷ In the case of EDM festivals, there are no countervailing policies warranting limiting liability. The policy goal, similar to that in *Kelly v. Gwinnell*,⁵⁸ is to reduce the incidence of death at these concerts. This goal supports not limiting liability, but rather strengthening liability so that the festivals are held responsible for the tragic fatalities that occur therein.

Further, there are other negligence principles that serve to impose an affirmative duty upon the festival promoters. The first is similar prior conduct.⁵⁹ “When an actor’s prior conduct, even though not tortious, creates a continuing risk of physical harm of a type

⁵² David G. Owen, Note, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1673 (2007).

⁵³ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §3 (2010).

⁵⁴ *Id.*

⁵⁵ *Melton v. Boustred*, 183 Cal. App. 4th 521, 529-530 (Cal. Ct. App. 6 Dist. 2010), (quoting *Erlich v. Menezes*, 21 Cal.4th 543, 552 (Cal. 1999)).

⁵⁶ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010).

⁵⁷ *Id.*

⁵⁸ *Kelly v. Gwinnell*, 96 N.J. 538 (N.J. 1984). See *supra* Part III(H).

⁵⁹ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 39 (2012).

characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm.”⁶⁰ In the case of the music festivals, the actors are the festival promoters and the relevant conduct is hosting the festival, which is intertwined with attendees taking Molly. This conduct, the existence of the festivals and the contingent use of Molly, are creating a continuing risk of physical harm at the concerts, namely the continuing incidence of death and hospitalization. Since March 2013, at least nine young adults have died due to taking Molly at EDM festivals.⁶¹ Due to the prior similar conduct, the festival promoters have a duty, as the Restatement outlines, to exercise reasonable care to prevent or minimize the harm.

Additionally, an affirmative duty is imposed upon the festival promoters because of the special relationship they have with the attendees. “[A] business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises” forms such special relationship.⁶² In the case of the festivals, the promoters are the business that possesses the land for the purpose of the festival, and the concertgoers are those who are lawfully on the premises. Thus, a special relationship emerges causing the festival promoters to owe a duty of reasonable care to the attendees, “with regard to the risks that arise within the scope of the relationship.”⁶³ The same risk, conducting the festival, which entails taking Molly, is within the scope of this special relationship. Thus, a duty in favor of the festival attendees arises.

C. *Duties Arising at Live Music Performances*

There are also specific duty principles that apply to regulating safety at live music performances. Regulations of musical performances are generally valid where they concern attendees, provided they do not limit constitutional freedoms of speech or expression.⁶⁴ Attendees of live music performances are generally

⁶⁰ *Id.*

⁶¹ Ben Sisario & James C. McKinley, Jr., *Drug Deaths Threaten Rising Business of Electronic Music Fests*, N.Y. TIMES, (Sept. 9, 2013), <http://www.nytimes.com/2013/09/10/arts/music/drugs-at-music-festivals-are-threat-to-investors-as-well-as-fans.html?adxnln=1&pagewanted=all&adxnlnx=1390673098-/6dvYMXkDJVGP2GkeiEgZw>.

⁶² RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (2012).

⁶³ *Id.*

⁶⁴ 2 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 10:36.

classified as invitees.⁶⁵ Thus, the festivals owe a duty of “reasonable and ordinary care against foreseeable dangers”⁶⁶ “The venue owner and operator have a duty to provide reasonably safe means of ingress and egress, a duty to use ordinary care to keep the premises safe, a duty to discover and correct or warn of any dangerous conditions and a duty to protect attendees from negligent activities.”⁶⁷ This duty may include providing extra security guards where there is foreseeable harm.⁶⁸ By and large, “the owner or operator who provides security at a live musical concert cannot control every event, but may be responsible for an injury to an attendee if such event was reasonably foreseeable.”⁶⁹

There are several situations unique to live music performance events for which the concert organizers or promoters have been held liable for injuries sustained by audience members. One cause of such festival-related injuries is “moshing.”⁷⁰ Moshing is a form of dancing that is associated with aggressive rock music and involves a crowded group standing in the general admission section of the venue, called a “mosh pit,”⁷¹ that exhibits violent behavior such as pushing and body-slammings.⁷² In the 1990s, when hard rock and moshing characterized pop culture, venue operators commonly adopted safety measures in order to prevent injuries resulting from such activity.⁷³ These included hiring more security and giving the band, the ultimate crowd controller,

⁶⁵ *Id.* See *Rotz v. City of New York*, 143 A.D.2d 301, 304 (N.Y.A.D. 1 Dept. 1988). An invitee is “a person who has an express or implied invitation to enter or use another’s premises, such as a business visitor or a member of the public to whom the premises are held open.” BLACK’S LAW DICTIONARY (9th ed. 2010). Invitees invoke a standard of care that requires the landowner to keep the premises reasonably safe for use for purposes consistent with the invitation and not to present unreasonable risk of harm. 2 LOUIS A LEHR, JR., PREMISES LIABILITY 3D § 38:1 (2013 ed.).

⁶⁶ *Rotz*, *supra* note 65.

⁶⁷ SELZ, *supra* note 64. See LEHR, *supra* note 65 at § 39:2.

⁶⁸ SELZ, *supra* note 64. See also LEHR, *supra* note 65 at § 43:16 (stating that while it may be necessary to hire security to satisfy a standard of care, hiring security is never the minimal burden, unless there have been substantial similar incidents necessitating the security guards presence).

⁶⁹ SELZ, *supra* note 64.

⁷⁰ *Id.*

⁷¹ THOMAS J. BERGER, IN THE PIT (2001), available at <http://www.moshing.org/chapter1.asp> (stating “[p]ut simply, a mosh pit is a spontaneous void containing at least one person, in which the boundaries of The Pit are comprised of other people, exerting energy in an attempt to prevent being pushed into the void.”).

⁷² SELZ, *supra* note 64.

⁷³ *Id.*

more responsibility in thwarting injurious behavior.⁷⁴

Other dangerous festival activities that have imposed a duty on the festival promoters include sod throwing,⁷⁵ lighting fireworks, and criminal acts of third parties.⁷⁶ In an Illinois case, one festival attendee threw a firework that injured another.⁷⁷ The court recognized that the festival promoters had knowledge of prior similar incidents but had nevertheless done nothing to prevent the activity from recurring.⁷⁸ Thus, the concert organizer was held liable for the injuries sustained.⁷⁹ Further, “[t]he failure to even warn those violating the law after the fireworks began bespeaks to the violators at least tolerance of their actions . . . Such [failure] encourages rather than discourages the illegal and unsafe activity.”⁸⁰

Generally, festival venue proprietors owe no duty to protect against third-party criminal acts perpetrated against patrons.⁸¹ This rule ceases to apply when the acts perpetrated are reasonably foreseeable.⁸² One factor weighed in determining foreseeability is the occurrence of prior similar incidents.⁸³ In the case where the criminal acts were reasonably foreseeable, the concert promoters do owe a duty of reasonable care to protect their attendees against injury resulting from such activity.⁸⁴ However, usually courts “find that an owner or operator of a concert venue has no duty to protect concert-goers from the criminal acts of third persons outside the concert venue, either

⁷⁴ *Id.* at 113, citing Ray Waddell, *Billboard Magazine Archive*, BILLBOARD (June 24, 2000, (3:56PM)), <http://www.billboard.com/magazine-archive>. *But see* Mason, *supra* note 31, (quoting DJ/producer Sebastian Ingrosso, “It’s a terrible thing that kids need to take drugs to enjoy something,” and DJ/producer Kaskade, “I think when thing like [death] happen it’s a time to take a moment and reflect and figure out how we can continue to make these events more safe. It’s important to take a step back and realize the importance of life. [W]e’re all here to have a good time. Let’s do it in a way that’s smart . . .”).

⁷⁵ 2 SELZ, *supra* note 64, citing *MacDonald v. PKT, Inc.*, 464 Mich. 322 (Mich. 2001) (where a woman was injured while trying to avoid sod being thrown, and the court held sod throwing was a foreseeable harm but reasonably protected against by a sufficient police presence).

⁷⁶ *Id.*

⁷⁷ *Martens v. Board of Trustees of Southern Illinois University*, 35 Ill. Ct. Cl. 80, 82 (Ill. Ct. Cl. 1981).

⁷⁸ *Id.* at 85.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See* 2 SELZ, *supra* note 63.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

because [of] lack of control of the areas outside the venue or [because] such criminal acts were unforeseeable.”⁸⁵

D. *A Summary of the Duty Owed*

Based on the foregoing principles, the festival promoters owe a legal duty of reasonable care to the festivalgoers. First, the increase in death caused by Molly overdose is directly correlated to the increase in the foreseeability of these deaths. Thus, according to the law delineated,⁸⁶ festivals cannot turn a blind eye to the possibility of these types of tragedies occurring, but rather festivals have an affirmative duty to protect against them. Further, it is clear that the festival organizers are classified as having a special relationship with the attendees. Concertgoers buy tickets in order to lawfully come onto the land and view the promoters’ organized musical performance. Accordingly, a duty owed by the festival promoters to their patrons arises here as well.

Next, even if the festivals did not owe a duty of reasonable care relying on the above principles, in states that follow New York’s approach⁸⁷ they owe a duty of reasonable care in light of all the circumstances, taking into consideration such factors as the burden of preventing the harm, the foreseeability of the risk, and the seriousness of the potential injury.⁸⁸ From this perspective, “all of the (relevant) circumstances” are as follows: the festivals are hosting music acts that are inextricably linked with drug use,⁸⁹ the drug use these concerts promote is inherently dangerous;⁹⁰ the danger is heightened by the facts that the drugs are often not what they seem to be and their users are unaware of this discrepancy;⁹¹ this drug use has, on several occasions, resulted in death;⁹² the festivals organizers know that their events are accompanied by this drug use and the dangers it encompasses;⁹³ the festival organizers know that deaths have occurred resulting from this

⁸⁵ *Id.*

⁸⁶ *See supra* Part III(A)-(C).

⁸⁷ 79 N.Y. JUR. 2d Negligence § 1.

⁸⁸ *Kelly*, 96 N.J. at 544.

⁸⁹ HOLLAND, *supra* note 47.

⁹⁰ Csomor, *supra* note 29.

⁹¹ Besson, *supra* note 26.

⁹² Morales, *supra* note 17.

⁹³ *See supra* Part III(F).

drug use;⁹⁴ and, there are measures that could be taken to effectively reduce the incidence of drug intake and death among concert attendees.⁹⁵ In light of these circumstances, the festivals owe a duty of reasonable care under New York's basic negligence outlook dealing with these types of events.

E. *Assumption of Risk*

The duty one owes to entrants on one's land is often mitigated by the assumption of risk doctrine. The assumption of risk doctrine maintains that a participant assumes the risks of the activity in which they are engaged.⁹⁶ "One who takes part in [a dangerous activity] accepts the dangers that inhere in it so far as they are obvious and necessary"⁹⁷ The assumption of risk is limited to include only those risks that are "known, apparent, or reasonably foreseeable consequences of [one's] participation."⁹⁸ By partaking in an activity on a proprietor's land, one consents to the duty of reasonable care exercised by said proprietor.⁹⁹ In other words, the proprietor is responsible for making sure the land is in a condition safe for its entrants, and the entrant accepts the proprietor's inspection. His acceptance is exhibited by his election to participate in the dangerous activity.¹⁰⁰ A "defendant's duty under such circumstances is a duty to exercise care to make the conditions as safe as they appear to be."¹⁰¹ Thus, only heightened risks and concealed dangers are excluded from those risks one assumes by voluntary participation.¹⁰² Similarly, "[r]elieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a [dangerous activity] is [only] justified when a consenting participant . . . has an appreciation of the nature of

⁹⁴ See *supra* Part I, note 1.

⁹⁵ See *supra* Part IV(B).

⁹⁶ See *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482 (N.Y. 1929).

⁹⁷ *Id.* at 483.

⁹⁸ *Turcotte*, 68 N.Y.2d at 433 (holding a horse racetrack owner-operator not liable for the injuries sustained by an experienced jockey during an average race where the land was marked by a wet, cupping condition and where the jockey was able to observe the conditions of the land before the race and had participated in prior races on that track).

⁹⁹ *Id.* See *Akins*, 53 N.Y.2d at 329 (1981).

¹⁰⁰ *Turcotte*, 68 N.Y.2d at 433.

¹⁰¹ *Id.*

¹⁰² *Benitez v. New York City Bd. Of Educ.*, 73 N.Y.2d 650, 658 (N.Y. 1989).

the risks”¹⁰³

To counter this argument, one might quickly conclude that by taking Molly, one assumes the risks associated with the drug’s use, including severe health problems and even death.¹⁰⁴ However, this argument fails for two reasons. First, the conclusion is not responsive to the appropriate inquiry. The question we should be asking under the assumption of risk doctrine is whether patrons assume the risk of dying just by attending the festivals. And the answer is no; patrons do not assume this risk of dying. Dying is not a “known, apparent, or reasonably foreseeable consequence”¹⁰⁵ of simply attending a music festival. Second, the increased risks associated with taking Molly at music festivals present an additional consideration. Even if we pose the question whether patrons assume the risk of dying by taking Molly, the answer is also no. Molly, in its pure form, is generally not lethal.¹⁰⁶ However, since the festival attendees are taking drugs that are actually impure,¹⁰⁷ the drugs constitute concealed dangers of which a voluntary participant does not assume the risk.

Next, it is possible that the festival attendee fails to appreciate the risk, which is also basis for failing to assume that risk.¹⁰⁸ This failure to appreciate the risks of Molly occurs because of two factors. First, the risks of taking Molly are exacerbated in the EDM festival atmosphere. The hot weather that usually marks the festival setting increases the incidence of dehydration. The crowdedness of an EDM festival contributes to increased heart rate. The side effects of taking Molly become more dangerous in the EDM festival environment. Second,

¹⁰³ *Morgan v. State*, 90 N.Y.2d 471, 484 (N.Y. 1997).

¹⁰⁴ Ultra Music Festival’s website has a clause in the Terms and Conditions of tickets that by purchasing tickets, buyers “assume any and all risks, whether expressly set forth herein, as well as, any other risks and dangers incidental or in any way relating to your presence during the Event, including any risks that occur prior, during or after the Event or any risks that are not foreseeable, such as, any and all risks arising from or relating to the acts or omissions of others (including Artists, Event attendees, the Venue owners or operators and its staff, employees and agents; or the Event organizer, its affiliates, subsidiaries, officers, directors, employees, members, partners, agents or designees). ULTRA MUSIC FESTIVAL, <http://ultratix.ticketfreak.com/ultratix/Policy.aspx?type=4> (last visited Mar. 1, 2013). It is questionable whether this clause would be upheld in court. *See Richards v. Richards*, 181 Wis.2d 1007 (Wis. 1994) (ruling a broad exculpatory clause void as against public policy).

¹⁰⁵ *Morgan*, 90 N.Y.2d at 484.

¹⁰⁶ Csomor, *supra* note 29.

¹⁰⁷ *See supra* Part II(A).

¹⁰⁸ *Turcotte*, 68 N.Y.2d at 437.

the severity of the danger that results from this exacerbation is unknown to the average consumer of Molly, especially the younger participants. If concert attendees really knew their drug use could lead to death, it seems dubious at best that they would continue to partake in such activity. Therefore, festival promoters are not protected by the fact that festivalgoers assume the risks of going to the festivals and taking drugs—the requisite duty of reasonable care prevails.

F. *Breach*

Since the festivals know about the inherent drug use that accompanies their existence, and since the festival attendees do not assume the risks associated with this drug use, the festivals have a duty to take reasonably prudent measures to avoid foreseeable harms associated with the illicit drug use. Should the festival promoters fail to take reasonable care, they fall short on their duty. Such failure constitutes breach.¹⁰⁹ In order to determine whether the festivals breached their duty to concertgoers, it is necessary to consider the steps the festivals take in order to exercise reasonable care in making the festival environment safe for their patrons.¹¹⁰

First, Electric Zoo, for example, has medical tents at five spots along the perimeter of the premises, which are shown on a map that patrons receive as they enter the event.¹¹¹ The map also depicts three “water refill stations” and five stations for “cold beverages,” (one of which is in a VIP area).¹¹² Further, their website expresses that everyone will be “subject to search” and that “illegal substances” are prohibited.¹¹³ This means that some security is present in addition to the medical staff. Also, a blog post on the website mentions that drug use is not encouraged and lists some potential side effects of Molly so festivalgoers can be aware of their peers’ safety.¹¹⁴

However, these precautions are merely evidence that house music festivals have actual knowledge that the drugs are circulating and are

¹⁰⁹ *Id.* BLACK’S LAW DICTIONARY, Web, (defines “breach of duty” as “the violation of a legal or moral obligation; the failure to act as the law obligates one to act”) (9th ed. 2010).

¹¹⁰ For purposes of detailing security measures, I will use the Electric Zoo as the illustrative festival, and specify when I am referring to a different festival.

¹¹¹ ELECTRIC ZOO, *supra* note 7 at <http://electriczooofestival.com/faq/#qN23>.

¹¹² ELECTRIC ZOO, *supra* note 7 at <http://electriczooofestival.com/blog/>.

¹¹³ ELECTRIC ZOO, *supra* note 7 at <http://electriczooofestival.com/faq/#qN23>.

¹¹⁴ ELECTRIC ZOO, *supra* note 7 at <http://electriczooofestival.com/blog/>.

wholly insufficient in preventing the foreseeable harm. The festival provides five medical tents for one hundred thousand attendees. This means each tent is responsible for twenty thousand people, which implies a disproportionate ratio of medical staff to festival attendees that could potentially need assistance. Next, the *three* water refill stations, which provide the only free water, are not only entirely too few in number, but also are situated at the perimeters of the space.¹¹⁵ This set up makes drinking water very difficult for one, or many, who may be dehydrated and in danger, as a common effect of using Molly. Moreover, security at the festivals is known to be lax.¹¹⁶

Additionally, it is very difficult to find the above information on the festival websites. For example, Electric Zoo's information is contained in blog posts that are not readily apparent when one goes to the site. When one visits the website, one first sees the "Home" page, which indicates the "Electric Zoo" logo, and presents images of past festivals and advertising for future festivals, with no mention of drug use admonition.¹¹⁷ There are several tabs the website visitor has the option of clicking.¹¹⁸ First, you can visit the "Gallery," which contains pictures of each past event.¹¹⁹ Next, you can click the "Merch Shop" tab, which allows the visitor to purchase festival memorabilia, such as t-shirts, sweatshirts, and sunglasses.¹²⁰ The fourth tab is entitled "Press," and contains some of the positive news mentions of the festival.¹²¹ Curiously, there is no press for the 2013 festival where the deaths of Jeff Russ and Olivia Rotondo occurred. It is not until the visitor clicks the fifth, "Blog" tab that he or she sees any mention of drug use. Here, one of many posts relays to its reader that Electric Zoo does not condone drug use and alerts the visitor to the location of help stations at the festival.¹²² However, this was just one entry posted only several days before the specific festival at issue.¹²³ It is the only mention of the

¹¹⁵ *Id.*

¹¹⁶ FESTIVALDRIVE: ELECTRIC ZOO SURVIVAL GUIDE, <http://www.festivaldrive.com/Electric-Zoo-Survival-Guide> (last visited Feb. 27, 2013) ("They will pat you down and check your bag before you enter the festival, but a smart partier will know all the places to hide forbidden items").

¹¹⁷ ELECTRIC ZOO, *supra* note 7, at <http://electriczoo festival.com/blog>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² ELECTRIC ZOO, *supra* note 7, at <http://electriczoo festival.com/blog>.

¹²³ *Id.*

festival's disapproval of attendee's drug use on the entire website. If someone had visited the website earlier than three days before the festival, he or she would have no idea that drug use was not accepted; the equivalent 2012 post completely fails to acknowledge that drugs are being used at all.¹²⁴

Ultra Music Festival's website is similarly situated, with tabs indicating a "Home" page, "Tickets," "Lineup," "Artists," "News," "Merch," and "Help."¹²⁵ Acknowledgement of the use of Molly is entirely omitted from each of these sections of the website. The relevant information regarding drug use can be seen only when one chooses to purchase a ticket to the event.¹²⁶ Information is included within the fine print of the ticket Terms and Conditions.¹²⁷ It is presented in such a way that blends in with all of the other information given, as it is not highlighted, bolded, or written in a different color.¹²⁸ The failure of the Ultra and Electric Zoo websites to outwardly discourage drug use proves the inadequacy of these disclosures.¹²⁹ If a website visitor is unlikely to happen upon the discouragement, the words are essentially worthless, and the festival has done nothing to reduce the incidence of illegal drug intake or death.

The duty and breach of EDM festivals in regard to illegal drug use are also analogous to the duties and breaches of event organizers in regard to the situations unique to live music events, such as moshing and sod throwing.¹³⁰ Drug use and other concert actions have this in common: for each, the concertgoer participates in a dangerous activity that attendees and promoters can reasonably foresee will harm his or her person. Therefore, the same remedies for moshing, sod throwing,

¹²⁴ *Id.*

¹²⁵ ULTRA MUSIC FESTIVAL, *supra* note 104.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ In New York, if a warning is "inconspicuously located" or "written in small print" it may be insufficient to satisfy one's duty to warn. 1 MICHAEL WEINBERGER, N.Y. PRODUCTS LIABILITY 2D § 17:28, Footnote 3 (2014 ed.). For example, in *Derienzo v. Trek Bicycle Corp.*, plaintiff Derienzo was injured while riding his bike after completing a jump that caused the bike frame to fail. The court held that the adequacy of warnings present in the bike's operation manuals was a question for the jury, but that a warning written in small font size and not readily apparent could be insufficient. *Derienzo v. Trek Bicycle Corp.*, 376 F.Supp.2d 537 (S.D.N.Y. 2005). See also *Arbaiza v. Delta Int'l Machinery Corp.*, No. 96-Civ-1224 (RJD), 1998 WL 846773 (E.D.N.Y. Oct. 5, 1998).

¹³⁰ See *supra* Part III(C).

and crowd control, as suggested above,¹³¹ can be used to combat the drug use that occurs at EDM festivals. These measures include increasing the presence of security and first-responders and giving the band or DJ, who has the most control over the crowd, more responsibility in dispelling the use of Molly or the participation in other dangerous activity. The DJ is located at the front of the crowd, on an elevated stage, and possesses a microphone. Thus, the DJ has full reign in orchestrating the crowd at his feet. The festival promoter, as a contractor who signed the DJ, has the power to require this heightened responsibility of the DJ simply by writing it into the terms of their contract.

Additionally, in *Martens v. The Board of Trustees of Southern Illinois University*,¹³² festival promoters were held liable for not rectifying the firework-throwing situation that had occurred in years past when a thrown firework injured one patron. Similarly, with house music festivals, deaths due to Molly overdoses continue to occur. If the festival promoters do nothing to prevent these tragic events from recurring, they are in breach under tort law as articulated in Restatement (Third) Torts § 39, (creating a duty when there is prior similar conduct), and should be held liable for such events. Therefore, festival promoters are in breach of their duty towards festival attendees and must take some measure to combat against the harm that confronts such patrons.

Breaching any negligence duty the festival promoters might owe, and even violating the Crack House Statute,¹³³ there is evidence that the festival promoters earn a profit from knowingly, and egregiously, allowing drugs to circulate the festivals.¹³⁴ The Crack House Statute was enacted in response to the rise of popularity of crack cocaine in the mid-1980s.¹³⁵ The statute makes it illegal “knowingly, open, lease, rent, use or maintain any place, whether permanently or temporarily, for the purpose of manufacturing distributing, or using any controlled substance.”¹³⁶ The statute also makes it illicit “to manage or control any place . . . and knowingly and intentionally rent, lease, profit from,

¹³¹ *Id.*

¹³² *Martens*, 35 Ill. Ct. Cl. at 82.

¹³³ 21 U.S.C.A. § 856 (2003).

¹³⁴ Morris, *supra* note 50.

¹³⁵ Michael H. Dore, *Targeting Ecstasy Use at Raves*, 88 VA. L. REV. 1583 (2002).

¹³⁶ 21 U.S.C.A. § 856 (2003).

or make available for use . . . the place for the purpose of unlawfully . . . distributing or using a controlled substance.”¹³⁷ According to an EDM blogger Shane Morris, the festival promoters intentionally allow certain drug dealers to enter the festival premises.¹³⁸ Morris discusses his experiences as a former drug dealer whose customer base was comprised of house music festival attendees.¹³⁹ He describes, in detail, the process by which promoters select drug dealers who enter the premises before security arrives in exchange for a cut of the drug sale profits.¹⁴⁰ Morris asserts,

I know for a fact the TomorrowWorld 2013 is being supplied Molly by my former supplier . . . I expect that local law enforcement has already been paid to turn a blind eye, the people selling the Molly will arrive before security ever gets there, and no one at TomorrowWorld will have a hard time “finding Molly.”¹⁴¹

Assuming Morris’s credibility,¹⁴² this is enough evidence to declare the EDM festivals in violation of the Crack House Statute.¹⁴³

First, it has already been established that the festival promoters allow the attendees to enter the premises for the purpose of unlawfully using drugs. However, the promoters would rebut this claim by arguing there is a greater purpose for attending an EDM festival; instead, the fans go to festivals for the purpose of artistic expression and entertainment, in order to hear their favorite DJs and celebrate EDM culture. Even if this argument succeeds, the festival organizers are still in violation of the statute. The reason for this is the festival promoters, who operate the land, intentionally allow drug distributors to enter their premises for the purpose of distributing drugs. For these invitees presence, there is no other purpose. Organizers “intentionally allow people to use the property with the knowledge that these people are engaging in drug activity,” which is sufficient violation of the Crack House Statute.¹⁴⁴

¹³⁷ *Id.*

¹³⁸ Morris, *supra* note 50.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* Since there is no other scholarship or reports that contain this information, I am hesitant to assign this information more weight in this Note’s argument.

¹⁴³ 21 U.S.C.A. § 856 (2003).

¹⁴⁴ Dore, *supra* note 135.

G. Causation

The final element for discussion is whether the festivals existence can be said to be a cause of the deaths that occur therein. There are two elements of causation. The first is cause-in-fact, also known as a but-for cause, or the cause without which the event could not have occurred.¹⁴⁵ The second is proximate cause, or “[a] cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor.”¹⁴⁶ Proximate cause serves to limit legal responsibility “to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability . . . upon the basis of some social idea of justice or policy.”¹⁴⁷

The mere existence of the festivals fulfills the causation requirement for the festivals to be liable for the deaths that occur therein. The best way to demonstrate this is by examining the California case *Sakiyama v. AMF Bowling Centers, Inc.*¹⁴⁸ In *Sakiyama*, four teenagers got into a car accident after an all-night rave party at the AMF venue, causing the death of two of the girls and the serious injury of the others.¹⁴⁹ The teens’ car collided with a tree after the driver, who died in the accident, fell asleep at the wheel.¹⁵⁰ The venue was ultimately held not liable in this case, partially for lack of causation;¹⁵¹ in this regard, the AMF venue is easily distinguished from the festivals. The decision compares the party at the AMF venue to any other commercial activity, such as a restaurant that stays open late and serves alcohol to patrons who will drive thereafter.¹⁵² The festivals at hand differ greatly from any other commercial activity.¹⁵³ The court’s conclusion, “that a business owner that leases its facility for a one-night event does not owe a duty of care to a person injured hours later at a remote location as a result of voluntary drug use and/or fatigue,”¹⁵⁴ also illuminates distinctions between this rave party and EDM festivals.

¹⁴⁵ BLACK’S LAW DICTIONARY, cause (9th ed. 2009).

¹⁴⁶ *Id.*

¹⁴⁷ W. Page Keeton et al., PROSSER AND KEETON ON TORTS § 41, at 264 (5th ed. 1984).

¹⁴⁸ *Sakiyama v. AMF Bowling Centers, Inc.*, 110 Cal.App.4th 398 (Cal.App. 2 Dist. 2003).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 409-10.

¹⁵² *Id.* at 409.

¹⁵³ See *infra* n. 159-60 and accompanying text

¹⁵⁴ *Sakiyama*, 110 Cal.App.4th at 406.

Sakiyama is also distinguished from *Weirum v. RKO Gen., Inc.*,¹⁵⁵ where “teenage drivers were encouraged to search for and find a popular radio disc jockey who was traveling to various locations around Los Angeles in a conspicuous red automobile” as part of a radio station giveaway contest.¹⁵⁶ In *Weirum*, when two teenagers discovered the disc jockey’s whereabouts, they raced to find him.¹⁵⁷ Instead, the teenagers got into a car accident and their guardians instituted a wrongful death lawsuit against the radio station.¹⁵⁸ The court in *Sakiyama* differentiated *Weirum*, which found the radio station liable for the teenagers’ accident, by saying “hazardous driving by teenagers was a necessary component of the [giveaway contest in *Weirum*],” but AMF’s “party was simply a party attended by teenagers.”¹⁵⁹ Therefore, the radio station played an active role in causing the accident while the AMF venue had only passive involvement that did not amount to causation.

The same distinctions the *Sakiyama* court applies to *Weirum*, and the comparison the *Sakiyama* court draws between that rave party and any other commercial activity, also apply to an EDM festival. An EDM festival is also not “simply a party” or a “commonplace commercial activity.”¹⁶⁰ Rather, a house music festival is a huge production, characterized by a mass gathering, usually hosted in warm locations for days at a time, and exists part and parcel with the illegal use of Molly.¹⁶¹ Additionally, the court’s conclusion applies only to “one-night” events, because of which a person is injured “hours later” at a “remote location.”¹⁶² On the contrary, EDM festivals entail three-day affairs during which the patrons have died on the premises during the performances.¹⁶³ Further, while “drugs may have been anticipated” in *Sakiyama*,¹⁶⁴ there is no question of their presence at EDM festivals as the two, festivals and drug use, are “hopelessly intertwined.”¹⁶⁵ Finally AMF “took numerous steps to *discourage and prevent drug use*,”¹⁶⁶ as

¹⁵⁵ *Weirum v. RKO Gen., Inc.*, 115 Cal.3d 40 (Cal. 1975).

¹⁵⁶ *Sakiyama*, 110 Cal.App.4th at 408. See *Weirum*, 115 Cal.3d at 45.

¹⁵⁷ *Weirum*, 115 Cal.3d at 45.

¹⁵⁸ *Id.*

¹⁵⁹ *Sakiyama*, 110 Cal.App.4th at 408.

¹⁶⁰ *Id.*

¹⁶¹ See *supra* Parts I-II.

¹⁶² *Sakiyama*, 110 Cal.App.4th at 406.

¹⁶³ See *supra* Part I.

¹⁶⁴ *Sakiyama*, 110 Cal.App.4th at 408.

¹⁶⁵ Morris, *supra* note 50.

¹⁶⁶ *Sakiyama*, 110 Cal.App.4th at 408.

opposed to the festivals passive approach of a website blog post that barely prepares attendees on how to respond in the case of a medical emergency.¹⁶⁷

Therefore, the factual elements necessary for a finding of causation, which were absent from *Sakiyama* and therefore saved the AMF venue from incurring liability, are present in the case of house music festivals. These elements include only the chance that drugs would enter the venue, as opposed to the surety that drugs will be at EDM festivals, and the fact that the AMF venue hosted a one-night, routine, commercial, activity, as opposed to an EDM festival which is an extraordinary, sweeping experience. The court points to the *Weirum* radio station's "ongoing direct involvement in the act that caused the accident and the injuries,"¹⁶⁸ which is exactly like the festival promoter's direct, ongoing involvement in hosting the festival, creating a forum for the illegal use of Molly to take place. This is the act that has caused the occurrence of such tragic fatalities.

H. *Social Host Liability*

In addition to the aforementioned conditions that may give rise to a duty on the part of the festivals, there is another doctrine that perhaps more aptly fits the situation at hand. In the past four decades, duty has been extended to social hosts under a doctrine called "social host liability."¹⁶⁹ Social host liability asserts that a social host who commits an enabling tort, like the provision of alcohol, may be responsible for the negligent acts of his or her guests.¹⁷⁰ A recently adopted New Jersey statute, which delineates this idea, defines a social host as one who expressly or impliedly "invites another person onto an unlicensed premises for purposes of hospitality and who is not the holder of a liquor license for the premises . . . , and who legally provides alcoholic beverages to another person who has attained the legal age to purchase and consume alcoholic beverages."¹⁷¹ However, some believe social host liability even extends to "a friend who shares her beer with another, an individual hosting a cocktail party, or even an employer

¹⁶⁷ ELECTRIC ZOO, *supra* note 7 at <http://electriczoo festival.com/blog>.

¹⁶⁸ *Sakiyama*, 110 Cal.App.4th at 408.

¹⁶⁹ Kelly v. Gwinnell, 96 N.J. 538 (1984).

¹⁷⁰ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7 (2010).

¹⁷¹ Administration of Civil and Criminal Justice, N.J. STAT. ANN. §2A:15-5.5 (West 1987).

sponsoring a company picnic or Christmas Party.”¹⁷²

The landmark social host liability case is *Kelly v. Gwinnell*.¹⁷³ There, plaintiff Kelly was seriously injured in a car accident caused by the defendant Gwinnell who was driving under the influence of alcohol.¹⁷⁴ Gwinnell had just come from the Zaks’, the social hosts’, house, where he had consumed the alcohol.¹⁷⁵ The Supreme Court of New Jersey held that, not only Gwinnell, but also the Zaks were liable for Kelly’s personal injuries. Not only were the Zaks were responsible for intoxicating their guest, which caused the accident, but also, as reasonably prudent people, the Zaks should have been able to foresee the risk of harm associated with allowing an intoxicated Gwinnell to drive home.¹⁷⁶

It is possible that the festivals are liable as social hosts, since the nature of the concerts is primarily social and the attendees are their guests. The enabling tort committed by the festivals would be their provision of EDM culture, which incorporates illicit drug use. Thus, although social host liability statutes speak of a liquor license and providing alcohol, this is analogous to a venue that allows for the provision of illegal drugs. In fact, the argument for festivals being liable as social hosts becomes stronger considering the illegal status of the drugs, which means they are recognized by society as having no social or medicinal value and are only dangerous.

From a policy standpoint, the decision of *Kelly v. Gwinnell* was very progressive. The court ruled with the idea of reducing drunk driving accidents in mind.¹⁷⁷ In his opinion, Judge Wilentz spoke of the high and increasing incidence of alcohol-related car accidents, the inability of commercial vendors to serve alcohol to intoxicated adults, and the toughening criminal repercussions of these accidents.¹⁷⁸ Most importantly, however, Judge Wilentz acknowledged that the decision was in accord with the “practically unanimously” accepted societal goal

¹⁷² Nichols Drinking/Driving Lit. §37:18 (1995).

¹⁷³ *Kelly*, 96 N.J. 538.

¹⁷⁴ *Id.* at 541.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 548.

¹⁷⁷ *Id.* at 545. (“[H]ere the imposition of a duty is both consistent with and supportive of a social goal—the reduction of drunken driving—that is practically unanimously accepted by society”).

¹⁷⁸ *Id.*

of reducing driving under the influence of alcohol.¹⁷⁹ Moreover, the court was aware that there were several drawbacks that might surface by imposing this kind of liability, but nonetheless held the social hosts liable.

[W]e recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation . . . as well as the added deterrent effect of the rule . . . outweigh the importance of those other values.¹⁸⁰

The court's decision demonstrates the powerful public policy justifications that drive otherwise strong resistant arguments.

Just as this court believed social host liability would cause the social host to be more careful in serving liquor to his guests, which would in turn reduce car accidents,¹⁸¹ imposing a similar liability on house music festivals would have an analogous effect. If the festivals knew they would be held liable for the deaths that occurred therein, they would perhaps take action to prevent these deaths from ever occurring. Possible actions include actively discouraging the use of Molly and providing more stringent security measures, instead of simply warning of the dangers of Molly in the fine print of the festival website.¹⁸²

III. LIABILITY AS A MATTER OF POLICY

A. *Policy Advanced by Holding the Festivals Liable*

The *Sakiyama* court also refused to extend liability to the AMF venue for policy reasons. The court believes holding the rave's host liable in such an instance would mean applying social host liability

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 548.

¹⁸¹ *Id.* at 552.

¹⁸² *See infra* Part IV(B); *see also* 1 MICHAEL WEINBERGER, N.Y. PRODUCTS LIABILITY 2D §17:28 (2014 ed.).

beyond its scope; it “see[s] no reason”¹⁸³ for diverging from the path of cases that have declined to hold business owners liable for similar events. However, house music festivals present different circumstances from those upon which the court in *Sakiyama* adjudged. The policy arguments upon which the court rests its conclusion to hold the venue not liable are no longer applicable when applied to a festival setting.

First, the court states “[t]here is no evidence that AMF collaborated with anyone to encourage partygoers to use the ecstasy or other intoxicants. Absent such evidence, and coupled with evidence that AMF engaged in numerous measures to prevent drug use on its premises, the policy of preventing future harm is not strong in the instant case.”¹⁸⁴ EDM festivals on the other hand, while they don’t explicitly encourage drug use, are inextricably linked with the use of Molly.¹⁸⁵ This idea, coupled with the evidence that the festival promoters take insufficient measures to prevent against harm, (as supported by the previously discussed blog posts and fine-print warnings, for example), proves that EDM festivals differ from the rave party in *Sakiyama* in that the policy of preventing future harm is important. Moreover, it is unthinkable that anyone would refute prevention efforts of more deaths like the two at Electric Zoo in 2013.

The next point the *Sakiyama* court makes against ascribing liability to the host is that “imposing such requirements upon AMF would be unduly burdensome.”¹⁸⁶ The court points to the safety and expense considerations that would arise by providing rest and transportation facilities for partygoers. Fatigue and driving post-festival, however, are not the dangers with which a festival promoter is concerned. Thus, the same safety and expense considerations are not pertinent. Instead, expenses might be related to greater security at the festival production or drug-related education for concertgoers. With these precautions safety concerns would diminish. In addition, the added expense would not be an obstacle for the given EDM festival, considering the EDM industry is a billion dollar industry.¹⁸⁷ Companies such as SFX Entertainment, which “profits from making media deals and corporate sponsorship of electric dance music,” hope to raise sums amounting to

¹⁸³ *Sakiyama*, 110 Cal.App.4th at 409.

¹⁸⁴ *Id.* at 411.

¹⁸⁵ *See supra* Parts I-II.

¹⁸⁶ *Sakiyama*, 110 Cal.App.4th at 411.

¹⁸⁷ Sisario, *supra* note 61, (stating the industry as worth \$4.5 billion).

\$300 million just to acquire specific festival promoters and producers, such as Made Events, the producer of Electric Zoo.¹⁸⁸ Thus, the added expense would be minimal compared to the large monetary scale on which these festivals operate.

The *Sakiyama* court also argues that outlawing rave parties will not lead to prevention of drug use.

[T]o ban all raves would be onerous to our community. Appellants seek to prohibit rave parties because they provide a venue for attendees to stay up all night, potentially use drugs, and then drive when they are either under the influence or too fatigued to do so. Unfortunately, there is no evidence that the rave scene will cease if we hold business owners liable to persons injured after they leave a rave party. Rather, it is just as likely that rave parties in traditional commercial settings will be replaced by raves in far more dangerous places, such as abandoned warehouses.¹⁸⁹

In this sense, the *Sakiyama* court is correct. Drug use will not cease to exist with the elimination of festivals.

Ridding culture of house music and its festivals, even if possible, is not the solution this Note is suggesting. Instead, it recommends holding the festivals liable for drug-related deaths that occur therein, unless they take sufficient measures of care to prevent the said deaths. Having the festivals assume liability for these deaths will not make them “insurers of the public safety” as the *Sakiyama* court feared.¹⁹⁰ Instead, liability will serve as valuable incentive to prevent illegal drug use and therefore reduce the chance of death at EDM festivals. Further, at up to three hundred dollars per festival ticket,¹⁹¹ the festival organizers can afford the cost of a lawsuit, especially if they have not spent that same money on preventative precautions. By choosing to invest those resources up front in preventative measures, they will no longer be found to fall short of the standard of reasonable care required of them by law. Moreover, placing the economic burden of death on the festivals would spread this cost onto those who can best afford it, instead of placing it on the shoulders of innocent parents. What is

¹⁸⁸ India Thomson, *Money, Music and Molly*, MUSIC BUSINESS JOURNAL, BERKLEE COLLEGE OF MUSIC, (October 2013), <http://www.thembj.org/2013/10/money-music-molly/#sthash.UMFgSGqB.dpuf>.

¹⁸⁹ *Sakiyama*, 110 Cal.App.4th at 412.

¹⁹⁰ *Id.* at 414.

¹⁹¹ Thomson, *supra* note 188.

more, these parents have no other remedy when the festivals provide a forum for their children to do illegal drugs and partake in the culture of EDM.

B. *Reasonable Measures Festivals Can Take*

“Persecuting a festival will not help” when it comes to eliminating illegal drug use, says DJ and producer, Diplo, of the group Major Lazer.¹⁹² Rather, the answer may lie in educating young, unaware festival attendees of the risks and harms associated with taking Molly or increasing security to make sure fewer drugs enter the concert premises. Overall, in order for festival promoters to avoid breaching their duty of reasonable care owed to concertgoers, the festival promoters must increase the negligible actions they already take in regard to illegal drug use. Some additional considerations the festivals might take include, but are not limited to: 1) actively dissuading festival attendees from using Molly, via their websites, promotions and advertisements, or their sponsors; 2) raising awareness of the dangers of Molly by posting more notices on their website, and increasing the visibility of their no-drug policy announcements by highlighting, bolding, or coloring them, increasing their font size or presenting them on the home pages of the sites; 3) organizing a drug education tutorial that each patron must watch in order to complete their purchase of a ticket; 4) halting the intentional permission of drug dealers to distribute drugs at the festivals; 5) increasing security at the event in order to prevent individuals from entering the festival venue with drugs; 6) increasing the availability of water refill stations and cold beverage purchasing stations; 7) centralizing the location of the water refill stations and cold beverage purchasing stations; and 8) partnering with drug educative organizations in order to promote awareness and even abstinence.¹⁹³ The possibilities abound. Each of these measures is as practicable as it is reasonable; none is too economically burdensome for the festivals to undertake. Until the festival promoters carry out any of these objectives, they are in breach of their duty toward festival patrons and should be held liable as such.

¹⁹² Hilary Hughes, *Major Lazer Takes Aim at Media Over EDM Show Drug Deaths*, ROLLINGSTONE, (Sept. 12, 2013), <http://www.rollingstone.com/music/news/major-lazer-take-aim-at-media-over-edm-show-drug-deaths-20130912>.

¹⁹³ Sisario, *supra* note 61. A festival called TomorrowWorld linked up with a non-profit organization, DanceSafe, dedicated to promoting drug use safety and awareness.

CONCLUSION

In the wake of the deaths caused by illegal drug use at the Electric Zoo music festival, it would be prudent to hold the festivals, (more specifically their promoters and organizers), liable for these fatalities until they take reasonable measures to prevent them. While music has always been tied to specific drug use, the connection between EDM culture and Molly is unprecedented: implicit within an EDM festival is the illegal use of Molly. Molly is ubiquitous throughout popular culture and the festivals even acknowledge its presence during shows. What the festivals don't acknowledge, however, are the risks that using a drug labeled Molly encompasses or the exacerbated dangers associated with using Molly in a hot, crowded festival setting. As a supplement to increasing physical measures such as free water, security and medical staff, festivals need to either be more vocal about their avid discouragement of illegal drug use or more aggressive in their educating festival attendees about its dangers, risks, and ways to recognize and combat its potential harm. Until and unless the festival organizers take action to more actively prevent injury, they are in breach of their duty of reasonable care owed toward festival attendees.

The TomorrowWorld festival provides prime example of how drug awareness and education work to prevent fatal injury. TomorrowWorld is the only festival that has acted upon fulfilling its requisite duty of reasonable care toward festival attendees. This festival partners with the organization DanceSafe, which promotes drug education and safety by providing its subscribers with a plethora of drug-related information.¹⁹⁴ Additionally, TomorrowWorld's website has a section devoted to "Your Safety," which explains some of the dangers of Molly and what the festival is doing to combat those perils, including supplying electrolyte-rehydration beverages and "not judging" if someone needs help or medical attention.¹⁹⁵ The 2013 installment of TomorrowWorld in Atlanta provided DanceSafe with a comfortable space that patrons were encouraged to pass through to take a break, drink cold water, and have a healthy, elucidating conversation about drug use.¹⁹⁶

¹⁹⁴ DANCESAFE, <http://www.dancesafe.org/about-us/> (last visited Nov. 5, 2014).

¹⁹⁵ TOMORROWWORLD, <http://www.tomorrowworld.com/your-safety> (last visited Feb. 27, 2013).

¹⁹⁶ DANCESAFE, <http://www.dancesafe.org/about-us/> (last visited Nov. 5, 2014).

According to Billboard Magazine, members of the EDM community have begun participating in an “honest conversation” discussing the best ways to deal with the drug use implicated by their culture.¹⁹⁷ The debate centers around whether the festivals should promote abstinence from drugs altogether versus a more informative policy of educating the EDM festival constituents.¹⁹⁸ “Just Say No” was a campaign introduced by Nancy Reagan during the Reagan administration in order to lower cocaine use among high-school students.¹⁹⁹ Many of those involved in the EDM industry opt for a “Just Say No” policy because this attitude avoids law enforcement issues.²⁰⁰ In addition, with an education policy, the venues in which the festivals operate must agree to permit harm reduction educators to enter.²⁰¹ This is not always easy to accomplish.²⁰²

However, TomorrowWorld has proven that providing safety information is doable and advantageous, as there were no fatalities at the 2013 presentation of the TomorrowWorld festival.²⁰³ Since a “Just Say No” policy ignores many issues that will nonetheless underlie festival environments, I believe the festivals should advocate a policy of “Be Smart.” This policy encompasses the idea that saying “no” is the smartest instinct; however, if festival visitors nevertheless end up using Molly, they are, at a minimum, able to recognize the risks and dangers of their actions and are thus better able to prevent grave harm. TomorrowWorld is an example of a festival that has acted upon these recommendations and consequently fulfilled its duty of reasonable care. It is time for the other festivals to follow in TomorrowWorld’s footsteps. Until then, festivals must be held liable for drug-related deaths that occur therein. After all, Diplo is right when he says, “persecuting a festival is not going to help.”²⁰⁴ But prosecuting a festival is.

¹⁹⁷ Mason, *supra* note 31.

¹⁹⁸ *Id.*

¹⁹⁹ Nancy Reagan’s Causes, THE RONALD REAGAN PRESIDENTIAL FOUNDATION AND LIBRARY, http://www.reaganfoundation.org/details_f.aspx?p=RR1008NRHC&tx=6 (last visited Feb. 28, 2013).

²⁰⁰ Mason, *supra* note 31.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Ralph Ellis, *At a Festival, Molly Danced but Didn’t Cut In*, N.Y. TIMES (Sept. 30, 2013), http://www.nytimes.com/2013/10/01/arts/music/at-a-festival-molly-danced-but-didnt-cut-in.html?_r=0.

²⁰⁴ Hughes, *supra* note 192.