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Lessons to Be Learned: The Victim Compensation Fund

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LESSONS TO BE LEARNED: THE VICTIM COMPENSATION FUND

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INTRODUCTION

Having read the articles for this panel, and having had the benefit of discussions during the Clifford Symposium, I want to offer some thoughts that use the articles as a jumping off point for trying to assess what lessons we can learn for our civil justice system from the September 11th Victim Compensation Fund of 2001. As you will see, I draw different lessons for mass disasters and for ordinary tort law. Before getting to those matters, I want to spend a few minutes discussing the Fund and what others have tried to describe as its model, and then make a few observations about why this situation differs radically from almost all other mass accidents, and especially mass torts, that have been studied. At the end I have added some thoughts about "accountability" in the context of possible September 11th litigation, and some suggestions about what the Special Master could do to help assure that relevant information is available for those who wish to learn more about the Fund's operations.

II. THE SEPTEMBER 11TH FUND

Many of the articles and many of the discussants in this symposium have attempted to describe the kind of model the Fund is, and I want to begin by agreeing with everyone, and no one. The Fund is what everyone says it is because almost every observation about it is accurate, but limited. It is surely a direct product of the perceived need for an airline bailout (the fact that most of the money set aside for that purpose was neither given nor loaned to the airlines is of interest, but not relevant to the Fund); indeed, it seems quite likely that, but for the fact that the airlines persuaded Congress that they needed immediate assistance, the Fund would not have been created eleven days after September 11th, and perhaps not at all. It is also true that if the Democrats in Congress had not insisted on a fund of some kind in

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exchange for the bailout, there might never have been one. Moreover, the decision to ask the American Bar Association for assistance, coupled with its wise use of Robert Peck to do much of the drafting, contributed heavily to what many see as the "tort" model of this program.

On the other side, the provision for offsetting "all" collateral sources is surely attributable to "tort reformers" in Congress, for whom the collateral source rule that denies such offsets has been a long-term target, as well as to those of both parties who were at least somewhat concerned with the impact of the program on the Treasury (and, for example, saw no reason why a family that received $2 million in life insurance should not have that taken into account in deciding how much other taxpayers should pay for that loss). And, as Kenneth Abraham and Kyle Logue point out, the unusual addition of life insurance to the collateral source mix at least makes fiscal sense in this context, even if not in other, more typical cases.[1]

Other elements, such as the no-fault liability rule, can be attributed to the desire to obtain quick and certain compensation, although the hoped-for speed has not materialized, not due to any fault of the Special Master, but because the program turned out to be far more complicated than its sponsors had realized. And surely the fears of airline insolvency, not to mention the inability of many claimants to make a case of liability against both solvent and potentially insolvent defendants, led Congress to have the United States Treasury pick up the bill, even though no one did the kind of analysis that Robert Rabin did that would have at least raised questions about whether the defendants had any realistic fear of having judgments entered against them.[2]

Other factors were at work also. It is impossible to overlook the massive impact of television on the public's attitude toward the victims; and the commanding presence of New York's Republican Mayor Rudolph Giuliani and a Republican President and House of Representatives also made it easier to accept the concept of a no-fault Fund, even though there was no public estimate at the time of passage of what it might cost. And, once the idea surfaced, can you imagine any politician saying, "Sorry, it costs too much, and we should just let the families fight it out in the tort system, along with the property owners and everyone else?"

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1. *See* Kenneth S. Abraham & Kyle D. Logue, *The Genie and the Bottle: Collateral Sources Under the September 11th Victim Compensation Fund,* 53 DEPAUL L.REV. 591 (2003).

2. *See* Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769 (2003).

The result of these and other pressures produced what I will call the "political" model—a little of this and a little of that, with no unifying theory that can explain why it was done this way in this situation and not done, or done differently, elsewhere, in the past or in the future. Indeed, the political model also explains some of what Special Master Kenneth Feinberg did in the collateral source offset situation—excluding charity and the portions of pension and life insurance that the decedents paid for themselves, despite the statutory "all." Similarly, his informal, or perhaps formal, cap on what he will direct the Fund to pay victims is also based on the political reality of what Congress (and other victims, especially rescuers) will say to payouts of more than $5-6 million. But, unlike courts and law professors, Congress does not have to explain what it did, or why it did this or that, nor must it create a nicely-confined model that explains it all. It just votes for provisions in a law and leaves it to others to explain what it did and why. In the end, even if Congress had all of the articles from this symposium, and all the rules of the Special Master, and the comments submitted to him sixty days after September 11th, my own view is that there would have been a program, and it would have looked quite similar to the one that was enacted, with the Special Master's glosses, because, on balance, this program seems to arrive at about the right set of compromises.

III. DEATH IS DIFFERENT

The second preliminary point I want to make is that this is not an ordinary mass tort case, not just because there are no solvent defendants that can be successfully sued, but because the vast majority of the victims here died. In that sense it is like an airline crash case—except the numbers in an airline crash are at worst ten percent of the deaths on September 11th—and there is enough insurance and other money to pay those claims. Just consider what the Fund would have looked like if most people had lived and not died. Even if the highest earners from Cantor Fitzgerald had been out of work for a year, given the nature of their work, they would still have been able to resume their work and not been permanently deprived of their earning capacity. The firefighters and police have excellent health and disability benefits, and the airline passengers would probably have been able to proceed only against the carriers, but would surely have had the best case on liability, and might well have prevailed. In short, there might well have been no need for a Fund, especially with the outpouring of charity.

But, as the United States Supreme Court has said in another context, "death is different,"[3] and so this Fund is different from those for most mass torts because all of its attention is focused on what to pay for a lost human life. This focus has another important effect: It has caused more people to think about the law of wrongful death and to see its problems in a way that no event has ever done before. There are two reasons for this focus: First, death here was on a mass basis, whereas in most large-scale cases there are many fewer deaths. Second, this is a public program, with public regulations, assumptions, numbers, and grids, unlike even the ordinary airplane crash where cases are almost always settled, and all of the numbers are secret, except to those involved.

Take the starkest example of fairness issues raised by the Fund. Congress has told the Special Master to use tort principles of economic loss, with the result that there are enormous disparities in what different people, of the same age and with the same number of family members, will receive, by a factor of up to ten (without counting collateral offsets). That disparity has proven to be very hard to justify to many people, both victims and the general public, but it reflects an abiding principle of tort law that perhaps needs reexamination.

Another side effect of the public scrutiny of the Fund is that many more people are now aware of the disparities in the damages that different states allow in wrongful death cases. The Special Master has been generous in applying tort principles, allowing damages to the victim for pre-death pain and suffering, in the substantial and fixed amount of $250,000, and also for loss of companionship for a surviving spouse and each child, again in fixed amounts.[4] Some states allow one and not the other, although it is doubtful that any state has seriously considered what others are doing and whether its own system continues to make sense. Some allow neither, but no state has fixed amounts for either category, even for near-instantaneous deaths like these. Yet imagine what would have happened if the Special Master had decided to "evaluate" the pain and suffering of each person who died and to assess the emotional loss, on an individual basis, of each surviving family member who is eligible for compensation.

The open process that the Fund used may cause others who lose family members to ask: "Why should I be treated differently from those who died on September 11th?" And they will have the data to back up those differences in individual treatment because the Fund is

3. Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

4. 28 C.F.R. § 104.47(a) (2003).

a public entity and its rules spell out who will get what under what circumstances. Similarly, there may be questions raised about why one state disallows certain damages that the Fund allows, and it may cause an increased focus on how human life should be valued in the tort context. It is also possible that these values will be exported to the regulatory area, where the Bush Administration and its supporters regularly tout cost-benefit analysis, and now will have to try to fit in the wide range of values under the Fund, with the values that agencies are now ascribing to human life for regulatory purposes.

For these reasons, if the Fund is to have any impact on our civil justice system, the most likely candidate is in the area of wrongful death. Whether the Fund will serve as a model for future mass disasters or even mass torts, as well as whether it will influence tort law generally, are the principal remaining topics to which I will now turn.

IV. Lessons for Mass Disasters

I used to think that, after the Fund was wrapped up, cool heads would sit down and develop a prototype for future funds, including a set of statutory conditions that would automatically trigger their operation, based on objective factors that would justify a public expenditure program like this one. It seemed so rational to do the thinking in advance and not let the emotions of a given moment interfere with the analysis. It was a neat, logical approach, but I have now concluded that there is no way that a law like that will ever be enacted, or if it were, that it would come up with the right set of answers.

I begin with the assumption that, like this Fund, future funds would be based on the political model, which is to say, the product of a series of compromises, based on the special circumstances of each disaster. Congress is known for its unwillingness to face up to hard questions in advance (sometimes with good reason), and it is almost unimaginable that the two houses would ever be willing to devote enough attention to a very difficult and politically charged matter, like this, to set up another system to deal with a September 11th-type event, unless their backs are to the wall and they have no choice.

But, even if the will was in Congress to write such a law, the choices of what events would trigger the program are far from clear. Would Oklahoma City come within such a law if it happened now? Or, if the only crash that killed people not on the planes was at the Pentagon (a military installation) would the Fund have been created, or should a fund be created in that situation? I do not know my answers to those questions; but even more important, I am sure there are no "right" answers, and I am even more sure that members of Congress would

never tackle such difficult questions unless they had to do so, especially when many members do not expect to be in office if or when another September 11th-type disaster occurs. At the very least, Congress would want to have some idea of possible solvent and liable defendants, and the extent of possible losses, before establishing another no-fault fund, even if it already had the benefit of the kind of legal analyses presented in the articles at this symposium.

There are further reasons why enactment of a pre-disaster statute seems unlikely and probably ill-advised. The Fund embodies a no-fault recovery system for a variety of reasons, but in the next cases, some of those reasons may not apply and, hence, it may make sense to provide some fault-based determinations, either for a victim to be able to recover, or to allow the United States to use subrogation principles to recoup from wrongdoers some or all of the money that it pays out to victims and their families. Furthermore, Congress's willingness to pay the kind of damages that the Fund is paying here is by no means certain, and will, as it did to some extent here, depend on a variety of unknown and currently unknowable factors. Finally, as Janet Alexander's article clearly demonstrates, even setting up procedures now is impossible because the procedures must be based on the substantive principles that they are designed to carry out, and not the other way around.[5] Unlike the Federal Rules of Civil Procedure, rules for a fund of this kind are not trans-substantive, but are directly tied to the nature of the determinations to be made and the amounts that may be paid out under such a scheme.

In short, however theoretically nice it would be to have an advanced plan for dealing with future disasters like September 11th, such a law almost certainly will not, and probably should not, be passed by Congress before another similar disaster occurs. This does not mean that the articles and discussions at this symposium and others that will consider the work of the Fund are irrelevant, but just that they will have their influence when new disasters arise, and have to be considered on the run, not as part of a process that will enable Congress to enact a well-thought-out plan that will apply to all future disasters "like" September 11th, whatever that may mean.

V. LESSONS FOR ORDINARY TORT LAW

The statute creating the Fund followed tort law (without saying which state's), but rejected the general rule that collateral sources of

5. *See* Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L.REV. 627 (2003).

payments do not offset damages payable to the plaintiff.[6] Instead, it provided that all collateral sources would serve as offsets, including a form of payment never thought to come within the collateral source rule—life insurance. The Abraham and Logue article explains why the general rule makes sense, why life insurance is generally not part of the discussion of changing the general rule, and why it may nonetheless have been perfectly sensible for Congress to have provided for collateral source offsets in this situation, principally because there is no third party to which the government would look for subrogation.[7] They also discuss the Special Master's nuanced treatment of those sources for which the victim has personally paid—parts of life insurance and pensions, being the principal ones—despite the seemingly broad statutory command.[8] Some commentators are justifiably skeptical of the reasons given for rejecting the idea of bringing charity within the collateral source offset, except for charity provided before the Fund was created or that was given in-kind or in small amounts. But there were reports that some families had their mortgage payments made through charity, including some very large ones, and it is more difficult to see why (politics aside, which is probably impossible) money given for that purpose should be excluded from the offsets required by the law. Whether one agrees with either the law or with the way that the Special Master interpreted it, there is an abundance of material from which a thoughtful dialog on collateral sources could begin.

The evidence that lawmakers are carefully considering the doctrine of collateral source offsets in light of the Fund's treatment of them is not encouraging. This year, the House of Representatives passed House Resolution 5 (H.R. 5), the Help Efficient Accessible, Low-cost Timely Healthcare Act (Health Act),[9] which is a major effort by Congress to limit damages of many different kinds in ordinary tort actions based on state law.[10] One part, section 6, deals with collateral sources under the title "Additional Health Benefits," and it reverses the prevailing state law rule and precludes plaintiffs from recovering anything dubbed an "additional health benefit."[11] That phrase suggests that this provision is limited to payments for hospital and doctors bills, but

6. Air Transportation Safety and System Stabilization Act, Pub. L. No.107- 42, §§ 401-409, 115 Stat. 230, 231 (2001).

7. *See* Abraham & Logue, *supra* note 1.

8. *Id.*

9. *See generally* Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003, H.R. 5, 108th Cong. (1st Sess. 2003).

10. *Id.* § 2(b).

11. *Id.* § 6.

the text uses the phrase "collateral source benefits,"[12] which seems broader than the title, although perhaps less broad than the collateral source offset provision governing the Fund, which specifically included life insurance.[13] On the other hand, because this is (or would become) federal law, as is the law governing the Fund, some would argue that Congress meant to establish the same offsets as under the Fund, and that would include many other sources, including life insurance if there were a death claim.

To add to the confusion, H.R. 5 speaks in terms of introduction of evidence on this topic, not of changing the law, but that may be no more than a drafting issue because this provision allows plaintiffs to show that they (or someone on their behalf, which might or might not include an employer) paid for these other sources of funding, much the way that the Special Master has done. Moreover, H.R. 5 would also forbid all forms of subrogation, not only against the claimant, but against any third party, a feature not found in the Fund's statute, but which seems primarily designed to protect defendants and their liability insurance companies and to hurt plaintiffs and their health insurance carriers.[14] Moreover, section 6 applies to settlements as well as litigated judgments, although how that is to be enforced remains unclear.[15]

One can debate the wisdom of this proposal, but it is hard to see what lessons its sponsors gained, or even sought to gain, from the experience of the Fund. It seems much more directed at lowering recoveries for plaintiffs (and the lawyers who make it possible for them to get to court) than at any rational allocation of responsibility for paying for injuries among first- and third-party insurers and those persons who commit tortious acts. And, for states that are considering legislative "tort reform," proponents of such change can point to the law that created the Fund that supports their approach, even though the circumstances are quite different. It may well be that lessons for ordinary tort law will be taken from the operation of the Fund, but there is reason to fear they will be the wrong ones, largely because the reasons for applying certain doctrines in this situation have little, if any, bearing on their applicability elsewhere—a fact that seems to have gone unnoticed in H.R. 5, if the Fund is any part of the basis for section 6.

12. *Id.*
13. 28 C.F.R. § 104.47(a) (2003).
14. *See generally* H.R. 5.
15. *Id.*

VI. Truth and Accountability

Several speakers and panelists have remarked on the role of litigation in determining the "truth" about what caused the events of September 11th and of the desire to hold "accountable" persons other than those who planned and carried out the attacks for the loss of three thousand lives and the other devastation. Presumably, those remarks are aimed at finding out what blame should be assessed against various parts of the federal government, such as the Federal Bureau of Investigation, the Central Intelligence Agency, the White House (current and prior), and those responsible for airline and airport security. Those goals are admirable, but if there is one thing clear about any litigation that may take place, it is that inquiries of that kind will never be allowed, either because the Government will have the case dismissed for failure to state a legal claim against it, or because the Government will claim a national security privilege that would enable it to refuse to answer pertinent questions, even if that meant that no claimant could gather the evidence needed to prevail. There is a special commission designed to answer those questions, but even it is having problems gaining what it considers to be necessary access to records that will enable it to carry out its mission. Answers to issues of accountability may nor may not be produced, but in this situation, litigation by victims has no chance of achieving that goal.

VII. A Plea to the Special Master

There is already a vast public record of the work of the Fund that will be a treasure trove for scholars, but there is much that may not be written down and will be suppressed, or both, on any number of grounds. Apparently, despite the grid, the Special Master is asked quite often, and agrees less often, but still in a significant number of cases, not to follow the grid, or perhaps more precisely the recommendation of Pricewaterhouse Coopers as to the application of the grid to a particular claimant. If the public is to evaluate the program, and in particular the use of a grid, it is essential to know when and why the grid was not applied, whether all deviations were in the upward direction, and who benefited from the deviations (claimants represented by counsel or those with other distinguishing, but commonly held, features).

I leave aside the question of whether it is ever proper for the estate of a deceased person that is receiving large amounts from the federal government to make a personal privacy claim when the issue is the basis for that federal payment. Assuming that such claims have some

validity, at the very least, the files could be redacted so that a person's general circumstances, including income and offsets, would be public, without identifying the person, except perhaps to someone who knew the deceased very well. Moreover, it would be a relatively easy matter to computerize the key data in each file and to develop statistics that are likely to interest scholars and policy makers, instead of leaving that work to be done by hand inputs once the Fund is no longer in business.

As part of a federal agency, the records of the Special Master are subject to the Freedom of Information Act[16] and even more importantly, the Federal Records Act,[17] which requires that records of historic interest, which these surely are, be retained and made public, subject to certain limited exceptions.[18] It would not only be appropriate, but highly advisable, for the Special Master to consult with the National Archives now, so that when the time comes to close shop, the office is ready to make its records available to the maximum possible extent. If there are lessons to be learned from the operation of this Fund, many of them will come from the details of how it actually worked, and for that, the records of the Special Master are the essential ingredient.

16. 5 U.S.C.S. § 552(a)(3) (2003).
17. 44 U.S.C.S. § 3101 (2003).
18. 44 U.S.C.S. 3102 (2003); 5 U.S.C.S. § 552(a)(4)(B), (a)(3)(E).