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Quest for Fairness in Compensating Victims of September 11, The

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THE QUEST FOR FAIRNESS IN COMPENSATING VICTIMS OF SEPTEMBER 11

Robert L. Rabin¹

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I. INTRODUCTION

Aside from natural disasters, when tragedy strikes – taking its toll in fatalities and serious injuries – we ordinarily look to the tort system for redress. Tort is not the exclusive form of redress, of course, in this era of private insurance and government disability programs.² But still, it remains our most highly visible mechanism for assigning responsibility and providing compensation. So, we *ordinarily* look to tort.

But there was nothing “ordinary” about September 11. And that includes how our legal system responded to the plight of injury victims of that horrific day. Within less than two weeks of September 11, Congress took action, funding a special compensation scheme for the victims and survivors of the terrorist acts entitled the September 11th Victim Compensation Fund of 2001 (hereinafter Victim Compensation Fund or Fund), which provides “no-fault” benefits; that is, compensation for physical harm without the necessity of establishing wrongful conduct as a basis for recovery.³

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²See Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75 (1993).

³Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 405(b)(2), 115 Stat. 230, 239-40 (2001). The provision of no-fault benefits – i.e., benefits recoverable without the necessity of establishing “fault” – was critical for two reasons. First and most obviously, the clearly responsible parties, the terrorists and their sponsors, are not a realistic

The Victim Compensation Fund has a singular character, reflecting the singularity of the event that led to its enactment. The early days, indeed the early weeks, following September 11 were marked by confusion and shock over what had befallen the nation. In that period – more precisely just eleven days after the event – the Air Transportation Safety and System Stabilization Act was enacted, establishing the Victim Compensation Fund.⁴ Not surprisingly, perhaps, the design of the Fund reflected the confusion and conflicting sentiment about how to address the nation's deepest anxieties about what had happened: The massive loss of life, and the prospect of total paralysis, or collapse, of our national air transportation system.

In this Article, I will begin by describing the approach to compensation taken in the Victim Compensation Fund. I will then discuss the implementing regulations promulgated by the Special Master appointed under the Fund. Next, I will offer a preliminary assessment of the significance of the Fund for the survivors of those who perished, as well as the seriously injured.⁵ And finally, I will speculate more broadly about the significance of the Fund for how we address the continuing problem of compensating victims of unexpected harm.⁶

II. THE DESIGN OF THE VICTIM COMPENSATION FUND

A. *Why a Fund?*

Congressionally enacted no-fault compensation legislation is a sufficiently uncommon event to trigger the question: Why action by Congress to establish a fund? After all, terrorist events as well-publicized as the Lockerbie airline disaster, the Oklahoma City bombing, and the earlier World Trade Center explosion failed to generate government compensation efforts at the time.⁷ More generally, the most comprehensive no-fault schemes addressing nationwide injury tolls of substantial proportion – workers' compensation and auto no-fault – have been adopted at the state level, rather than through Congressional action. Moreover, although federal no-

source of compensation. Second, establishing tort liability on the part of the airlines or other potential defendants, while not out of the question, is fraught with difficulties, as I will discuss *infra*, Part IV. As of this writing, the toll of fatalities from the terrorist acts is 3,025. See Eric Lipton, *Death Toll is Near 3,000, but Some Uncertainty Over the Count Remains*, N.Y. TIMES, Sept. 11, 2002, at G47.

⁴*Id.* at § 401-409.

⁵This Article, which is based on my Cleveland-Marshall Fund Lecture on March 21, 2002, offers a preliminary assessment only. The Special Master's implementation of the Victim Compensation Fund through the determination of individual claims is still at an early stage as I write.

⁶In another article, Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831 (2002), I discuss the potential future claims of exposure-only victims of September 11 and its aftermath. The next section of this Article, describing the design of the Fund, is substantially the same as the corresponding section in the exposure-only victims article, but otherwise the two articles address distinct aspects of the Fund with this article focusing on the treatment of claims for physical harm.

⁷See David W. Chen, *Many Relatives, Wary and Anguished, Shun Sept. 11 Fund*, N.Y. TIMES, June 1, 2002, at B1.

fault schemes have been enacted, they have been a relative rarity.⁸ In fact, the most notable of the federal schemes appear to have reflected Congressional perceptions of emergency circumstances, triggered by industry threats of withdrawal from critical areas of product manufacture and service provision under the specter of catastrophic tort liability. In particular, no-fault compensation for childhood vaccine injuries, and quasi-no-fault coverage for nuclear energy-related accidents under the Price-Anderson Act fit this scenario of sensitivity to political exigencies.⁹

It is possible to view the adoption of the Fund from a similar perspective. In the immediate aftermath of September 11, the airline industry appeared on the brink of collapse, as passenger travel dropped precipitously and menacing storm clouds of future tort claims loomed on the not-so-distant horizon. In this scenario, Congress, in the course of bailing out the airline industry through subsidies and limitations on liability, could do no less than offer a quid pro quo to the air crash victims in the form of a compensation scheme.¹⁰

This seems to me an excessively realpolitik view. As a spontaneous reaction to September 11, charitable giving in the private sector reached unprecedented levels.¹¹

⁸See MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 841-50 (7th ed. 2001) (surveying federal forays into no-fault compensation schemes).

⁹See Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 955 (1993) (commenting that Congress passed the Price-Anderson Act, which provided coverage for nuclear energy-related accidents, "with the express intent of encouraging investment in nuclear energy research and operations by a private sector daunted by the prospect of multimillion-dollar claims and a constrained insurance market"); *id.* at 958 (explaining that Congress passed the National Childhood Vaccine Injury Act of 1986 "in response to the concerns of the vaccine manufacturers, who had threatened to withdraw from the market because of anxieties about the possibility of crushing liability resulting from the infrequent but unavoidable injuries from exposure to vaccines"); *see also* the Swine Flu Act, 42 U.S.C. § 247b(j)(1) (1976) (amending the Federal Tort Claims Act to allow those injured by the swine flu vaccine to bring suit against the federal government rather than manufacturers or distributors of the vaccine).

¹⁰See Lizette Alvarez & Stephen Labaton, *A Nation Challenged: The Bailout; An Airline Bailout*, N.Y. TIMES, Sept. 21, 2001, at A1.

¹¹Total estimated contributions, one year after the event, were roughly \$2.7 billion. *See* Stephanie Strom, *A Cloud Spreads Over Charities as Billions in Gifts Come With a Critical Look*, N.Y. TIMES, Sept. 11, 2002, at A32. The most sizable of the September 11th charities have collected and disbursed funds in the hundreds of millions of dollars. By the end of April 2002, the American Red Cross's Liberty Disaster Fund had raised more than \$966 million and had distributed \$567.5 million to Sept. 11 victims. Jacqueline L. Salmon, *Red Cross Headquarters Laying Off 100; Cutbacks Not Tied to Sept. 11 Fallout, Spokesman Says*, WASH. POST, Apr. 30, 2002, at B5. After the Sept. 11 Fund had received \$425 million dollars, fund managers began to recommend that people donate to other causes. At the end of January, it had already distributed \$160 million. *See* Anne-Marie O'Connor, *Sept. 11 Fund Says Send Gifts to Charities in Need*, L.A. TIMES, Jan. 23, 2002, at A5. The third-largest Sept. 11 fund, the Twin Towers Fund, had raised a total of \$148 million. David Barstow and David M. Herszenhorn, *Guiliani to Give Money Quickly In Shift on Twin Towers Charity*, N.Y. TIMES, Feb. 27, 2002, at A1. Even the smaller new charities that sprung up in the wake of September 11 had received substantial donations. "[T]heir connection to September 11 has given them a platform that most start-up charities lack. Contributions large and small, mostly unsolicited, have poured into their coffers." Domenica Marchetti, *September 11 Charities Face Challenges Beyond the Ordinary*, CHRON. OF PHILANTHROPY, Mar. 7, 2002, at 11. Total estimated

Indeed, by mid-January, 2002, a manager of the September 11 Fund, which had \$425 million in its coffers at that point, appealed to the public to redirect donations to other worthy charitable causes that had suffered precipitous drop-offs in contributions after the terrorist acts.¹² Similar manifestations of sympathy for the victims, characterizing them as heroes who died for their country as in warfare, were reflected at sporting events, in memorial gatherings, and in the mass media.¹³

There is no reason to think that members of Congress, who endorsed the Fund with acclaim just two weeks after the event, at the high tide of emotional response to September 11, were immune to these sentiments. In short, the Fund was created under singular circumstances. Rather than reflecting a political trade-off designed to quell workplace unrest (black lung, workers' compensation), or to provide liability assurances to an industry (vaccine, Price-Anderson), the Fund was conceived at least in part as a grant of largess to the survivors of those who had unwittingly served as surrogates, stand-ins, for the rest of the American people.

These considerations partially explain the structure of the Fund. At the same time, however, the Fund does reflect both its inextricable connection to Congress's correlative desire to protect the airline industry, and its inescapable lineage as, in the final analysis, a no-fault plan, not a mini-version of the tort system.¹⁴ Hence, its curious hybrid structure, which I will next describe.

B. A Design Reflecting Cross-Purposes?

At its core, the Fund reflects the love-hate relationship the American public has with its tort system. One key theme in the Fund is the resolution of claims with dispatch, avoiding the years of delay and uncertainty that are taken to be the plight of injury victims who must seek recourse through tort. Under the Fund, all claims are to be determined within 120 days of filing,¹⁵ and payments are to be made within 20 days of determination.¹⁶ These determinations, along with all other guidelines for decision, procedural and substantive, are to be made by a Special Master, designated by the Attorney General to administer the Fund.¹⁷ Moreover, and significantly, the

contributions, as of a year after the event, reached \$2.7 billion. *Ground Zero: Charity, A Flood of Money, Then a Deluge of Scrutiny For Those Handing It Out*, N.Y. TIMES, Sept. 11, 2002 at B5.

¹²See O'Connor, *supra* note 11, at A10; see also Anne Marie Chaker, *Red Cross Gives Disaster Relief to Tony Enclave*, WALL ST. J., Feb. 7, 2002, at B1 (detailing the difficulties the Red Cross faced in finding more recipients for its charity).

¹³The Salt Lake City Winter Olympics commenced only after "[a]n honor guard of U.S. Olympic athletes, accompanied by New York City fire and police officers, carried the tattered World Trade Center flag to the center of Rice-Eccles Stadium." Richard Ernsberger Jr., *Showtime in Salt Lake*, NEWSWEEK INT'L, Feb. 18, 2002, at 46. Memorial services and gatherings were also held in great profusion. Richard C. Dujardin, *2001: A Year to Test Our Faith*, PROVIDENCE J., Dec. 29, 2001, at D01.

¹⁴I discuss the structure of the Fund from a political economy perspective in Rabin, *supra* note 6, at 1867-69.

¹⁵Air Transportation Safety Act § 405(b)(3).

¹⁶*Id.* at § 406(a).

¹⁷*Id.* at § 404.

determinations by the Special Master are final and not subject to judicial review.¹⁸ While attorney representation of claimants is allowed, and a right to a hearing is provided,¹⁹ the system is clearly meant to fast-track claims, with a minimum of legalistic maneuvering. Indeed, no explicit provision is included for defensive representation on behalf of the Fund to safeguard against false or overstated claims.

The quest for speedy resolution of claims is further buttressed by the supporting structure of time limitations on filings, reinforcing the theme of reaching closure with dispatch on claims arising out of the events of September 11. The Special Master was to adopt implementing regulations within ninety days of the statute's enactment, devising a procedural system for resolving claims and giving further content to the broad definitions of compensable harm²⁰ – and that latter date, in turn, triggered a two-year period in which all claims under the Act were to be filed.²¹

This drive to achieve rapid closure can be taken to reflect the singularity of the events of September 11 as a catalyst. In sharp contrast to existing systems of no-fault compensation, the Fund addresses injuries arising out of a single set of related *events*, rather than an ongoing course of risk-related *activity*. If anything, this contrast underscores the disenchantment with tort. Ordinarily, catastrophic injury “events” are grist for the tort mill.²² Even though tort remains an option, the Fund can implicitly be viewed as a statement of the perceived inadequacies of the tort remedy for meeting the call for an immediate response to the needs of the September 11 victims.²³

Critics of tort, of course, would point not only to the system's delay but also to its indeterminacy, in particular from a compensation perspective.²⁴ Within limits, the

¹⁸*Id.* at § 405(b)(3).

¹⁹*Id.* at § 405(b)(4).

²⁰Air Transportation Safety Act § 407.

²¹*Id.* at § 405(a)(3).

²²See Deborah R. Hensler and Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 972 (1993) (discussing the tort response to the 1981 collapse of two skywalks onto a crowded dance floor at the Kansas City Hyatt Regency); see *id.* at 975 (treating the more than 1,000 wrongful death and personal injury claims filed in the aftermath of the 1980 fire at the MGM-Grand Hotel in Las Vegas).

²³It is critical to note that the inadequacy of tort can be taken, in part, to be self-generated by the cap on liability established in the Act. See *infra* notes 35-37 and accompanying text.

²⁴These sentiments were echoed in Congressional discussion of the Act, which included several statements about tort law's shortcomings in general and in this particular case. For example, after criticizing the tort system more generally, Senator McCain concluded:

No amount of money can begin to compensate the victims [of September 11th] for their suffering. Nothing will make them and their families “whole.” It is not the intent of the federal fund to do this. Nor is it the intent of the fund to duplicate the arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort system—awards from which up to one third or more of the victims' award is often taken by attorneys.

The intent of the fund is to ensure that the victims of this unprecedented, unforeseeable, and horrific event, and their families do not suffer financial hardship in addition to the terrible hardships they already have been forced to endure.

Fund is meant to create baseline assurance that victims of physical injury and their survivors will receive benefits. More precisely, the Fund establishes eligibility for individuals “present at [any of the three crash sites] at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes,”²⁵ and who “suffered physical harm or death” as a result of the crashes.²⁶ For this circumscribed class, the Fund provides benefits for both economic and non-economic losses.

In spelling out those benefits, however, the Fund appears to do a dramatic about-face from its foregoing rejection of tort precepts. Economic loss is defined to include not just medical expenses and loss of present earnings, but “loss of business or employment opportunities” – presumably future lost income – “to the extent recovery for such loss is allowed under applicable state law.”²⁷ And non-economic loss is broadly defined to include “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.”²⁸ Interestingly, no parallel to the economic loss definition that referenced “[as] allowed under applicable state law” is included in this latter definition of non-economic loss. Nonetheless, the pervasive influence of the tort perspective of doing individualized justice – disparaged by critics of the system, trumpeted by its advocates – is apparent on the face of the provision.

But there is one substantial qualification to this apparent generosity of spirit. Another bane of the existence of tort system critics is the collateral source rule, which allows for the recovery in tort of out-of-pocket expenses even if they have been reimbursed by “collateral” sources such as health and disability insurance. Under the Fund, there is no recovery for these items.²⁹ Indeed, the restriction on “double recovery,” as tort critics would put it, is written in exceedingly broad terms to cover “all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist-related aircraft crashes....”³⁰

So, the Fund steers a somewhat uncertain course between collective principles that would emphasize timely compensation and filling the gaps of unmet need, on the one hand, and individualized recovery that would pull in the direction of the tort model, on the other. Before examining this tension in somewhat more detail,

147 CONG. REC. S9589, S9594 (daily ed. Sept. 21, 2001) (statement of Rep. McCain). Senator Boxer likewise implicitly invoked concerns about the tort system’s delay by suggesting that she supported “a victim’s compensation fund to help ensure that victims’ families receive compensation in a timely fashion.” *Id.* at S9593.

²⁵Air Transportation Safety Act § 405(c)(2)(A)(i).

²⁶*Id.* at § 405(c)(2)(A)(ii).

²⁷*Id.* at § 402(5).

²⁸*Id.* at § 402(7).

²⁹Nor is it possible to recover punitive damages under the Fund. *See* Air Transportation Safety Act § 405(b)(5).

³⁰*Id.* at § 402(4). In treating life insurance and pension funds as “primary,” the Fund departs from the parameters of other no-fault schemes.

however, consider the escape hatch provided in the Act – the prospect of lodging a tort claim instead of proceeding under the Fund.

C. Tort: A Meaningful Option?

The tort option under the Act, once again, reflects the ambivalence of Congress towards the tort system. Congress might have decided, of course, to treat the Fund as the exclusive remedy for September 11 victims – or, at least, the exclusive remedy for those victims eligible for benefits under the Fund. In doing so, it could have pointed to the most longstanding no-fault model, workers' compensation, where tort recovery is precluded to injured workers in claims falling within the coverage of the no-fault scheme.³¹ Instead, under the Fund, a tort remedy is provided as an option for eligible claimants who choose to waive their right to seek no-fault benefits.³²

One can only speculate about why tort was left open to prospective claimants; perhaps in recognition of the fact that some victims with substantial collateral source recoveries – most notably, victims with major life insurance holdings, accrued pension benefits, or accidental death coverage – might well have anticipated no recoverable benefits under the Fund.³³ Or realistically, Congress may have simply recognized that substantial categories of September 11 victims – most clearly, those suffering property damage and psychological harm without accompanying physical injury – were simply not covered by the Fund.³⁴ Of course, tort, as the default system, would have been available for addressing these claims – how successfully is another matter – without the need for establishing a federal cause of action in the Act. But this would arguably have created the appearance of treating Fund beneficiaries as second-class citizens if they were offered no tort option.

Whatever the case, Congress's ambivalent embrace of tort is highlighted by the title of section 408, which creates the federal cause of action: "Limitation on Air Carrier Liability."³⁵ If Congress was determined to leave tort as an option, it was equally determined to constrain tort along lines familiar to observers of late twentieth century tort reform. The Act establishes a ceiling on tort liability of the air carriers, providing that liability "shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier."³⁶ In subsequent legislation, this

³¹The bar on tort suits generally only extends to the employer. Workers injured on the job remain free to sue third parties in tort, whose conduct contributed to their workplace injuries. The suits frequently involve claims for injury from allegedly defective machinery in the workplace that causes injury to the employee. For coverage of the topic, see MARC A. FRANKLIN AND ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 614-31 (7th ed. 2001).

³²Air Transportation Safety Act § 405(c)(3)(B)(i).

³³See *supra* notes 29-30, and accompanying text. Note, however, that the Special Master softened the offset provision in the Final Rule. See *infra* note 57.

³⁴See the statute's provision identifying a claimant as an individual who has "suffered physical harm or death." Air Transportation Safety Act § 405(c)(2)(A)(ii). In addition, the Special Master's decisions were made final, with no recourse to judicial review. Air Transportation Safety Act § 405(b)(3).

³⁵*Id.* at § 408.

³⁶*Id.* at § 408(a). The amount of insurance coverage was \$1.5 billion per plane. See Jim VandeHei and Milo Geyelin, *Economic Impact: Bush Seeks to Limit Liability of Companies Sued as Result of Attacks*, WALL ST. J., Oct. 25, 2001, at A6.

protective cap on liability, linking it to the limits of insurance coverage, was carried over to aircraft manufacturers, property owners in the World Trade Center, airport owners, and governmental entities.³⁷

Ceilings aside, exclusive jurisdiction to hear “all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes” is located in the federal district court for the Southern District of New York.³⁸ However, no federal common law is created; rather, the court is to apply the substantive law of the state in which the crash occurred.³⁹ Finally, just to leave no doubt about it, section 408(b)(1) declares that the federal cause of action is to be “the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.”⁴⁰

Thus, claimants eligible under the Fund are put to a choice: they must elect either to claim benefits under the Fund, or to waive their rights and pursue a tort claim.⁴¹ At the same time, for those falling outside the eligibility limits of the Fund, tort, as circumscribed in the Act, remains available.

D. Ambivalence Reconsidered

This, then, is the basic structure of the Fund and the tort option. One is left with a fundamental question: Is the Fund, on the one hand, grounded in a collective model emphasizing needs-based benefits for a community of victims? Or, is it grounded in an individual entitlements model of compensating for harm on a case-by-case basis (a paler version of tort)? As the previous discussion indicates, there is evidence pointing in both directions.⁴²

In support of a needs-based model, there is initially the choice of no-fault, in and of itself. While no-fault schemes are not narrowly needs-based, they are premised on the notion that compensation for basic economic harm suffered is the first order of business, and that considerations of defendant misconduct and plaintiff contributory carelessness (fault and comparative fault) are largely irrelevant. In other words, that injury arising out of a given activity or event is in itself a sufficient condition to warrant redress.⁴³ This seems to square with the underlying premise of the Victim

³⁷See Title II—“Liability Limitation” of the subsequent compromise Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201(b)(2), 115 Stat. 597, 645 (2001). It is noteworthy, however, that the same act refused to limit the liability of companies supplying airport security: “Nothing in this section shall in any way limit any liability of any person who is engaged in the business of providing air transportation security and who is not an airline or airport sponsor or director, officer, or employee of an airline or airport sponsor.” *Id.* at § 201(b)(3).

³⁸Air Transportation Safety Act § 408(b)(3)

³⁹*Id.* at § 408(b)(2).

⁴⁰*Id.* at § 408(b)(1).

⁴¹*Id.* at § 405(c)(3)(B).

⁴²It should be noted that there is virtually no legislative history to serve as guidance on the provisions of the Fund.

⁴³On the irrelevance of fault considerations and the activity-based nexus for claims, see generally ORRIN KRAMER & RICHARD BRIFFAULT, *WORKERS’ COMPENSATION: STRENGTHENING THE SOCIAL COMPACT* at 13 (1991). The high priority given to basic economic harm is

Compensation Fund, disavowing “fault” as a prerequisite for recovery. In addition, the treatment of collateral sources – the striking set-off provision for “*all* collateral source compensation, *including* life insurance, pension funds [and other government benefit schemes]” – further supports this horizontal equity/needs-based reading of the Fund objectives.⁴⁴ Finally, there is the retention of the tort option. If a true option in the strong sense, tort might well have been taken to be meant as an individual rights pathway for those choosing to forgo the contrasting collectively-based welfare scheme.

On the other hand, the Fund provisions offer clear support for an individual entitlements model reading. To begin with, the scheme defines “economic loss” to include future lost earnings as interpreted in applicable state law. This interpretive approach presumably anticipates case-by-case projections of the future earning power of the particular claimant. In the same vein, the definition of “non-economic loss” to include unlimited pain and suffering, loss of consortium, and “all other [intangible loss] of any kind” is a straightforward invitation to assess harm case-by-case. Indeed, the notion of subjectively redressing non-economic loss is inherently at odds with the collective, insurance-based principles underlying no-fault.⁴⁵ And finally, the overall cap on liability in tort at insurance limits combined with the likely prospect that non-Fund based tort claims (especially for property damage) might seriously limit recovery for personal harm in tort could be taken as indirect evidence that a measure of complementary individualization was anticipated in the no-fault scheme.⁴⁶ In other words, if claimants were to be coerced into no-fault by circumstances beyond their control, they should get some approximation of what tort would ordinarily have to offer.

If nothing else, these cross-cutting themes assured a critical role for the Special Master in setting the stage for implementation of the Fund through interpretive guidelines. I turn next to his efforts in developing these guidelines.

illustrated in the auto no-fault context by the New York no-fault statute, among the most generous, which explicitly allows recovery only for “basic economic loss” (up to \$50,000). See N.Y. INS. LAW § 5102(a) (McKinney 1995). In the workers’ compensation context, the focus on basic economic loss is demonstrated by the caps on recovery for lost wages at modest levels in death and serious injury cases, as well as the exclusion of noneconomic loss from compensable harm. See *infra* note 59 and accompanying text; LARSON, *infra* note 60.

⁴⁴September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,287, (proposed Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104) (emphasis added). Indeed, the italicized terms underscore the possibility of reading the provision to offset *private* charitable contributions, as well. This possibility raised a sufficient outcry to trigger an early assurance from the Special Master that such private contributions would not be taken into account in determining awards. See *Putting a Price on a Life*, CHI. TRIB., Feb. 10, 2002, at C8.

⁴⁵Still, even no-fault schemes that replace tort in its entirety sometimes retain scheduled pain and suffering. See Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404 (2000) (examining New Zealand’s experience with a comprehensive no-fault accident compensation scheme).

⁴⁶See Geraldine Baum & Josh Meyer, *Final Rules on Sept. 11 Fund Give Families More Money, Victims*, L.A. TIMES, Mar. 8, 2002, at A1.

III. IMPLEMENTING THE FUND: GUIDELINES

When the Special Master, Kenneth Feinberg, was appointed on November 26, 2001, his initial task was to promulgate regulations resolving the principal tensions in the Act and filling in some important blanks.⁴⁷ He tested the waters by issuing a set of draft regulations (“Interim Final Rule”) for commentary on December 21, 2001.⁴⁸ Subsequently, on March 8, 2002, he issued final regulations (“Final Rule”) spelling out his interpretations of Fund provisions.⁴⁹

Feinberg’s reading of the main provisions of the Fund reveals an interesting effort to strike a balance between understanding the Act in traditional no-fault terms that would have emphasized meeting scheduled basic loss of victims, and interpreting the Act in an open-ended fashion that essentially would have offered tort-type, individualized compensation in a no-fault setting. His manner of resolving this tension is evident in the approach taken to the three key substantive benefit provisions: collateral source offset (i.e., the reductions in awards for outside benefits), economic loss, and non-economic loss.

A. *Collateral Source Offset*

A threshold issue left unresolved by the language of the Act was whether *private* charitable contributions received by victims and their survivors would be offset against Fund benefits. As indicated above, the Act provided that “all” collateral sources “including” life insurance, pension, and public welfare schemes were to be deducted from benefits under the Fund.⁵⁰ A literal reading of this proviso might well have included, by implication, private charitable benefits as a set-off. Consequently, as contributions swelled into the multi-millions and beyond, there was a distinct possibility that an offset of private contributions funneled to survivors would lead to virtually no recovery at all from the Fund for a substantial number of families, particularly when aggregated (as a set-off) with life insurance and pension offsets explicitly required by the Act.⁵¹ Not surprisingly, a huge outcry arose in light of this possibility.⁵²

The Special Master responded with alacrity in his Interim Final Rule, indicating that there would be no offset for private charitable contributions.⁵³ As a practical matter, political considerations aside, the offset of private charitable contributions might well have created chaos simply because the major private September 11

⁴⁷See Diana B. Henriques & David Barstow, *A Nation Challenged: The Special Master; Mediator Named to Run Sept. 11 Fund*, N.Y. TIMES, Nov. 27, 2001, at B1.

⁴⁸September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (proposed Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104) [hereinafter *Interim Final Rule*].

⁴⁹September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (to be codified at 28 C.F.R. pt. 104) [hereinafter *Final Rule*].

⁵⁰Air Transportation Safety Act § 405(b)(6).

⁵¹See Diana B. Henriques, *A Nation Challenged: The Federal Fund; Official Vows All Families of Victims Will Get Aid*, N.Y. TIMES, Dec. 28, 2001, at B7.

⁵²See Diana B. Henriques, *A Nation Challenged: Compensation; Victims’ Families Get Break on Earlier Charity*, N.Y. TIMES, Dec. 20, 2001, at B7.

⁵³*Interim Final Rule*, *supra* note 48, § 104.47(b)(2).

charities were virtually paralyzed in the early months – experiencing management and distributional issues of staggering magnitude.⁵⁴ While these problems were ironed out to some extent as time passed, it was by no means clear that it would have been possible to account for private benefits received and receivable by Fund-eligible claimants at the time when Feinberg issued his regulations.

Nonetheless, as just mentioned, the Act explicitly called for the offset of life insurance and pension benefits – and here too, there was an outcry from victims’ families (in particular, the well-endowed) that they were likely to receive nothing in Fund benefits because of the foresight of the deceased, who it was argued, had earned or set aside funds for such a contingency.⁵⁵ These protests were sharpened to a fine point by prospective claimants observing that unconstrained tort – the absence of a Fund – would be a superior option, since life insurance and pension benefits traditionally are not offset under the tort system.⁵⁶

Once again, the Special Master responded to the criticism, this time in the Final Rule, by interpreting the Act to allow reduction of the offset to the extent of victims’ self-contributions.⁵⁷ More generally, Feinberg announced that it would be “very rare” for *any* eligible claimant to receive less than \$250,000.⁵⁸ It should be noted that neither of these interpretive moves is grounded in the language of the Act.

Rather, the Special Master’s actions reflected a fundamental philosophical difference buried in the esoteric legal language of collateral offset. On the one hand, a need-based approach to compensation would point to full offset of all collateral sources, as the Act appeared to require, since these benefits do contribute to meeting basic needs. On the other hand, under an individual claimant-focused tort-type inquiry as to the “deserving” status of the victim, offsets arguably would be ignored entirely. In the end, the Special Master arrived at something of a compromise, liberalizing the statute from the victims’ perspective by reducing the offset through recognition of victims’ contributions and entirely ignoring outside private charity received by Fund-eligible claimants.

B. Economic Loss

As mentioned, in addressing economic loss, the Act appears to be at cross-purposes with the literal terms of the collateral source offset provision in referring to recovery of “loss of business or employment opportunities” as defined in state tort law.⁵⁹ On its face, this would seem to suggest an individualized inquiry in every case into the lifetime earnings prospects of each deceased victim. Inquiries of this sort are entirely at odds with the traditional no-fault approach of scheduled benefits reflecting social welfare goals of categorical treatment of those suffering serious injury or

⁵⁴See, e.g., Myron Levin, *Flood of Sept. 11 Aid Swamps Charities*, L.A. TIMES, Dec. 8, 2001, § 1, at 1; See also *Ground Zero*, *supra* note 11, at B5.

⁵⁵See Henriques, *supra* note 52, at B7.

⁵⁶This assumes, of course, that liability would have been possible to establish in tort. See *infra* notes 74-78, and accompanying text.

⁵⁷See *supra* note 49, § 104.47.

⁵⁸See *supra* note 49, at 11,234 (Statement by the Special Master).

⁵⁹Air Transportation Safety Act § 402(5).

death, and generally capping recoveries at levels approximating statewide median wage earnings.⁶⁰

In the Final Rule, the Special Master again devised a compromise. While there is no mention of scheduling in the statute, Feinberg established a grid applicable to the range of potential claimants: a “presumed economic loss” schedule based on age, size of family, and recent past earnings, along with a cap applicable to the upper 2% of income earners.⁶¹ In devising this strategy, he provided for awards that recognized very considerable future earnings disparities, an announced range of \$300,000 to \$4.35 million. But at the same time, he rejected an approach that would have recognized entirely open-ended, case-by-case speculation about future earnings prospects.⁶²

C. Non-Economic Loss

Although there are exceptions, no-fault schemes typically do not provide for individualized pain and suffering loss, apart from optional or supplemental recourse to tort.⁶³ In fact, tort law itself, as encapsulated in wrongful death statutes, did not traditionally provide any pain and suffering loss for survivors – that is, loss of companionship.⁶⁴ Indeed, many states still do not recognize non-pecuniary loss as compensable to survivors in tort, limiting recovery to economic loss.⁶⁵ And some

⁶⁰Death benefits are typically calculated as a fixed percentage of the decedent’s average weekly wage, which is capped at a level that varies from state to state, but generally approximates the average weekly wage in the state. See U.S. Dept. of Labor, State Workers’ Compensation Laws, 2001, available at www.dol.gov/esa/regs/statutes/owcp/stwclaw/tables-pdf/table-12.pdf (last visited Sept. 4, 2002); see also AFL-CIO, Workers’ Compensation Comparisons, 2001, at <http://www.aflcio.org/safety/compcomp.htm> (last visited Sept. 4, 2002). See generally 5 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 93.01 (2000) (“The beginning point in calculating the amount of benefits is the ‘average weekly wage.’ This, when the fixed statutory percentage of roughly between one-half and two-thirds has been applied to it, becomes the unit of benefit by which practically all compensation . . . is measured, subject to maximum and minimum limits.”). In many states, including New York, the surviving spouse continues to receive the weekly benefit during the entire period of the widow/widowerhood, which continues until the surviving spouse remarries or dies. Some states, however, impose limits on the duration (e.g., 500 weeks in Michigan) or the total dollar amount (e.g. \$160,000 in California) of the death benefits. 5 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 98.03[1]; 10 LARSON App. B-16; N.Y. WORKERS’ COMP. § 16 (McKinney 2002); Cal. Lab. Code § 4702 (West 2002). For the New York schedule of benefits for serious injuries (permanent partial disability), see New York Workers’ Compensation Law § 15 (1991).

⁶¹Final Rule, *supra* note 49, § 104.43.

⁶²See *Putting a Value on Lives*, N.Y. TIMES, Jan. 24, 2002, at A26.

⁶³See, e.g., 1 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 1.03[4] (2000) (“There is no place in [workers’] compensation law for damages on account of pain or suffering, however dreadful they may be.”).

⁶⁴See, e.g., *Liff v. Schildkrout*, 404 N.E.2d 1288 (N.Y. 1980).

⁶⁵See DAN B. DOBBS, THE LAW OF TORTS § 297 (2001).

other states, such as California, refuse to recognize pain and suffering of the deceased *victim* prior to death as recoverable in tort.⁶⁶

Nonetheless, the Special Master provided for *scheduled* non-economic benefit awards under the Fund, for each victim and every surviving eligible family member. In the Interim Final Rule, \$250,000 was to be awarded for each victim; a figure that remained unchanged in the Final Rule.⁶⁷ With respect to survivors, the Interim Final Rule provided \$50,000 for the spouse and each dependent, a figure that was increased to \$100,000 in the Final Rule.⁶⁸ Thus, a surviving spouse with two children would receive benefits of \$550,000 for non-economic loss in a claim under the Fund.

D. Resolving Tensions: A Perspective

The game plan for implementation that emerges from the Fund and its subsequent interpretation in the Final Rule can be seen as a curious hybrid: one foot in no-fault precepts and the other in tort principles. Neither the Fund provisions nor the implementing regulations can be read, however, apart from the long shadow cast by three related considerations: 1) the constraints on the tort action provided as an optional remedy; 2) the fundamental structure of common law tort rules; and 3) the September 11 events themselves.

Consider initially the constraints on the tort remedy enacted along with the Fund. As mentioned earlier, this statutory tort action replacing common law tort rights (albeit adopting common law *substantive* tort principles) capped tort at insurance limits against virtually all potential defendants.⁶⁹ As a practical matter, this was taken to mean that recovery under the tort option, if it were exercised, might be severely limited after all the outside property damage claims (which of necessity would be brought in tort) were aggregated with personal injury claims – \$1.5 billion per air carrier, it was thought, would soon be exceeded.⁷⁰ To the extent that this perception was accurate, it created pressure for a no-fault option sufficiently robust to avoid coercing claimants into substantially diminished recoveries in tort.

Related to this point, as the next section will indicate, even the watered-down version of tort was by no means clearly an available option. The applicable common law rules required a considerable stretch to provide a remedy to victims in the World Trade Center; and as far as passengers on the flights were concerned, negligence of the carriers and baggage inspectors – let alone more attenuated defendants – was anything but a foregone conclusion.⁷¹

⁶⁶See *Williamson v. Plant Insulation Co.*, 28 Cal. Rptr. 2d 751 (Cal. Ct. App. 1994).

⁶⁷*Final Rule*, *supra* note 49, § 104.44.

⁶⁸*Interim Final Rule*, *supra* note 48, § 104.44; *Final Rule*, *supra* 49, § 104.44.

⁶⁹See *supra* notes 36-37, and accompanying text.

⁷⁰See Lizette Alvarez & Stephen Labaton, *A Nation Challenged: The Bailout; An Airline Bailout*, N.Y. TIMES, Sept. 22, 2001, at A1; Mary Jacoby, *Lawyers Say Suits May Benefit Clients*, ST. PETERSBURG TIMES, Nov. 15, 2001, at 1A; Bob Van Voris, *Lawyers Take Over Ground Zero*, NAT'L L.J., Mar. 11, 2002.

⁷¹See discussion *infra* Part IV.

Finally, the event itself cast a long shadow. No one would rest easily with coercing the surviving families into a long, drawn-out pursuit of recovery in tort, given the special sympathy for their plight.

In view of these factors, the Special Master's strategy emerges and becomes apparent: Edge up closely enough to the range of tort compensation to make no-fault benefits under the Fund an offer that could not be refused by most eligible parties. Note that this is a very different set of motivations than one ordinarily finds underlying no-fault systems. Workers' compensation, auto no-fault, black lung benefits for coal miners, and virtually every other system of no-fault, unapologetically provide a form of social insurance against risk; they are not fraught with symbolic significance associated with heroism and patriotic feelings.

IV. THE TORT OPTION

As indicated earlier, a potential claimant under the Fund is put to a choice: An eligible party can claim benefits under the Fund and waive tort, or opt out of the Fund and take one's chances in tort.⁷² In the Final Rule, the Special Master makes it somewhat less of a stark proposition by providing that claimants can get "ballpark estimates" of recovery under the Fund before deciding whether to waive any claim for no-fault benefits.⁷³ But once the tort option is chosen, the claimant takes tort on its own terms.

In fact, tort claimants are channeled into a system that might involve taking tort on *less* than its ordinary terms, because the pool of available funds – given the cap on liability at insurance limits and the non-Fund-eligible claims for property loss – may very well yield what mass tort observers refer to as a "limited fund."⁷⁴

Liability limits aside, what are the prospects in tort? Consider first the airline passengers. Ordinarily, air crash cases are settled relatively quickly. But there is nothing ordinary about the circumstances of September 11. Can negligence be established against the airlines? Perhaps, by arguing a failure to secure the cockpits adequately, or asserting that there was inadequate screening for dangerous objects – although the latter would require extending vicarious liability to the airlines for alleged negligence of the security screeners, who were at least formally independent contractors.

The inspector/screeners could of course be sued directly, and their liability in fact is not capped under the statutorily established tort remedy. But their solvency is in question; and here too establishing negligence would be somewhat problematic. The box cutters carried onto the planes and apparently used as the principal weapons by the terrorists, for example, were not clearly in violation of FAA regulations.⁷⁵

The terrorist acts raise an independent issue in tort, creating the prospect of a defense claim of no proximate cause, because they could be taken to be

⁷²See *supra* Part II.C.

⁷³*Warily Circling the Sept. 11 Fund*, N.Y. TIMES, June 5, 2002, at A26.

⁷⁴See FED. R. CIV. P. 23(b)(1)(B).

⁷⁵Shelley Murphy, *America Attacks: Impact on New England; Logan's Baggage Screeners Defended Workers Unfairly Blamed, Company Supervisor Says*, BOSTON GLOBE, Oct. 10, 2001, at B1; Jonathan Eig, *Affixing the Blame for Sept. 11 Loss: A Widow's Choice*, WALL ST. J., Sept. 11, 2002, at A1.

unforeseeable acts and consequently as intervening misconduct that cut off the liability of both the airlines and the screeners. None of these issues is sufficiently clear to avoid the strong prospect of protracted and uncertain litigation before a jury.

If anything, claims on behalf of the building occupants and rescuers rest on even less firm ground. Here, the case against the airlines and security personnel is a substantial step further removed in terms of foreseeability, making it likely that proximate cause requirements would be very difficult to satisfy. Indeed, it is correlatively less clear that the case would survive summary judgment in the first instance. It would be possible, of course, to sue instead (or in addition) the building owner and perhaps various building contractors and parties involved in the design and construction of the World Trade Center. On this score, once again, there is a threshold issue of negligence that must be satisfied, as well as a related question of cause in fact; in other words, would even a non-negligent design have withstood the impact of the massive collision and incineration? The early reports and studies are inconclusive at best.⁷⁶

In short, the prospects of establishing claims in tort are far from certain. Nonetheless, whatever the risks in tort, comprehensive analysis requires assessment of the benefits as well. These are relatively familiar; in tort, there would be no scheduling of economic or non-economic loss, juries would be relatively unconstrained, and the background events seem to assure a strong measure of underlying sympathy for the plaintiffs.

Depending on the applicable state law, there might not be collateral source offsets; and certainly even in less generous jurisdictions there would be no offsets for pensions and life insurance.⁷⁷ Similarly, punitive damages would not be barred (as by the Act⁷⁸), although in view of the attenuated case for negligence and proximate cause the likelihood of anything beyond compensatory damages seems small.

Thus, if liability in tort could be established, damages would likely be higher than under the Fund, particularly for very high-wage earners and those who had highly promising future job prospects. But once again, there is the limit on aggregate damages under the Fund to take into account, and the time value of comparative awards.

Presumably, recovery under the Fund would be far quicker and subject to far lower litigation costs than recovery in tort, even if the latter were ultimately successful. In the end, recourse to tort is subject to a sufficient number of potential pitfalls and limitations to make the Fund option appear more attractive, on its face, for most claimants.

V. A MODEL FOR THE FUTURE?

At the outset, I noted that when tragedy strikes, victims ordinarily look to the tort system for redress as long as there is a potentially responsible party. Is the tragedy

⁷⁶See James Glanz & Eric Lipton, *Expert Report Disputes U.S. on Collapse*, N.Y. TIMES, Oct. 22, 2002 at B1. See also, *Report on Towers' Collapse Ends Mostly in Questions*, N.Y. TIMES, May 1, 2002, at C18.

⁷⁷New York does recognize collateral offsets by statute, but not for life insurance. See N.Y. C.P.L.R. § 4545 (McKinney 2002) (requiring collateral source offsets but excepting life insurance and certain other collateral sources such as social security benefits).

⁷⁸Air Transportation Safety Act § 405(b)(5).

of September 11, and the adoption of the Victim Compensation Fund, likely to trigger a shift in social attitudes towards no-fault compensation of those injured or killed by random tragic events? Put aside terrorist activities for the moment. Scaffolding falls unexpectedly from a tall building onto a busy street, crushing the unsuspecting driver and passenger in a passing automobile.⁷⁹ For the victims, there is no government compensation plan, other than Social Security benefits, to provide economic assistance to the surviving family even if the potential defendants are insolvent so that tort is not a realistic option.

These “Acts of God,” or of randomly careless and/or irresponsible parties, occur and will continue to occur episodically. As a society, we deeply empathize, for the moment, with the plight of the victims and survivors. But soon we go about our lives, depending on existing private insurance mechanisms and tort, if the circumstances are right, to provide compensation. Where tort is applicable, we depend on it, in part, to promote deterrence of similar risk-generating conduct in the future. It seems highly unlikely that anything coming out of September 11 will alter this pattern of expectations and systematic arrangements in the direction of a broad-based no-fault compensation scheme.

But what about random *terrorist* activities: Is the September 11 no-fault scheme likely to provide a blueprint for future responses to such events? The similarities of September 11, albeit on a smaller scale of human carnage, to the Oklahoma City bombing and the earlier World Trade Center terrorist incident, among others, were not lost on observers; critics soon raised fairness concerns about awarding benefits to September 11 survivors when no such scheme was in place or enacted after the fact for the victims of earlier terrorism against the nation.⁸⁰ In part, this concern may now be addressed retroactively.⁸¹ Still, there is no systematic governmental effort to identify victims of past terrorist attacks and incorporate them in a scheme resembling the Victim Compensation Fund.

Nonetheless, it is one thing to tolerate differential treatment of events that have already transpired. It is quite another to ignore parallels if the nightmare of an event roughly similar in character to September 11 were to occur again in the near future. It seems highly unlikely that victims of a like attack on commercial high rises in or outside of New York, in the near future, would not be incorporated under an amended version of the Victim Compensation Plan. All the same, looking to the longer-term future, it seems premature to predict whether such a scheme, or one grounded in a more traditional social welfare, needs-based economic loss model, will be adopted down the road. That depends, in significant part, on how satisfied we are, from the perspectives of fairness and cost, with the implementation of the Victim Compensation Plan itself, which is just getting under way.

⁷⁹See Gary Washburn, Jeremy Manier, & Crystal Yednak, *Permits Key in Scaffolding Probe; Officials Unsure Who's Responsible for Issuing Them*, CHI. TRIB., Mar. 12, 2002, at N1.

⁸⁰*Oklahomans Questioning Sept. 11 Aid*, N.Y. TIMES, Dec. 23, 2001, at B8.

⁸¹See David W. Chen, *Many Relatives, Wary and Anguished, Shun Sept. 11 Fund*, N.Y. TIMES, June 1, 2002, at B1 (noting that the House passed legislation that would make American victims of the 1998 U.S. Embassy bombings in Africa eligible for compensation from the Fund and that some senators were also seeking to expand the Fund's scope to include victims of the 1993 World Trade Center and the 1995 Oklahoma City bombing).

One can hope that we never face terrorism on a massive scale again. If instead we confront the also-grim prospect of an occasional random, small-scale loss of life at the hands of terrorists, it seems more likely that tort will remain our first-order systemic response – just as it is presently when a scaffold falls from a building or a plane from the sky, and the lives of the unfortunate victims and surviving families are altered forever. In the end, tort has demonstrated remarkable staying power. By contrast, government intervention to provide no-fault benefits remains a chancier proposition, and, at this point, an approach that fails to be grounded in a broader social consensus about what fairness and justice require.