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COMPENSATION FOR VICTIMS OF TERROR: A SPECIALIZED JURISPRUDENCE OF INJURY

*Marshall S. Shapo**

I. A JURISPRUDENCE OF INJURY

The attacks of September 11 pose challenges to what I have called our jurisprudence of injury:¹ a comprehensive, if loosely defined system of law that includes tort, compensation statutes and regulation. The basic tort features of the events are clear. The primary wrongdoers were intentional tortfeasors, of whom the operational villains are dead and their managers as a practical matter unreachable, unless the attacks eventually come to be tied to a government.

One could ascribe negligence to a number of secondary actors in the American private sector and also to the government. Although one may reasonably predict that any negligence of the government would be immunized by the discretionary function exception of the Federal Tort Claims Act,² this asserted negligence would provide a policy basis for the funding provided by the September 11 Victim Compensation Fund of 2001 (“Fund”).³ Further fleshing out the broad spectrum of the jurisprudence of injury, the Fund itself represents, in an extraordinarily complex way, the sort of compensation system that has been primarily associated with workers’ compensation. Finally, various regulatory and quasi-regulation issues swirl around the subject after the fact, notably the

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1. *See generally* ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984) [hereinafter JURISPRUDENCE OF INJURY].

2. *See* 28 U.S.C. § 2680(a) (2000).

3. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401-409, 115 Stat. 230, 237-41 (2001) [hereinafter Air Safety Act].

question of how much the government should be involved in providing security against terrorists—in this case, airport security.

Complicating the analysis is what I have called, in another connection, the Problem of the Missing Tsar.⁴ Ideally, we might desire a sovereign who would make decisions on both an overall basis and a day-to-day basis about how the consequences of personal injuries are to be allocated among various social institutions. It is true that all of our traditions—philosophical as well as practical—militate against having a Tsar. What is striking about the legislation setting up the Fund, however, is that, in fact we have created a sub-Tsar for the event: the Special Master.⁵

A global challenge to a targeted fund of this sort inheres in the compassionate desire to create a comprehensive umbrella for a wide range of misfortunes. At the other pole is the instinct to decentralize the allocation of injury costs as much as possible to those who cause injuries, and, where they have any responsibility for injuries, to the victims. Thus, our desire for large public policy solutions, of which the most comprehensive injury compensation plan on the planet is the New Zealand solution,⁶ is forever at war with a highly focused tort way of doing things.⁷ The events of September 11 put these philosophical issues to a grisly test.

This Article focuses on the Fund, which is one title of a broader statute, the Air Transportation Safety and System Stabilization Act.⁸ I shall be commenting on what Congress may have been thinking when it hurriedly passed this legislation, which is dated just eleven days after the horrific events in question. And I shall suggest some other rationalizations for this unique statute, including its specific combination of wealth transfers and liability limitations.

II. THE EVENTS

Let us briefly rehearse the facts of September 11 as they would appear in the narrow terms of the common law. The events in question arose out of a carefully planned set of intentional torts. Persons who

4. See Marshall S. Shapo, *Tort Reform: The Problem of the Missing Tsar*, 19 HOFSTRA L. REV. 185, 185 (1990).

5. See Air Safety Act, *supra* note 3, § 404(a).

6. For a summary by a knowledgeable observer, see Sir Geoffrey Palmer, *The New Zealand Experience*, 15 U. HAWAII L. REV. 604 (1993).

7. See, e.g., JURISPRUDENCE OF INJURY, *supra* note 1, at 10-187-10-192 (summarizing the relationship of tort to other systems of compensation and regulation).

8. See Air Safety Act, *supra* note 3, §§ 401-409.

were literally troglodytes, halfway around the world, conceived a massive series of trespasses and batteries with the purpose of inflicting emotional distress not only on victims but on the nation as a whole. As this is written, it is not beyond the realm of possibility that there may be some involvement of actual governments, in addition to unofficial organizations, in these events. If that were the case, there would be a potential to impose an international form of tort liability against those governments⁹ as well as, theoretically, against individuals and nongovernmental groups.¹⁰

From a domestic law point of view, however, the principal bases for tort liability lie in a set of possible negligences—or even strict liabilities—that might be taxed to various actors. These include private providers of security, whose alleged carelessness in hiring and carrying out their duties would appear to present a *prima facie* case of negligence. Those front-line negligent tortfeasors, however, are likely to be unusable for anything like the amounts at stake.

More practical potential defendants are the airlines, who contracted with the security organizations, and who had independent responsibilities of care to their passengers and to others who would prove to be in harm's way. The carriers at least have much more capacious pockets than the security firms. They are also the beneficiaries of the immunity provided by the waiver requirements the statute imposes on those who take advantage of the compensation system established for the victims of the attacks.¹¹

Another group of private parties that might be defendants is the makers of the airplanes, who could be alleged to have provided inadequate security for the flight deck. Finally, a possible defendant is the Government, whose agents possessed fragments of information that, in retrospect, could be taken to generate duties to prevent these deadly acts, with the variety of risks they presented to many interests.

I set against this background of legal theory a few personal anecdotes that have policy relevance to a day on which Americans will always remember where they were when they heard the news. As members of my law school community gathered in the school atrium

9. *See, e.g.*, The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(5) (1994 & Supp.) (providing for damage actions “against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state” or its officials or employees).

10. *See* 18 U.S.C. § 2333(a) (2000) (stating that “[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States”).

11. *See* Air Safety Act, *supra* note 3, § 405(c)(3)(B)(i).

during the first hours after the attacks, I encountered a woman who I recognized as a member of the torts class that had just begun for the term. We chatted briefly about the possible effects of the events on civil liberties. The next morning I encountered her again and she mentioned that she had been acquainted with a young man who had been a leader of the passengers' heroic stand against the hijackers on the Pennsylvania flight. That morning I also received an e-mail from another member of the class who told me that he would not be in class for some days because he had gone to New York City to see his orthodontist, and could not get a return flight. He reported that his plane had landed at La Guardia airport at precisely 9:00 a.m. just as the attacks were in progress.

A fellow synagogue member of one of my sons, who lives in Northern Virginia, crawled from the wreckage of the Pentagon. A friend and former professional colleague of my other son, who lives in Illinois, was the recently appointed director of the New York Port Authority. He did not escape from his office in the eyrie of one of the Twin Towers. I record these stories purely as illustrations of the radiations of these events throughout the polity—examples of how in a dreadfully fortuitous way they tended, at least pro tem, to make that fragmented collection of a quarter billion people into a community.

III. THE LEGISLATIVE RESPONSE

Congress' response focused on those who died or were physically injured by the attacks.¹² The legislation setting up the Fund¹³ provides a virtual textbook of leading issues in contemporary injury law:

It establishes a nontort alternative for "any individual (or relatives of a deceased individual) who was physically injured or killed as a result" of the attacks.¹⁴ This alternative is a specialized compensation system under the administration of the Special Master.¹⁵

"[T]he Special Master shall not consider negligence or any other theory of liability,"¹⁶ and "may not include amounts for punitive damages in any compensation paid."¹⁷

A remarkable subsection declares that "the amount of compensation to which the claimant is entitled" shall be "based on the harm to the

12. *See id.* § 403.

13. *See id.* §§ 401-409.

14. *Id.* § 403.

15. *See id.* § 404.

16. *Id.* § 405(b)(2).

17. *Id.* § 405(b)(5).

claimant, the facts of the claim, and the individual circumstances of the claimant.”¹⁸

“The Special Master shall reduce the amount of compensation . . . by the amount of the collateral source compensation the claimant has received or is entitled to receive”¹⁹

Collateral sources to be deducted from payments under the program include “life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to” the attacks.²⁰

The waiver of the right to file civil actions for those who submit claims under the Fund “does not apply to . . . civil action[s] to recover collateral source obligations.”²¹

A claimant who submits a claim for compensation “waives the right to file a civil action . . . for damages sustained as a result of” the attacks.²²

For those who elect to sue carriers, there will be “a Federal cause of action” that “shall be the exclusive remedy for damages arising out of” the attacks,²³ and the liability of the carriers for both compensatory and punitive damages “shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”²⁴

With a swiftness matched to the occasion, the Department of Justice in consultation with the Special Master, who was appointed on November 26, 2001, moved to establish a detailed set of rules for the administration of the Fund. The rules, originally promulgated in the form of an Interim Final Rule on December 21, 2001,²⁵ include the following provisions as augmented in the Final Rule published on March 13, 2002:²⁶

“Eligible claimants” include those present at the attack sites “at the time of or in the immediate aftermath of the crashes . . . who suffered

18. *Id.* § 405(b)(1)(B)(ii).

19. *Id.* § 405(b)(6).

20. *Id.* §§ 405(b)(6), 402(4).

21. *Id.* § 405(c)(3)(B)(i).

22. *Id.*

23. *Id.* § 408(b)(1).

24. *Id.* § 408(a).

25. *See* Interim Final Rule, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,282 (Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104) [hereinafter Interim Rule]. Unless otherwise indicated, all subsequent citations are to this Interim Final Rule.

26. *See* Final Rule, September 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].

physical harm” and the personal representatives of those who died on any of the four hijacked planes or at any of the attack sites.²⁷

The Special Master “shall take into consideration” “individual circumstances” that “may include the financial needs or financial resources of the claimant or the victim’s dependents and beneficiaries.”²⁸

Before the deduction of collateral sources, no compensation award could be “less than \$500,000” where a decedent had a spouse or dependent or \$300,000 in the case of a decedent “who was single with no dependents.”²⁹

In the case of decedents “who did not have any prior earned income, or who worked only part time outside the home,” economic loss could be calculated “with reference to replacement services and similar measures.”³⁰

“The presumed non-economic losses for decedents” would be “\$250,000 plus an additional \$100,000 for the spouse and each dependent of the deceased victim.”³¹

“[T]he United States shall be subrogated to all potential claims against third party tortfeasors of any victim receiving compensation from the Fund.”³²

IV. PROBLEMS IN ADMINISTRATION AND PUBLIC PERCEPTION

The statute and the rules, drafted under the pressure of public outrage at the events and compassion for the plight of the survivors, generated some difficult problems in practical administration as well as public relations. As the New Year dawned, there were reports about the reluctance of potentially eligible people to sign on as beneficiaries of the Fund.³³ Television news clips captured the discomfort of the Special Master, the very able and experienced Washington lawyer Kenneth Feinberg, as he faced emotional criticisms by survivors.³⁴ The survivors complained of such features of the Fund as the \$250,000 cap on noneconomic damages.³⁵ A New York City police officer whose wife died in the attacks told Mr. Feinberg at a meeting with victims, “I feel

27. Interim Rule, *supra* note 25, §§ 104.2(a)(1)-(3), at 66 Fed. Reg. 66,282.

28. *Id.* § 104.41, at 66 Fed. Reg. 66,286.

29. *Id.*

30. *Id.* § 104.43(c).

31. Final Rule, *supra* note 26, § 104.44, at 66 Fed. Reg. 11,246.

32. Interim Rule, *supra* note 25, § 104.63, at 66 Fed. Reg. 66,287.

33. *See, e.g., Evening News* (CBS television broadcast, Jan. 18, 2002).

34. *See, e.g., Good Morning America* (ABC television broadcast, Jan. 22, 2002).

35. *See* Milo Geyelin, *Criticism of Sept. 11 Victims' Fund Sparks Backlash*, WALL ST. J., Jan. 23, 2002, at B1.

your offer spits on my wife, my mother-in-law and my father-in-law,” saying that he had to watch his in-laws “pop pills just to get through the day.”³⁶

At the same time, criticism mounted from those vexed with what they considered the avarice of the victims’ families. One viewer wrote an officer of a victim advocacy group, “[i]f \$1.6 million isn’t enough for you, then I hope you rot in hell.”³⁷ Another letter writer said, “[w]e feel your grief, really,” but “I’m just wondering if we have to feel your greed, too.”³⁸ A particularly graphic example of the almost tawdry mediaizing of the issue was a full color picture that occupied most of the front page of the *Chicago Sun-Times*.³⁹ The photograph was of sixteen women, pregnant on September 11, whose husbands died in the attacks.⁴⁰ These widows, most of them smiling broadly with their infants in their arms, appeared surrounding a radiantly smiling Diane Sawyer, anchor person for ABC.⁴¹ A Chicago computer consultant, interviewed by a reporter on State Street, declared that “a little bit of this is becoming a money grab . . . How you die and when you die is somehow becoming worth more money. I don’t think we’re giving \$1.6 million to the families of soldiers killed in Afghanistan.”⁴²

Even within the narrow topic addressed here, Osama bin Laden had created a problem for Solomon. Indeed, it was one that went far beyond deciding what to do with one baby in a controversy between two women. It required a consideration of the traditional rationales of tort law, of the bases for fashioning specialized compensation systems, and of the overarching problem of how society should respond to misfortunes generally.

V. THE GOALS OF LAW AND POLICY

When we analyze policy questions both molar and molecular,⁴³ our scholarly traditions teach us to look for the major premise. What are the goals of law and policy in determining society’s responses to the attacks of September 11? One orthodox form of analysis indicates that a

36. *Id.*

37. *Id.*

38. *Id.*

39. *See Victims’ Families Face Backlash*, CHI. SUN-TIMES, Jan. 24, 2002, at 1.

40. *See id.*

41. *See id.*

42. Art Golab, *Victims Fund Raises Ire: Backlash Hits Victims’ Kin*, CHI. SUN-TIMES, Jan. 24, 2002, at 18.

43. The dichotomy is Holmes’, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917).

principal goal of injury law is the control of behavior that creates risks.⁴⁴ Interestingly, the deterrence function indirectly provided by the statute requires initiation by claimants who elect to bring private actions. If one assumes that allowing suits against carriers and their agents would lead to efficient levels of risk-taking, the statute creates an intriguing wrinkle on the usual criticism of the “negligence lottery.” In this context, whatever social dicing there is depends on the decisions of individual claimants about whether to seek compensation from the Fund, or to exercise their common law rights to sue the airlines.

It is relevant here to refer to the very first section of the overall statute, which as noted is called the Air Transportation Safety and System Stabilization Act, and of which Title I is labeled “Airline Stabilization.”⁴⁵ That section provides for federal compensation for air carriers, implemented by the President, “in an aggregate amount equal to \$5,000,000,000 for . . . direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order” and subsequent orders of that sort.⁴⁶ This amount also covers “the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.”⁴⁷ Thus, typifying a public choice approach, Congress pays off the airlines for their misfortunes as a result of the attack; under the same statutory roof, it also leaves open a litigation avenue for injured persons and survivors that presumably would have the incidental result of making the airlines more careful.

The legislation manifests several specific purposes. But intuition suggests that, fashioned in the emotional aftermath of the attacks, the statute also reflects an unfocused desire to strike out against a particularly awful set of life’s misfortunes, events burdening the national soul with a recognition that retribution is not available on behalf of the victims—or the nation—in any tit-for-tat manner. The statute thus is both a symbol of displaced vengeance and a marker of social compassion. At the very outset of the Special Master’s statement attached to the Interim Final Rule for the Fund, he refers to the Fund as “an unprecedented expression of compassion on the part of the American people to the victims and their families devastated by the horror and the tragedy of September 11.”⁴⁸

44. See, e.g., JURISPRUDENCE OF INJURY, *supra* note 1, at 4-3-25.

45. See Air Safety Act, *supra* note 3.

46. *Id.* § 101(a)(2).

47. *Id.* § 101(a)(2)(B).

48. Interim Rule, *supra* note 25, at 66 Fed. Reg. 66,274.

The use of law—any kind of law—as a deterrent is imprecise at best.⁴⁹ Because of that inexactitude, dependence on deterrence as the centerpiece of tort rationales constantly runs the risks of both under- and over-deterrence. Those difficulties find a close parallel within injury law in problems of under- and over-compensation. In traditional analysis, fairness of compensation is the other principal pillar of injury law alongside deterrence. Suits against the carriers, in the view of some, would provide some corrective justice in favor of the victims and survivors. However, the enactment of the compensation legislation obviously is aimed at fairness in the round—at a kind of distributive justice in a situation where the concept of justice is multifaceted.

In theory, Congress might have begun the legislative process by viewing itself as a think tank, dedicated to cogitating on the human toll of the attacks in the broad context of how society allocates life's burdens, including the burdens of death and injury, in general. However, Congress did not have that meditative luxury. And even if it had, it would have been sensitive to the problem of the Tsar; it would have recognized that it is not at all likely that it will enact a fully articulated, comprehensive compensation system for all kinds of misfortune. Therefore, in deciding to allocate federal funds to the victims, Congress made a pragmatic decision to carve out these particular events from all the rest of life's misfortunes for which some remedy can be provided by dollars. In this regard, it is noteworthy that the victim compensation part of the statute "constitutes budget authority in advance of appropriations Acts and represents the obligation of the Federal Government to provide for the payment of amounts for compensation under this title."⁵⁰

With respect to those who choose to take advantage of federal funding and thus to waive any tort actions, Congress made a number of rough-and-ready judgments. These judgments reflect many of the cross-currents that run through our law of injuries, including the common law of torts and the development of statutory compensation systems.

The decision to enact a no-fault system is one of the most important of these choices. We should note the contrast between this no-fault scheme and that of workers' compensation. Even at the time that the states adopted the workers' compensation model to deal with the

49. Cf. *Moisan v. Loftus*, 178 F.2d 148, 149 (2d Cir. 1949). In this opinion, which implicitly emphasizes the limits of the formula in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), Learned Hand notes the "illusory" nature of quantitative estimates of the factors most often crucial to issues of negligence. See *id.* I am grateful to Chris Montroy for calling this case to my attention.

50. Air Safety Act, *supra* note 3, § 406(b).

problem of industrial injuries, there was at least a real possibility of a tort action against a known defendant, who was directly responsible for the injuries in question. By comparison, any fault of potential domestic defendants in the case of the attacks is a fault that derives only from the crimes of third parties who are either dead or extremely elusive.

The decision to leave to claimants the choice of an assured compensation payment from federal funds or the gamble of a torts suit is not a unique one,⁵¹ although this surely is not the approach of the workers' compensation model. Again, the comparison with that system is interesting. Workers' compensation is, in the main, an exclusive remedy, with its exclusivity justified on the basis of a well-known *quid pro quo*: plaintiffs give up the tort action, tied as it is to the handicaps of contributory negligence and assumption of risk, in exchange for a relatively assured, but often less lucrative, payment. By comparison, the Fund legislation offers legal consumerism in the hyper mode. Although the suit against the carriers is an exclusive remedy within the category of civil actions, it is only one of two full alternative remedies.⁵² Wildly differing metaphors may apply: the consumer gets to play one of two games available in the casino—or gets to pick from either of two sections of the supermarket. These crass presentations of the issue simply underline the leeway to indirectly influence the choice of social policy that Congress has given to potential claimants.

In addition to the straight subsidy provided the airlines for both direct and incremental losses,⁵³ and the compelled waiver of civil actions imposed on those who elect compensation from the Fund,⁵⁴ the carriers received yet another benefit from the Fund section of the legislation. This is the provision on liability actions that caps “liability for all claims, whether for compensatory or punitive damages” at the “limits of the liability coverage maintained by the air carrier.”⁵⁵ That provision is an anomaly where traditional tort law is concerned. In fact, it is a very different kind of cap than those that typically appear in tort-reform legislation and proposals, which focus on damage amounts for noneconomic losses and punitive damages. Those types of caps essentially define, if arbitrarily, what losses are. By comparison, the

51. *See, e.g.*, *Allison v. Merck & Co.*, 878 P.2d 948, 960-61 (Nev. 1994) (holding no preemption of suit for vaccine-caused injuries by National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-11-15 (Supp. 1992)).

52. *See supra* text accompanying notes 14-15.

53. *See* Air Safety Act, *supra* note 3, § 101(a)(2)(A)-(B).

54. *See id.* § 405(c)(3)(B)(i).

55. *Id.* § 408(a).

Fund legislation implicitly acknowledges that legally recognized losses may be greater than insurance coverage but makes a public choice that constitutes a direct subsidy.

The usual stance of tort law, in harsh current slang, has been that entities that are careless on a large scale “deserve to die.” Illustrative are the bankruptcies of many asbestos companies as well as of the maker of the Dalkon Shield. But for a variety of policy reasons, Congress in this statute enacted the view that the airlines deserved to live even if they were careless; indeed, it in effect said that they must live, for the health of the nation.

Another interesting feature of the Fund legislation is the breadth of its definition of the collateral sources that must be deducted from payments by the Fund.⁵⁶ Particularly striking is the inclusion of life insurance in the definition of deductible collateral sources, a choice that goes beyond traditional definitions of such payments.⁵⁷ Giving especially sharp point to Congress’ decision to deduct collateral sources and to deduct them so broadly—as well as its apparent premise for doing so—is the Special Master’s explication of the definition of economic loss.⁵⁸ There, he paraphrases the rules as mandating that his “schedules, tables, or charts should identify presumed determinations of economic loss up to a salary level commensurate with the 98th percentile of individual income in the United States.”⁵⁹ He comments that “any methodology that does nothing more than attempt to replicate a theoretically possible future income stream would lead to awards that would be insufficient relative to the needs of some victims’ families, and excessive relative to the needs of others.”⁶⁰ He also notes specifically that the requirement in the Act that he

consider “the individual circumstances of the claimant” indicates that the Special Master may consider a particular claimant’s financial needs and resources, just as the Department [of Justice] and the Special Master considered the needs of the claimants in concluding that no claimant bringing a claim on behalf of a deceased victim should receive less than \$500,000 or \$300,000 before collateral source offsets.⁶¹

56. See Air Safety Act, *supra* note 3, § 402(4).

57. See, e.g., RESTATEMENT (SECOND) OF TORTS, § 920A cmt. c (1977).

58. See Interim Rule, *supra* note 25, at 66 Fed. Reg. 66,274, 66,278 (Statement by the Special Master).

59. *Id.* at 66 Fed. Reg. 66,278.

60. *Id.*

61. *Id.*

Congress, the rules, and the Special Master thus all accept the proposition that social fairness requires taking need into account. But need is defined, in true capitalist style, as related closely to income levels. Illustratively, before collateral offsets the payments to survivors of a married victim who died at thirty-five with two dependent children would total \$809,426 if he was earning \$10,000, but would be \$4,542,828 if he was earning \$225,000.⁶² For a single decedent who was thirty-five and earning \$10,000 when she died, the payments—again before collateral offset—would be \$325,946 but they would be \$2,523,762 for someone earning \$225,000.⁶³

These raw numbers are excellent examples of the reasons for the vexation of critical legal scholars about the inegalitarian nature of tort damages.⁶⁴ However, the rules do make a small bow to feminist analysis in providing that for nonearners, the Special Master may consider “replacement services and similar measures.”⁶⁵ The bow is a restrained one because at least in their terms, the rules do not take into account the opportunity cost of homemakers who would net more money by putting their children in day care while they more fully realize their earnings potential.⁶⁶

The rules make a clear set of choices about the dollar value of feelings and of life generally. Perhaps the most interesting of these is the presumption of a \$250,000 value for the noneconomic loss of decedents and an additional \$100,000 for that of spouses and each dependent.⁶⁷ Those familiar with the cases involving pre-impact fear of persons killed in air crashes will understand that this appears to be exceptionally generous with respect to the awful final moments of the decedents.⁶⁸ By contrast, the rules seem relatively stingy with respect to the affective losses of survivors. These arbitrary choices simply illustrate the incoherency—perhaps the necessary incoherency—of our theories of

62. See Presumed Loss Calculation Tables Before Any Collateral Offsets, Revised on August 27, 2002, at 12 (“Presumed Economic and Non-Economic Loss for a Married Decedent with 2 Dependent Children (Ages Newborn and 9 at Date of Death of Victim) Before Any Collateral Offset”), available at http://www.usdoj.gov/victimcompensation/vc_matrices.pdf (last modified Aug. 27, 2002).

63. See *id.* at 14 (“Presumed Economic and Non-Economic Loss for a Single Decedent Before Any Collateral Offset”).

64. See, e.g., Richard Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 799 (1990) (saying that “[t]ort damages deliberately reproduce the existing distribution of wealth and income”).

65. Interim Rule, *supra* note 25, § 104.43, 66 Fed. Reg. at 66,286.

66. I am grateful to Martha Chamallas for remarks that led to this observation.

67. See Final Rule, *supra* note 26, § 104.44, at 66 Fed. Reg. 11246.

68. See, e.g., *Haley v. Pan Am. World Airways, Inc.*, 746 F.2d 311, 317-18 (5th Cir. 1984) (affirming \$15,000 award “for no more than four to six seconds of . . . anguish”).

tort damages, especially damages for intangibles. Underlining the difficulty of quantifying affective relationships in precise dollar amounts is the change of the awards for spouses and dependents from \$50,000 in the Interim Final Rule to \$100,000 in the Final Rule.⁶⁹ The explanation is laconic, as it almost had to be: “After reviewing the public comments and meeting with numerous families of victims, we have decided to double [the \$50,000] amount to \$100,000 for the spouse and each dependent.”⁷⁰

Related benchmarks are the overall compensation minimums of \$500,000 for decedents with spouses or dependents and \$300,000 for single decedents with no dependents.⁷¹ These are themselves arbitrary figures that could be criticized as too low—few would have the temerity to say that they are too high. What is significant is that they appear to codify a general belief that for a variety of reasons, stated and mostly unstated, the existence of a life itself has financial value. It is interesting in this connection that Congress, perhaps casually, specifically included the currently controversial concept of “hedonic damages” in the definition of “noneconomic losses.”⁷²

It is worth noting, at least incidentally, that the statutory references to those eligible for compensation do not appear to be rigorously logical. One may compare, in this regard, the statement of Congressional purpose “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed” in the attacks⁷³ with the definition of the category of eligible individuals as including “the personal representative of the decedent who files a claim on behalf of the decedent.”⁷⁴ There appears to be a mixture here of traditional concepts of wrongful death and survival, but this is surely not unique in our existing state law.

VI. CONCLUSION

The Fund legislation, and the losses that generated it, house many of the central arguments about how society should deal with injuries. In particular, they raise in a very emotional context the cross-equity problem among all kinds of injuries and misfortune more generally.

69. Compare Final Rule, *supra* note 26, § 104.44, at 67 Fed. Reg. 11,246, with Interim Rule, *supra* note 25, at 66 Fed. Reg. 66,286.

70. Final Rule, *supra* note 26, at 67 Fed. Reg. 11,239.

71. See Interim Rule, *supra* note 25, § 104.41, at 66 Fed. Reg. 66,274.

72. Air Safety Act, *supra* note 3, § 402(7).

73. *Id.* § 403.

74. *Id.* § 405(c)(2)(C).

From a social point of view, how do we distinguish the deserts of those who slip in the bathtub from those injured in the “second collision” of an allegedly uncrashworthy automobile? More relevantly, how do we distinguish those individuals from the firemen who were headed up into the Twin Towers as everyone else was coming down, and American soldiers who die from either hostile or friendly fire in Afghanistan—or Iraq?

Tort law provides only interstitial answers, and those only to the first pairing of victims, and Congress, as we have noted, is not likely to provide a comprehensive solution that encompasses all the cases. With no Tsar to place the issues in a general framework and settle them globally, the equity profile of compensation is a jagged one. On this battleground, symbolic disputants are the man who claims that a cap of a quarter of a million dollars on the intangible losses associated with the death of his wife spits on her memory and the person who accuses survivors of greed. And that battleground is political.

In creating the Fund, Congress tried to broker the politics of injury. What are we to make of this legislative patchwork, hastily constructed with the noblest intentions? Unlike the thoroughgoing New Zealand scheme, the Fund legislation carves out a narrow wedge of misfortune. Limited as it is to the relief of victims of events occurring in just three places on a single morning, the statute even contrasts with the workers’ compensation laws and the varied no-fault statutes for motor vehicle accidents. All of those statutes embrace injuries that occur every day throughout their jurisdictions.

There will be many different interpretations of why, out of the broad spectrum of possible responses, Congress chose to create this Fund with its distinct provisions. Surely some of the distinguishing features of September 11 that led our national legislature to this solution include the unique occasion of an attack on the continental United States that caused thousands of deaths and the repetitively-broadcast television images of the events. Even the instigating cave-dwellers of Afghanistan saw—as we all did—the crashes, the fire, and the smoke as they rolled along miles of videotape.

Let me compare the day of the attack on Pearl Harbor, at the edge of my memories of boyhood. Without plumbing the comparative impact of print, radio, and television, I think that we can say that the events of September 11 turned out to be a quintessential television occasion. That would have been so even if those events had not been made for television, although it appears that in a very real sense their diabolical instigators planned them that way. By comparison, Americans who saw

films of the attack on Pearl Harbor saw them, if at all, in newsreels in theaters. And at the time, Hawaii was not a state and in any event was 2500 miles away from the country as it then was constituted. The attack on the continental United States in 2001 aroused many feelings, but one response that stands out and is manifested in the Fund legislation—and is further magnified by the subsequent anthrax cases—is a new sense of national vulnerability.

All of this has led to a unique form of public choice. The legislation has something for everyone, in response to a most tragic set of circumstances. It specifically pays off the airlines, it limits their liability in any event, it offers them a potential immunity—remarkably, one conferrable by choices made by victims and survivors—and it funds a wide range of losses for those victims and survivors from the general revenues.

Finally, it provides a certain balm for us all, in our continuing horror at the events, our collective compassion for the victims, and our increased sense of vulnerability. The film clips and reports of the discussions that a sometimes beleaguered Special Master has had with the survivors present a continuing drama that would be as familiar to Tocqueville as to devotees of soap operas. After the accelerated fashioning and passage of the statute, and the speedy drafting of the rules with the Special Master's explication, we are only in an intermediate stage of that drama. Now we appear to be witnessing a nationwide community conversation about the limits of compassion, the sharing of burdens, and even the vices of greed and envy.

A byproduct of the Fund statute is its teaching about the limits of traditional economic analysis. Perhaps the most noteworthy feature of the Fund legislation is its most obvious feature: the commitment of federal money for the relief of victims of what was not only perceived domestically as an attack on us all, but was intended in that way.

Churchill, perhaps the greatest figure of the twentieth century in light of his combined accomplishments, captured the core of the situation with his characteristic eloquence, concision and humanity. In his war memoirs, he describes how his insistence on a national insurance scheme for bomb damage arose from his view of a demolished restaurant in Margate:

The proprietor, his wife, and the cooks and waitresses were in tears. Where was their home? Where was their livelihood? Here is a privilege of power. I formed an immediate resolve . . . I dictated a letter to the Chancellor of the Exchequer laying down the principle that

all damage from the fire of the enemy must be a charge upon the State and compensation be paid in full and at once.⁷⁵

Churchill observed that it was essential to the political success of this scheme that the public and Parliament were willing “to separate damage resulting from the fire of the enemy from all other forms of war loss.”⁷⁶ He added, “it would be a very solid mark of the confidence which after some experience we are justified in feeling about the way in which we are going to come through this war.”⁷⁷

There are, of course, differences in both the events and the responses. But as a general description of the politics and the policy of this specialized jurisprudence of injury, the words of the master are resonant. The Fund forges a linkage, one beyond the graphs of microeconomic theory, among tens of millions of souls. Besides the survivors, those include—only illustratively—my student with her acquaintance on the Pennsylvania plane, my student with the orthodontist’s appointment in New York, my sons and their friends and colleagues, living and dead.

75. WINSTON S. CHURCHILL, *THEIR FINEST HOUR* 349 (1949).

76. *Id.* at 350.

77. *Id.*