

The 9/11 Fund:
Sui Generis or Blueprint for the Future?

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Outline of Presentation

I. Introduction

A. Perspectives on Legislative Compensation Schemes

1. Worker's Compensation – origins and design of the traditional no-fault model
2. Iterations – 20th century developments
3. Limitations
 - a. conceptual
 - b. political

B. The 9/11 Fund: Departure from the traditional model

1. General considerations
 - a. Ex post model
 - b. Government responsibility
2. Congressional 9/11 model
3. Special Master 9/11 model
4. Special Master implementation

II. Acts of Terrorism: No-Fault or Tort?

A. Reprise on Sept. 11 (if no Fund had been established) – inadequacies of tort

1. Prospect of insolvency

2. Protracted delay, frustration, and uncertainty of litigation process for this particular class of victims – intolerable in this very special case

3. Liability issues – great uncertainty

- a. Passengers (v. airlines or screeners)
- b. Building occupants (v. above or building owner)
- c. Acceptable in this particular case to reach different outcomes in tort for these two distinct classes?

B. Scenarios for the future: The inadequacies of tort

1. Mass acts of terror
2. Localized acts of terror

C. Other no-fault models

1. Israel
2. Northern Ireland
3. State (U.S.) victim compensation schemes

III. Questioning the Baseline Assumption: Is there a case for special treatment – assured compensation – for victims of terrorism?

A. Israel does so under the justification of a nation at war, with victims of terrorism seen as indistinguishable from fallen soldiers

1. For purposes of adopting a no-fault compensation scheme, is the U.S. at war with a foreign enemy? Would we view the victims of a terrorist bombing in the near future as stand-ins for the nation at large?
2. If so, precisely with whom is the U.S. at war – *foreign* terrorists and their agents only? Under that rationale Oklahoma City victims are relegated to tort – and distinguished from 9/11-type victims.
3. If no-fault coverage is inclusive of Oklahoma City victims, is coverage then extended to victims of every white Aryan survivalist group and to victims of the next Unabomber? To all of the innocent victims, in other words, of those who have killed because

they have deep-seated grievances against the government? To the victims of terrorists like John Muhammad and Lee Malvo, in the reign of terror in D.C.? It strains common understanding to think of most of these victims of disparate acts of terrorism in war imagery.

B. Under a broader conception of “deserving victims,” as in Northern Ireland, it would be possible to carve out special no-fault treatment for victims of criminal violence more generally – which would include victims of terrorism.

1. All of the states have done so, in modest fashion. But the justification here, too, rests on an unstable foundation. If it is a communal expression of bereavement or sympathy, then what of the victims of the Rhode Island nightclub fire?

2. Catastrophic events of this kind obviously occur in random fashion—even putting aside natural disasters – and our traditional response has been to relegate the victims to tort (for better or often for worse).

C. Normative concerns and realpolitik considerations seem to merge at this point – that is, because we find it so hard to draw sensible boundaries, the tendency has been to avoid creating special domains of assured compensation.

D. In the end, then, the 9/11 model and its variants may well fail to have lasting influence as much because of the inability to come up with a convincing foundation for treating the victims of terrorism as a special class as because of specific design flaws in the model.