8 CLAIMS FACILITIES

FOLLOWING THE 2013 BOSTON MARATHON attack, One Fund Boston was founded to collect private donations to compensate those injured. That experience prompted interest in the idea of a national compassion fund. Such a fund would serve as a centralized facility for nonnatural disasters, as a counterpart to the International Red Cross, which aids victims of natural disasters.[1] Imagine that you are a partner with a firm that specializes in nonprofit organizations. Will you advocate creating this fund or suggest that victims use the traditional tort mechanism? If you opt for a fund, how might you approach its design? Should there be different categories of circumstances covered? Who would finance the administration of the fund and its compensation payments? Would claimants be entitled to opt out of the fund and use regular courts?

"Claims resolution facility" is a term used to describe entities like this hypothetical fund that are organized to process and compensate mass injury claims.[2] A facility may derive from a range of circumstantial and legal triggers. A natural disaster like Hurricane Katrina, an act of terror like the Boston Marathon bombing, a defective product like asbestos—each demands a means to achieve justice. Claims facilities are often used as an alternative or a supplement to the standard litigation civil action (usually tort proceedings) to determine liability, establish a compensation mechanism, and compensate those injured.

Issues to consider are as follows.

- What are the range of triggers for claims facilities? Does it matter whether it is a natural or human-caused disaster? Should different types of human-caused disasters be distinguished (for example, terrorist vs. corporate-negligence-driven disasters)?

- How might the source of resources—government, donations, private firms (single or many, deep pockets or bankrupt)—affect the goals and process?
- How does one balance efficiency with equity in administration and compensation design?

The Traditional Court-Based Tort Mechanism and the Challenge of Mass Torts

At its most basic, tort law "consists of the rules governing civil suits for injuries caused by wrongs to others" and is as varied as the human activity that might cause risk of injury.[3] Most frequently, individuals file tort lawsuits against entities that have harmed them. Plaintiffs can seek a remedy for either economic (medical bills, future earnings) or noneconomic losses (pain and suffering). In tort claims, the court (judge or jury) determines liability and a defendant (and its insurer) that is held liable bears the cost. If the magnitude of the claim exceeds the defendant's assets, recovery is limited to the defendant's bankrupt estate. An administrator appointed by the court determines how to distribute the funds.

For over thirty years, the American tort system has been broadly criticized for its awards (considered by some too parsimonious and by others too profligate), the volatility of judgments, the enormous costs, the slow pace of proceedings, and the adversarial structure.[4] Before the 1970s, most tort claims were filed by an individual or a few individuals against a specific tortfeasor (the actor alleged to be responsible for the plaintiff's harms). During the 1970s and particularly the 1980s, however, mass tort litigation emerged, in which "hundreds of thousands of people sued scores of corporations for losses due to injuries or diseases that they attributed to catastrophic events, pharmaceutical products, medical devices or toxic substances."[5] Three main differences distinguish mass torts from individual tort claims: the large number of claims associated with a single litigation, the congruence of actors and issues within a litigation, and the interdependency of claim values.[6]

Private Tortfeasor Responsibility

Mass tort litigation cases have added complexity to an already stressed civil justice system, with courts struggling to resolve cases fairly and efficiently. Some strategies adopted to address these problems are managing cases at their pretrial stages, in hopes of reducing duplicative activities and transaction costs, and formal or informal aggregative or collective procedures.[7] One highly contested formal option is filing class actions, governed in federal cases by Rule 23.[8] Although class action may serve some efficiency purposes, scholars argue this tool has been largely

rejected by key courts, which refuse to recognize mass tort claims to fulfill the conditions of that rule,[9] and lawyers, who claim that using class actions will affect individual lawyer-client relationships.[10] Moreover, this mechanism is criticized as inequitable for subjecting all individuals to uniform class treatment.[11] Courts adopted a more informal means of collective disposition through negotiated settlements. Unfortunately, even the most creative and innovative judicial solutions adopted by courts were unable to address the challenges of the asbestos and the Dalkon Shield cases, leading to the adoption of court-administrated claim facilities.[12]

Asbestos

Asbestos is a naturally occurring substance of fibrous threads that are resistant to heat, fire, and chemicals. Thus, asbestos was widely used by industry for insulation and protection. The Environmental Protection Agency (EPA)[13] deemed asbestos to be carcinogenic in 1970, and since then nearly a million claimants have filed suit against 8,400 business entities in arguably the longest-running mass tort in U.S. history.[14] Starting with the U.S. Court of Appeals for the Fifth Circuit decision that manufacturers could be held liable for injuries caused by asbestos exposure,[15] a barrage of litigation ensued, causing chaos and consternation among civil courts, insurance companies, corporations, lawyers, and plaintiffs.[16] Asbestosis and mesothelioma can be caused by a single asbestos fiber, and the latency period preceding symptoms can exceed a decade. Thus, it can be very difficult, and even impossible, for a claimant to prove that a specific party is responsible for his injury—a problem that has been called the "indeterminate defendant."[17] Although courts initially aimed to handle asbestos cases on an individual basis, claims exponentially increased and courts turned to aggregative procedures.[18]

On the one hand, parties, and to some extent also judges, were eager to avoid trials on the merits and, on the other hand, parties were not willing to settle without at least a trial date (as a form of leverage).[19] Numerous judicial initiatives, attempting to lower transaction costs, ranged from a coercive judicial consolidation to reach settlements based on administrative schedules to a computer-driven model to generate case values, transforming asbestos litigation into a de facto quasi-administrative regime.[20] Bankruptcy proceedings of the liable asbestos manufacturers became a dominant venue for resolving asbestos claims, typically involving "valuation of present and future asbestos claims against a bankrupt defendant . . . and then a reorganization plan" to compensate claimants from the defendant's assets through creation of an administrative claims facility.[21] However, some funds were exhausted before fully compensating victims.

Another approach attempted to collaboratively create trusts outside the bankruptcy courts as a way to reach a global class action settlement. One such fund was established by a consortium of defendants (the Center for Claims Resolution settlement); a separate attempt was made to settle all litigation against Fibreboard, a major defendant.[22] These two alternative trusts were not approved by the U.S. Supreme Court because of their failure to provide protection for the individuals who did not consent to them, resulting in a termination of all attempts to reach global settlements through class action litigation in the asbestos case.[23] Other out-of-litigation solutions were also attempted, such as adopting a consolidated manufacturer and insurer process, administered by an independent firm, the Center for Public Resources. Using expedited class action rules, the center provided three-arbitrator panels that devised a strict allocation formula under the aegis of the bankruptcy court.

More than $250 billion has now been spent on litigation over nearly fifty years.[24] The mass harm represented by the asbestos cases spurred attempts to achieve greater efficiency through consolidation, aggregated lawsuits, group settlement conferences, group trials, and group settlement contracts. Unfortunately, these attempts have had limited success, are fraught with exorbitant administrative costs, result in deadlocks among parties and counsel, and give inconsistent compensation to victims. Deborah Hensler comments that such aggregation benefits some but disadvantages others and that the courts should have usefully developed rules and practices that align with the realities of such litigation.[25]

Dalkon Shield

The Dalkon Shield cases began in 1971 with women who had suffered injury from the eponymous intrauterine birth control device manufactured by A. H. Robins Company. By 1985, Robins had disposed of more than nine thousand tort claims, with five thousand more pending in federal and state courts. At this stage Robins had paid approximately $530 million in punitive and compensatory damages. Thus, the traditional tort mechanism was able to provide remedies to a meaningful number of claimants. Challenges began on August 1985, when Robins filed a petition for bankruptcy.[26] Under the umbrella of the bankruptcy court, Robins attempted to reach a "global peace" settlement for all present and future victims. Two decisions were made: establishing a "bar date" after which claims could not be submitted and establishing a "closed fund" for compensation. Some claimants feared the fund would be inadequate and suggested that either Robins should be sold to produce revenue or an unrestricted fund should be created. The court responded by appointing an expert to devise a mechanism through which claims

could be evaluated, but the lengthy process prevented full consideration of individual plaintiffs' cases.[27]

The final aggregated amount was decided by the court after a long process of hearings and expert testimonies, allowing Robins to form the Dalkon Shield Claimants Trust[28] and an in-house claims resolution facility that assumed the responsibility of Robins and its successors for Dalkon Shield personal injury claims. The facility aimed to deal with the science of causality, the responsibility of specific defendants, options to reach a comprehensive aggregate settlement, and a distribution mechanism.[29] The court determined that plaintiffs could recover damages on the basis of the defendants' market share, because a handful of companies accounted for a majority of the market and had collaborated on the manufacture of the product. Claimants were given three payment options, representing "a trade-off between speed and level of recovery, on the one hand, and evidentiary requirements and evaluation of individual factors, on the other." Option 1, a flat amount calculated according to a schedule of benefits, handled nearly half the claims in a few months; Option 2 aimed to resolve the bulk of the remaining Dalkon Shield claims, and its amount varied by type and extent of injury while minimizing administrative expenses. The most difficult and complex claims were expected to pursue a traditional litigation style as Option 3. The process in Option 3 was designed to be adversarial, with a right to trial if a settlement could not be reached. The options provided some tailoring of process to the claim and aspired to address concerns over the dehumanization of the legal process.

Criticisms of the options were that less educated or unrepresented claimants might choose Option 1 regardless of an individual claim's merit[30] and that many plaintiffs perceived the process as hostile to them.[31] Carrie Menkel-Meadow, an arbitrator in the Dalkon Shield process, noted that "some claimants will not feel good about the justice system, no matter what the financial outcome, unless they have a chance to tell their story, report their pain, and in some cases, confront some representative of the company that wronged them."[32] Indeed, although the trust attempted to communicate directly with claimants through newsletters and informational meetings, there was little opportunity for the claimants to achieve meaning making by expressing their own perspectives.[33]

Deepwater Horizon

On April 20, 2010, a blowout and fire on the oil rig Deepwater Horizon, leased by BP, a British company, caused the largest-ever oil spill in U.S. waters. BP immediately agreed with the U.S. government to establish a Gulf Spill Independent Claims Fund in the amount of $20 billion and an environmental cleanup fund

Health Courts

As a senior health policy staffer for the Senate Committee on Health, Education, Labor, and Pensions, you have been asked to analyze the revival of a bill to pilot design of health courts. Such specialized courts, which have been adopted in several states, constitute a tort replacement regime to shift the venue from medical malpractice cases filed in common law courts (based on findings of fault and damages) to adjudication in specialized, dedicated tribunals and "expedite, simplify, and rationalize compensation decisions."[34] What other goals might you consider, and how would you measure success? What legal arguments are likely to be raised? What kind of design process would you recommend? What qualifications for an expert neutral?

Opioid Epidemic

Over three hundred thousand lives have been lost to the opioid epidemic between 2000 and 2017. Early lawsuits against opioid manufacturers were personal injury claims brought on behalf of persons with addiction who overdosed. In January 2018, Judge Dan Aaron Polster of the U.S. District Court of the Northern District of Ohio remarked, "We don't need briefs and we don't need trials." The litigation has now reached 1,548 federal court cases, brought on behalf of 400 cities and counties; 77 tribes, hospitals, and union benefit funds; and millions of people. Another 332 cases have been filed in state courts. Judge Polster has brought his long experience with multidistrict litigation to bear and assigned three special masters to work in parallel, but these cases appear to be the most complex litigation our courts have faced.

Judge Polster does not want to just move money around. He says, "What we've got to do is dramatically reduce the number of pills that are out there and make sure that the pills that are out there are being used properly."[35] Given the complexity of law, the many parties (individual, corporate, government agencies, local cities and towns, physicians, hospitals), and public policy, what steps might be undertaken, and by whom, to address this "behemoth" issue?[36]

of $1 billion; BP appointed Kenneth Feinberg as the independent administrator (the Gulf Coast Claim Facility, or GCCF). The facility—created by agreement, not by a court or federal legislation—was established to offer a faster and more predictable outcome for potential claimants compared with those affected by the *Exxon Valdez* spill of 1989.[37]

As described in the press, "The administration and BP got together . . . and decided, both, that coming up with a guaranteed sum to pay eligible claims was a creative alternative to years and years of protracted litigation."[38] The purposes of the fund were therefore clear—to avoid court time and expense, uncertainty, and legal fees. All claims previously filed in court against BP were transferred to the GCCF. The first phase, aimed at Gulf residents and businesses, allowed those who claimed injury from the spill to apply for emergency payments, requiring only that the claimant submit by November 23, 2010, a claim with documentation of prespill income. Those claiming the emergency payment were not required to waive their right to sue[39] and could reapply for losses every month until the program concluded.[40]

The second and final phase of the claims process, which began after emergency claims filing closed, was planned for three years. Individuals could claim for full-review final payment, interim payment, or quick final payment.[41] Those who chose full review could submit proof for past and future damages and seek a lump-sum final payment but gave up the right to sue BP and other companies involved in the spill (although they could decline the final offer). Those choosing to receive interim payment could claim only past damages and had to provide documentation of loss. They were not required to sign a release of claims and could reapply every quarter. Quick payments supplied $5,000 for individuals and $25,000 for businesses but required claimants to sign a release and waive the right to sue BP in the future. Only those who received compensation as part of the first emergency phase were eligible to submit either interim payment claims or quick payment final claims. A limited appeals process featured a GCCF panel of judges selected by the chancellor of the law school at Louisiana State University (Jack Weiss). In sharp contrast to the tort class actions of asbestos and Dalkon Shield, the court oversight of claim administration was waived in favor of a private facility manager.

BP has paid $8.2 billion to individuals and businesses. The press praised the fund as "a remarkably effective alternative to the cumbersome way damages are usually meted out after a corporate accident. . . . The whole point of the Gulf Coast fund is to keep cases out of court; in return for compensation . . . the victims get monetary damages, just as they would if they won a court case, but without the

expense of a lawsuit."[42] However, the BP fund was also criticized for its vague legality, its questionable valuation mechanisms, and its overall lack of transparency.[43]

Ultimately, BP's aspiration to minimize litigation in civil courts was only partially successful. In August 2010, actions related to the spill were transferred to Judge Carl Barbier in the U.S. District Court for the Eastern District of Louisiana for consolidated pretrial proceedings. By June 2, 2011, the litigation—originating in different districts—consisted of hundreds of cases and over a hundred thousand claimants.[44] A few dozen of the claims asked for a judicial regulation of the GCCF. BP attempted to push back against regulation of the fund, but in February 2011, the court partially granted the request to supervise communications.[45]

One of the most significant elements of the court's decision was that "while Feinberg and the GCCF were independent of BP with regard to the evaluation and payment of claims" they were not fully independent. The court ordered BP, Feinberg, and the fund not to present Feinberg and the fund as fully independent or neutral and not to contact represented claimants or provide legal advice to unrepresented claimants. They were also asked to clearly express claimants' rights both to file claims in lieu of accepting a final payment and to get advice from counsel before reaching settlements. Moreover, the dissatisfaction of claimants and the government's growing concern with the fund caused Attorney General Eric Holder to investigate the facility. Findings were announced in June 2012, declaring that the GCCF's assessment procedures often underevaluated the damages.[46] Before the investigation report was submitted, BP and plaintiffs' lawyers announced the end of the Gulf Spill fund process under Feinberg. A new fund was administered by the court, with the goal of making settlement more appealing to more people.

The Deepwater Horizon Court-Supervised Settlement Program now administers the procedure for medical claims and economic and property damages claims.[47] Subsequent legal rulings concern BP's liability for damage and injuries, with further decisions expected on penalties due under the Clean Water Act.[48] According to the information provided at the website of Deepwater Horizon Claims Center, 405,266 economic and property damage claims were filed and 184,552 payments of $12 billion were made by mid-2019.[49]

This experience highlights the important role of the court—and the transparency, independence, and legitimacy it represents—in designing a mechanism that falls somewhere between the strictly legal process of the *Exxon Valdez* and the not-quite-independent BP-Feinberg GCCF. For example, Lawrence Susskind recommended paying Feinberg's firm through a panel of stakeholder representatives who could verify that Feinberg was doing what he agreed to do.[50] The

administrative feasibility of the GCCF addressed the *Exxon Valdez* problems but did not outweigh the loss of the court's legitimacy.[51]

Jack Weinstein, after years of teaching, serving as legal advisor to public agencies, and presiding as judge in every kind of judicial matter, reflected on the difference between tort law as oriented to individuals and in the case of mass disasters. The goal in the individual tort case is to achieve justice; in the mass tort case, the court aims to deliver mass justice through adapted case management, either with class action or consolidation case process. But this shift from the individual to the mass comes at a high cost, resulting in less justice to the individual and to society, and with significant loss of efficiency and increase in ethical concerns.[52] Carrie Menkel-Meadow, who served as a lawyer and as a neutral in tort cases handled by Weinstein, took on the challenge of how to preserve individual justice in the mass context by examining the fairness of outcomes and the procedural protections. Among her recommendations were to undertake special scrutiny of who participates and to design more varied processes to enhance parties' satisfaction.[53] The following case illustrates how Menkel-Meadow's approach has been implemented.

Fortune 500 Race Discrimination

A race discrimination class action was filed against a Fortune 500 company. In 2013, a U.S. district court approved a settlement of $160 million to be distributed to class members. The distribution was administered by a special master, Lynn P. Cohn, working with a federal court, who designed a combination of conflict resolution techniques to assess damages.[54] This claims facility in effect acted as an ADR provider by establishing a panel of neutrals who underwent training and then conducted hearings. Class members had two options for relief: file either a simple claim form or a detailed claim form to request payment from the settlement fund. The simple claim form contained three brief questions on length of service, status, and time in class period, and payment was made within a month of submission due date, without any individualized review. The detailed claim form had about fifty questions, conveyed the right for an individualized assessment by a neutral, and was eligible for a claim against the $25 million extraordinary fund, but a claimant who filed it also retained the right to elect an expedited monetary award according to the simple form calculation. All interviews took place during a three-month period in 2014 in Chicago, via in-person conference or videoconference. The process was characterized by the highly intense emotions of many claimants. Neither defendants nor their counsel participated in the hearings. The special master had responsibility to ensure the fairness and consistency of awards.

The special master concluded that the process used could serve as a model for settlements for a certified class under Federal Rules of Civil Procedure 23(c)(4) (or any settlement involving a large number of plaintiffs), subject to consideration of the time and cost to handle the individualized assessments. The opportunity for claimants to be heard by an experienced neutral in a nonadversarial setting that emphasized fairness and consistency proved successful to the plaintiffs and neutrals in this case. The absence of the defendant and counsel in the hearings relaxed the adversarial tone experienced in litigation, or even in mediation and arbitration; however, the overall fairness may be balanced by the court's role in establishing the class and the settlement fund. This case demonstrates how a flexible process design with options for voice, control, and efficiency, plus careful oversight of the settlement parameters, can deliver justice to the satisfaction of both the parties and the court institution.

Natural Disasters

Claims facilities for natural disasters draw on public funds to compensate those affected. Victims of natural disasters may attribute partial responsibility to public agencies for failing to take adequate prevention measures. The primary goal may be efficient disaster relief and horizontal equity (those similarly situated receive similar compensation). In such cases, the public expects speed in eligibility determination and distribution and minimized expense in administering public resources. Nevertheless, the challenge of coordinating federal, state, and local agencies can pose significant barriers to responding with sufficient speed. Moreover, if significant human error is at issue and damages are severe, expectations for justice will encompass not only distributive but also procedural and retributive elements, which approximate a tort framework and include opportunities for voice and acknowledgment.[55]

Hurricane Katrina

On August 29, 2005, Hurricane Katrina struck the Mississippi Gulf Coast, causing one of the worst natural disasters in the history of the United States. Coastal flooding extended into Alabama, levee failures led to severe flood damage in New Orleans and surrounding areas, and wind damaged residential and commercial buildings throughout Louisiana and Mississippi. Nearly 1,700 lives were lost, 800,000 people were displaced, and estimated economic losses exceeded $125 billion.[56] In New Orleans, thousands of people took shelter in the Superdome stadium, where supplies were scant and conditions deteriorated rapidly. It took

the Federal Emergency Management Agency (FEMA) five days to get water to the Superdome.[57]

President George W. Bush declared it a disaster relief area on September 14.[58] To provide efficient relief equitably among recipients, the U.S. Senate approved nearly $60 billion in federal aid to state and local governments through the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).[59] The act allows payment of up to $25,000 to any individual or household for repairing damaged property; the Small Business Administration offered loans of up to $200,000 to homeowners for repairs to damaged primary residences and up to $1.5 million for business property, machinery, and inventory. By April 2006, some $88 billion in federal aid was allocated for relief, recovery, and rebuilding and another $20 billion requested to help victims of Hurricanes Katrina and Rita (which hit the area less than a month later). Distributions were made by administrative agencies according to regulated standards.

In such circumstances, the most efficient solution is arguably to give the same flat award to every claimant (who can prove residence in the affected area). An equitable solution would require each claimant to provide proof of the losses to support compensation. However, the more rigorous the procedure for determining eligibility, causation, and damages becomes, the more inefficient it renders the process. Moreover, equitability is undermined by excessively long procedures. At some point, justice delayed becomes justice denied.[60]

A second issue is bureaucratic competence and capacity. In the case of Katrina, FEMA took the lead on investigating and managing compensation, but it was poorly operated. Scholars observe that public sector agencies make suboptimal decisions "by not using principles of benefit-cost analysis when making their decisions as to whether to protect an area as illustrated by the Corps of Engineers decision not to strengthen the New Orleans levees."[61] When Hurricane Harvey hit Houston, Texas, in 2017, FEMA had significantly improved its operations and coordination with state and local agencies to provide assistance. Nevertheless, greater investment in prevention infrastructure like seawalls and dams may be a cost-effective measure.

Manitoba Floods

The 2011 floods in Manitoba, Canada, highlighted the complexity of victims' perceptions of causation and fairness during natural disasters and the implications for design of a compensation scheme. Historic flows of many rivers and creeks of the Assiniboine River systems resulted in flooding of fields and cities. The Manitoban government opened a portage to divert the water, an action that arguably

San Diego Wildfires

In 2007, wildfires tore through San Diego County. Fourteen people were killed, 160 others were injured, and 1 million people were evacuated. The major contributing factors were drought in Southern California, hot weather, and Santa Ana winds. Nearly a million acres burned.

More than two thousand law suits were filed against San Diego Gas & Electric (for sparks from transmission lines) by more than five thousand plaintiffs. Parties included individuals, the City of San Diego, the County of San Diego, Cal Fire, the San Diego County Parks and Recreation Department, and multiple insurance carriers and underwriters.

Consider the DSD Analytic Framework, and sketch out the potential goals and processes you would consider in designing a system for this situation.[64]

aggravated the situation. Over seven thousand people were evacuated and over Can$1.2 billion was paid out by the province. Lindy Rouillard-Labbe conducted an extensive study of the victims' experience with that compensation process.[62] She found that Manitobans attributed over 75 percent responsibility to the government for failure to prevent the disaster. The severity of the damages and perception of human responsibility created an expectation for compensation (both damages and need for retribution) and for voice and acknowledgment. A tort framework that tracked damages was considered more fair than a fixed-amount reimbursement. Those who attributed the catastrophe to nature had lower expectations of both economic and noneconomic awards from the process.[63]

Terrorist Acts

September 11th Victim Compensation Fund

Following the terrorist-related aircraft crashes of September 11, 2001, Congress adopted the Air Transportation Safety and System Stabilization Act (ATSSSA) to preserve the viability of the U.S. air transportation system and establish the September 11th Victim Compensation Fund (VCF) to compensate any individual who was injured or killed. This bill was deemed imperative to save the airlines,[65] because the threat of lawsuits, coupled with an unstable economy, made it impossible for airlines to borrow the necessary operating capital to remain in business.

The fund incorporated both a bailout for the airline industry and an alternative to the tort litigation system for victim's families. Kenneth Feinberg was appointed special master by U.S. Attorney General John Ashcroft and given wide discretion on design of the fund procedures. The VCF was freestanding, with no limits on its administration or individual payments. The goal was to provide fair repayment for the sudden loss of a loved one and some degree of justice for that loss. Unlike the BP fund he would administer ten years later, this fund gave Feinberg full responsibility for determining what was fair and just.[66] In both cases, court procedures were initially bypassed: with 9/11, the responsible party was known but infeasible to prosecute; with BP, the responsible party admitted liability and volunteered compensation. With 9/11, an individual hearing process was offered; with BP, beyond lost lives, property damage made up the bulk of the claims, which were submitted under an evidentiary process.

Feinberg was directed by ATSSSA's section 405 to "determine . . . the extent of the harm to the claimant, including any economic and noneconomic losses" and set the amount of compensation "based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."[67] The statute covered only claims for physical harm or death, not for property damage. Economic losses were determined by the victim's lost income from 9/11 through his or her expected retirement.[68] Noneconomic losses were set at fixed amounts for all victims: $250,000 for all victims and $50,000 (later raised to $100,000) for a victim's surviving spouse and each surviving child. Losses were reduced by certain collateral sources of compensation (life insurance, pension funds, death benefits programs, and any government payment on account of death but not personal savings, investments, or other assets).

Janet Alexander has posed questions on procedural design in the context of the VCF: What is the purpose of a compensation program? What values should the program embody? Why should eligible claimants be treated differently from apparently similarly situated persons? Why are existing procedural institutions inadequate to compensate these persons?[69] Alexander argues that the design was unsatisfactory.

> First, no real thought was given to procedural design. The drafters, in a tearing hurry and with many other large and urgent matters to think about, took the simplest procedural form that was ready to hand. . . . The central purpose of the Act was not to compensate victims but to keep the airlines running by, among other things, protecting them from going broke paying tort judgments.[70]

George L. Priest adds his own criticism by comparing the VCF with the social norms for dealing with the consequences of unintended losses: tort law, private

market insurance, government insurance, and government welfare. In each of these four options, there is a rationale for award (and limits) relative to the loss. While Priest finds no specific fault with Feinberg's method or outcomes, he states that the fund had no coherent rationale or ethic of restraint and that the definition of awards was entirely dependent on Feinberg.[71] Priest also expresses some concerns regarding Feinberg's use of grids and caps, award limits, methodology and evidence for future income, application of the collateral source rule (regarding life insurance), and the ineligibility of other terrorist attacks.

Feinberg met with nearly a thousand families. In the end, 7,403 claims were filed, and 5,560 of these received over $7 billion, averaging $1.2 million, with no legal fees or taxes. In March 2009, thirty families (3 percent of the total victims) opted out and filed suit against the Port Authority of New York and New Jersey, architects, Motorola, and the airlines. It is difficult to assess whether using the facility reduced the overall compensation provided for victims. First, the data that exist are imprecise, though they reveal that settlement in litigated claims was around $5 million each, much higher than the fund's $1.2 million average. Second, it is unclear how to measure the economic effect of the procedural route, which saved the claimants from going to trial. As Gillian Hadfield notes in one of the few studies evaluating victims' views on the process, those opting for litigation were motivated primarily by nonmonetary gains of the litigation process—namely, the opportunity to obtain information, force accountability, and prompt responsive change through litigation.[72]

In retrospect, Feinberg concluded that the VCF was very successful under the circumstances but that he would not hold it out as a standard model for no-fault public compensation. The several success factors he highlighted seem relevant to other circumstances. Claimants were treated fairly and with respect, dignity, and compassion. Participation was very high. There was a focus on consistency and transparency and on narrowing the gap between higher- and lower-recovery claimants. Distribution was unskewed, despite an economic remedy based on future earnings. Administration was efficient; the VCF had 450 employees and only 1.2 percent of its expenses were administrative. The review process featured a high level of information disclosure and opportunity for claimants to tell their stories and achieve a level of closure. Significantly, the congressional body was able to preserve the airlines, which was the primary motivation of the ATSSSA.[73] Scholars do not dismiss Feinberg's take on his own creation but are puzzled by the disparity between Feinberg's satisfaction with the VCF and his claim that it should not be used as a future model.[74]

The VCF was "closed in 2004, having paid over $7.049 billion to surviving personal representatives of 2,880 people who died in the attacks and to 2,680 claimants who were injured in the attacks or the rescue efforts . . . thereafter."

President Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010, under which the World Trade Center Health Program was established; later the act was reauthorized for another five years, until 2020. On July 29, 2019, President Donald Trump signed into law a renamed Never Forget the Heroes Act.[75]

One Fund Boston

On April 15, 2013, an explosion during the Boston Marathon killed three people and injured over two hundred. The perpetrators were quickly identified, but there was no public source of compensation for the deaths and injuries. Instead, the Commonwealth of Massachusetts and City of Boston retained the law firm of Goodwin Proctor to organize One Fund Boston as a nonprofit organization.[76] Governor Deval Patrick and Mayor Thomas Menino urged the public to make donations on the NPR radio program *Talk of the Nation* and through social media.[77] Kenneth Feinberg was invited to serve as administrator of the fund with a "mission to distribute the funds fairly, reasonably and as quickly as possible."[78]

Feinberg's initial draft of the payment protocol was shared at public meetings over two days in Boston; feedback resulted in a change to also compensate people who received outpatient emergency treatment but no overnight hospital care.[79] Eligible claimants were those with claims for death and physical injury that resulted in amputation of a limb, hospitalization for one or more nights, or treatment on an emergency outpatient basis at one of the Boston area hospitals. There was no adjustment for economic loss or emotional distress. Feinberg chose a hospital visit as a proxy for eligibility, because the claimant pool could have otherwise included everyone at the marathon (and even beyond). Further, his protocol avoided in-depth, fact-specific, and time-consuming administration. Claimants could submit a personal statement and could request a meeting with Feinberg (meetings were held between June 15 and 25, 2013). Claims were accepted for one month (May 15 through June 15, 2013); payments commenced on June 30, 2013. Table 8.1 lists the initial claimant payments as of June 28, 2013.

As Table 8.1 reveals, approximately $61 million was distributed in the first seventy-five days to the families of the four deceased (including the police officer shot by the perpetrators of the bombing) and more than two hundred other individuals. The payments were a charity gift without a liability waiver (adopting a different approach to that of the 9/11 VCF, in which accepting payment meant waiving the right to sue in court). An advisory panel of survivors was formed to guide distribution of the remaining funds.[80] In July 2015, the fund completed its distribution of over $80 million to over two hundred victims and their families.

Table 8.1 Payments to victims of the 2013 Boston Marathon bombing

Injury	*Number of victims*	*Allocation per victim*
Death claims	4	$2,195,000
Amputation of two limbs	2	$2,195,000
Amputation of one limb	14	$1,195,000
Hospital overnights		
32 or more	10	$948,300
24–31	5	$735,000
16–23	5	$580,000
8–15	15	$480,000
3–7	16	$275,000
1–2	18	$125,000
Outpatient ER treatment patients	143	$8,000
Total	232	$60,952,000

Source: City of Boston, "One Fund Boston Administrator Ken Feinberg Distributes Nearly $61 Million Among 232 Eligible Claimants," July 1, 2013, http://www.cityofboston.gov/news/default.aspx?id=6211.

An additional $1.5 million was set aside to "continue to provide personalized care and support."[81]

From a structural perspective, plaintiff counsel to those injured faced uncertain terrain on sources of compensation for their clients. The One Fund Boston was limited (although vastly more generous than funds organized for the tragedies at Virginia Tech or Aurora, Colorado).[82] The terrorists' family was poor, the organization that ran the marathon had capped liability, and government officials had sovereign immunity,[83] so lawyers considered other possible defendants to sue in civil court, like the makers of the pressure cookers and ball bearings used in the explosive device. The Massachusetts Bar Association called on Massachusetts Attorney General Martha Coakley to give victims and other people injured in the bombing a chance to appeal the One Fund Boston's awards or at least to apply for some of the subsequent donations. Feinberg responded, "I must say the goal here, to distribute $60 million in roughly 60 days at no cost to the claimants, with 100 percent of the $60 million going to the victims, requires rough justice. . . . We cannot start evaluating individual claims and individual circumstances without slowing down the process, at great cost, to evaluate medical records."[84] Efficiency dominated the compensation process, with equity paying an obvious price. Future research evaluating the victims' perceptions of the process could shed light on the desirability of such trade-offs.

Israeli Policy—Hostile Actions Casualties

In contrast to the United States, where injuries from terrorist acts may or may not be compensated, Israel's Benefits for Victims of Hostilities Law, 5730-1970), establishes the rights of casualties of "Hostile Actions" and their family members to monetary remuneration and other benefits, including monthly payments, rehabilitation, annual grants, and lump-sum grants. "Hostile harm" is defined by law and generally refers to a harm caused by enemy troops of a state or entity hostile to Israel, so long as the act leading to harm stems from the Israeli-Palestine conflict or is executed by a terrorist organization. The National Insurance Institute of Israel is the administrative body responsible for receiving the requests for benefits and deciding on the amounts and benefits provided. Legal proceedings—first before an administrative committee and later before labor courts—can be taken if disagreement as to entitlement or benefits amount arises. This mechanism assumes the Israeli state bears the responsibility to compensate victims and family members of all acts caused by hostile states or terror organizations and that no other entity will compensate victims for their loss. Despite the broad state responsibility for the compensation, the insurance institute was criticized for its bureaucratic processes. Note that Israel's Property Tax and Compensation Fund Law (15 L.S.I. 101 [1960/61]) separately provides compensation for terrorism-caused property damage.[85] Considering the contrasting compensation policies of Israel and the United States, how would you advise another country to frame and decide among available options?

Key Framework Issues in Claims Facilities

The formation of a claims facility is often determined by the nature of the triggering event and its associated paradigm for determining liability and distribution.[86] In the case of a natural disaster, such as Hurricane Katrina, the model is primarily a welfare design, to provide a social safety net to ensure basic needs are met in a time of crisis. The government is the likely administrator and funder. In contrast, if a disaster is reasonably anticipated, some degree of preventive land use policy or insurance may ameliorate the damage of future events. Whether before or after the event, it is the taxpayers (local or national) who bear the burden.

Salient factors and claimant priorities are different under a tort model, in which a court can determine the responsible party, assess damages to compensate the

victims, and punish the defendants to deter future bad behavior. Claims facilities are one means of attempting to improve administrative feasibility in mass tort situations. Menkel-Meadow highlights significant factors in claims facility design as including the "nature of the injuries, whether [injuries manifest in] death, long-term disability, latency, medical monitoring, loss of consortium, etc.; the science of causation; the relative number of defendants; the depth of the defendant's pockets; the numbers of claimants; and the fee structures of their lawyers."[87] Another important factor may be the opportunity of the injured to tell her story to an authority, have her damages and injuries acknowledged, and confront the wrongdoer.

Terror attacks complicate the picture, because these are public disasters with low predictability and, although manmade events, are generally not caused by parties that can realistically be sued for damages. This circumstance calls for the adoption of a mechanism similar to the natural disaster paradigm. In these cases, there may not be resources to compensate the injured. The victims of the USS *Cole*, 1993 World Trade Center, and Oklahoma City attacks received no compensation. In contrast, Congress authorized $6 billion (taxpayer funds) for payment to the families who lost their loved ones on 9/11 to forestall mass litigation that could have put the airline industry out of business. The compensation for victims of the Boston Marathon came from private donations.

The stakeholders and parties of a claims facility include individuals, businesses, insurers, government agencies, counsel, the media and the public, and the facility's organizer—whether a court, legislature or executive agency, nonprofit or private entity. Often the tort model of determining liability, assessing damages, and providing compensation is employed; the more the facility involves the court, the more transparency is expected and the more legitimacy is accorded.[88] If an individual is appointed administrator, she may have the flexibility to decide the procedural and substantive criteria for claimant eligibility and compensation and the fund's accountability with regard to the parties and the public. Such flexibility may be cause for concern if the decision-making criteria are not transparent, as some perceived in the GCCF fund.[89]

Goals

In most cases, there are multiple desirable goals, and the facility administrator will need to determine the priorities of the stakeholders and assess the trade-offs among them. The primary tension is among administrative feasibility, efficiency, and equity. Equity calls for fair compensation (claimant eligibility and compensation criteria), a fair process by an independent neutral administrator, and a

balance of privacy and transparency. Efficiency calls for low transaction costs for claimant and administrator, ease of filing a claim (but without fraud), concern for the number of claimants (trying to include only those eligible), speed of process, and finality of the process (as opposed to right of appeal within the administrative process or to a court).[90]

Who decides among these tensions? Francis McGovern notes the challenges faced by administrators and believes systems operate best when the court and a neutral claims administrator cooperate. "The more available the data about the potential ramifications of resolving a tension one way or another, the more ex ante, rather than ex post, those tensions are resolved, the more transparent the decision-making process can be. And the more considered the expectations of the parties and the more accountable the implementer, the more likely the design of the distribution process could approximate a second-generation dispute system design."[91]

The identity of the facility designer, her relationship and engagement with the stakeholders, and the resources available for the design process and claimant distribution will significantly shape implementation of the priority goals for the system. Kenneth Feinberg, whose experience designing and administering claims facilities spans nearly five decades and a diverse array of circumstances, highlights three elements critical to design: substantive criteria on which claimants are eligible for relief, procedural criteria for filing a claim, and practical mechanics for processing claims.[92]

Processes and Structure

The processes described in this chapter are both facilitative and evaluative. Administrators sought to balance privacy with transparency. Legitimacy derives from a fair neutral, fair process, and fair outcome, most often rendered by a court. Substantive due process covers (where applicable) a determination of liability, eligibility, and payment criteria. Procedural due process aims for accessibility and transparency of claim filing, efficient claims handling (speed of process and finality, minimized transaction costs for claimant and administrator), and a respectful claimant experience (e.g., choice of process, opportunity to be heard, and opportunity to confront the wrongdoer).

Claims facilities for resolution of dispute streams are provoked by urgent, unanticipated events. However, lessons from one experience can inform system design structure or options for future prevention through public policy around natural disasters and possibly tort reform. Optimally, one would compare factors

Las Vegas Shooting

Following the Las Vegas shooting of October 1, 2017, the Las Vegas Victims Fund gathered $31.4 million from private contributions and distributed it to over 500 claimants, in three categories: families of the 58 killed or with permanent brain or physical injuries, those injured and admitted to hospitals before October 10, and those injured and treated before October 10. Kenneth Feinberg collaborated with the National Center for Victims of Crime in administration of the process, which was completed in March 2018, in accordance with their highest priority: "collecting and distributing money as soon as possible."[94] In addition to the distribution, a number of fee-only financial advisors from across the country volunteered to offer free financial advice to recipients of fund payouts, coordinated by the Law Vegas Survivors Project at the Investor Protection Clinic at the William S. Boyd School of Law at the University of Nevada at Las Vegas. What distinguishes this process design, and what lessons might be usefully drawn?

contributing to equity (fair outcomes, eligibility, and payment criteria) and fair process (transparency, independent neutral, and sources of legitimacy) to capture the metrics of substantive, procedural, and administrative due process.[93]

Evaluation

System design for claims facilities would benefit from more empirical research on stakeholder perspectives (equal treatment, satisfaction, perception of fairness, claims administrator neutral and stable) and observed characteristics (percentage of claimant participation, finality, objective and transparent decision-making criteria, administrative costs, processing time, fraud prevented), supplemented with process tracing of how the system was designed, by whom, and according to what goals.

Key takeaways from scholarship[95] and the administrative structures used in these cases include the following:

- If a tort action is the trigger, more coordination between the relevant court and administrator is critical to demonstrate legitimacy of the process and outcomes; claim consolidation and aggregation may ease the administrative pressure.

- The greater the number of claimants, the more important the transparency of the structure and process for setting claim eligibility and payment criteria.
- The longer the claim period and the smaller the compensation fund, the more likely that claimants will opt for efficient administration over customized amounts.
- The more complex the injury and damage, the more likely that claimants will benefit from process options: quick, fast, and accessible (without counsel) may be preferred by many. Claimants with more evidence and time may prefer a more tailored process.
- Whether a tort, a terrorist event, or a natural disaster with some human culpability (e.g., a government agency with jurisdiction to help prevent the disaster), claimants may deeply value an opportunity to express their losses, be acknowledged by someone in authority, or confront the responsible party—even if that expression does not yield higher compensation.