

## **MONEY FOR LIVES: THE STORY OF THE 9/11 VICTIMS' COMPENSATION PROGRAM**

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*Worth*, the 2021 Netflix film depicting the administration of the 9/11 Victims' Compensation Fund (VCF), focuses on the evolution of lawyer Kenneth Feinberg's approach to compensating the families of those who lost their lives in the terrorist attacks on New York City's World Trade Center Towers and the military's Pentagon building in Washington DC and the Pennsylvania plane crash provoked by the plane's doomed passengers. The attacks killed 2976 people, including approximately 400 first responders, and immediately seriously injured several hundred more (Dixon & Stern 2004: 15-16). In the years following, thousands more developed injuries as a result of the toxic substances that polluted the site and much of lower Manhattan (Hellerstein & Ors 2012). The Fund, authorized within days of the attacks, was a key component of the United States (US) Congress's strategy to protect the aviation and insurance industries from what lawmakers feared would be a crushing number of liability claims emerging from the deaths and destruction immediately wrought by the attacks.

Accepted by business-oriented legislators as the price of securing the protection of industry against litigation, the parameters of the compensation fund were hastily cobbled together by a legislative minority concerned about the fate of the victims' families, assisted informally by a collection of tort law academics perceived to share these concerns.<sup>1</sup>

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\* Judge John W Ford Professor of Dispute Resolution, Stanford Law School. I have known Kenneth Feinberg for four decades. I consulted him about the dynamics of mass tort litigation when I first began my research on the subject, spoke along with him on myriad academic panels focused on mass torts, and currently serve with him on an advisory board to the RAND Institute for Civil Justice. This review draws on the film *Worth* and Feinberg's account of the 9/11 Victims' Compensation Fund on which the film is based, and also on my memories of our interactions over the years.

<sup>1</sup> I was one of the many law faculty consulted during this intense period, but my contribution was modest at best.

The 9/11 Compensation Program—perhaps not surprisingly given its designers—was modelled after state tort law-based regimes that dictate compensation available to families of wrongful death victims who file claims in court against entities and persons who allegedly caused the victims' deaths. Under most states' laws, the amount of money available to families is determined primarily by economic loss: that is, the amount of money that the deceased would have contributed to their family had their lives not been cut short. This doctrine is consistent with the fundamental principle of tort compensation, that it is intended to restore victims to the *ex ante* economic status of which they were deprived by the tortfeasor.

The tort law doctrine that animated the VCF's design distinguished the Fund from many other government-established compensation funds that cap both individual awards and the total amount appropriated for the fund. Adopted at a time when neither the total number of victims nor the scale of the economic loss was known, the September 11th legislation did not incorporate any caps on individual awards; nor did Congress specify how much money would be available to victims in all. Who would be compensated and how much were left to the fund administrator to spell out in rules that would be subject to public review and comment. What was clearly specified was that in order to receive compensation from the Fund, families would have to give up all present and future rights to sue the airlines, insurers, other industries or any other entity that they might conceivably be able to hold liable under tort law, with the exception of the terrorists themselves, whom an amendment to the statute left susceptible to legal action.

Enter Kenneth Feinberg, the ambiguous hero of *Worth* and the author of the book on which it is based (Feinberg 2006). Dubbed a 'Special Master' in reference to the title he and other judicial adjuncts assume in complex civil litigation in the US where they assist judges to resolve cases, Mr Feinberg had a well-established reputation as an effective settlement negotiator. But, unlike his previous roles where his authority flowed from the judge (or occasionally, when he negotiated dispute settlements outside court, from the private parties who hired him), in the 9/11 Compensation Program, Mr Feinberg's authority flowed from the federal government, from the US Attorney General who appointed him and, ultimately, from the President. To many anguished victims' families, Feinberg was the face of an indifferent government that was more interested in protecting the airlines from taking responsibility for their role in facilitating the attacks than in assisting victims' families. Their animus is illustrated in the film by a raucous meeting at which families hurl invectives at Feinberg. Although this meeting is fictional,

it is true to Feinberg's experience dealing with families at the inception of the fund and illustrates the tremendous challenge he faced in gaining victims' trust.

To many (including me), Feinberg was the best and most logical choice for the Special Master position. The statute enabling the Fund left virtually all details about how to allocate compensation to its administrator. In multiple mass tort lawsuits, dating back to the landmark Agent Orange veterans' class action (Schuck 1986), Feinberg had shown his skill at devising complex plans for determining eligibility for compensation and specifying amounts on offer. To my academic colleagues and lawyers who specialize in tort law, Feinberg was the master of 'grids': elaborate multi-factorial tables that sort plaintiffs into categories according to their personal characteristics, injuries and other features that tort law deems relevant for determining compensation. Importantly for Feinberg's evolution as the 9/11 Fund administrator, negotiating the details of these grids rarely, if ever, includes the ultimate claimants: negotiations are hard fought by the lawyers representing defendants and different groups of victims, but the victims themselves are out of sight and hearing, brought into the process only after the deals have been struck.

This process of resolving mass torts in the US—a process that Feinberg helped shape over the years—reflects procedural rules and US Supreme Court holdings. When the nature of the facts and law underlying mass claims incentivize defendants to settle, their goal is to strike a deal for 'global peace'—a settlement that will include all those with viable claims and close off litigation. Two main approaches have evolved over the last 40 years, the rule 23(b)(3) damage class action and the non-class aggregate settlement. By 2001, Feinberg had successfully used both approaches to negotiate settlements. But neither had required him to engage in protracted negotiations with individual victims.

In US class actions, judges are required to review and approve any settlements that are reached between class representatives and defendants, and then only after a 'fairness' hearing which each class member is entitled to attend for the purpose of voicing their opinion on the proposed settlement. Some proposed settlements attract considerable attention, particularly when the class includes organized groups, such as the veterans who brought the Agent Orange lawsuit, or more recently the National Football League concussion victims. But in most instances, only a tiny fraction of class members participates in fairness hearings. And sometimes the details of the claiming process, including the evidence that claimants will have to produce to obtain compensation, are not

hammered out until after the judge approves the aggregate settlement amount and overall compensation plan. Moreover, as a result of two US Supreme Court decisions in the late 1990s, most mass tort lawsuits are not eligible for class treatment. Outside the class action framework, no rules or practice require that the court inquire into the plaintiffs' views of the proposed settlement's fairness, although to receive payment each individual plaintiff must sign a release of their right to sue and defendants may require that a very large percentage of claimants sign such releases before finally agreeing to the settlement.

Although many lawyers and judges believe that tort plaintiffs only care about how much money the dispute resolution process delivers to them, there is a vast empirical literature showing that disputants pay sharp attention to whether the procedure used to decide compensation is—in their eyes—fair. Being heard—being able to tell one's story—is a critical component of perceived fairness, which is also associated with disputants' perception that they have been treated with dignity and respect (Lind & Tyler 1988). As a scholar working in the 'procedural fairness' domain, I had numerous opportunities to discuss this research with Feinberg at academic conferences on mass torts. He routinely discounted the research, arguing that, whatever survey respondents might say, in the end, resolving mass torts was all (and only) about the money.

It is not unreasonable to speculate that Feinberg anticipated that the process of resolving 9/11 victims' claims would resemble the two mass settlement procedures he was familiar with: there would be a challenging process of devising rules for allocating compensation under the public spotlight created by the national trauma of the terrorists' attacks. But in the end, there would be a 'grid', a formula for assigning claimants to categories and calculating compensation owed them according to the formula. Although Feinberg obviously was aware of the high emotion surrounding the process, in the end it would be all about the money. If he was able to devise a formula that was acceptable to most of the victims even though it would fully satisfy none, the Fund—and his leadership—would be deemed a success. The film highlights this metric of success by focusing on the growing percentage of victims who agreed to forgo their rights to go to court in exchange for a monetary settlement. Neither justice nor fairness was central to achieving this outcome; indeed, as he has frequently said, Feinberg believes both are unattainable in the harsh real world in which he is used to operating (Bushey 2021).

*Worth* depicts Feinberg's ultimate success in resolving virtually all of the 9/11 victims' claims through the Fund as a consequence of his dawning

realization of the victims' humanity. In the film, over the two years of the Fund's initial statutory existence, he morphs from a brooding opera lover whose life is far removed from the lives of most of the victims to a warmer, sympathetic figure, willing and able to relate to their diverse needs. But in the long years of my professional acquaintance with Feinberg, I have never found him insensitive to the human condition or other people's needs. Indeed, he launched his career as Chief of Staff to Senator Ted Kennedy, a Democratic Party stalwart, and then from the position of Special Master to the Agent Orange Veterans' Compensation Fund, appointed by the famously progressive federal Judge Jack Weinstein. In my view, what Feinberg discounted in the early days of the Fund was the need to provide opportunities for individual victims to tell their stories, their need to be heard by the powerful bureaucrat who would determine their economic fate. Ironically, the master of dispute resolution, who discounted the importance of procedural fairness in the formal court system that purports to offer this to all who come through its doors, ended up implementing an alternative out-of-court dispute resolution process that emphasized listening to victims (Feinberg 2021).

Although the film, perhaps inevitably, focuses on the interpersonal dynamics of determining how much compensation victims' families would get, Feinberg's book focuses on the fundamental conundrum of how to translate the value of a life into money—hence the film's title. At first thought, many people recoil from the idea of putting a dollar value on life. 'Stop offering me money,' cries the widow of one of the 9/11 victims; 'I don't want money.' But across time and cultures money has been considered the appropriate form of compensation for injury and death. Myriad government programmes use estimates of the average value of a life as the basis for making trade-offs between investments in health, safety and environmental protection (Appelbaum 2019). What distinguishes tort liability from these administrative programmes is that it requires decision-makers to place *different* values on people's lives, depending on their demographics, education, income and other personal characteristics. Tort doctrine makes explicit that in our society men are worth more than women (because women's income on average is less than men's) (Finley 2004), that whites are worth more than people of colour (because the latter's income is diminished by systemic racism) (Doroshov & Widman 2007), that the middle-aged are worth more than the elderly (because the latter's remaining work lives are shorter than the former's) (Finley 2004). Whether or not these outcomes are just was the nub of controversy over Feinberg's calculations of Fund awards.

Americans recognize multiple norms for achieving what scholars term distributive justice, that is, fair allocation of resources (Hegtvedt & Cook 2000). 'We should all get the same amount of money,' yells one of the family members at the raucous meeting with Feinberg depicted early in the film. Some government subsidized compensation programmes do indeed adopt an *equality* norm, and in the immediate aftermath of the terrorists' attacks, when Americans seemed to draw together in solidarity, it seemed appealing to some. But comments on Feinberg's proposed rules (which he shared on a publicly accessible website) largely supported an *equity* or deservingness norm, with many arguing—as tort law decrees—that the families of the high-powered financial analysts who lost their lives in the World Trade Center Tower deserved more money than the families of the low-wage window washers employed by the restaurant at the top of the tower. Some commentators, deployed a third *need* norm counter-intuitively, arguing that the widows' of the financial analysts needed more money to pay their mortgages and children's private school tuition than the widows of the window-washers who presumably needed neither (Hensler 2003).

As a result of the way the 9/11 statute was drafted, Feinberg had little room to manoeuvre when it came to calculating awards. The statute called for tort-based compensation, meaning the financial analyst's widow was indeed owed more than the window-washer's. Using his rule-making authority, Feinberg found a way to soften the harshness of tort law's reliance on social distinction. The rules he adopted provided a minimum of \$250,000 to every eligible claimant, regardless of economic loss. He specified initially that no claimant, no matter how high the salary of their lost bread-winner, would receive more than \$7 million, although he apparently offered more in a few cases. He also deliberately excluded considerations of gender, race and ethnicity in estimating lifetime earnings (Feinberg 2021). A year into the life of the fund, seven families of high-earning victims sued Feinberg, arguing that he had run rough-shod over the statutory rules by bending them to respond to some individual circumstances but not others (Chen 2003). In the end, the mean and median awards to victims' families were \$2.08 million and \$1.68 million respectively (Dixon & Stern 2004: 25). However, the individual amounts varied dramatically, reflecting the extreme disparity in potential life-time earnings of those who lost their lives.

But many would argue that justice is not only about money, if it is about money at all. *Worth* focuses on the overwhelming majority of eligible claimants who accepted the Special Master's financial offer and signed away their rights to sue. Ninety-six families of victims opted out of the

fund to file suit (Weiser 2009) in the immediate aftermath of the attacks, and subsequently, first responders who were injured by exposure to toxic substances as they worked on the site, filed a class action against the contractors who managed the clean-up and New York City (Hellerstein & Ors 2004). The film implies that those who refused to accept the Fund's offer until the last minute were motivated by their greedy lawyers. But qualitative interviews with some victims' family members suggest they were driven at least in part by a desire for the public accountability litigation might provide, which they valued above money (Hadfield 2008).

Ironically, although the 9/11 Fund formally denied victims' families their right to go to court as the price of accepting the compensation offered by Feinberg and his associates, the rules adopted by Feinberg granted most far more than they would have been likely to recover in court. Under states' wrongful death rules, the aggregate losses of survivors totalled far more than would have been available from the airlines' insurance (Dixon & Stern 2004: 19), meaning that tort litigation to secure benefits would have had to target myriad defendants who might well have been deemed not liable under law. Moreover, it was by no means certain that the airlines would be held liable by a jury for acts perpetrated by terrorists. A long and costly litigation fight would have ensued, and the plaintiffs would have been dependent on contingency fee lawyers' willingness to invest in such a fight. Families whose loved ones had modest future income streams would likely not have been able to secure representation at all. In contrast, many Fund applicants were represented by attorneys *pro bono* (Dixon & Stern 2004: 40). Subsequent successful litigation by first responders and others with long-term injuries from toxic exposure relied on collective litigation approaches. But just four years prior to 2001, the US Supreme Court had invalidated class certification for asbestos litigants and implied that class treatment was not appropriate for tort litigants generally (*Amchem Products v Windsor* 1997; *Ortiz v Fibreboard Corp* 1999). Practically and politically speaking, the VCF offered most survivors their best chance of covering their financial losses.

Ultimately, the small minority of victims' families who filed suit received settlements in court averaging \$5 million, about twice what families received on average from the Fund (Weiser 2009). However, they received these settlements long after the Fund had delivered its last cheque to families. Were it not for the presiding judge's insistence that their lawyers limit fees to 15 per cent of awards—an unusual ruling that would not have been predicted at the time the families decided to sue—they likely would have paid out one-third to one-half of their awards to their lawyers. And in exchange for agreeing to settle they gave up sharing at trial evidence

that they believed would hold the airlines accountable for the terrorists' success.

Although *Worth* suggests that Feinberg's success in persuading virtually all of the victims' families to accept compensation from the Fund and forgo litigation was the consequence of adopting more just rules for estimating the value of lives, Feinberg himself disputes this. Commenting on his appointment as administrator of a \$500-million fund for families of victims of recent Boeing 737 Max plane crashes, he said 'Money is a very poor substitute for loss. I try never to use words like "fairness" or "justice" because I think those words have no applicability.' (Bushey 2021)

### **About the author**

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## Cases

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## Legislation

The 9/11 Victims' Compensation Fund (VCF) was established by the Air Transportation Safety and System Stabilization Act, 49 USC §40101. The VCF operated from 2001–2004. After extensive political lobbying on behalf of first responders and others who suffered long-term injury as a result of the attacks, in 2010, Congress adopted the James Zadroga 9/11 Health and Compensation Act, Public Law 111-347, which reactivated

the VCF for a period of five years and included support for medical monitoring. In 2015, Congress adopted the James Zadroga 9/11 Health and Compensation Reauthorization Act, Public Law 114-113, which extended the life of the VCF to 2090 (sic). In 2019, Congress raised the total number of eligible enrollees in the 9/11 Compensation Program. Details on the history of the VCF are available at [World Trade Center Health Program website](#).