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# The September 11<sup>th</sup> Victim Compensation Fund: The Answer to Victim Relief?

Joe Ward\*

## INTRODUCTION

The events of September 11, 2001 shook America to its core. The world was forever changed as the horrific tragedy unfolded on live television. Families were destroyed as loved ones were severely injured or killed, leaving spouses and children in need of aid. In response, the United States government established the September 11th Victims' Compensation Fund in an effort to provide the necessary reparations to victims of the terrorist attacks.<sup>1</sup> This article will analyze the September 11th Victims' Compensation Fund (hereafter "Fund") as a way of compensating victims while preserving the financial stability of the United States economy.

This Fund was created to address rising concerns in the wake of the terrorist attacks regarding the continued viability of the airline industry.<sup>2</sup> Some feared civil liability for the events of September 11th could force the airlines into bankruptcy.<sup>3</sup> Such an event would have been a colossal blow to the country's already unsteady economy because the airline industry is a cornerstone of the economy.<sup>4</sup> As such, its collapse would undoubtedly cause many thousands of Americans to lose their jobs and shatter the public's economic confidence.

Although Congress has expressly precluded individuals from "double dipping," (receiving compensation from the Fund and subsequently pursuing sepa-

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\* JD Candidate, 2004. I want to give special thanks to Professor Jim Gash for his help in identifying relevant issues discussed in this article and his invaluable assistance in crafting my thesis.

1. Air Transportation and Safety Stabilization Act, Pub. L. No. 107-42, § 101, 115 Stat. 230 (2001).

2. See, e.g., Marilyn Adams, *Bankruptcies Possible as Airlines' Losses Continue*, USA TODAY, July 18, 2002, at B1; Wendy Zellner, *Industry Outlook 2002: Services: Travel*, BUSINESS WEEK, Jan. 14, 2002, at 124.

3. *Id.* See, e.g., *Mariani v. United Air Lines, Inc.* No. 01 Civ. 11628 (S.D.N.Y. July 24, 2002); Gail Appleson, *American Airlines Sued for \$50 Million in WTC Attack* (Apr. 9, 2002), available at <http://www.freerepublic.com/focus/news/662229/posts>. These are two examples of lawsuits brought against the airlines after September 11th. While the *Mariani* case was brought by a survivor of a passenger on United Flight 175, the suit against American Airlines was brought by a survivor of one killed in the World Trade Center.

4. *Id.*

rate legal actions) some victims still choose to file suit.<sup>5</sup> These suits attempt to place liability for the horrific events of September 11th onto readily identifiable entities with deep pockets, and away from those directly responsible: the terrorists.<sup>6</sup> The Fund provides a more workable alternative to tort litigation for compensating victims' families.

Congress is correct in precluding individuals from double dipping for two reasons. Firstly, there is a fundamental fairness issue,<sup>7</sup> and secondly, most suits filed by the families would surely fail under a negligence theory because there is no proximate cause with which to show negligence on the part of the potential defendants.<sup>8</sup> A suit against the airlines would likely fail, ultimately precluding the plaintiff from receiving any compensation from the Fund. Consequently, those individuals who seek compensation for injuries suffered on September 11, 2001 are better served by using the legislative avenue of recovery rather than the judicial system. This country has enough frivolous litigation, and it is illogical to encourage people to bring suits that are destined to fail. This is especially true when a reasonable and sufficient alternative like the Fund is available.

Section I of this article focuses on the legislation resulting from the September 11th tragedy, particularly the Air Transportation and Safety Stabilization Act ("ATSSA"), which created the Fund. Section II discusses the extensive background of the Fund, including information regarding victims' eligibility, compensation requirements and amounts. Section III analyzes *Mulligan v. Port Authority*, a recent New York decision representing one of the first judicial decisions restricting the manner in which claims are filed with regard to the terrorist attacks. Section IV discusses the fundamental fairness problems inherent in double-dipping from the Fund. Section V explores the proximate cause issues, which will likely cause litigants to lose their suits against private entities for the terrorist attacks. Finally, Section VI discusses the reasons why the September 11th Victims' Compensation fund is a better solution for compensating victims than tort litigation.

## I. LEGISLATION IN RESPONSE TO SEPTEMBER 11<sup>TH</sup>

Eleven days after the tragic attacks, Congress enacted the Air Transportation and Safety Stabilization Act ("ATSSA").<sup>9</sup> The goal of ATSSA was to pre-

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5. Air Transportation and Safety Stabilization Act § 405(c)(3)(B)(i), 115 Stat. at 239.

6. See James A. Gash, *At the Intersection of Proximate Cause and Terrorism: A Contextual Analysis of the (Proposed) Restatement Third of Torts' Approach to Intervening and Superseding Causes*, 91 KY. L. J. 523 (2003).

7. See generally *id.*

8. *Id.*

9. Air Transportation and Safety Stabilization Act § 101, 115 Stat. at 230.

serve the viability of the United States air transportation system.<sup>10</sup> ATSSA provided that the President shall compensate air carriers for losses stemming from the September 11 tragedy.<sup>11</sup> The President was given discretion in awarding compensation, with a ten billion-dollar aggregate limit to be awarded.<sup>12</sup> Furthermore, no individual air carrier was to be liable for an amount greater than the limits of their individual liability insurance coverage.<sup>13</sup> This provision ensures the air carriers will not be forced to expend their own capital to compensate victims, thereby avoiding potential bankruptcy problems.

## II. SEPTEMBER 11<sup>TH</sup> VICTIMS' COMPENSATION FUND

The September 11th Victims' Compensation Fund was formed by the ATSSA.<sup>14</sup> The purpose of the Fund is to provide compensation to any individual who was physically injured or to the families and beneficiaries of any individual who was killed as a result of the terrorist-related incidents of September 11th.<sup>15</sup> It is a no-fault alternative to tort litigation.<sup>16</sup>

Although the Fund provides for victims personally injured in the terrorist attacks as well as those who file on behalf of a deceased victim in the tragedy, it does not compensate for proprietary injuries such as loss of employment.<sup>17</sup> Eligible individuals include those present at the World Trade Center, Pentagon, or Pennsylvania crash site at the time of, or in the immediate aftermath of, the

10. Air Transportation and Safety Stabilization Act § 105, 115 Stat. at 233.

11. Air Transportation and Safety Stabilization Act § 101, 115 Stat. at 230.

12. *Id.* The Act provides, "Notwithstanding any other provision of law, the President shall take the following actions to compensate air carriers for losses incurred by the air carriers as a result of the terrorist attacks on the United States that occurred on September 11, 2001:

(1) Subject to such terms and conditions as the President deems necessary, issue Federal credit instruments to air carriers that do not, in the aggregate, exceed \$10,000,000,000 and provide the subsidy amounts necessary for such instruments in accordance with the provisions of the Federal Credit Reform Act of 1990 (2 U.S.C. 661 et seq.).

(2) Compensate air carriers in an aggregate amount equal to \$5,000,000,000 for-

(A) direct losses incurred beginning on September 11, 2001, by air carriers as a result of any Federal ground stop order issued by the Secretary of Transportation or any subsequent order which continues or renews such a stoppage; and

(B) the incremental losses incurred beginning September 11, 2001, and ending December 31, 2001, by air carriers as a direct result of such attacks.

13. Air Transportation and Safety Stabilization Act § 408(a), 115 Stat. at 241.

14. Air Transportation and Safety Stabilization Act § 403, 115 Stat. at 237.

15. Air Transportation and Safety Stabilization Act § 403, 115 Stat. at 237.

16. Air Transportation and Safety Stabilization Act § 405(c)(3)(B)(i), 115 Stat. at 239-40.

17. Air Transportation and Safety Stabilization Act § 404, 115 Stat. at 237-38.

crashes and who suffered physical harm as a direct result of the terrorist-related aircraft crashes.<sup>18</sup> In addition, personal representatives of those victims killed in American Airlines flights 11 and 77 or United Airlines flights 93 and 175, excluding terrorists, are eligible to file a claim.<sup>19</sup> Only one claim is permitted for each victim, and all claims must have been postmarked by December 22, 2003.<sup>20</sup>

Those eligible to file a claim for a deceased victim are usually appointed by the court of appropriate jurisdiction.<sup>21</sup> The following are eligible: the victim's personal representative, executor of the victim's will, or administrator of the victim's estate.<sup>22</sup> Submissions must include the claimant's and the victim's Social Security number or National Identification number, original signatures, and the last signature must be notarized.<sup>23</sup> One must also supply supporting documentation including notification of a filing of a claim and a list of parties notified.<sup>24</sup>

Those individuals filing claims must provide the following information: whether the claimant intends to file for advanced benefits, the victim's employment history, and education/accreditation history.<sup>25</sup> Additionally, a list of dependents not listed on the victim's 2000 tax return must be included as well as the victim's tax return information, compensation/income information, benefit packages, non-reimbursed burial costs, memorial service costs, and medical costs.<sup>26</sup> Also, the victim's collateral sources of income, the victim's will and proposed estate distribution plan, and any other information relevant to the claim that could be useful in awarding compensation must be included.<sup>27</sup>

In most instances, the state's wrongful death statute will govern the economic loss portion of the Fund's award<sup>28</sup> and the award for the victim's non-economic loss will be distributed through the estate.<sup>29</sup> Therefore, where there is a will, the \$250,000 in non-economic loss should be distributed according to the will, and where the victim died without a will, the \$250,000 should be distrib-

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18. Air Transportation and Safety Stabilization Act § 405(c)(2)(A)(1), 115 Stat. at 239.

19. Air Transportation and Safety Stabilization Act § 405(c)(2)(B), 115 Stat. at 239.

20. Air Transportation and Safety Stabilization Act § 405(c)(3), 115 Stat. at 239.

21. Air Transportation and Safety Stabilization Act § 405(c)(2)(C), 115 Stat. at 239.

22. Air Transportation and Safety Stabilization Act § 405(c)(3)(A)(1), 115 Stat. at 239.

23. *Id.*

24. *Id.*

25. A \$50,000 advanced payment against the final compensation amount to be awarded if the victim's family is suffering financial hardship.

26. <http://www.usdoj.gov/victimcompensation/deceasedvictims.pdf>.

27. *Id.*

28. Air Transportation and Safety Stabilization Act § 408, 115 Stat. at 241. Department of Justice September 11<sup>th</sup> Victim Compensation Fund of 2001, available at <http://www.usdoj.gov/victimcompensation/index.html>.

29. Department of Justice September 11<sup>th</sup> Victim Compensation Fund of 2001, available at <http://www.usdoj.gov/victimcompensation/index.html> (currently the victim's non-economic loss amount is presumed to be \$250,000).

uted according to the intestacy laws of the victim's domiciliary state.<sup>30</sup> Usually, a spouse or dependent will be entitled to receive the additional non-economic loss that has been added to the award on his or her behalf.<sup>31</sup>

Compensation is based on values calculated from Presumed Loss Calculation Tables.<sup>32</sup> The Presumed Loss Calculation Tables Before Collateral Offsets contain estimated compensation data.<sup>33</sup> The compensation data provided is not the exact loss- it is an approximation of the presumed loss before collateral offsets.<sup>34</sup> There are currently no published presumed loss tables for victims who suffered physical injuries.<sup>35</sup>

Compensation is awarded based on the decision of the Special Master.<sup>36</sup> These decisions are final and non-appealable.<sup>37</sup> However, a claimant may request a hearing on his or her claims either before the award amount is calculated or after the calculation to request a review of the presumed award.<sup>38</sup> Any claimant desiring a hearing will be afforded one. Claimants can either elect to receive the presumed award and then proceed to a hearing if they so choose, or they may go directly to a hearing.<sup>39</sup> The Special Master's review of whether or not to render an award is final and not subject to judicial review.<sup>40</sup>

In the requested hearing, the claimant is entitled to be represented by counsel.<sup>41</sup> Claimants also have the right to present evidence including documents and witnesses, and have such other due process rights as are deemed appropriate by the Special Master.<sup>42</sup> In exchange for certain recovery, claimants agree to waive

30. *Id.*

31. Currently this amount is presumed to be \$100,000.

32. <http://www.usdoj.gov/victimcompensation/index.html>.

33. *Id.* These tables begin with an established victim age and compensable income value. After adjustments for factors such as taxes, fringe benefits, supplemental income, and victim life expectancy, the table sets forth an amount for the presumed economic loss of the victim. The Special Master will then award compensation based on that figure.

34. *Id.* Collateral offsets include things such as pensions and insurance benefits, which serve to compensate victims in the event of death.

35. *Id.* Physically injured victims should refer to the regulations.

36. Air Transportation and Safety Stabilization Act § 405(b)(3), 115 Stat. at 241. The Special Master is an individual expressly trained for the claim procedure.

37. <http://www.usdoj.gov/victimcompensation/faq1.pdf>.

38. *Id.*

39. *Id.*

40. Air Transportation and Safety Stabilization Act § 405(b)(3), 115 Stat. at 241. Thus, if a claimant elects to collect from the Fund, they cannot then challenge the adequacy of the award in the court system.

41. Air Transportation Safety and System Stabilization Act § 405(b)(4), 115 Stat. at 239.

42. *Id.*

all rights to civil claims related to the injuries sustained, except those civil suits necessary to collect funds from collateral sources.<sup>43</sup>

As an alternative to recovery from the Fund, ATSSA created the option for an individual to file a claim under a federal cause of action.<sup>44</sup> ATSSA makes this cause of action the exclusive civil remedy, vesting original and exclusive jurisdiction in the United States District Court for the Southern District of New York.<sup>45</sup> The major question is whether ATSSA will successfully lure claimants away from the traditional time-consuming and uncertain litigation process into the realm of certain recovery, albeit of an uncertain amount, from the Fund.<sup>46</sup>

### III. MULLIGAN V. PORT AUTHORITY

Recent court orders have sought to discourage claimants from collecting from the fund and then filing a separate suit against a civil entity.<sup>47</sup> One order was issued in *Mulligan v. Port Authority*.<sup>48</sup> In *Mulligan*, the Honorable Alvin K. Hellerstein, a Manhattan U.S. District Court Judge, outlined how one's filing and service of a complaint against the Port Authority of New York and New Jersey could impact one's filing of a claim with the Fund.<sup>49</sup> Judge Hellerstein wrote in pertinent part:

Plaintiffs' First Amended Class Action Complaint names four plaintiffs who bring action as individuals and as representatives of all others similarly situated. Plaintiffs argue that §7108 does not exclude the possibility of a class notice of claim. I disagree. Section 7108 requires individual application and *individual* showing of claim and injury, not a generalized allegation suitable for a class. Section 7108 mandates that the notice of claim contain the name and address of *each* claimant, a description of the claim of that claimant, and the damages sustained by that claimant. The class allegations in the First Amended Class Action Complaint are inconsistent with the requirements of sections 7107 and 7108. Members of the class other than the named plaintiffs are not identified, nor are their claims or damages described. Because each purported member of the class has not complied with sections 7107 and 7108, plaintiffs cannot bring suit against the Port Authority as a class. The class allegations in the plaintiffs' First Amended Class Action Complaint are stricken.<sup>50</sup>

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43. Air Transportation and Safety Stabilization Act § 405(c)(3)(B)(i), 115 Stat. at 239. A collateral source includes life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist attacks. Air Transportation Safety and System Stabilization Act, § 402(4), 115 Stat. at 237.

44. Air Transportation and Safety Stabilization Act § 408(b), 115 Stat. at 240-41.

45. Air Transportation and Safety Stabilization Act § 408(b)(3), 115 Stat. at 241.

46. See generally <http://www.usdoj.gov/victimcompensation/index.html>.

47. See *supra* note 3 and accompanying text.

48. *Mulligan v. Port Authority of New York and New Jersey*, 2002 WL 31233245 at 1 (S.D.N.Y. Oct. 4, 2002).

49. *Id.* at 1.

50. *Id.* at 1.

The practical effect of this ruling, should it pass appellate review, is the prohibition of the filing of class actions by the September 11 victims in New York State. There are two possible consequences: either many victims will settle for compensation through the Fund rather than trying a case individually which would be difficult and financially burdensome, or victims will litigate their claims, clogging the nation's court systems with numerous scattered suits. The latter consequence is detrimental to all parties involved because it frustrates non-litigious victims' efforts to receive their rightful compensation. Additionally, it creates an unnecessary burden on the court system.<sup>51</sup>

#### IV. FUNDAMENTAL FAIRNESS PROBLEMS

Congress' prohibition of double dipping from the Fund as well as collateral sources is both necessary and appropriate. To allow double dipping would be fundamentally unfair to those victims choosing not to file suit. Each claim is deducted from an aggregate pool of money comprising the Fund.<sup>52</sup> As such, the more claims that are paid from the Fund, the smaller the aggregate pool of money will become. Consequently, allowing victims to collect from the Fund and also file suit would be unfair to potential claimants who may not be able to recover at all because the Fund would be depleted. As of January 1, 2004, 2,884 death claims and 4,185 injury claims were filed.<sup>53</sup> Given the uncertainty of the value of future claims, fundamental notions of fairness dictate that individuals intending to collect from both the Fund and a lawsuit must be precluded from collecting before those victims seeking compensation exclusively from the Fund. Accordingly, Congress is justified in its prohibition of double recovery from the Fund and collateral sources.

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51. I say "needless burden" because it is highly probable that those victims' tort claims will rest on a theory of negligence, which has a required element of proximate cause. Most courts, and reasonable juries would conclude that the extent of harm conceived for letting the terrorists on the planes with box cutters is not that the Towers would fall. Thus, there is likely no proximate cause element, and the tort claims would largely fail. See *supra* note 3 and accompanying text; see *infra* notes 101-103 and accompanying text.

52. Air Transportation and Safety Stabilization Act § 406, 115 Stat. at 240. See generally <http://www.usdoj.gov/victimcompensation/index.html>.

53. David W. Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, With Reservations*, NEW YORK TIMES, January 1, 2004 at B1.



## V. PROBLEMS WITH PROXIMATE CAUSE

Tort litigation is element-driven; to succeed in court, a plaintiff has the burden of proving all elements of the particular cause of action.<sup>54</sup> To succeed on a negligence theory of liability, there must be a breach of a duty that causes damage to a party.<sup>55</sup> In addition, the breach of the duty must be both the actual and proximate cause of the damages.<sup>56</sup> While the breach, duty, factual cause, and damages elements are fairly straightforward, juries often find the issue of proximate cause difficult and confusing.<sup>57</sup>

### A. *Palsgraf: The Foundation of Proximate Cause*

In order to understand proximate cause in its proper context and function, it is important to analyze *Palsgraf v. Long Island Railroad Company*.<sup>58</sup> Justice Cardozo's majority opinion forms the basis for all legitimate proximate cause analyses.<sup>59</sup> In *Palsgraf*, two men attempted to board a moving train.<sup>60</sup> While one succeeded, the other lost his balance and dropped a small package he was carrying onto the railroad tracks.<sup>61</sup> The package contained fireworks that exploded when it landed on the tracks.<sup>62</sup> The vibration from the explosion caused a scale to tip over and strike the plaintiff, Mrs. Palsgraf, while she was standing on the far end of the train station platform.<sup>63</sup> The trial court found that the negligence of the train employees in assisting the man aboard the train actually caused the package to fall onto the tracks.<sup>64</sup>

In the majority opinion, Justice Cardozo resolved the case on grounds unrelated to proximate cause, insisting that causation had nothing to do with the

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54. See generally RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (Basic Principles) (Tentative Draft No.2 March 25, 2002).

55. *Id.*

56. *Id.* The restatement defines factual cause as the following:

§ 26. Factual Cause: An actor's tortious conduct must be a factual cause of another's physical harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under § 27.

And although it is not expressly defined, proximate cause is analyzed accordingly:

§ 29. Limitations on Liability for Tortious Conduct: An actor is not liable for harm different from the harms whose risks made the actor's conduct tortious.

57. See Gash, *supra* note 6 at 531 n.50.

58. 162 N.E. 99 (N.Y. 1928).

59. See Gash, *supra* note 6 at 531 n.50.

60. *Palsgraf*, 162 N.E. at 99.

61. *Id.*

62. *Id.*

63. *Id.*

64. See Gash, *supra* note 6, at 533 (citing *Palsgraf*, 162 N.E. at 101).

plaintiff's injuries.<sup>65</sup> He stated "[t]he law of causation, remote or proximate, is thus foreign to the case before us."<sup>66</sup> Justice Cardozo chose to analyze the case with regard to whether the train employee breached a duty to Mrs. Palsgraf.<sup>67</sup> He perceived the scope of the duty to be a function of the risk presented by the allegedly tortious conduct.<sup>68</sup> "The risk reasonably to be perceived defines the duty to be obeyed and risk imports relation; it is risk to another or to others within the range of apprehension."<sup>69</sup> Thus, in *Palsgraf*, the reasonably foreseeable risks could include personal injury to the man trying to board the moving train and possible damage to his package. It could even be argued that it was reasonably foreseeable that the package might damage the railroad tracks, depending on its size and weight.<sup>70</sup>

Put more simply, some scholars have conceptualized Justice Cardozo's risk analysis as consisting of "spheres of danger," which create a spatial design for imposing liability.<sup>71</sup> That is, those reasonably foreseeable risks from the breach compose a sphere of danger, and any damages resulting from a risk inside the sphere give rise to liability. Conversely, damages resulting from risks outside the sphere do not permit recovery.<sup>72</sup> The critical question in Justice Cardozo's view was whether the risk was within the sphere of danger. Specifically, in *Palsgraf*, the question was whether the risk of a scale falling on a woman standing on the platform a great distance away was reasonably foreseeable were a man to drop a package onto railroad tracks while trying to board a moving train.<sup>73</sup> Justice Cardozo answered in the negative, finding that the wrongfulness of the act (the man boarding a moving train) was irrelevant.<sup>74</sup>

65. *Palsgraf*, 162 N.E. at 101.

66. *Id.*

67. *See Gash supra* note 6 at 533 (citing *Palsgraf*, 162 N.E. at 100). Justice Cardozo openly questioned whether the train employee actually breached a duty of care to the man he was helping into the train. *See id.* at 533. (Cardozo stated, "If there was a wrong to [the man carrying the package] at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package.")

68. *Id.*

69. *Palsgraf*, 164 N.E. at 101.

70. *See Gash, supra* note 6 at 533 (2003).

71. *Id.*

72. *Id.* (citing *Palsgraf*, 162 N.E. at 100)(referring to what Cardozo called the "orbit of danger" and "orbit of duty" as defining the scope of responsibility); *see also Palsgraf*, 164 N.E. at 102 (Andrews, J., dissenting) (characterizing Justice Cardozo's approach as creating a "radius of danger").

73. *Id.*

Modernly, courts routinely hold that an actor owes a broader duty of care with regard to physical harm than that suggested by Justice Cardozo.<sup>75</sup> However, the current test for proximate cause does include a “scope of the risk” inquiry, which essentially employs the Cardozian view of the sphere of danger.<sup>76</sup> Without proving proximate cause, the tort of negligence is not a viable option and recovery is impossible.<sup>77</sup>

### B. Proximate cause analysis: Risk/Utility Test

Every analysis of proximate cause, in one way or another,<sup>78</sup> involves the risk/utility test often written as “B<PL.”<sup>79</sup> That is, the burden of refraining from the conduct (“B”) must be less than the probability of injury (“P”) multiplied by the gravity of harm (“L”). Law students throughout the United States are familiar with this analysis as a method of ascertaining whether an individual negligently breached a duty of care by falling below the standard of care of a reasonably prudent person.

Courts use the benchmark standard of care of the reasonably prudent person because all aspects of conduct carry some degree of risk, and to make conduct tortious when it carried *some* degree of risk would be tantamount to strict liability.<sup>80</sup> Strict liability refers to liability that does not depend on actual negligence or intent to harm, but is based on the breach of an absolute duty to make something safe.<sup>81</sup> A strict liability tort system for negligent conduct would not only prove ineffective, but also dangerous. Individuals would not be able to function in our litigious society for fear of being subject to constant civil liability. Businesses could not operate, many public services would be discontinued, and our

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74. *Id.* (discussing the language used in both the majority opinion and the dissenting opinion with regard to the scope of the duty owed).

75. *Id.*

76. *Id.* (citing RESTATEMENT (THIRD) OF TORTS n. 4, § 29, cmt. n. 6) (“Ordinarily, the risk standard contained in this section will, without requiring any separate reference to the foreseeability of the plaintiff, preclude liability for harm to such plaintiffs.”); *id.* (“Generally, application of the risk standard should avoid much of the need for consideration of unforeseeable plaintiffs.”).

77. *Id.* (for more information on the current state of the “scope of the risk” debate including the RESTATEMENT THIRD approach).

78. See Gash, *supra* note 6 at 536 (citing *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1557 (7<sup>th</sup> Cir. 1987)) (“Ordinarily . . . the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytic than operational significance.”).

79. This test was originated by Judge Learned Hand shortly after *Palsgraf* was decided. See *id.* (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)). In that case he explained that a person fails to act as an ordinary reasonable person when the probability of harm risked by certain actions (“P”) multiplied by the gravity of harm risked by such conduct (“L”) outweighs the burden of not engaging in the conduct (“B”).

80. *Id.*

81. BLACK’S LAW DICTIONARY 926 (7th ed. 1999).

freedom as we know it would be forever changed. Consequently, the courts have settled upon the universal standard of care as that of the reasonably prudent person.<sup>82</sup>

### C. Proximate Cause Analysis of the September 11th Attacks

The next step in this review of the September 11th tragedy is to conduct a risk/utility analysis.<sup>83</sup> Such an analysis is essential for any September 11 victim who elects to forego compensation from the Fund and file a negligence suit against a private entity. Without the requisite proximate cause, the action would fail, leaving the victim with no compensation for injuries sustained.

With respect to the September 11 victims, the issue revolves around the scope of duty the airlines owed individuals. Following Justice Cardozo's analysis, the author would argue that a legal snapshot should be taken at the moment of impact between the planes and their targets to determine the reasonable risks associated with the allegedly negligent conduct: in this case, letting the terrorists onto the planes with box-cutters.<sup>84</sup> Those reasonably foreseeable risks associated with the conduct would fit inside the sphere of danger, and result in grounds for liability.

In the case of the terrorist attacks, there may be some debate over the foreseeable risks of allowing terrorists onto the planes with weapons. It seems clear that no one had ever contemplated terrorists using commercial airliners as weapons of mass destruction. The risk to individuals located outside the planes seemed rather remote, and certainly outside the zone of danger.<sup>85</sup>

However, upon closer examination, the risk to those outside the planes may not have been as unforeseeable as first imagined. Reports have surfaced following the tragedy that suggest that a Federal Bureau of Investigation ("FBI") offi-

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82. *Id.* (The law assumes that this reasonably prudent person, prior to engaging in any particular conduct, evaluates the risks posed by that conduct and balances those risks against the utility to be gained by engaging in such conduct. If the risks of harm posed by the conduct outweigh the utility of engaging in that conduct, then the reasonably prudent person will necessarily not engage in the conduct.)

83. For the purposes of this section, the discussion focuses on the potential liability of the airline industry.

84. See Gash *supra* note 6 at 541 (describing the notion of a legal snapshot).

85. Obviously those victims that were inside the jets were within the sphere of danger. The risk to potential hostages upon letting terrorists with weapons onto a plane is clearly foreseeable. Thus, this section will focus on the foreseeability of risk to those victims not physically on the planes.

cial in Phoenix wrote a memo prior to September 11, 2001, expressing concern about a number of pilots of Middle-Eastern citizenship training at nearby flight schools.<sup>86</sup> Apparently, the official's supervisors neither acted upon the memo, nor disseminated it within the FBI, the Central Intelligence Agency, or other governmental agencies.<sup>87</sup> Moreover, the *New York Times* best-selling and popular author, Tom Clancy, wrote about a fictional situation where a terrorist flew a commercial jet into the Capitol in an attempt to kill the President.<sup>88</sup>

The central question remains: are these victims outside the doomed planes within the Cardozian sphere of danger? If so, the airlines would have owed those individuals a duty of care, which they obviously breached. Thus, under the Cardozian view, they could recover damages against the airlines.<sup>89</sup>

It seems that counting individuals not physically in the planes within the sphere of danger is over-inclusive. To permit such inclusion would be tantamount to applying strict liability to the September 11th tragedy. In order to maximize efficiency, courts have made the applicable standard of care that of the reasonably prudent person.<sup>90</sup> Allowing the sphere of danger to extend to those victims on the ground would negate the reasonably prudent person concept.

This extension of the sphere of danger essentially follows Justice Andrew's dissenting opinion in *Palsgraf*. Justice Andrews maintained that one owes a duty to all, not just those in the zone of danger.<sup>91</sup> Applying the Andrews view to September 11,<sup>92</sup> the people in the World Trade Center and Pentagon were within the zone of danger the moment the terrorists entered the planes with weapons. This view makes little sense because everyone within the flight range of the planes would then be in foreseeable danger. Therefore, it may be absurd to claim that the victims not physically in the planes were within the reasonably foreseeable sphere of danger at the time the terrorists entered the planes. Following this logic, it is difficult to imagine any way in which victims not on the planes could recover from the airlines.

Applying the risk/utility analysis to the victims on the ground, it is obvious the airlines are not the proximate cause of the victims' injuries and damages. To determine whether the airlines were the proximate cause of the victims' injuries

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86. See <http://www.heritage.org/Research/HomelandDefense/WM100.cfm>.

87. *Id.*

88. See generally TOM CLANCY, EXECUTIVE ORDERS 5-6 (Thorndike Press 1996).

89. This presupposes that they also proved the remaining elements of the tort (i.e. damages).

90. See *supra* notes 81-83 and accompanying text.

91. See *supra* note 76 and accompanying text.

92. See *supra* note 85 and accompanying text.

and damages, a simple three-step query is appropriate.<sup>93</sup> The initial inquiry is: what types of harm did the airlines reasonably foresee at the time of the allegedly tortious conduct?<sup>94</sup> The second question is: is the type of harm actually caused to the victims not physically in the planes was one of the types of harm identified in the first query?<sup>95</sup> The third and final question is: was the harm actually suffered sufficiently probable to occur and sufficiently grave to the extent that it is proper to render the airlines' conduct tortious?<sup>96</sup> If these questions are answered in the affirmative, proximate cause exists and liability is appropriate. If not, proximate cause does not exist and no liability is appropriate.<sup>97</sup>

With regard to the initial question, the type of harm reasonably foreseeable at the time the terrorists were allowed on the planes was relatively limited. The most obvious would be risk to the passengers being held hostage. There might also have been a foreseeable risk to personal property and the airplanes themselves. In any event, the reasonably foreseeable risks were in and around the planes themselves. Secondly, the type of harm suffered by those victims not physically in the airplanes was a type of harm suggested in question one, namely physical harm or death. Thus, the crux of the analysis comes down to the final question regarding probability and gravity of harm. Although the gravity of the harm could hardly have been worse, the test probably fails with regard to probability of harm. There was no reason to foresee that those victims in the World Trade Center and Pentagon would suffer physical harm when the terrorists entered the planes. This is evidenced by the fact that the initial news reports suggested the first crash into World Trade Center Tower Two was probably an accident.<sup>98</sup> Furthermore, the passengers on the planes did not initially resist the terrorists because they thought it was likely they would remain safe throughout the ordeal. It was only after the first plane crashed and passengers on board began to hear reports via their cell phones that any resistance was shown by passengers on the planes.<sup>99</sup> Consequently, it is difficult to argue there was any foreseeable risk to the victims in the World Trade Center Towers and the Penta-

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93. See Gash, *supra* note 6 at 602.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Phil Hirschorn, *Lawsuits Likely After WTC Attacks*, CNN (Oct. 10, 2001), available at [www.cnn.com/2001/US/10/10/rec.tower.evacuation/index.html](http://www.cnn.com/2001/US/10/10/rec.tower.evacuation/index.html).

99. See [www.cnn.com/2002/US/09/11/ar911.memorial.pennsylvania/index.html](http://www.cnn.com/2002/US/09/11/ar911.memorial.pennsylvania/index.html).

gon, especially since those victims in the planes did not even fully believe they were at risk until well after the attacks had commenced.

Moreover, most passengers believed the terrorists would negotiate for their demands, rather than destroy the planes. Thus, it is hard to say there was any real probability of risk to victims on the ground.<sup>100</sup> Consequently, the third step in the risk/utility analysis fails, and liability to the airlines for damages suffered by those victims on the ground is likely inappropriate.

## VI. THE VICTIM COMPENSATION FUND: A BETTER CHOICE

The Fund is a far better choice than tort litigation for victims seeking compensation for damages suffered in connection to the September 11th tragedy. Notwithstanding the fact that the lawsuits are destined to fail due to proximate cause concerns, the results would be equally devastating should they somehow succeed. Successful tort litigation would lead to financial crisis for the airlines. In the presently recovering economy, the airlines currently teeter on the brink of bankruptcy.<sup>101</sup> Any additional financial adversity might push them over the edge.

For example, United Airlines recently filed for bankruptcy.<sup>102</sup> While United continues to operate, financial liability to the victims of September 11th could very well force the company to fold, causing damage to thousands of investors, workers, and travelers.

Airlines are an integral part of the American economy and their continued viability is of national concern.<sup>103</sup> Not only would those directly connected to the airline industry be adversely affected, there would also be a trickle-down effect that would spread throughout the country. Those who lose their jobs will be forced to collect unemployment, investments will decline, and businesses will likely have to curtail their national business ventures due to the difficulty in travel arrangements. Consequently, the actions of a few plaintiffs could potentially harm society as a whole. Given the uncertain nature of the suits, and the socially adverse effect the suits could have, recompense from the Fund is a better avenue for victim compensation.

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100. There was a probability of grave harm to those in the planes; thus the airlines are likely liable for damages suffered by those victims. My argument is that the three-step B<PL analysis fails to impose liability on the airlines for the damages suffered by those victims on the ground.

101. See *supra* note 2 and accompanying text.

102. See <http://www.cnn.com/2002/TRAVEL/12/08/united.bankruptcy/index.html>.

103. *Id.*

## VII. CONCLUSION

The September 11th Victims' Compensation Fund is a more appropriate method of compensating victims of this tragedy than tort litigation. Yet, there may be ways to refine the Fund's claim process to more adequately compensate victims. One solution is to allow mediation as a method of resolving a claim, rather than the Special Master ruling, in order to give claimants a more effective venue in which to argue their cases. Currently, victims are permitted to have a hearing in front of the Special Master with the goal of fully explaining their claims. Victims may present witnesses and evidence to the Special Master. While these hearings are a good idea, they may not be the best option available. Mediation would provide a vehicle for the victims to be heard while minimizing the cost of litigation.

Through mediation, victims can participate in the process of compensation. By allowing the victims to discuss their claims, it may allow them to achieve closure. Often, when dealing with a tragedy, communicating one's feelings in a mediation-like venue facilitates the healing process. The mediation process would allow such communication, whereas an evidentiary hearing would not. While the ultimate result of mediation and a hearing may not differ significantly, mediation could be extremely beneficial.

The emphasis of mediation is the process itself, not the result. Neutral mediators are abundant, and the sessions could be relatively informal. It is essential that victims are allowed to participate in the claim and are given a substantial role in the award determination process. If victims utilized mediation, the Fund could be a truly effective source of compensation, both financial and, perhaps more importantly, emotional.



