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Damage Assessment in Mass Conflicts: Understanding the September 11 Victim Compensation Fund Schemes

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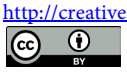

Abstract

The article aims to examine the characteristics of the damage assessment schemes that are responsible for the success of the September 11 Victim Compensation Fund. To this end, the fundamental concepts for understanding mass conflicts and the modalities of collective agreements will be presented first, considering the nature of the obligations involved. This will be followed by a more detailed presentation of the underlying facts and the methodology used in the schemes for fixing damages resulting from the terrorist acts of September 11, 2001. At the end, findings relevant to the success of the methodology employed will be presented. The factual support is provided by the case study, with emphasis on the data extracted from the annual reports (VCF Annual Report) published by the United States Government. The research method used is descriptive legal research using a quantitative descriptive analysis method approach and processing primary and secondary data.

Keywords

Class Actions, Mass Disputes, Collective Agreements, Damage Assessment, September 11 Victim Compensation Fund

1. Introduction

In September 2001, the activities of the Al-Qaeda terrorist group resulted in four unprecedented terrorist acts in world history. On that day, two commercial airliners from American Airlines and United Airlines (flights 11 and 175 respectively) were hijacked and intentionally directed to crash into the north and south towers of the World Trade Center building in New York. A third plane, also from American Airlines (flight 77), crashed into the Pentagon building, the headquar-

ters of the US Department of Defense located in the state of Virginia. Finally, a fourth united aircraft (Flight 93) crashed in a field in Shanksville, Pennsylvania, due to the actions of passengers who, having learned of the terrorist intentions of the hijacking group, avoided crashing into the planned location.

As a direct result of the acts of terrorism, 2977 (two thousand, nine hundred and seventy-seven) people died that day. In addition, many people (police officers, pedestrians, workers, tourists, etc.) suffered various types of physical injuries, some of which only became apparent in the following years.

That same month, on September 22, the President of the United States signed into law a bill entitled the *Air Transportation Safety and System Stabilization Act of* 2002, previously approved by the US Congress, with the aim of preventing a collapse in the national aviation industry, with significant implications for the economy. Its preamble clearly stated the objective of "preserving the continued viability of the United States transportation industry", avoiding the legal liability of airlines for damages caused to consumers and third parties. This led to the creation of a first compensation fund (*September* 11 *Victim Compensation Fund* - VCF1), mostly financed by insurance companies. This fund was managed by an independent professional in order to ensure fair compensation for victims and relatives of the deceased through self-composition, avoiding court litigation.

In 2011, a new compensation fund was created (James Zadroga 9/11 Health and Compensation Act - VCF2), aimed at compensating individuals whose injuries were only noticed after the first fund was closed, notably the professionals who took part in debris removal and rescue operations for direct victims.

Both funds consisted of compensation schemes created after the event causing mass damage and, although subject to criticism, achieved significant results. Around 97% (ninety-seven percent) of eligible families opted to join the VCF1 fund, resulting in more than 7 (seven) billion dollars in benefits paid out on an individualized basis, based on eligibility criteria. More than 5560 (five thousand, five hundred and sixty) people were covered in less than 3 (three) years, with administrative costs of just 1.2% (Hodges & Voet, 2018).

Having established these premises, the article aims to examine the characteristics of the damage assessment schemes that are responsible for the success of the September 11 Victim Compensation Fund.

To this end, the fundamental concepts for understanding mass conflicts and the modalities of collective agreements will be presented first, taking into account the nature of the obligations involved. This will be followed by a more detailed presentation of the underlying facts and the methodology used in the schemes for fixing damages resulting from the terrorist acts of September 11, 2001. Finally, relevant findings will be presented regarding the success of the methodology employed, as well as the possibility of replicating it in the resolution of mass conflicts in Brazil.

The factual support is provided by the case study, with emphasis on the data extracted from the annual reports (*VCF Annual Report*) published by the US

government.

The research method used is descriptive legal research using a quantitative descriptive analysis method approach and processing primary and secondary data.

This article is the product of post-doctoral research carried out between 2022 and 2024 at the State University of Rio de Janeiro, under the supervision of Professor Antonio do Passo Cabral.

2. Terminology: Understanding Mass Conflicts and Satellite Concepts

In the field of collective proceedings, there are many concepts put forward by the specialized doctrine, some of them with obvious overlap, others with content under intense debate. In fact, as widely recognized in the doctrine, "the reality of collective litigation and, consequently, of collective proceedings is multifaceted, admitting various profiles" (Vitorelli, 2023).

In the context of pre-procedural phenomena, at least three concepts are worth highlighting: collective conflicts, structural conflicts and mass conflicts. These phenomena may give rise, in the procedural field, to the recognition of institutes such as collective proceedings, structural proceedings and civil proceedings in the public interest (public interest litigation or public law litigation), with varied characteristics that directly affect the forms of composition.

2.1. Collective and Structural Conflicts

Collective conflict is a disagreement that "exists in reality and involves a multiplicity of subjects who make up a group" (Vitorelli, 2018b). In this type of conflict, the existence of a right or a passive legal situation attributed to a collective is discussed.

Although the existence of the "ontological individualist" (or aggregative) current, which defends the thesis that collectivities should be understood as mere fictions resulting from the sum of their members, the true subjects of law[1], is not unknown, the collectivist point of view provides a more solid basis for the theory of law. This is because it alone makes it possible to recognize certain forms of collective rights, especially those related to groups that are not organized on the basis of values such as individual autonomy, like some traditional communities (Jovanović, 2012). Likewise, as Denise Réaume points out, understanding collectivities as mere fictions does not adequately explain the ownership of goods of general interest characterized by the impossibility of individual apprehension ("holding constraint") (Réaume, 1988).

As we have already explained in previous work (Tavares, 2020), collective

[1]This is what Thomas Franc argues, for whom individuals are the holders of collective rights, with collectivities being mere "non-inherent historical-social constructs" (Frank, 1999). Also along these lines, Joseph Raz defines collective rights as the right of members of a given group to a common good that cannot be demanded singularly (Raz, 1988). There is a large group of authors who argue that collectivities should not be recognized as subjects of rights.

rights (or collective claims), the subject of collective conflicts, can be understood from a *non-aggregative* and *non-reductionist point of view*: rights that belong to a collectivity[2], in order to protect its own interests (Galenkamp, 1991)[3]. Logically, although the interests of the community cannot be reduced to those of its members, they are naturally related. This is because the existence of the collectivity depends on its ability to provide a collective interest that maximizes the happiness of its various members at the same time (Newman, 2004).

Once these premises have been established, it is possible to imagine concrete situations in which the collective interest clashes with the interests of the majority of the group's members. It is also possible to imagine situations in which the internal conflict within the group is highly intense, so that the sum of each member's interests would shed little light on the best way to exercise the collective right.

Sometimes, when faced with concrete collective litigation, individuals who make up the same community have heterogeneous and conflicting interests, because they have different perspectives on the problem. This is the case of what is known as radiated diffusion collective litigation, a concept developed by Edilson Vitorelli, a type of litigation marked by high levels of conflict (Vitorelli, 2016).

More specifically, the conflict or structural problem is abstractly characterized by the "existence of a state of structured non-conformity", that is, a "situation of continuous and permanent illegality or a situation of non-conformity, although not exactly illegal, in the sense of being a situation that does not correspond to the state of affairs considered ideal" (Didier Jr. & Zaneti Jr., 2023). Attributing greater utility to the concept, some of the doctrine recognizes such conflicts as a result of the way a bureaucratic structure (public or private) operates, arising progressively from a set of acts, omissions, policies or practices that "in isolation may even appear to be lawful", but which generate a situation of violation of the rights of the group (Vitorelli, 2023).

The typology of structural conflicts attracted the attention of American scholars in the mid-twentieth century, with the major reference being the *Brown v.*

[2]In defense of the collectivist current, responding to Boshammer's criticisms, Jovanović explains that, in the field of international law, the crime of genocide is not to be confused with the killing of individuals. Its radical genos, of Greek origin, means "race, nation or tribe", while the verb caedere, of Latin origin, has the meaning of "to kill". This understanding has been enshrined in domestic legislation, such as Law 2.889/1956, which regulates the crime of genocide in Brazil. Thus, this crime would consist of an action directed against a national, ethnic, racial or religious group as an entity, and not against its members. As a result, it is possible to achieve the criminalized intention of destroying the group, in whole or in part, through the death of a single member. It follows that the physical existence of the members of a group is not to be confused with the existence of the group itself, which becomes more evident if we consider the cultural traits that define the collectivity (Jovanović, 2012).

[3]For the author, this perspective presupposes the *de facto*, i.e. extralegal, existence of collectivities, which may encounter obstacles in the context of the general theory of law, which is why she defends their recognition in a restricted way to traditional communities. The differentiation between individual interests and the collective interest is explained by Newman, for whom the collective interest "is something that enhances the collective well-being [...], that makes the community prosper." (Newman, 2004)

Board of Education case, in 1954[4]. In most cases, structural disputes consist of collective conflicts related to the (mal) functioning of a bureaucratic structure of a public nature (Vitorelli, 2018b). This is the case of the current functioning of the public structures that make up the Brazilian prison system, marked by the lack of adequacy to the legal needs arising from the duty to protect the dignity, life and physical integrity of people in prison.

A recent example of a structural problem was presented in the Action for Failure to Comply with a Fundamental Precept (ADPF) No. 708, before the Federal Supreme Court (STF), known as the "Climate Fund case", which challenged the federal government's omissions in its duty to mitigate climate change ("unconstitutional state of affairs in environmental matters"). Conflicts of this nature tend to be remarkably complex, presenting themselves as "polycentric" disputes. As described by Fletcher, polycentricity is the property of a complex problem with several "centers" of subsidiary problems, each of which is related to the others, so that the solution of each depends on the solution of all the others (Fletcher, 1982). It is therefore possible to speak of the existence of various "zones of interest" (Cabral, 2009) which come together and move apart circumstantially.

2.2. Mass Conflicts

Mass harm or *scattered damages* are those in which a large number of individuals suffer damage as a result of a common event, such as an accident, a product defect in the consumer market or an anti-competitive practice.

Quite often, access to justice is pointed to as the main reason for class actions, especially in the case of mass injuries that generate insufficient rewards for filing individual lawsuits (*small claims*) (Blennerhassett, 2016). This does not mean, however, that all cases of mass conflict result in insignificant injuries. Just take the example of the attack on September 11, 2001, in which a set of common events (terrorist attacks) resulted in multiple physical and psychological injuries to various people, and omissions by the airlines involved with regard to the duty of consumer safety were pointed out.

In such cases, collective claims usually derive from contingent factual situations (Mancuso, 2004), arising from conflicts involving groups without prior social organization. As a result, the full definition of the groups involved will depend heavily on a prior analysis of the way their members interact and the degree of exposure to the injury suffered.

Commonly, in mass conflicts, claims can be exercised not only collectively, but also individually, as the Consumer Protection Code (Law 8.078/1990) recognizes in relation to homogeneous individual rights (art. 103, §§ 2 and 3).

2.3. Collective Proceedings

Collective proceedings are those conducted by a special procedural subject in

[4]Supreme Court of the United States, *Brown v. Board of Education of Topeka*, 347 U.S. 483, 1954.

defense of a collectively considered right, whose immutability of the sentence's command will reach a community or collectivity. The collective procedural relationship would therefore be marked by three elements: the affirmation of a collective legal situation, extraordinary legitimacy and the extension of the effects of the judgment to subjects who did not take part in the process (Gidi, 1995).

As Fredie Didier Jr. and Hermes Zaneti Jr. explain, it doesn't seem right to include in this concept the circumstances of being brought by an autonomous legitimized party and of having a special regime of res judicata, situations which, in reality, can also be present in individual proceedings (Didier Jr. & Zaneti Jr., 2017):

> *Thus, a collective proceeding is one in which a collective right lato sensu is claimed* (*active collective legal situation*) *or the existence of a passive collective legal situation is asserted* (*homogeneous individual duties, for example*). *It should be noted, then, that the core of the concept of collective proceedings lies in their litigious object: collective proceedings are proceedings whose litigious object is an active or passive collective legal situation.*
> *This distinction differs from the one proposed by Antonio Gidi, "according to his thinking, a class action is one brought by an autonomous legitimate party* (*legitimacy*), *in defense of a collectively considered right* (*object*), *whose immutability of the command of the sentence will affect a community or collectivity* (*res judicata*) [...]".

In fact, extraordinary legitimacy can also be found in individual cases, such as maintenance actions brought by the Public Prosecutor's Office in the interest of an incapacitated person, which is quite common.

In addition, the fact that the immutability of the sentence's command affects a community is a mere consequence of the subject matter of the litigation, insofar as the holder of the collective legal situation (active or passive) is a collective entity. In fact, the regime of res judicata (objective and subjective limits and method of production) can be regulated by the legislator in any way it sees fit, regardless of the subject of the litigation.

There is also a relevant reason for not considering res judicata as an essential element in the characterization of collective proceedings: the existence of collective procedural techniques (and, therefore, collective proceedings) whose purpose is not to produce res judicata, such as the incident for judging repetitive cases (Didier Jr. & Zaneti Jr., 2017) and concerted acts (art. 69, § 2, of the CPC).

As a result, it is possible to conceptualize the collective process more broadly, with the particularity of whether a collective right in the broad sense (active collective legal situation) or the existence of a passive collective legal situation[5].

[5]Doctrinal opinions that reject the existence of passive class actions are not unknown. According to Edilson Vitorelli, although widespread, the recognition of passive class actions in Brazil "is mistaken and expresses an erroneous understanding of the concept of passive class actions, as practiced in the United States" (Vitorelli, 2018a). This work, however, is oriented towards recognizing the possibility of attributing a legal duty or a state of subjection to a collective subject, which can be achieved through passive class actions. However, this is a subject whose explanation goes beyond the limits of the proposed object. For a better understanding of the subject, see Peixoto, 2016.

In foreign doctrine, it can be seen that the concept of collective proceedings is also broadly conceived, without taking into account the procedural aspects that have now been ruled out (legitimacy and res judicata). Along these lines, the UK Parliament's *Access to Justice Act* 1999 defines *Multi-Party Action* (MPA) as a genre that includes both representative actions, a "single" action aimed at resolving common issues of fact or law, and the collective judgment of individual claims that present common issues (*aggregate proceedings*)[6]. This is what Joanne Blennerhassett explains (Blennerhassett, 2016):

> *MPAs are one form of collective procedure that may lead to a remedy or broaden access to a remedy for mass harm. They are court-based mechanisms and can take many guises. One of these is the "collective action" or "representative action", which is often used for civil litigation seeking to secure collective redress.*
> [...]
> *Ther are other forms of group litigation procedures that need to be distinguished from collective actions as the claimants' cases remain separate and distinct but are grouped together for collective management, such as the English and Welsh tool of the Group Litigation Order (GLO).*

For Olijnyk, the collective process should be conceived in a very broad sense, so as to encompass various forms of *collective redress* (Blennerhassett, 2016)[7]. In all of them, it is possible to be faced with a "mega-litigation", characterized by Olijnyk by the existence of "high stakes, multiple parties, long hearing times, legal and factual complexity and a large volume of documentation" (Olijnyk, 2014).

Although, as we have seen, the concept of collective proceedings is quite simple, its legal discipline is not. The regulation of the interactions between the group that holds the collective right, the members of the group, the collective legitimized party, the opposing parties, intervening third parties and the judging body make up the collective due process of law, which is full of questions with no express legal answer (Vitorelli, 2016). Added to this are the various types of collective procedural techniques used to resolve disputes that can have the most diverse shades of complexity.

2.4. Structural Proceedings and Public Interest Litigation

Coined by Owen Fiss in 1979 (Fiss, 1979), based on his analysis of the *Brown* case, the structural process can be broadly understood as that which has as its object a structural problem (dispute or conflict), seeking to change the state of

[6]As defined in the *Access to Justice Act* 1999 (*The Funding Code*), "'Multi-Party Action' or 'MPA' means any action or actions in which a number of clients have causes of action which involve common issues of fact or law arising out of the same cause or event". Available at: http://www.opsi.gov.uk/si/si2000/70248906.htm. Accessed on: Dec. 23, 2018.

[7]The author points out that collective proceedings are still an incipient phenomenon in most jurisdictions, attracting attention in a small number of countries in the last quarter of the 20th century (Blennerhassett, 2016).

non-conformity towards an ideal state of affairs. For authors such as Didier Jr. and Zaneti Jr., multipolarity (polycentricity[8]), collectivity and complexity are typical characteristics of this type of process, although not essential (Didier Jr. & Zaneti Jr., 2023). This is an abstract concept that identifies structural processes even in individual actions whose outcome can have a collective reach. This would be the case of a lawsuit in which a particular inmate seeks specific religious assistance or respect for their customs within a prison.

In a different direction, Edilson Vitorelli conceives the structural process as a necessarily collective and complex process, in which the aim is, through judicial action, "to reorganize a bureaucratic structure, public or private, which causes, fosters or enables the occurrence of a violation by the way it works, giving rise to a structural dispute" (Vitorelli, 2018b). This conception, because it is more concrete, adds more utility to the concept, avoiding its extension to individual claims in which structuring techniques are occasionally used.

The need to rethink the procedures applicable to structural processes is not exactly new. As early as 1978, Lon Fuller argued that polycentric conflicts are not suitable for resolution by normal adjudication techniques, claiming that at some point atypical "managerial" techniques would be necessary (Fuller, 1978). In fact, especially in structural processes and other complex collective disputes, the practical difficulties in quickly and homogeneously composing the interests of the groups involved calls for creative and even "weak" judicial solutions (*week remedies*), in Mark Tushnet's expression. According to Tushnet, an example would be the "judicial encouragement of negotiations between the affected parties on the outlines of a more detailed plan, which the courts could ratify rather than develop independently" (Tushnet, 2009).

Thus, due to its complex and programmatic nature, the structural process tends to develop in a peculiar way, with a first phase aimed at 1) recognizing and understanding the characteristics of the problem, allowing the different interest groups to be heard. In a second phase, it turns to 2) drawing up a work plan aimed at changing the state of non-compliance, 3) implementing this plan, either compulsorily or by negotiation, and 4) monitoring the results of implementation, in order to guarantee the expected result (correcting the state of non-compliance and obtaining conditions that prevent it from recurring in the future) (Vitorelli, 2018b).

Collective proceedings are very close, for some, without distinction[9], to "civil proceedings in the public interest". In fact, public law litigation is a slightly older expression, originally attributed to Abram Chayes in a 1976 article (Chayes, 1976). In this work, the author addresses a procedural phenomenon that is dif-

[8]As Fletcher suggested in 1982, "a classic metaphor for a polycentric problem is a spider's web, in which the tension of the various threads is determined by the relationship between all the parts of the web, so that if one pulls on a single thread, the tension of the whole web is redistributed in a new and complex pattern" (Fletcher, 1982).

[9]This is the case of Margo Schlanger, for whom the terms "public law litigation", "structural reform litigation" and "institutional reform litigation" refer to the same procedural phenomenon (Schlanger, 1999).

ferent from the traditional resolution of disputes between private parties. It refers to litigation (particularly collective litigation) which increasingly involves the determination of questions of public law, whether statutory or constitutional, and often results in a decision which does not merely clarify the meaning of the law, but itself establishes a regime which orders the future interaction of the parties and also of absentees, subjecting them to continuous judicial supervision.

The approximation, or even identity, between structural lawsuits and public interest civil lawsuits derives from some shared characteristics, such as the mutability (or dynamism) of the subject matter, polycentricity (absence of fixed subjective positions), the prospective and regulatory nature of decision-making, the encouragement of self-composition, the involvement of public policies and the continuous nature of planned jurisdictional action. Although some authors have dedicated themselves to establishing a clearer distinction between the two categories (Vitorelli, 2023), it is certain that both Fiss and Chayes have dedicated themselves to exploring the growing injunctive, prospective and planned litigation, which differed from the traditional adjudicated solution conducted by the adversarial model for resolving private cases. As Margo Schlanger rightly points out, this is essentially the same phenomenon (Schlanger, 1999).

In summary, this topic has made it possible to note the existence and describe the various types of conflicts and the procedures for resolving them properly. In the next topic, considerations will be presented regarding the self-compositional techniques applicable in the field of collective conflicts.

3. The September 11 Victim Compensation Fund (VCF1) Scheme

Having established the necessary premises for classifying collective conflicts and understanding the various forms of composition, the following topics will be devoted to an analysis of the September 11 Victim Compensation Fund's negotiated reparation scheme.

On September 22, 2001, just eleven days after the attacks attributed to the terrorist group Al-Qaeda, the President of the United States signed the Victim Compensation of the Air Transportation Safety and System Stabilization Act. The expressive speed with which the act was approved by the Legislative Branch was based on the need to preserve the national civil aviation industry, as set out in its preamble[10].

According to the legislative discipline, the Department of Justice was to issue the regulations necessary for the operation of the fund within ninety days. As a result, on November 26, 2001, Kenneth R. Feinberg was appointed by the *Attorney General as Special Master*. He was later appointed on December 21 to lay down, in detail, the initial discipline for self-compositional procedures. In addition, the Fund financed a free telephone service for the exchange of information,

[10]United States. *Air Transportation Safety and System Stabilization Act*. Available at: https://www.congress.gov/bill/107th-congress/house-bill/2926 and https://www.govinfo.gov/app/details/COMPS-10415. Accessed on July 26, 2023.

as well as an eligibility form for urgent assistance benefits, to be filled in and submitted by interested parties at the service points established in New York and Washington DC. Finally, on March 13, 2002, the *Special Master* issued the final regulations and forms necessary to authorize the final compensation for damages (Hodges & Macleod, 2017).

3.1. Collective Settlement as a Priority Technique

In an empirical study published in 2018, Hodges and Voet assessed the satisfaction levels of the main collective redress mechanisms in several European states. The authors catalogued these mechanisms into five categories: 1) legal disputes in representative actions; 2) civil actions arising from criminal trials (civil actions *ex delicto*); 3) reparations paid as a result of the intervention of a public regulatory authority (regulatory *redress*); 4) collective alternative dispute resolution (ADR) mechanisms, the dominant model of which is the "consumer ombudsman" (a model endorsed by the United Nations Conference on Trade and Development); 5) sectoral *administrative redress schemes* (Hodges & Voet, 2018) for *personal injury claims*. In all categories, it is possible for redress to result from a self-composed practice.

Analyzing each of the mechanisms under various criteria based on empirical evidence, access, duration, costs, screening, identification of the damage, identification of the victims, prior legal assistance, proportionality of compensation, deterrence, etc. Hodges and Voet concluded that the regulatory redress and consumer *ombudsman* models, especially when combined and associated with self-compositional practices, score much higher than the collective legal dispute model on all criteria (Hodges & Voet, 2018).

In the field of US jurisdiction, the case of the *September 11 Victim Compensation Fund* is an example of the union of these two reparation technologies. This alternative-to-court compensation scheme was created by the US Parliament to ensure fair compensation for victims and relatives of the deceased through self-composition, under the management of a specialist (Special Master), similar to the Ombudsman.

3.2. Eligibility in VCF1

According to the Air Transportation Safety and System Stabilization Act (ATSSSA), the eligibility of applicants for VCF1 should be assessed by the *Special Master*, subject to the following admission criteria:

> (*A*) *an individual who—*
> (*i*) *was present at the World Trade Center*, (*New York*, *New York*), *the Pentagon* (*Arlington*, *Virginia*), *or the site of the aircraft crash at Shanksville*, *Pennsylvania at the time*, *or in the immediate aftermath*, *of the terrorist-related aircraft crashes of September* 11, 2001; *and*
> (*ii*) *suffered physical harm or death as a result of such an air crash*;
> (*B*) *an individual who was a member of the flight crew or a passenger on*

> *American Airlines flight* 11 *or* 77 *or United Airlines flight* 93 *or* 175, *except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September* 11, 2001, *or a representative of such individual shall not be eligible to receive compensation under this title*; *or*
> (*C*) *in the case of a decedent who is an individual described in subparagraph* (*A*) *or* (*B*), *the personal representative of the decedent who files a claim on behalf of the decedent*[11].

Only one application per individual was allowed, with the consequent waiver of the right to file civil suits for the same facts in any court. As for individuals who had already filed individual or collective actions, joining the out-of-court self-settlement scheme required prior withdrawal of the claim[12].

Subsequently, regulations issued by the Department of Justice, in prior consultation with the Special Master, took care to establish relevant concepts. An example is the idea of "physical harm", understood as:

> - *a physical injury to the body that was treated by a medical professional within* 24 *hours after the injury was sustained*, *or within* 24 *hours after the rescue*, *or within* 72 *hours after the injury or rescue in the case of victims who could not immediately realize the extent of their injuries or for whom medical treatment was not available on September* 11, *or within such time as the Special Master determines for rescue personnel who could not or did not obtain medical treatment within* 72 *hours*; *and*
> - *which required hospitalization for at least* 24 *hours or which caused*, *temporarily or permanently*, *partial or total physical disability*, *incapacity or disfigurement* (*Hodges & Macleod*, 2017).

On the other hand, psychological damage was not covered by VCF1, and the *Special Master had* the discretion to compensate more heavily for cases of physical damage that lasted longer.

Eligibility also took into account the location of the damage. The victim had to have been on board a hijacked plane or have been physically present at the sites of the World Trade Center, the Pentagon or Shanksville, Pennsylvania. The World Trade Center site was demarcated with an addition of one block on all sides. If there was clear evidence of physical damage, for example due to falling debris, occurring outside this zone, then the *Special Master* had the discretion to award compensation (Hodges & Macleod, 2017).

3.3. Damage Assessment

The most controversial discussions within the VCF1 certainly concerned the method of calculating compensation, especially whether standardized parame-

[11]Available at: https://www.congress.gov/107/plaws/publ42/PLAW-107publ42.pdf. Accessed on: October 2, 2023.
[12]United States. *Air Transportation Safety and System Stabilization Act*. Available at: https://www.congress.gov/107/plaws/publ42/PLAW-107publ42.pdf. Accessed on: October 2, 2023.

ters should be adopted for all claimants. As the legislation was silent on the point, different methods were used for deceased claimants and survivors with injuries.

Despite the absence of compensation for "psychological damage", economic and non-economic compensation was established. By way of example, in the case of deceased victims, each claimant family member was recognized the payment of fixed compensation for non-economic loss, in the amount of $250,000 (two hundred and fifty thousand dollars), with the addition of $100,00 (one hundred thousand dollars) for the spouse and dependents.

On the other hand, economic losses relating to the deceased or disabled were calculated using the presumed methodology. This provided consistency and ensured that claimants of the same age and earning power received the same level of compensation. In short, the victim's earnings history was provided and the appropriate compensation level was selected. Any applicable state and federal taxes were subtracted. A deduction was made for the portion of the victim's earnings that would have been consumed by the victim. The calculation included an average rate of income growth over time and an average length of working life. The formula incorporated a deduction for periods of unemployment based on national averages (Hodges & Macleod, 2017).

As for the survivors, economic and non-economic compensation was also recognized.

Taking into account the heterogeneity of the physical injuries suffered, as well as the significantly different long-term effects, individualized payments were considered appropriate for personal injuries. According to the established regulations, each claim for compensation for individual physical injuries was to be individually assessed, establishing the non-economic loss according to the extent, nature and permanence of the injury. There was no formula for calculating the non-economic loss resulting from physical damage, nor was there a pre-defined value. The regulations only provided that the *Special Master* could base himself on the non-economic loss methodology for deceased victims and adjust the compensation according to the extent of the claimant's physical injury.

Similarly, the same methodology established for calculating the economic losses owed to relatives of deceased victims was used for the purposes of compensating surviving victims, with the necessary adjustments in line with the impact of the damage on working capacity and its duration.

For the start of the negotiations, the VCF1 was designed so as not to overburden the applicants. In short, they had to provide the victim's age, earnings history, employment benefits and collateral compensation data, along with the age and status of the victim's family members. All this information was considered relatively simple for claimants to obtain (Hodges & Macleod, 2017).

3.4. Compensation Scheme Procedure

The start of VCF1 negotiations required interested parties to submit an applica-

tion with documentary proof of eligibility, based on three cumulative requirements: 1) physical injury or death; 2) presence at the scene of the accident; 3) injury suffered at the time of the events or as a result of them.

With regard to deceased victims, there were no specific rules on the list of "*personal representatives*", nor even on any duty to notify and divide amounts. According to the regulations, "those appointed in accordance with the legislation of the victim's state shall be considered personal representatives for the purposes of claims against the VCF1" (Hodges & Macleod, 2017). Only in the event of the absence of an executor or successor appointed by the jurisdiction of origin could the *Special Master* adopt a simplified procedure for recognizing beneficiaries. In order to avoid future litigation against possible absentees, all representatives had a duty to provide a list of potential VCF1 beneficiaries, as well as undertaking to notify them. The list was published on the internet.

Once the request, made on a standardized form, was accepted, two paths were open to those interested, called *Track A* and *Track B*, chosen at the discretion of the complaining party.

In the first procedural form (*Track A*), after the application was accepted by the evaluation team appointed by the *Special Master*, the applicant was formally notified, indicating the amount presumed to be due. They were also offered the possibility of a hearing before the *Special Master* or a person appointed by him, for clarification. In the event that, instead of immediate acceptance, the representative requested a hearing, it was up to the *Special Master to* decide whether to increase the amount of compensation due, based on the grounds put forward by the claimant. There was no possibility of an appeal to challenge this final decision.

In the second procedural form (*Track B*), the appointment of a hearing was automatic, as soon as the eligibility was admitted. These hearings were held in a variety of ways, by correspondence, in person, by telephone, etc. Likewise, at the end, it was up to the *Special Master to* set a final amount due, with no provision for administrative appeal.

Around 89% (eighty-nine percent) of those seeking compensation for physical damage opted for *Track A*. The other 11% (eleven percent) opted for *Track B*. *On the* other hand, those seeking compensation for the death of family members opted for Track *A* (forty-seven percent) and *Track B* (fifty-three percent) in a balanced manner. Despite this, a clear demographic difference was identified in the choices made by those interested in death benefits, with high-income families preferring Track *B* (Hodges & Macleod, 2017).

3.5. VCF1 Statistics

The VCF1 was responsible for compensating a total of just over 7 (seven) billion dollars, with $5,996,261,002.08 going to the families of fatal victims and $1,053,154,534.56 to compensate victims of physical damage. Of the total of 7403 (seven thousand, four hundred and three) applications, 5560 (five thousand, five

hundred and sixty) were granted, while the rest were denied, withdrawn or abandoned. The total administrative costs amount to approximately eighty-six million dollars (Hodges & Macleod, 2017).

Table 1 and Table 2 show the main data.

4. Relevant Findings from a Successful Model

Considerations on the efficiency and success of the VCF1 can be made from the general costs of administering the program, which totaled $86,873,312.312. This figure corresponds to around 1.2% of the total dollars earmarked for compensating victims, revealing a high level of efficiency. It should be noted, however,

Table 1. Compensation statistics for all types of damage.

Number of requests (by object)		
Death	2.968	
Physical damage	4.435	
Total number of requests:	7.403	
Detais		
Track A (67% of agreements signed)	3.735	$3,029,856,022.91
Track B (33% of agreements signed)	1.825	$4,019,559,513.73
Total agreements signed	5.560	
Total amount indemnified		$7,049,415,536.64
Average compensation		$1,267,880.49
Average compensation		$855,919.50
Maximum compensation		$8,597,732.00
Minimum compensation		$500.00

Table 2. Administrative costs.

Pricewaterhouse Coopers (including subcontractor costs)	$76,511,000.00
Public lawyers and government support for the program	$3,667,000.00
Administrative courts	$679,000.00
Aspen Systems	$4,674,000.00
CACI	$862,000.00
Consultants	$76,312.00
Feinberg Group	$0
Out-of-pocket expenses	$404,000.00
Total	$86,873,312.00

that the compensation was high and that several individuals offered their time on a *pro bono basis*. *For* example, the Feinberg Group, *Special Master* and many lawyers did not charge for their time. Despite this, as Christopher Hodges notes, it is reasonable to assume that "the alternative option, a lawsuit based on civil liability, would normally incur substantially higher transactional costs" (Hodges & Macleod, 2017).

In addition, the speed with which individual reparations took place is striking. Ninety-seven percent of eligible families chose to claim the benefit of the scheme. Almost 7,500 individualized applications were processed and completed in less than three years. Compared to the delays, costs and uncertainties of the civil justice system, the Fund has proved to be an efficient and effective alternative (Hodges & Macleod, 2017).

5. Conclusion

There are many mechanisms for repairing collective damage drawn from foreign experience, and five categories stand out. These are: 1) legal disputes in representative actions; 2) civil actions arising from criminal trials (civil actions *ex delicto*); 3) reparations paid as a result of the intervention of a public regulatory authority (regulatory reparation); 4) collective alternative dispute resolution mechanisms (ADR), the dominant model of which is the "consumer ombudsman" (a model approved by the United Nations Conference on Trade and Development); 5) sectoral administrative redress schemes for personal injury claims. In all categories, it is possible for redress to result from a self-composed practice.

When looking at these mechanisms under various criteria: access, duration, costs, screening, identification of the damage, identification of the victims, prior legal assistance, proportionality of compensation, deterrence, etc. comparative studies have given special value to the regulatory redress and consumer ombudsman models, especially when combined and associated with self-compositional practices.

In the field of US jurisdiction, the *September 11 Victim Compensation Fund* is an example of the union of these two reparation technologies. This alternative compensation scheme was created by the US Parliament in order to ensure fair compensation for victims and relatives of the deceased through self-composition, under the management of a specialist (*Special Master*), similar to the *Ombudsman*.

Adopting a self-composed *opt-in* structure, the reparations scheme can be considered a solid example of the relevance and usefulness of properly constructing compensation schemes after the event causing mass damage and has achieved significant results. Around 97% (ninety-seven percent) of eligible families opted to join the VCF1 fund, resulting in more than 7 (seven) billion dollars in benefits paid on an individualized basis, based on eligibility criteria. More than 5560 (five thousand, five hundred and sixty) people were covered in less

than 3 (three) years, with administrative costs of just 1.2%, proving to be an efficient mass reparation scheme.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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