

WHY THE SEPTEMBER 11TH VICTIM COMPENSATION FUND PROVES THE CASE FOR A NEW ZEALAND-STYLE COMPREHENSIVE SOCIAL INSURANCE PLAN IN THE UNITED STATES

*James C. Harris**

“Tort law frequently resembles a Rubik’s cube. With each attempt to align one aspect of the puzzle, the effort distorts another.”¹

I. INTRODUCTION.....	1368
II. BACKGROUND.....	1372
A. <i>The New Zealand Plan</i>	1373
B. <i>The September 11th Victim Compensation Fund</i>	1376
III. CURRENT AMERICAN TORT DOCTRINES AND NO-FAULT AUTO PLANS.....	1379
A. <i>Joint and Several Liability</i>	1380
B. <i>Comparative Negligence</i>	1382
C. <i>No-Fault Automobile Insurance Plans</i>	1384
IV. HOW THE NEW ZEALAND PLAN AVOIDS THE INHERENT PROBLEMS OF TRADITIONAL TORT LAW	1386
V. SOME COMMON ARGUMENTS AGAINST ADOPTING AN NZP-STYLE SCHEME IN THE UNITED STATES.....	1393
A. <i>Line-Drawing Problems</i>	1393
B. <i>Fairness Issues</i>	1395
C. <i>“9/11 Was Different”</i>	1398
D. <i>Lack of Deterrence</i>	1402
E. <i>Need for Retribution</i>	1405
VI. CONCLUSION.....	1407

* J.D., Northwestern University School of Law, 2006; B.A. Philosophy, B.A. Computer Science, Amherst College, 2002. I would like to thank Professor Ronen Avraham and Professor Marshall Shapo for encouraging support and valuable cautions, respectively.

¹ William R. Tapella II, *Comparative Fault, Contribution, and Joint and Several Liability: An Argument Against Reconciliation*, 88 ILL. B.J. 694, 694 (2000).

I. INTRODUCTION

Although American tort law has been modified and reformed numerous times throughout its history as part of an ongoing effort to make it more fair, simple, or administratively efficient, it seems that nearly every effort to solve one problem creates another. This has been especially true in sticky situations involving multiple defendants. To illustrate, consider the following situation:

[A] drunk driver hits a jogger on a dark road at night. Assume the driver did not see the jogger because: (i) the driver's perception is greatly impaired by alcohol; (ii) a street light maintained by the city is burned out and this was known by the city; and (iii) the jogger was not wearing reflective clothing. Assume that a jury would find that all three parties breached a duty of care and were factual causes of the accident, and that the jury would apportion fault, if asked to do so, as follows:

Drunk Driver: 90%

City: 5%

Jogger: 5%²

Pure joint and several liability, the traditional rule that would apply in this situation, allows the jogger, upon successful completion of a lawsuit, to collect 100% of her judgment (suppose \$100,000) from either defendant. The jogger could, therefore, collect the full \$100,000 from the city even though the jury (arguably) only found the city responsible for 5% (or \$5000) of the damage.³

However, most jurisdictions no longer follow pure joint and several liability.⁴ A more common approach is a comparative negligence rule, whereby each defendant is held accountable only for that proportion of the judgment equal to the defendant's proportionate responsibility in causing the injury.⁵ In a comparative negligence regime, the driver above would pay at most \$90,000, and the city would pay at most \$5000.⁶ But then the Rubik's cube nature of tort law becomes clear: By aligning the law from the defendant's perspective, comparative fault distorts the law from the plaintiff's perspective. If the driver cannot pay \$90,000 (if, for instance, the driver is insolvent and has no insurance), then the jogger receives just \$5000 for a \$100,000 injury. If compensation is to be a primary goal of tort, then such a result is hardly more satisfactory than requiring the city to pay the driver's share, as under pure joint and several liability. Several

² Jim 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, 589 (2003).

³ See *infra* notes 97–101 and accompanying text.

⁴ Some states apply it in particular scenarios, and a few states still use it as a default rule. See *infra* note 115.

⁵ See *infra* note 102 and accompanying text.

⁶ See *infra* notes 114–124 and accompanying text.

more tort alternatives exist, but no complete system is satisfactory.⁷ Certain limited-scope, no-fault statutes are in force in several states and foreign jurisdictions,⁸ but these are only effective within the confines of their respective injury-specific contexts.⁹

One recent example of a limited-scope, no-fault compensation system is the September 11th Victim Compensation Fund (“VCF” or “the Fund”), part of Congress’s reaction to the 2001 terrorist attacks on the United States.¹⁰ In the aftermath of 9/11, the problems posed by the existence of multiple potential defendants were particularly acute.¹¹ The Al Qaeda operatives who hijacked the four airplanes are analogous to the drunk driver in the example above, insofar as they bear most of the responsibility for the victims’ injuries, but they are also insolvent, unavailable for paying judgments, or dead.¹² Accordingly, plaintiffs sought alternate defendants—the airlines, airplane manufacturers, building owners, and others—who are analogous to the city in the example above.¹³ This latter group was less responsible for the injuries, but presumably more capable of paying a judgment, and available to do so. However, many of these potential defendants, particularly the airlines, were on the verge of bankruptcy themselves. Thus, while they may have had funds with which to settle claims by victims of the terrorist attacks, actually doing so would have threatened to put at least some of them out of business entirely.¹⁴

To ameliorate the situation, Congress combined money requisitioned from general government revenues with charitable donations to create the VCF, a fund to compensate all of the victims of the terrorist attacks.¹⁵ Participation in the Fund was optional; Congress left victims the option to sue

⁷ Alternatives include joint and several liability with contribution and strict liability. They shift liability among defendants in various ways but none solves the central Catch-22 of tort law: the inability to always provide full compensation to the plaintiff while ensuring that no defendant will have to pay for more than the damage he has caused.

⁸ See *infra* notes 127–143 and accompanying text.

⁹ See *infra* notes 127–143 and accompanying text. Victims of certain mass torts have also received compensation through limited no-fault plans, and several authors have proposed no-fault plans for medical malpractice claims. See, e.g., Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093 (1993); Randall R. Bovbjerg & Frank A. Sloan, *No-Fault for Medical Injury: Theory and Evidence*, 67 U. CIN. L. REV. 53 (1998); Howard Hiatt & Paul Weiler, *No-Fault Medical Coverage Would Cure Many Ills*, BOSTON GLOBE, Nov. 5, 1999, at A27.

¹⁰ Air Transportation Safety and System Stabilization Act, Pub. L. No 107-42, § 405(b)(2), 115 Stat. 230, 238 (2001) (codified as amended at 49 U.S.C. § 40101 (West Supp. 2003)).

¹¹ See John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1043–44 (2003).

¹² See *id.* (“Terrorists . . . are hardly likely defendants: All but one of those thought directly involved is dead, and the task of assigning responsibility to others who planned or supported the terrorists seems daunting, if not impossible.”).

¹³ See *In re* September 11th Litigation, No. 21 MC97(AKH), 2004 WL 1320897 (S.D.N.Y. June 10, 2004).

¹⁴ *Id.*

¹⁵ Air Transportation Safety and System Stabilization Act §406, 115 Stat. at 238.

in tort if they were dissatisfied with the Fund payment.¹⁶ The unprecedented horror of the events of September 11th and the associated national insult were undoubtedly the impetus for Congress to enact such a revolutionary system, but the reason for the bill's creation should not limit its prospective application, if it is found to be a good model for the future.¹⁷ The central thesis of this Comment is that using the Victim Compensation Fund as a model for injury compensation in this country would in fact be a beneficial change for the country.

One possible way that Congress could extend the theory of the Victim Compensation Fund would be to establish a system like New Zealand's comprehensive social insurance plan. In New Zealand, a victim of accidental injury need not prove fault or causation of any kind; as long as a claimant has satisfactorily established injury, the state will compensate him for his losses.¹⁸ The New Zealand Plan ("NZN" or "the Plan") is especially practical for addressing the problem of multiple defendants. Since all awards come from a pool, there is no danger of leaving a plaintiff entirely uncompensated and, likewise, no danger of forcing a single defendant to bear the full costs of an injury that was actually caused by another negligent actor or merely by an unlucky sequence of events.

In contrast to the NZN, the VCF reserved claimants the right to sue in tort if they so chose. However, the overwhelming majority of potential claimants opted to accept money from the Fund—thereby waiving their right to sue—which was a major factor in the ultimate success of the VCF.¹⁹ Although this trend can be explained by pointing to the low chance of a September 11th plaintiff recovering money in court compared to a typical tort plaintiff,²⁰ economists have shown that if a compensation system ex-

¹⁶ In this sense, the Victim Compensation Fund was similar to an "opt-out" style no-fault plan, under which all participants choose at the outset whether to participate in the plan and forgo both the opportunity and risk of litigation, or to remain in the tort system with its enlarged risks and opportunities. See *infra* notes 127–143 and accompanying text for a discussion of no-fault plans generally.

¹⁷ See, e.g., Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573 (2001). But see Leo Boyle, *A Dangerous Distortion*, 38 TRIAL 9 (2002); Erin G. Holt, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513 (2004).

¹⁸ See Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 52 MD. L. REV. 1070, 1070 (1993).

¹⁹ Fund compensation was eventually chosen by 97% of all eligible claimants, and aggregate payouts totaled approximately \$7 billion. David Hechler, *Conquering the Challenge*, NAT'L L.J., Dec. 20, 2004, at 20.

²⁰ See Culhane, *supra* note 11, at 1047–48 (noting that although the judge presiding over the 9/11 litigation found a broad duty of the airlines to the people killed in the terrorist attacks, "it is possible, perhaps likely, that this broad definition of duty will not survive on appeal," and "a jury might regard the acts of the terrorists as supervening causes that cut off the airline's liability"). The potential plaintiffs may also have chosen the Fund for other, perhaps personal or patriotic reasons. However, as long as it were established that future everyday plaintiffs were not averse to giving up the lawsuit option, this would not bar establishing a widespread Plan in the United States.

isted for all injuries, future victims would face a similar tradeoff;²¹ thus, a rational plaintiff would choose guaranteed compensation virtually every time.

This Comment argues that the United States would benefit by doing just what is described above—addressing the shortcomings of our current tort system by adopting a comprehensive social insurance system like New Zealand’s. The success and public acceptance of the VCF’s limited-scope, no-fault model suggests that such a move could enjoy broad support from the general public.²² Such a move would also solve the fundamental problems that plague tort law, including the problem of multiple defendants, imperfections in the trial process, causation luck, and unpredictable financial status.²³ The current tort system contains a myriad of other problems that would also be solved by adopting an NZP-style plan.²⁴ However, this Comment focuses on the theoretical and philosophical problems of our current compensation scheme,²⁵ rather than the practical problems that have grown up in the implementation of the tort system. Additionally, for illustrative examples, this Comment focuses on situations involving multiple defendants. These situations are by no means the only ones where the NZP has clear advantages, but examining them is the easiest way to understand differences between the NZP and American tort law and the improvements that would result from switching to an NZP-style system.

The establishment of a comprehensive social system is not merely an academic exercise: The success and public acceptance of limited-scope, no-fault plans—including the VCF—strongly suggest that such a system is

²¹ See Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315 (2004); Jeffrey O’Connell et al., *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 MD. L. REV. 160, 161 (1996) (“Compensation under [no-fault] plans more closely matches compensation with economic loss—principally medical and wage losses.”). But see Yu-Ping Liao & Michelle J. White, *No-Fault for Motor Vehicles: An Economic Analysis*, 4 AM. L. & ECON. REV. 258, 260 (2002) (“[A] justification for jurisdictions to adopt a mandatory no-fault system is that drivers do not choose it voluntarily even when it would be desirable for them to do so.”). Recall that society as a whole will benefit to some degree from potential plaintiffs’ opting out of court, but even more significant cost savings will be realized by eliminating the option to sue altogether (since modified no-fault systems with thresholds lose far more money in transactions costs than pure systems). See *infra* notes 131–136 and accompanying text.

²² See David M. Studdert et al., *Can the United States Afford a “No-Fault” System of Compensation for Medical Injury?*, 60 LAW & CONTEMP. PROBS. 1 (1997).

²³ See *infra* Part IV.

²⁴ See, e.g., Mullenix, *supra* note 21, at 1322–27 (listing the following as among the problems with our current tort system: frivolous lawsuits, runaway noneconomic damage awards, lack of actual damage calculations, junk science in the courts, problems with the jury system, limitations of immunities, forum shopping, attorney fee awards, and judicial selection).

²⁵ These could be considered the problems inherent in any injury compensation system based on adversarial court proceedings. See Herbert M. Kritzer, *American Adversarialism*, 38 LAW & SOC’Y REV. 349, 368–72 (2004).

feasible.²⁶ Many commentators have analyzed either the NZP or the VCF in isolation.²⁷ Some have asked whether the NZP could work in the United States,²⁸ whether something like the VCF should be adopted for future terrorist acts,²⁹ or whether aspects of the VCF might be useful to adopt in a future tort reform act.³⁰ Still others have gone so far as to consider whether the VCF should spur the United States to scrap the tort system altogether and adopt no-fault for all torts.³¹ But to date no commentator has explicated the compelling argument that the similarities between the VCF and the NZP, together with the success of the VCF, urge the adoption of a comprehensive social insurance plan substantially similar to the NZP in the United States.

Part II of this Comment provides useful background information for comparing the efficacy of the two main compensation systems analyzed in the Comment by describing the New Zealand Plan and the Victim Compensation Fund in detail: what each plan covers, who it covers, and how it is funded. Part III begins by briefly describing two approaches to tort law—joint and several liability and comparative negligence—and the problems associated with each. It then goes on to discuss no-fault auto plans as an example of how some states have benefited by eliminating one class of tort lawsuits. Part IV discusses how a New Zealand-style plan would be an improvement over any of the compensation systems existing in this country (described in Part II) and would solve the theoretical problems of tort lawsuits, such as the joint and several liability problem. Part V addresses common arguments against the implementation of a comprehensive plan in the United States. Finally, Part VI concludes by briefly summarizing my argument that adopting a New Zealand-style social insurance plan in the United States would be beneficial because it would have a negligible effect on the economics of most accident situations, it would be a major improvement in certain cases, and it would not have any major drawbacks.

II. BACKGROUND

Both the New Zealand Plan and the Victim Compensation Fund operate to fairly compensate victims of physical injury with a minimum of bureaucratic delay. A description of the origins and mechanics of each is the

²⁶ See Studdert, *supra* note 22 (arguing that at least medical no-fault could be adopted in this country on the basis of the success of a similar system in Sweden).

²⁷ See, e.g., James P. Kreindler & Brian J. Alexander, *September 11 Aftermath: A Perspective on the VCF and Litigation*, 18 AIR & SPACE LAW. 1 (2004).

²⁸ See, e.g., Marshall S. Shapo, *Compensation for Terrorism: What We Are Learning*, 53 DEPAUL L. REV. 805 (2003).

²⁹ See, e.g., Culhane, *supra* note 11.

³⁰ See, e.g., Mullenix, *supra* note 21.

³¹ See, e.g., Rabin, *supra* note 17.

first step in explaining how nationwide compensation for accidents in the United States could follow the same pattern.

A. *The New Zealand Plan*

In 1967, New Zealand convened a Royal Commission to investigate the law governing lawsuits for accidental incapacity or death,³² an area of the law that many suspected of falling woefully short of providing ideal results for the compensation of personal injuries.³³ The resulting report, named after the chair of the Commission, became known as the Woodhouse Report.³⁴ The Woodhouse Report presented five principles that the Commission believed a compensation system for injured persons should follow: (1) “protect all citizens . . . from the burden of sudden individual losses” resulting from physical incapacity; (2) provide compensation from a community-financed scheme for all injuries based on the same scale regardless of the causes of a person’s injuries; (3) urge physical and vocational recovery from work-interrupting injuries; (4) provide benefits related to lost income; and (5) fulfill the previous four goals in a timely manner in recognition of the fact that a delay in compensation is antithetical to the system’s purpose.³⁵ The Report went on to explain how the remedies currently available in New Zealand did not meet these goals³⁶ and concluded by suggesting that a comprehensive scheme of accident compensation would accomplish all of the desirable goals for an accident compensation framework.³⁷

In the wake of the Woodhouse Report, the New Zealand Parliament passed the Accident Compensation Act of 1972, laying out the framework for their social insurance scheme. It has undergone several waves of changes since then, but its basic tenets remain unchanged today.³⁸ The principal act that governs the scheme is the Injury Prevention, Rehabilitation, and Compensation Act of 2001.³⁹ The basic premise of the Act is simple: personal injury tort suits for damages are not allowed.⁴⁰ Instead, in most situations,⁴¹ an injured party in New Zealand will receive compensa-

³² Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404, 406 (2000).

³³ Tort law in New Zealand at the time faced many of the same problems that tort law in this country faces now. *See id.* at 407–08; Mullenix, *supra* note 21, at 1323–27.

³⁴ Todd, *supra* note 32.

³⁵ *Id.* at 407 (citing ROYAL COMM’N OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967)).

³⁶ The Report analyzed workers’ compensation along with the common law action for damages and found them both unsatisfying. *Id.* at 409.

³⁷ *Id.*

³⁸ *Id.* at 410.

³⁹ A guide to the act is available online. Accident Compensation Corp., <http://www.acc.co.nz/about-acc/about-the-iprc-act/index.html> (last visited Feb. 18, 2006).

⁴⁰ *Id.*

⁴¹ *See infra* notes 55–61 and accompanying text.

tion for his injuries, including loss of wages, from a centralized fund.⁴² The scheme operates like insurance in the sense that everyone contributes a small amount to the fund, and everyone is covered in case of an accident.⁴³ By relinquishing the right to sue in tort, injured parties are assured recovery for their injuries, a quid pro quo arrangement akin to the compromise that underlies workers' compensation in the United States.⁴⁴ Although a typical Plan payment is smaller than a large American personal injury tort award, every qualifying victim receives compensation.⁴⁵ Thus, in the aggregate, plaintiffs do not necessarily receive less compensation.⁴⁶

The Plan covers everyone physically located in New Zealand at the time of his injury, regardless of nationality,⁴⁷ although foreigners are limited to recovery of "treatment, social rehabilitation and death payments."⁴⁸ The Plan even covers New Zealanders abroad.⁴⁹ The Plan is administered by a body called the Accident Compensation Corporation ("ACC").⁵⁰ Run by a board composed of eight directors, a staff of senior managers, and approximately 2000 employees throughout New Zealand,⁵¹ the ACC is in charge of "preventing injury, collecting personal injury cover levies, determining whether claims for injury are covered by the scheme . . . , paying compensation, buying health and disability support services to treat, care for and rehabilitate injured people, and advising the government."⁵² The pledge of the ACC is "to prevent injury, to provide the best treatment and care if injury occurs, and to quickly rehabilitate people back to work or independence at a price that offers high value to levy payers and all New Zealanders."⁵³

⁴² Todd, *supra* note 32, at 416–17.

⁴³ See *supra* note 161; see also Miller, *supra* note 18, at 1071 ("[T]he basic principle of the original program [was] community or collective—as opposed to individual—responsibility. . . . [T]he scheme reflected a concept of social insurance; it was not a private insurance scheme.")

⁴⁴ Miller, *supra* note 18, at 1088.

⁴⁵ Qualified victims includes most victims of accidental injury in New Zealand. See *infra* notes 47, 55–61.

⁴⁶ Recall that the sum of annual workers' compensation payments, modest though each individual payment may be, dwarfs the amount awarded in personal injury lawsuits. Another way to think about this is to consider that someone injured in New Zealand does not forgo a higher tort award to accept money from the Plan because any anticipated award is not certain and must be discounted by the likelihood of losing in court. William J. Nelson, Jr., *Workers' Compensation: Coverage, Benefits, and Costs*, 1985, SOC. SEC. BULL., Jan. 1988, at 4.

⁴⁷ Todd, *supra* note 32, at 420–22.

⁴⁸ *Id.* at 444. Thus, foreigners may not recover lost wages from the Plan. *Id.*

⁴⁹ *Id.*

⁵⁰ Michael Whincup, *Compensation for Accident Victims: The Exemplary Model of New Zealand*, 7 J. CONSUMER POL'Y 497, 499–503 (1984), reprinted in MARSHALL S. SHAPO, TORT AND INJURY LAW 1105 (2d ed. 2002).

⁵¹ How ACC Is Structured, http://www.acc.co.nz/wcm001/idcplg?IdcService=SS_GET_PAGE&ssDocName=WCM002112&ssSourceNodeId=3860 (last visited Feb. 18, 2006).

⁵² About ACC, <http://www.acc.co.nz/about-acc/> (last visited Feb. 18, 2006).

⁵³ *Id.*

The Plan provides coverage for a finite list of mishaps articulated in the statute.⁵⁴ By definition, the plan covers “personal injuries” including the following major categories: injuries “caused by an accident,” injuries caused by “medical misadventure,”⁵⁵ injuries caused by “work-related gradual processes” or disease, and injuries caused by treatment of other covered injuries.⁵⁶ Personal injury includes death, physical injuries, mental injury suffered as a result of physical injuries, and certain specified other mental injuries.⁵⁷ A mental injury caused by witnessing an injury to someone else is not covered.⁵⁸ Ailments or injury brought on by a gradual process, disease, or infection are specifically excluded from coverage, with some exceptions.⁵⁹ Certain actions will also disentitle a claimant from receiving benefits under the plan.⁶⁰ Thus, the plan is not universal health care, but merely coverage for those types of injuries that might typically give rise to tort suits in the United States.⁶¹ Although it has been revised several times⁶²

⁵⁴ Todd, *supra* note 32, at 421–22.

⁵⁵ This term of art does not mean the same thing as medical malpractice as defined by U.S. case law. Rather, “medical misadventure” means

personal injury caused by medical error or medical mishap. . . . “Medical error” means the failure of a registered health professional to observe a standard of care and skill. . . . So this test is founded not on the existence of a certain type of injury . . . but on the question of . . . negligence or culpability.

Todd, *supra* note 32, at 436. “Medical mishap” is defined as an adverse consequence of treatment when treatment is properly given, the adverse consequence is severe, and the likelihood of an adverse consequence resulting from such proper treatment is rare. *Id.*

⁵⁶ *Id.* at 421.

⁵⁷ *Id.* at 427.

⁵⁸ Such a mental injury, though ineligible for coverage under the Plan, could give rise to a suit for damages against the person who caused the injury, with the possibility that the bystander will recover more for his mental anguish than the person who was actually injured. Some have suggested that this scenario is problematic. *Cf. id.* at 431–32.

⁵⁹ *Id.* at 427.

⁶⁰ *Id.* at 460–61. These actions include refusal to undergo a treatment or rehabilitation plan provided by the insurer, knowingly misrepresenting one’s state of injury or employment to the ACC or an employer, willfully inflicting an injury on oneself or committing suicide, “being injured in the course of committing a criminal offense,” and being sent to prison. *Id.* at 461. Various public policies are furthered via these disentitlement provisions, including the idea that one should not profit from crimes that one commits and the idea that, during imprisonment, “no earnings have been lost on account of the injury.” *Id.* “[T]he right to compensation is not permanently denied,” but merely suspended for the term of the imprisonment. *Id.*

⁶¹ The Plan actually has a slightly wider scope. *See infra* Part V.A.

⁶² The most significant change occurred in 1998 when workplace accident insurance was transferred from the ACC to six private insurance providers on the theory that competition would produce the most efficient levels of premiums and compensation. The ACC regained total responsibility for insuring the country nine months later. *ACC Backed on Insurance*, PRESS (Christchurch, N.Z.), July 3, 2000, at 8, available at 2000 WLNR 3423280; *ACC Reports a \$817M Surplus*, DOMINION POST (Morgantown, W. Va.), Aug. 25, 2000, at 13, available at 2000 WLNR 3458069; *Pensioners Get Pay Raise, High Earners Pay More*, PRESS (Christchurch, N.Z.), Apr. 1, 2000, at 1, available at 2000 WLNR 3445989. *See infra* notes 258–259 and accompanying text for what this indicates about the government’s ability to effectively deter accidents.

and has its critics, the NZP has emerged as a substantial success over the past three decades in accomplishing its goals of prompt and egalitarian treatment for accident victims.

B. The September 11th Victim Compensation Fund

Rather than leave the compensation of the victims of the September 11th terrorist attacks to the uncertain avenues of tort lawsuits, Congress addressed their plight with a provision in the Air Transport Safety and System Stabilization Act (“ATSSSA”), passed just eleven days after the attacks.⁶³ The main thrust of the legislation was to preserve the airline industry.⁶⁴ To this end, it provided \$15 billion in aid to airlines and \$3 billion for safety and security “to restore public confidence in the airline industry.”⁶⁵

The Victim Compensation Fund was contained in Title IV of ATSSSA and had a similarly beneficent purpose: “a grant of largess to the survivors of those who had unwittingly served as surrogates . . . for the rest of the American people.”⁶⁶ Although referred to as an afterthought, the VCF was groundbreaking legislation in the way that it provided for the highly unusual claims that would inevitably be brought on behalf of victims injured or killed on September 11th.⁶⁷ Like the New Zealand Plan, the VCF was based on a compromise: if an injured party claimed compensation from the Fund, he was prohibited from filing any lawsuit related to the events of September 11th, except for suits against individual terrorists or terrorist organizations⁶⁸ or suits to recover collateral sources.⁶⁹

If a victim decided not to claim from the Fund, ATSSSA permitted him to sue under an exclusive federal cause of action created for damages arising out of the crashes. The statute explicitly listed the potential defendants whom victims were permitted to sue, including the airlines, the airplane manufacturers, the companies running airport security, the building owners, and others.⁷⁰ In the case of suits against air carriers, liability was limited to the extent of the carrier’s insurance coverage.⁷¹ Plaintiffs could only bring

⁶³ See ASS’N OF TRIAL LAWYERS OF AM., ELEVEN DAYS: THE BIRTH OF THE VICTIM COMPENSATION FUND (2001), available at <http://www.atla.org/homepage/TLC2.pdf>.

⁶⁴ This reason for the bill was stated in its preamble. Kreindler & Alexander, *supra* note 27, at 17.

⁶⁵ *Id.* at 18.

⁶⁶ Rabin, *supra* note 17, at 576.

⁶⁷ *See id.*

⁶⁸ Kreindler & Alexander, *supra* note 27, at 17, 18.

⁶⁹ John H. Haley, *The Airline Industry and Insurance After September 11*, 16 AIR & SPACE LAW 1, 15 (2002). Collateral sources are sums of money received by tort plaintiffs from sources other than the judgment against the defendant. Examples include life insurance, health insurance, and unemployment benefits. See *infra* notes 79–81 and accompanying text for a discussion of collateral sources.

⁷⁰ Kreindler & Alexander, *supra* note 27, at 17, 19.

⁷¹ *Id.* at 18 (“Notwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001,

suits in the Southern District of New York, and the law of the state where the crash occurred applied.⁷² Nearly one-hundred families chose the tort option, filing suits against the various defendants mentioned above.⁷³ Presently, the victims have survived a motion to dismiss but their case remains tenuous.⁷⁴ The tort suits, however, are not the focus of this Comment, nor were they the focus of the VCF legislation.

The other half of the compromise was the option to claim for compensation from the Fund. To be eligible, a party must have been present at the World Trade Center, the Pentagon, or the crash site in Pennsylvania and suffered physical harm or death, or have been a member of the flight crew or a passenger on one of the hijacked flights.⁷⁵ Physical harm was “narrowly defined to include only the most serious injuries and only those treated within several days of the catastrophes, thus ruling out any future latent claims.”⁷⁶

The VCF required the attorney general to appoint a Special Master to make determinations of awards.⁷⁷ No punitive damages were available from the Fund,⁷⁸ and an award from the Fund had to be reduced by the amount of all collateral source payments received by the victim.⁷⁹ Collateral sources for the purposes of this rule included pension funds, death benefits programs, and payments by federal, state, or local governments re-

against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”).

⁷² *Id.* at 19.

⁷³ *Id.*

⁷⁴ See *In re September 11th Litigation*, No. 21 MC97(AKH), 2004 WL 1320897 (S.D.N.Y. June 10, 2004). Kenneth Feinberg, the Special Master for the 9/11 Fund, believes that the September 11th plaintiffs have little to no chance of recovering damages in court. Kenneth Feinberg, Special Master for the September 11th Victim Compensation Fund, Pope & John Lecture Series on Professionalism (Sept. 13, 2005).

⁷⁵ Haley, *supra* note 69, at 14–15. Eligible claimants also included the legal representatives of people present at the sites or on the planes who died in the crashes. Excluded from the list of eligible claimants was anyone determined to have been linked to the terrorists responsible for the hijackings. *Id.* at 15.

⁷⁶ Holt, *supra* note 17, at 518. One complaint about this provision was that long-term injuries to rescue workers resulting from exposure to the atmosphere at Ground Zero were not covered, nor were injuries to workers cleaning up the wreckage, both of which could be seen to fall within the spirit of the VCF. Haley, *supra* note 69, at 15; Kenneth P. Nolan & Jeanne M. O’Grady, *The Victim Compensation Fund—Looking a Gift Horse in the Mouth*, 53 DEPAUL L. REV. 231, 239 (2003). However, others have argued that this provision was necessary to reduce the incidence of fraudulent claims against the Fund, since minor and nonlethal injuries are less likely to be well documented. See Holt, *supra* note 17, at 518 n.28.

⁷⁷ Kreindler & Alexander, *supra* note 27, at 18.

⁷⁸ *Id.*

⁷⁹ *Id.*

lated to the terrorist attacks.⁸⁰ Collateral sources did not include charitable gifts or donations.⁸¹

The legislation required that claims against the Fund be determined within 120 days of filing and paid within 20 days of determination.⁸² There was also a two-year period under which all claims were to be filed.⁸³ Considering the speed with which a victim received compensation and the low burden to qualify for compensation, the benefits paid were quite generous. Some have said that a “pervasive influence of the tort perspective of doing individualized justice . . . is apparent on the face of the provision.”⁸⁴ At the very least, there is a “baseline assurance that victims of physical injury and their survivors will receive benefits.”⁸⁵ In reality, the benefits calculation reflected yet another compromise: “a balance between understanding the Act in traditional no-fault terms that would have emphasized meeting scheduled basic loss of victims, and interpreting the Act in an open-ended fashion that essentially would have offered tort-type, individualized compensation in a no-fault setting.”⁸⁶ Specifically, the amount paid to a victim or his family for lost wages was determined by reference to a grid based on “presumed economic loss,” taking into account age, size of family, and recent past earnings, and converting those calculations into a lump sum.⁸⁷ The range of probable awards was determined to be from \$300,000 to \$4.35 million,⁸⁸ with the average presumptive award being \$1.65 million.⁸⁹ Some criticized the calculation mechanism as being too harsh on big earners, whose awards are smaller in relation to their salaries than smaller earners.⁹⁰

⁸⁰ Josh Romero, *A Victim's Eye View of the September 11th Victim Compensation Fund*, 71 DEF. COUNS. J. 64, 65 (2004).

⁸¹ Holt, *supra* note 17, at 551–52. One controversial provision was related to life insurance payouts. Originally, the Special Master intended to treat life insurance benefits as collateral sources, thus reducing the amount of an award from the Fund. However, victims, among others, were outraged, claiming that such a rule would punish those people with the foresight to use their own money to provide for the futures of their family members. Ultimately, the Special Master conceded to a compromise where a recipient's award, after being reduced by the amount of life insurance proceeds received, would be increased by the amount the recipient had actually paid as insurance premiums. Because the amount paid in premiums is usually much smaller than the amount received as proceeds, this was only a small concession on the part of the Special Master. Rabin, *supra* note 17, at 583.

⁸² Rabin, *supra* note 17, at 576.

⁸³ *Id.* at 577.

⁸⁴ *Id.* at 578.

⁸⁵ *Id.*

⁸⁶ *Id.* at 582.

⁸⁷ *Id.* at 584. For details on the calculation process, see Nolan & O'Grady, *supra* note 76, at 239–44.

⁸⁸ Rabin, *supra* note 17, at 584.

⁸⁹ Haley, *supra* note 69, at 15.

⁹⁰ Nolan & O'Grady, *supra* note 76, at 240 (“[The] Special Master is penalizing the financially successful.”). Some also made the very opposite criticism, that the Fund was too liberal with its awards to wealthy claimants. Interestingly, the Special Master was also given the authority, at his sole discretion, to increase or decrease the award for any victim based on the particulars of the claimants' circum-

Noneconomic benefits were also available at a flat rate per individual, paying \$250,000 per victim plus \$100,000 for each spouse and each dependent⁹¹ in order to compensate victims' families for "mental anguish . . . loss of enjoyment of life, loss of society and companionship[,] . . . and all other non-pecuniary losses of any kind or nature."⁹² The overwhelming majority of families found the VCF offer too good to refuse given their speculative prospects in court⁹³: Ninety-seven percent of all eligible claimants received compensation from the Fund, with total awards near \$7 billion.⁹⁴ In general, one might say:

A strong finish for the VCF. Over time, many of the kinks in the VCF process have been worked out, due in large measure to the Special Master's exercise of flexibility and common sense in rendering appropriate awards to the families and to those physically injured on September 11. Indeed, in the end the "numbers" suggest the VCF [was a success].⁹⁵

III. CURRENT AMERICAN TORT DOCTRINES AND NO-FAULT AUTO PLANS

To illustrate the problems of tort law generally, this Part will describe two schemes used by the tort system in the difficult situation where a plaintiff sues multiple defendants: joint and several liability and comparative fault, both of which contain significant shortcomings. While a switch to the NZP in the United States would be beneficial for a variety of reasons, including significant cost savings, the focus of this Comment is on the underlying, theoretical improvements, which can be best understood by looking at these complicated scenarios involving multiple defendants. This Part will also describe how, in contrast to these two problematic doctrines, several states operate under no-fault auto plans, the effects of which have been positive, but limited to the auto accident arena.⁹⁶

stances. No awards were decreased but a large number of awards were substantially increased. Feinberg, *supra* note 74.

⁹¹ This amount was originally set at \$50,000 and objected to by many who considered it too low in comparison to what has been awarded in the past in tort suits. Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV 769, 791 (2003).

⁹² Kreindler & Alexander, *supra* note 27, at 18.

⁹³ See Studdert et al. *supra* note 22.

⁹⁴ Hechler, *supra* note 19, at 20.

⁹⁵ Kreindler & Alexander, *supra* note 27, at 19. Kenneth Feinberg also agrees and has publicly expressed his view that the Fund was, without a doubt, a success. See Feinberg, *supra* note 74.

⁹⁶ Workers' compensation statutes, effective in all fifty states, operate in substantially the same manner as no-fault auto insurance and have enjoyed similar success. A detailed discussion of them is omitted from this section simply for the sake of brevity.

A. Joint and Several Liability

Recall again the hypothetical accident from the introduction. Pure joint and several liability, the traditional doctrine applicable in this sort of situation, would provide that, because one or more tortfeasors has caused the plaintiff's injury, she may sue any one of them, or all of them, for her full damages.⁹⁷ The doctrine is relatively simple to administer, gives all the power to the plaintiff, and is currently applied in fifteen American jurisdictions.⁹⁸ For joint and several liability to apply, "tortfeasors need not act at the same time, act in concert, or agree to engage in a course of tortious conduct. So long as their independent acts contributed to causing a tortious injury, they are jointly and severally liable for it."⁹⁹ Thus, assuming that the jogger's injury is worth \$100,000, she can sue the city and collect the full \$100,000; she can sue the drunk driver and collect \$100,000; or she can sue them together, and then choose from whom to collect the \$100,000.¹⁰⁰ To illustrate the folly of the joint and several liability rule, this section will explore the law of Massachusetts, one of the few states that still uses the doctrine in practice.¹⁰¹

Massachusetts adheres to the traditional doctrine of joint and several liability, but with a couple of twists. In an effort to modernize the doctrine, courts recognize a limited form of comparative negligence whereby the amount payable to the plaintiff is deducted in proportion to the plaintiff's fault.¹⁰² Massachusetts courts, thus, avoid the absurd result of a plaintiff recovering the full cost of her injury when she was, say, forty-five percent at fault for it. However, so determining a plaintiff's fault requires the jury to make a second determination, adding yet another unpredictable and inefficient element to the trial process.¹⁰³

⁹⁷ Joseph W. Glannon, *Liability of Multiple Tortfeasors in Massachusetts: The Related Doctrines of Joint and Several Liability, Comparative Negligence, and Contribution*, 85 MASS. L. REV. 50, 50 (2000).

⁹⁸ The jurisdictions are Alabama, Arkansas, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia. See Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 215 n.80 (2003).

⁹⁹ Glannon *supra* note 97, at 51

¹⁰⁰ She cannot, however, collect more than \$100,000 total.

¹⁰¹ See Glannon *supra* note 97, at 51.

¹⁰² *Id.* at 52.

¹⁰³ See Bovbjerg & Sloan, *supra* note 9, at 108–09 ("Opinions differ greatly as to whether medical malpractice fact finders accurately apply the applicable rules of law."); Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1371 (1989) (criticizing the use of juries in medical malpractice cases because "[e]ven under the best of circumstances, juries can never be as effective as specialized triers of fact at deciding medical cases because jurors are exposed to the medical issues only once" and "[t]he uncertainty produced by the system undermines the appearance of legitimacy and aggravates the problems of availability and affordability of insurance").

Additionally, Massachusetts has a contribution statute, enacted in 1962, that allows a joint tortfeasor to seek contribution from other joint tortfeasors if she pays more than her pro rata share of the judgment.¹⁰⁴ “Pro rata share” in this context means an amount equal to the judgment divided by the number of joint tortfeasors; it does not mean the amount of the judgment multiplied by the percentage fault found by the jury for that tortfeasor. Under the statute, a settling defendant cannot be made to contribute to a defendant who later pays more than his pro rata share; the settling defendant effectively “buys peace” with the plaintiff.¹⁰⁵ Both Massachusetts doctrines, comparative negligence and contribution, are intended to improve the treatment of multiple defendant lawsuits in Massachusetts, but, as the example below shows, joint and several liability is wholly unsatisfactory, even with these modifications.

In the 1990 Massachusetts case of *Laveck v. Pascoe Pizza*, “an afternoon and evening of steady drinking by driver and passengers culminated in a car accident” which left Cheryl Laveck dead.¹⁰⁶ Under a theory of negligence, Laveck’s family sued the driver of the car and also the owner of the establishment where the group had been drinking, Pascoe Pizza, for allegedly selling alcohol to the driver when he was already intoxicated.¹⁰⁷ The driver, knowing that he was at fault, immediately settled for \$10,000, the limit of his insurance.¹⁰⁸ The corporation proceeded to trial, where the jury returned a verdict of \$750,000 for the plaintiff.¹⁰⁹ Under the Massachusetts version of comparative negligence, the jury was also required to determine the relative fault of each party in the incident, which it found to be fifty percent to the driver, thirty percent to the deceased, and twenty percent to the corporation.¹¹⁰ The judgment was correspondingly lowered by thirty percent,¹¹¹ leaving a \$525,000 bill for the pizza company when the real culprit in the situation, the drunk driver, got off with paying a scant \$10,000.¹¹²

The driver could not be sued for contribution because he had settled and was immune from paying anything more to the plaintiff. If the driver and the corporation had both gone to trial, the result would still be problematic. Each defendant would have been required to pay \$262,500 despite the

¹⁰⁴ Glannon, *supra* note 97, at 62.

¹⁰⁵ *Id.* at 65–72. The exact terms of a settlement can give rise to a variety of complex scenarios with various effects on other defendants, but looking at just this one will be enough to show how flawed the system is. *Id.*

¹⁰⁶ 558 N.E.2d 15, 16 (Mass. App. Ct. 1990).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ On appeal, the judgment was lowered again for the \$10,000 settlement. *Id.* at 18.

¹¹² The tone of this paragraph should not be taken as a suggestion that the defendants in the case should have been punished more. The point here is the injustice done to the pizza company, not the lack of retribution to the drunk driver.

fact that the jury had found the driver to be more than twice as responsible for the injury as the corporation. And the possibility was strong that the driver could not pay \$262,500, which would entail either the corporation paying more than its pro rata share or the plaintiff receiving less than the full judgment. No matter how the scenario is constructed, joint and several liability always leaves open the possibility that a defendant will pay more than the amount for which he or she is responsible. Such a result does not promote optimal deterrence,¹¹³ a sense of fairness, or individualized justice.

B. Comparative Negligence

The more common doctrine of comparative negligence is an improvement on the basic rule of joint and several liability, but still contains a major flaw. The California statute that abolished joint and several liability—albeit only with regard to noneconomic damages—included the following language describing specifically the rationale for the move:

The legal doctrine of joint and several liability, also known as “the deep pocket rule,” has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage.¹¹⁴

Additionally, most other states have abolished joint and several liability in favor of comparative negligence through statute and case law.¹¹⁵

¹¹³ At first blush, one might assume that requiring a defendant to pay for more than the amount of damage he has caused would result in fewer accidents than would limiting his liability to his share of the injury, and that this would be a good move. Such a reaction would, however, miss two subtleties. First, “detering” an activity usually does not mean eliminating it completely. Rather, the goal of most laws that impose criminal or civil penalties is to achieve an *optimal* level of deterrence. To take auto accidents as an example, optimal deterrence is achieved when the cost of all the accidents that occur plus the cost of taking care to avoid accidents is reduced to a minimum. Avoiding more accidents than this optimal amount costs more than it saves—imagine how many costly precautions would have to be taken to ensure that there were never a single accident on American roads. Thus punishing defendants for more than the damage they have caused does more harm than good. See Frank A. Sloan et al., *Tort Liability and Obstetricians’ Care Levels*, 17 INT’L REV. L. & ECON. 245, 245 (1997) (“Optimal prevention is obtained at a care level that minimizes the total cost associated with injuries. Total cost is the sum of the resource cost and utility loss attributable to injuries, prevention cost, and administrative cost of compensating injury victims.”). Second, even if we wanted to eliminate road accidents no matter what the cost, with a joint and several liability scheme, punishing one defendant beyond what he is responsible necessarily means punishing another defendant for less than he is responsible. Thus, charging someone for more damage than he has caused can actually have the effect of increasing accident rates overall.

¹¹⁴ CAL. CIV. CODE § 1431.1 (2005).

¹¹⁵ See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000).

Comparative negligence can seem like a good approach: each defendant pays his share of the fault, as determined by a jury, and no more. However, in a multiple defendant situation, there is always the possibility that one or more of them cannot pay his portion of the judgment, leaving the plaintiff with less than full compensation.¹¹⁶ In California, multiple defendants are jointly and severally liable for a plaintiff's economic damages, while the comparative negligence rule only applies to noneconomic damages.¹¹⁷ A judgment is also reduced by the amount of negligence attributable to the plaintiff.¹¹⁸ This is a fine compromise in an ideal situation where there is a defendant who can afford to cover for the economic damages caused by the others or where the plaintiff can survive without his full damages. However, one can easily imagine circumstances where California's rule would be problematic—for example, if the plaintiff needs every cent of the judgment or if the defendants together do not have the resources to pay the full judgment.

When the financial positions of the various defendants suggest that a plaintiff might not receive his full damages, some juries in California have found a way around the comparative negligence rules: they simply apportion as much negligence to the defendants as required to ensure an adequate recovery for the plaintiff.¹¹⁹ A particularly striking example of this phenomenon is found in *Pamela Lee B. v. Hayden*, a case in which the plaintiff was raped in the garage of her boyfriend's apartment.¹²⁰ She sued the property manager and building owner on the theory that insufficient lighting led to her attack.¹²¹ Her attorney alerted the jury that the rapist and his accomplice had no substantial resources but that the property owner and manager were quite well-off.¹²² The jury subsequently allocated ninety-five percent of the fault for the plaintiff's injuries to the property manager and owner, four percent to the rapist, and one percent to his accomplice.¹²³ The case was overturned on appeal¹²⁴ but remains a prime example of how problem-

¹¹⁶ Ronald R. Ratten, *Corrective Justice and the D.C. Assault Weapon Liability Act*, 19 J. LEGIS. 287, 303–04 (1993).

¹¹⁷ Brett A. Nissenberg, *Judicial Reapportionment of Liability in a Comparative Negligence Setting: An Efficiency Argument*, 44 UCLA L. REV. 213, 217 (1996). Noneconomic damages include items such as pain and suffering, loss of consortium, and loss of enjoyment of life.

¹¹⁸ See Robert B. Ireland, III, Comment, *Modified Joint and Several Liability in Mississippi: The Absent Settling Tortfeasor and the Immune Employer*, 70 MISS. L.J. 821, 828 n.35 (2000) (discussing Mississippi's current system, which is essentially the typical contemporary comparative fault rule with a small joint and several liability component).

¹¹⁹ See, e.g., *Scott v. County of Los Angeles*, 32 Cal. Rptr. 2d 643 (Cal. Ct. App. 1994) (overturning a jury's finding that the County of Los Angeles was seventy-four percent responsible for injuries inflicted on a child by his grandmother and that the grandmother was just one percent responsible).

¹²⁰ 31 Cal. Rptr. 2d 147 (Cal. Ct. App. 1994), *rev'd*, 880 P.2d 112 (Cal. 1994).

¹²¹ *Pamela Lee B.*, 31 Cal. Rptr. 2d at 149.

¹²² *Id.* at 160.

¹²³ *Id.* at 149.

¹²⁴ Nissenberg, *supra* note 117, at 218–19.

atic the doctrine of comparative fault can be.¹²⁵ If the case had not been overturned, then without the jury's apportionment of fault, the plaintiff would not have recovered her damages; however, with the jury's apportionment, a building manager and owner would have been forced to pay a huge sum of money for an injury that they really had a very small part in causing.¹²⁶ Thus, comparative negligence, in the end, is not a satisfactory solution to the problems created by joint and several liability.

C. No-Fault Automobile Insurance Plans

In stark contrast to joint and several liability and comparative negligence, there are a few areas of the law where recovery for an injury is not based on proving the negligence of a tortfeasor, but comes from a central fund or insurance company upon a simple showing of loss. These plans do not suffer from the problems inherent in the systems described above, but they have only been enacted in the United States in limited scope. These include workers' compensation,¹²⁷ a few mass-tort contexts,¹²⁸ and no-fault automobile insurance plans.¹²⁹ All have aspects that are relevant to the VCF/NZP discussion, and this section will analyze no-fault auto plans as an example of laws in the United States analogous to the NZP.¹³⁰

No-fault auto insurance plans come in modified and pure varieties.¹³¹ A pure no-fault plan, similar to the NZP and the VCF, does not permit any tort suits for damages.¹³² All recoveries for injury losses are made through claims to one's own insurance company and one may never be sued as a result of injuring someone else.¹³³ This type of plan has never been enacted in the United States, but does exist in various foreign jurisdictions.¹³⁴ A modified no-fault plan allows a plaintiff to sue for serious injuries above a

¹²⁵ *Id.*

¹²⁶ It is not a stretch to say that the wealthy defendant in this case had a "very small part" in causing this injury given that "[t]he reviewing court had little difficulty in assessing the jury's liability apportionment in this case" before sending the case back for a limited new trial on the issue of apportionment of damages. *Id.* at 219.

¹²⁷ See SHAPO, *supra* note 50, at 1048-90.

¹²⁸ See Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993).

¹²⁹ See Liao & White, *supra* note 21.

¹³⁰ See, e.g., Ellen Solender, *New Zealand's No-Fault Accident Compensation Scheme Has Some Unintended Consequences: A Caution to U.S. Reformers*, 27 INT'L LAW. 91, 110 (1993).

¹³¹ See SHAPO, *supra* note 50, at 1021. There is a third variety, termed "add-on," but it does not represent a significant departure from the traditional tort liability system and including it in the analysis would not be especially helpful. *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Liao & White, *supra* note 21, at 291. The jurisdictions using a pure no-fault scheme are Quebec, Northern Territory in Australia, New Zealand, and Israel. *Id.*

threshold that is expressed as either a dollar amount¹³⁵ or a verbal description of harm.¹³⁶

Pure no-fault plans eliminate the problems that traditional tort law faces in joint and several liability situations. Modified no-fault plans eliminate those problems for claims below the threshold; however, the problems still exist for larger claims, and those larger claims are where the problems cause the most trouble. Another major advantage of no-fault systems is the reduction of transaction costs,¹³⁷ and pure no-fault plans save considerably more than modified plans.¹³⁸ The reduction in transaction costs results in higher net amounts received by injured plaintiffs and lower insurance premiums for insured motorists.¹³⁹ The administrative costs savings for no-fault plans are so significant that they can sometimes even maintain the level of compensation per claimant equivalent to tort suits, despite compensating a much larger group of claimants.¹⁴⁰

A common misperception about no-fault auto plans is that they drive the accident rate up by removing the incentive to drive carefully that comes from the fear of liability.¹⁴¹ Numerous studies have been conducted to determine whether this assumption holds true,¹⁴² but they have not confirmed this dire prediction; rather, no consensus at all has emerged regarding the effect of no-fault plans on accident rates.¹⁴³

¹³⁵ Dollar amounts in the United States range from \$1000 in Kentucky to \$10,000 in Hawaii. *Id.* at 291–92.

¹³⁶ Verbal thresholds include “disfigurement,” “serious disfigurement,” “permanent, serious disfigurement,” and “permanent serious disfigurement which results in mental or emotional suffering.” The American jurisdictions that currently employ some form of no-fault are Colorado, the District of Columbia, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, North Dakota, Utah, Nevada, Florida, New Jersey, New York, Michigan, and Pennsylvania. *Id.*

¹³⁷ The transaction costs include amounts paid to lawyers and expert witnesses and court fees. *Id.* at 290. Some, such as members of ATLA, would not see this as a positive change. *See* Bovbjerg & Sloan, *supra* note 9, at 117 (referring to no-fault auto insurance, Bovbjerg and Sloan state “[i]n many states, political lobbying from trial attorneys, who presumably had much to lose from comprehensive no-fault initiatives, generally succeeded in reducing the scope of no-fault laws enacted, sometimes to the point where tort remained essentially intact”).

¹³⁸ One author’s economic model arrives at an overall figure of eighty percent savings for a pure no-fault plan and twenty to forty percent for a modified plan. STEPHEN J. CARROLL ET AL., NO-FAULT AUTOMOBILE INSURANCE: A POLICY PERSPECTIVE 9–15 (1991).

¹³⁹ *See* O’Connell et al., *supra* note 21, at 171.

¹⁴⁰ *See* Bovbjerg & Sloan, *supra* note 9, at 107 (discussing limited no-fault plans for medical malpractice in Florida, Bovbjerg and Sloan state “[i]n terms of the compensation level per paid case in Florida, no-fault and comparable tort cases appear to pay similar amounts”). The one area where no-fault may reduce compensation is in the area of noneconomic damages such as pain and suffering or loss of consortium.

¹⁴¹ *See* Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability on Traffic Fatalities*, 47 J.L. & ECON. 357 (2004) (describing a moral hazard posed by no-fault auto insurance).

¹⁴² *Id.*

¹⁴³ *See* DON DEWEES ET AL., EXPLORING THE DOMAIN OF ACCIDENT LAW 22–26 (1996) (stating that there is no consensus); Cohen & Dehejia, *supra* note 141, at 358 (showing that accident rates go

One intuitive explanation for why switching to no-fault insurance does not drive up accident rates is that a strong incentive to drive carefully exists regardless of a driver's potential liability: car accidents are symmetrical in the sense that a driver who causes an accident is likely to injure himself in addition to another driver. However, a lack of symmetry in contexts other than road safety does not mean that switching to no-fault insurance in those areas will necessarily lead to higher accident rates. In other risky environments, such as the workplace and in medicine, extensive safety regulations exist and are easier to monitor. In fact, the highway system is the only large-scale arena where the government has difficulty promoting safety because individual actors, rather than institutional actors, are the ones likely to cause injury; luckily for no-fault proponents, the deterrent effect of self-preservation appears to operate efficiently on roadways.

IV. HOW THE NEW ZEALAND PLAN AVOIDS THE INHERENT PROBLEMS OF TRADITIONAL TORT LAW

In many common situations, the economic effects of compensating the victim of an injury will be similar under the NZP and the American doctrine of either comparative fault or joint and several liability, except for transaction costs. In more complicated situations, the more significant advantages of the NZP become clear. For example, in the case of a typical two-party accident in the United States, if Plaintiff motorist is injured by Defendant motorist and Defendant has insurance, then Plaintiff sues to recover his loss from Defendant's insurance. If Defendant does not have insurance, or if Plaintiff loses the lawsuit, then Plaintiff makes a claim against his own uninsured motorist coverage and recovers his loss anyway. Defendant does not pay anything out of his own pocket,¹⁴⁴ Plaintiff is fully compensated for his losses, and the loss is spread among society by the private insurance companies. This scenario works so long as both parties are insured and no one sues for an amount in excess of insurance coverage.

Similarly, in New Zealand, Defendant does not pay anything out of his pocket and Plaintiff's losses are covered by insurance.¹⁴⁵ Thus, in the most basic scenario, the economics of the NZP are close to the economics of what currently happens in the United States—all drivers¹⁴⁶ pay insurance

up); J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & ECON. 427 (2001) (showing that rates are higher with no-fault than tort); S. Paul Kochanowski & Madelyn V. Young, *Deterrent Aspects of No-Fault Automobile Insurance: Some Empirical Findings*, 52 J. RISK & INS. 269 (1985) (showing that rates stay the same); Paul Zador & Adrian Lund, *Re-Analysis of the Effects of No-Fault Auto Insurance on Fatal Crashes*, 53 J. RISK & INS. 226 (1986) (showing that rates go down).

¹⁴⁴ Except for perhaps increased insurance premiums.

¹⁴⁵ See *supra* Part II.A.

¹⁴⁶ Although this paragraph uses motorists as an example, the argument can be extended to most typical tortfeasors including, for example, institutional actors, medical malpractice claims, products manufacturers, and others. The idea is simply that most people who undertake risky activities on a large

premiums, and any injured drivers have their losses covered by the insurance companies.¹⁴⁷ Even in this simple scenario, however, the NZP has the important advantage of saving money by avoiding the staggering transaction costs associated with litigation and adversity.¹⁴⁸

More significant advantages of the NZP become clear in more complicated situations. On a basic level, in order for an injured party in the United States to be eligible to receive compensation, his injury must have been caused by someone else, and the circumstances of the causation must be such that the other person's connection to his injury can be sufficiently proven in court, both of which can often depend on mere luck. Luck operates just as much on potential defendants since, for example, not everyone who regularly drives carelessly causes injury and is forced to pay for the costs he generates, and not everyone who drives carefully always avoids injuring others.¹⁴⁹

Luck continues to play a role in the courtroom. In a single-defendant case under the U.S. system, the plaintiff usually has the option to sue an uninsured defendant, or to sue a defendant for an amount in excess of the defendant's insurance coverage.¹⁵⁰ Additionally, the success of such an aggressive plaintiff does not always depend solely on the culpability of the defendant, but can be influenced by a number of factors, including the quality of the plaintiff's counsel, the quality of the defendant's counsel, the forum in which the suit is brought, the availability of evidence or witnesses, and the amount of time and money each party spends on the case.¹⁵¹ Thus,

scale buy liability insurance and essentially pay incrementally over time for the large damage caused by isolated incidents.

¹⁴⁷ This illustrates the basic principle of loss-spreading, whereby the costs incurred by an injured driver are not borne entirely by the driver himself. Rather, every other uninjured driver pays a small portion of the injured driver's costs in the form of insurance premiums. In this sense the injured driver's loss is "spread" among all the drivers in the country because every driver sustains a small loss (the insurance premium) and no driver sustains a large loss. See Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 473 (2005).

¹⁴⁸ See *supra* note 138 (noting the enormous cost savings of no-fault plans). But see *infra* note 175 (hypothesizing that the cost savings may not be as extreme when a no-fault plan requires extensive infrastructure).

¹⁴⁹ For a robust theory of the role of luck in accident law, see Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians* (Law and Economics Research Paper Series, Research Paper No. 05-18, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=806464. The authors point out that, on the victim side, "the compensation available to . . . equally innocent victims is entirely a function of luck" and on the injurer side "it violates egalitarian fairness to allow things outside the control of similarly careless actors to determine massively dissimilar liability." *Id.* at 10, 26.

¹⁵⁰ The amount that a plaintiff claims in excess of a defendant's policy limit is called "blood money," but such amounts are rarely sought. See Tom Baker, *The Blood-Money Myth*, LEGAL AFF., Oct. 2002, at 43. However, each instance where this happens is damaging, and can be eliminated by adopting an NZP-style scheme.

¹⁵¹ See Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 972 (2004).

the size of the judgment may be more dependent on the plaintiff's ability to expend resources on litigation than on the merits of the case, producing the unsettling result of depriving of compensation those least able to shoulder the financial burden of injury.

Furthermore, because judgments are often based on the earnings potential of the party injured or killed, defendants are often punished less for injuring poor people than rich ones, regardless of their level of blame.¹⁵² And whether a deserving plaintiff can recover his entire judgment from a defendant depends on whether the defendant has sufficient assets to pay the amount.¹⁵³ Thus, a plaintiff injured by a rich defendant will probably be compensated for his losses while a plaintiff injured by a poor defendant may not be.¹⁵⁴ The inherent injustice of this system is clear.

By contrast, in New Zealand, regardless of the financial position of either party or any other factor unrelated to fault or deserving status, the plaintiff simply recovers his losses from the ACC.¹⁵⁵ Benefits under the Plan are comprehensive and include both the cost of treating covered injuries in New Zealand's public health system¹⁵⁶ and lost wages.¹⁵⁷ The Plan

¹⁵² See, e.g., *White v. FCI USA, Inc.*, 319 F.3d 672, 674 (5th Cir. 2003) (requesting, in the plaintiff's original petition, "compensatory damages for lost pay, lost fringe benefits, front pay, [and] loss of wage earning capacity").

¹⁵³ Assets include amounts available through insurance. One might be tempted, at this stage in the argument, to support a scheme that included tort lawsuits for deterrence purposes, but that included a fund to compensate those unlucky plaintiffs whose defendants are unable to pay their full judgments. The problems with a system like this are twofold. First, retaining tort lawsuits in any form would introduce inefficiencies, thus increasing the costs of the system without any offsetting benefit since there is little evidence that lawsuits promote deterrence better than no-fault schemes. See Michael J. Moore, *Promoting Safety Through Workers' Compensation: The Efficacy and Net Wage Costs of Injury Insurance*, 20 RAND J. ECON. 499, 499 (1989) (showing that in a workers' compensation context, "the safety incentive effects of higher insurance premiums offset any moral hazard effects."); Solender, *supra* note 130, at 110 ("[R]ecent research indicates that the threat of tort litigation has been overstated and may, in fact, be of no importance in regulating safety."); David M. Studdert & Troyen A. Brennan, *No Fault Compensation for Medical Injuries*, 286 J. AM. MED. ASS'N 217 (2001), available at <http://www.jama.ama-assn.org/cgi/content/full/286/2/217> (showing that "recent empirical findings and new patient safety imperatives debunk" the myth that "removal of fault-based determinations will have a deleterious impact on deterrence goals"); *supra* note 143 (describing studies of the deterrent effect of no-fault auto accident schemes).

Second, the fund in a scheme like this would help in situations where the plaintiff is unlucky, but would not help in situations where the defendant is unlucky, i.e., when a normally careful defendant has, through a stroke of bad luck, injured someone extremely wealthy and has been stuck with a large judgment (a judgment that he is able to pay, but that he does not "deserve" to pay). The availability of private insurance would be no consolation for such potential defendants since it would force those with significant assets to carry more insurance than those without any assets, regardless of the asset-holding actors' likelihood of actually causing injury to others.

¹⁵⁴ This is especially true given that wealthy defendants are more likely to carry liability insurance than are less wealthy defendants.

¹⁵⁵ What Am I Entitled to?, <http://www.acc.co.nz/claimscare/entitlements/> (last visited Jan. 15, 2006).

¹⁵⁶ See Todd, *supra* note 32, at 456 ("The treatment must be for the purpose of enabling the injured person to lead as normal a life as possible and must be necessary and appropriate for that purpose.").

also pays the costs of rehabilitation,¹⁵⁸ death benefits,¹⁵⁹ and a lump sum related to “whole person impairment.”¹⁶⁰ To pay for these benefits, the defendant is not charged with a large judgment that could potentially bankrupt him. Instead, under the NZP, people engaging in dangerous activities pay fees that are used to pay for injuries caused by those activities.¹⁶¹ To the extent that the defendant breached a safety standard, he will be fined, and if he has actually committed a crime, he will be punished.¹⁶²

The scenarios where the NZP has the most positive effect are multiple defendant situations, such as the example of the unfortunate jogger discussed above in the sections on joint and several liability and comparative negligence.¹⁶³ In the United States, the case would be handled differently depending on the jurisdiction in which the incident occurred, but no jurisdiction’s system would be totally satisfactory. If the jogger were injured by a drunk driver in New Zealand, however, she would be able to recover any losses due to her injury from the ACC in the same way that she recovered her losses in the simple two-party case.

¹⁵⁷ For employed earners, the employer must pay eighty percent of the injured person’s wages for the first week. After that, the ACC pays eighty percent of the injured person’s wages for the rest of the victim’s life as long as she remains unable to work. “Potential workers,” a group including students, people who have recently stopped working, and people on parental leave, get special treatment to more accurately reflect their probable future earnings. See Weekly Compensation, http://www.acc.co.nz/wcm001/idcplg?IdcService=SS_GET_PAGE&ssDocName=WCMZ002293&ssSourceNodeId=3883 (last visited Jan. 15, 2006).

¹⁵⁸ Rehabilitation includes vocational, social, and physiological rehabilitation, as well as “aids and appliances, home help, child care, modifications to the home, assistance with transport, and training for independent living.” Todd, *supra* note 32, at 458; see also Rehabilitation, http://www.acc.co.nz/wcm001/idcplg?IdcService=SS_GET_PAGE&nodeId=3884 (last visited Jan. 15, 2006).

¹⁵⁹ Death benefits are available up to NZ\$4500. See Death Benefits, http://www.acc.co.nz/wcm001/idcplg?IdcService=SS_GET_PAGE&ssDocName=WCM000139&ssSourceNodeId=3860#P141_11470 (last visited Jan. 15, 2006).

¹⁶⁰ The amount varies between NZ\$2500 and NZ\$100,000 depending on the severity of the injury. See Todd, *supra* note 32, at 457.

¹⁶¹ There are seven accounts, and each provides compensation for a different class of injury and is funded by a different source. For example, the Employers’ Account is funded by premiums paid by all employers and provides cover for work-related injuries; direct payment from the government funds the Non-Earners’ Account, which compensates people who are not in the paid workforce, such as students, beneficiaries, retired people, and children; and the Motor Vehicle Account is funded by a tariff on the price of gas and a component of the motor vehicle licensing fee and provides payment for injuries involving motor vehicles and on public roads. See How ACC Is Funded, <http://www.acc.co.nz/about-acc/acc-funding> (last visited Jan. 15, 2006). Employers typically pay just over one percent of their wage bills into the fund, but the rate varies according to the likelihood of injury, and in high risk industries the rate may rise to five percent. Provision is made both for repayments to employers with good safety records and penalty rates for those with bad ones. See Whincup, *supra* note 50.

¹⁶² See *infra* Part IV.D for more discussion of the deterrence measures of the NZP.

¹⁶³ The jogger was struck by a drunk driver while he was wearing dark clothing at night on a street with inadequate lighting. A potential jury would find the driver 90% at fault for the injury, the city 5% at fault, and the jogger 5% at fault. See Gash, *supra* note 2, at 589.

Under the NZP, because the jogger would not need to bring a personal injury suit to recover her losses, neither the driver nor the city would be charged specifically for the incident—but that does not mean that actors would be free to injure others at will. To keep accident rates low, the ACC, in addition to collecting levies and making payments to victims, enforces safety standards in an effort to prevent accidents before they happen. To that end, the ACC supervises areas where injuries tend to occur, including the roads,¹⁶⁴ the workplace,¹⁶⁵ and the medical arena,¹⁶⁶ setting appropriate safety standards and assessing fines for noncompliance. Additionally, many situations where people cause injury to others constitute civil infractions or actual crimes for which the state imposes punishments designed to deter the behavior in the future.¹⁶⁷

An important effect of establishing a central office such as the ACC to set safety standards everywhere is that the office can determine who is in the best position to prevent different types of accidents and hold those parties responsible.¹⁶⁸ In the United States, because of the tort system, specifically the joint and several liability doctrine, only wealthy parties tend to be held responsible for causing accidents, while less wealthy parties are rarely

¹⁶⁴ Cameras with radar produce automatic tickets for people driving over the speed limit. See ACC Accident Statistics 2004, <http://www.acc.co.nz/injury-prevention/acc-injury-statistics/> (last visited Jan. 15, 2006). Drunk driving laws are enforced through the use of random breath tests. See General Information About New Zealand, <http://www.migrationbureau.com/newzealand/info.asp> (last visited Jan. 15, 2006). The current legal blood alcohol limit for driving in New Zealand is eighty milligrams of alcohol per one-hundred milliliters of blood. Drink Driving, http://www.acc.co.nz/wcm001/ideplg?IdcService=SS_GET_PAGE&ssDocName=wcm001262&ssSourceNodeId=4118 (last visited Jan. 15, 2006). This is equivalent to the legal blood alcohol content limit for drivers in many places in the United States, although it is usually expressed in the United States as “.08” or “.08 percent.” The ACC has instituted a “Stop Bus Programme” for the purpose of increasing awareness and improving attitudes toward drunk driving. See ACC Stop Bus Programme, http://www.acc.co.nz/wcm001/ideplg?IdcService=SS_GET_PAGE&ssDocName=wcm000508&ssSourceNodeId=4118 (last visited Jan. 15, 2006).

¹⁶⁵ Like the Occupational Safety and Health Administration in the United States, the ACC oversees workplace safety standards and educates the public about injury prevention at work. See Standards, <http://www.acc.co.nz/injury-prevention/safe-at-work/legislation/standards/> (last visited Jan. 15, 2006); Work Safety, <http://www.acc.co.nz/injury-prevention/safe-at-work/> (last visited Jan. 15, 2006) (including brochures such as “The ACC WorkSafe Cycle” and “The ACC WorkSafe Injury Model”); Occupational Safety & Health Administration, <http://www.osha.gov> (last visited Jan. 15, 2006).

¹⁶⁶ The ACC keeps close records of medical misadventure injuries to see if doctors are being held to the right level of care. See ACC Injury Statistics 2004, <http://www.acc.co.nz/injury-prevention/acc-injury-statistics/> (last visited Jan. 15, 2006).

¹⁶⁷ These infractions include battery, drunk driving, reckless endangerment, and others. As a result, the NZP does effectively answer criticisms that it fails on deterrence grounds. See *infra* Part V.D.

¹⁶⁸ In any particular scenario, the party who can most efficiently prevent an accident is called the “least-cost avoider.” See Steven Shavell, *Economic Analysis of Accident Law*, 10 (John M. Olin Ctr. for Law, Econ. & Bus. Discussion Paper No. 396, 2002), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/396.pdf. Imagine two actors, one with a lot of resources but little ability to efficiently prevent accidents, and another with few resources but lots of opportunities to inexpensively prevent accidents. In this situation, we would like the actor who can efficiently prevent accidents (the least-cost avoider) to be charged with that responsibility.

sued.¹⁶⁹ Thus, wealthy parties have an incentive to spend their resources trying to prevent accidents, even if they cannot do a very good job of it, while less wealthy parties have no incentive to prevent accidents, even if they are in good positions to do so.

The September 11th litigation is an example of this very situation. The victims sued both the airlines and the building owners.¹⁷⁰ Suppose that both defendants are found jointly and severally liable, and because the airlines are bankrupt,¹⁷¹ the building owners are required to pay the full judgment.¹⁷² Building owners, aware that airlines tend to be insolvent much of the time, now have an incentive to try to prevent future occurrences similar to September 11th. To that end, they might spend considerable sums of money researching how to make building structures stronger, how to airplane-proof their buildings, tearing down old buildings and building new ones, etc. Airlines, knowing that they tend to be insolvent and are not likely to be required to pay large tort judgments, do nothing to prevent hijackings, even though they could very easily and cheaply install more secure cockpit doors.¹⁷³

Instead of letting this scenario develop, Congress passed ATSSSA and its companion piece, the Aviation and Transportation Security Act,¹⁷⁴ which together compensated the victims and required airlines to install secure cockpit doors, but did not require anything of the building owners. In other words, Congress required the least-cost avoider to do its part to prevent accidents and removed the incentive for parties not in a good position to prevent accidents to inefficiently spend resources trying to prevent accidents. An NZP-style system would have this effect in many similar, but smaller, situations every day, adding up to a considerable efficiency advantage in the aggregate.¹⁷⁵

¹⁶⁹ See *In re September 11th Litigation*, No. 21 MC97, 2004 WL 1320897 (S.D.N.Y. June 10, 2004).

¹⁷⁰ For the purposes of this example, assume that these are the only two defendants.

¹⁷¹ Assume the airlines are bankrupt.

¹⁷² There was a liability cap for the air carrier defendants equal to the insurance policy limit of the air carriers, but no such limit existed for the building owners. See *supra* note 71 and accompanying text.

¹⁷³ See Press Release, Fed. Aviation Admin., FAA Sets New Standard for Cockpit Doors (Jan. 11, 2002), available at <http://www.faa.gov/apa/pr/pr.cfm?id=1487>.

¹⁷⁴ ATSA was passed by Congress two months after ATSSSA and implemented a variety of safety measures for the nation's air traffic. In addition to requiring stronger, locking cockpit doors, it spells out security requirements for airlines regarding baggage and passenger screening, carrying of weapons on commercial flights, presence of air marshals, and training of security personnel. See Haley, *supra* note 69, at 16.

¹⁷⁵ One potential drawback of a central safety-monitoring bureau would be the legal process required to administer so many fines for so many individuals. It has been hypothesized that such legal process might reduce the cost savings of switching to the NZP. Note, however, that even these critics agree that the NZP would be a net cost savings; they merely wonder just how much money would be saved. See Bovbjerg & Sloan, *supra* note 9, at 118 (“[A large no-fault system] will require a more formal internal legal process, to some extent eroding the extraordinary savings in administrative expense

It might be argued that switching to an NZP-style system in the United States is unnecessary because the same result could be obtained under the American tort system by mandating complete insurance.¹⁷⁶ That way, just like under the NZP, if someone were injured, he would simply receive compensation for his injuries from his insurance coverage, regardless of the financial status of the person who injured him. This argument fails to grasp that if the difficult task of ensuring that everyone in the United States had full liability, disability, life, and health insurance were accomplished, the resulting system would be quite similar to the NZP. No one would pay for the cost of his own injuries or anyone else's, and no one would have to worry about supporting his family in case of incapacity or death. Thus, this line of reasoning actually supports adopting the NZP, which is itself essentially an insurance scheme.¹⁷⁷ The only difference is that because the NZP is run out of a centralized office, it can deter dangerous activities to a sufficient degree by charging fees for those activities as a way to pay for injuries caused by them.¹⁷⁸

The bottom line is that, under the NZP, injured victims are promptly compensated for their injuries, any truly responsible parties are punished to the extent of their wrongdoing, and bystanders with deep pockets are not hijacked under a bloated theory of negligence to pay hospital bills that no one else can afford. One commentator has noted: "After twenty-five years during which the scheme has undergone almost perpetual analysis and review and has been reconstructed three times, it emerges as a substantial success. The coverage is still comprehensive, the cost is relatively low and the lessening of human suffering clear."¹⁷⁹

and time that we observed in [smaller-scale no-fault] programs."). See also *infra* notes 253–257 and accompanying text for a description of the weaknesses in an argument against centralized accident prevention based on the idea that the government has neither the access to information nor the incentives necessary to effectively deter accidents.

¹⁷⁶ The hypothetical situation proposed in this argument would require that total insurance coverage be mandatory since everyone in the United States has the option to fully insure himself, and yet the actual rates of self-insurance are low. See Universal Health Care Coverage, http://www.policyalmanac.org/health/universal_health.shtml (last visited Jan. 15, 2006) (reporting that 14.6% of the population has no health insurance); MRI Consumer Behavior/Insurance, <http://usgovinfo.about.com/library/weekly/aa031701a.htm> (last visited Jan. 15, 2006) (reporting that 9.3% of the U.S. population has disability insurance).

¹⁷⁷ Indeed, the NZP is technically referred to as New Zealand's system of social insurance. See Miller, *supra* note 18, at 1071 ("The scheme reflected a concept of social insurance.").

¹⁷⁸ See *infra* notes 258–259 and accompanying text for a description of how, in 1998, New Zealand briefly handed workplace accident insurance over to competitive private insurance providers, and how the system benefited from returning all insurance coverage to the ACC nine months later.

¹⁷⁹ Todd, *supra* note 32, at 488–89.

V. SOME COMMON ARGUMENTS AGAINST ADOPTING AN NZP-STYLE SCHEME IN THE UNITED STATES

Despite the practical benefits and theoretical elegance of the New Zealand Plan, numerous scholars have argued that a similar system could not work in the United States.¹⁸⁰ These critics' arguments can be grouped into the following five categories: Line-Drawing Problems, Fairness Issues, "9/11 Was Different," Lack of Deterrence, and Need for Retribution. None of these arguments is ultimately compelling, especially considering the success of the September 11th Victim Compensation Fund. The following sections will rebut each of them in turn.

A. Line-Drawing Problems

This category of counterarguments includes two variants, one dealing with the efficiency of the NZP, and the other dealing with its fairness. To illustrate, consider the following actual cases that arose in New Zealand. On the one hand, a man who suffered a stabbing pain in his lower back upon standing up after adjusting an exhaust pipe on his vehicle was not permitted to recover from the Plan.¹⁸¹ On the other hand, a woman who suffered a ruptured disc when she bent down to plait her daughter's hair and sneezed did get compensation.¹⁸²

The first type of line-drawing counterargument says that if the Plan is going to make these kinds of distinctions when determining awards, it will require lots of lawyers working lots of hours, rendering the system at least as inefficient as the various systems currently in place in the United States.¹⁸³ Fortunately, there is substantial evidence indicating that no-fault

¹⁸⁰ See, e.g., Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 124 (2002) ("[T]he Victim Compensation Fund most probably will not be utilized as a model for future alternatives to tort litigation, largely because each prior fund-approach to mass tort harms has been idiosyncratic in design and implementation."); Rabin, *supra* note 17, at 589 ("[G]overnment intervention to provide no-fault benefits remains a chancier proposition, and, at this point, an approach that fails to be grounded in a broader social consensus about what fairness and justice require."); Shapo, *supra* note 28, at 818 ("In fact, in practice, a truly comprehensive solution is a chimera.").

¹⁸¹ See Shapo, *supra* note 28, at 814 (citing GEOFFREY PALMER, COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA 251 (1979)).

¹⁸² *Id.* The reason these cases came out the way they did is the definition of the word "accident" in the legislation governing the NZP. Since 1992, a recoverable "accident" has been defined to include "a specific event . . . that involves the application of a force or resistance external to the human body . . . and is not a gradual process," inhalation or ingestion of a foreign substance or object that is not a virus or bacteria, a burn or exposure to radiation, exposure to the elements or extremes of temperature or environment. Todd, *supra* note 32, at 429. A criminal act is considered to be an accident, as is an occupational disease, but other illnesses are not considered accidents. See *id.* at 429-41.

¹⁸³ Shapo, *supra* note 28, at 814 ("When tribunals split hairs like these on inter-event comparisons, it would not be surprising to find lawyers applying refinements at least as subtle to interpersonal comparisons that involve projections of income levels—or the value of affective relationships.").

plans generally save substantial amounts of money overall,¹⁸⁴ particularly because they require less work to be done by lawyers.¹⁸⁵ Additionally, no-fault plans in the United States, such as workers' compensation, are forced to draw similarly fine lines,¹⁸⁶ and yet workers' compensation is not plagued by claims taking months or even years to resolve¹⁸⁷ and armies of lawyers filing petitions to reconsider whether a particular claimant's injury is covered.¹⁸⁸

The second type of line-drawing argument focuses on the ultimate equity of compensation rather than the costs associated with getting there. For instance, one might refer to the two examples mentioned above and point out that the two victims were injured in very similar circumstances, but only one received compensation from the Plan: "distinctions drawn between illness and accidental injury under the system cause persons similarly disadvantaged to be treated differently."¹⁸⁹ However, the tort system in the United States is much less effective at treating like parties alike. As described above, the failure of tort cases to render consistent verdicts is one of its main failings.¹⁹⁰ In fact, some have argued for scrapping the American tort system altogether precisely because it so often fails to treat like situations alike.¹⁹¹ At least with the NZP, identical claimants will have identical recoveries.

¹⁸⁴ See, e.g., Patricia M. Danzon, *The Swedish Patient Compensation System: Lessons for the United States*, 15 J. LEGAL MED. 199, 200 (1994) (discussing Sweden's no-fault system for medical malpractice injuries and finding that "[o]verhead is 14–18% of total premiums, compared to roughly 60% in the United States"); Avraham & Kohler-Hausmann, *supra* note 149, at 66 n.153 (citing KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?* 165 (2005) (arguing that "the administrative costs of the 9/11 Victim Compensation Fund was [sic] 1.2 percent").

¹⁸⁵ Frank A. Sloan et al., *The Road from Medical Injury to Claims Resolution: How No-Fault and Tort Differ*, 60 LAW & CONTEMP. PROBS. 35, 54 (1997) ("[L]awyers' fees are substantially lower under no-fault than under tort. Compared to tort, no-fault practically eliminates the legal expenses for dispute resolution.").

¹⁸⁶ *Darco Transportation v. Dulen*, 922 P.2d 591 (Okla. 1996) (considering the question whether a truck driver was covered by workers' compensation when he sustained injuries as a result of engaging in sexual intercourse with his girlfriend while driving his truck).

¹⁸⁷ See Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693, 693 (1994) ("The interval from injury to compensation [for a tort claimant] averages six years in the State of New York, and those with the most serious injuries typically wait over a decade.") (reviewing PAUL C. WEILER ET AL., *A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATENT COMPENSATION* (1993)).

¹⁸⁸ See Howard Hiatt & Paul Weiler, *No-Fault Medical Coverage Would Cure Many Ills*, BOSTON GLOBE, Nov. 9, 1999, at A27 ("Both business and labor agree that the no-fault occupational injury regime provides workers with fast and accessible compensation, effective prevention, . . . and economical administration.").

¹⁸⁹ James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781, 797 (1981) (reviewing GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY* (1979)).

¹⁹⁰ See *supra* note 151 and accompanying text.

¹⁹¹ See Avraham & Kohler-Hausmann, *supra* note 149. The authors note that in American tort law, "the luck of causation gives rise to vastly disparate treatment of equally careless actors . . . and similar treatment of dissimilarly careless actors," and "the luck of source of misfortune gives rise to unequal

But one might still object to the fact that our two plaintiffs were distinguished when it seems that they were so similar. This is not a problem with the NZP, but rather an example of what must inevitably happen at the fringes of any compensation system, be it tort law, workers' compensation, or social insurance. It may not seem fair that the woman braiding her daughter's hair was compensated while the man fixing his muffler was not, but the system, like any system, has to have a limit somewhere, and the borders of the NZP are better defined than the borders of American tort law.¹⁹² The VCF had this problem and dealt with it,¹⁹³ and few argued that the existence of a line made the Fund unfair. One should also not lose sight of the fact that when an injury is not covered by the NZP,¹⁹⁴ options remain open through tort suits and health insurance.¹⁹⁵

Another kind of line-drawing problem is how to allocate awards once an injury has been deemed compensable, including the issue of whether to pay victims for intangibles such as pain and suffering or loss of companionship.¹⁹⁶ This counterargument is a variation on the previously discussed problem of defining the limits of the plan. If intangibles are included, then everyone will have to pay a little more in premiums into the fund for disbursement, but everyone will know that if he is injured, he will recover for intangibles. Conversely, the system could be run more leanly with slightly lower premiums and no payments for intangibles. The issue is merely one for society or lawmakers to decide in setting up the system; it says nothing about whether the system could actually work. The central point is that everyone will be treated equally.¹⁹⁷

B. *Fairness Issues*

Critics of the NZP and other no-fault plans also object to them on grounds of an amorphous notion of "fairness."¹⁹⁸ It has been said that "gov-

treatment of equally blameless victims." *Id.* at 25. They conclude that because tort is premised on the idea of injurers compensating their victims, these problems are inherent and cannot be remedied, and therefore, "there are in fact no sound practical or pragmatic justifications to maintain tort law." *Id.* at 64.

¹⁹² Tort has no defined limit at all, and whether a plaintiff can recover depends on the complex interaction of multiple concepts such as duty, breach, and causation that are themselves ill defined.

¹⁹³ See *supra* notes 75–76 and accompanying text.

¹⁹⁴ Although, generally, nearly every injury is covered.

¹⁹⁵ Recall that the NZP does not render health insurance redundant. While there may be some overlap in coverage between the two types of insurance, they are not identical since not everyone has health insurance, the Plan does not cover illnesses or nonaccidental injuries, and health insurance does not cover lost wages.

¹⁹⁶ See Shapo, *supra* note 28, at 812. ("The [line-drawing] difficulty becomes even greater with respect to the valuation of intangibles.")

¹⁹⁷ Thus, the NZP fits one description of an ideal compensation scheme since it "entail[s] some liability for risk creation (though not necessarily on par with liability for harm caused), and assure[s] equal terms of compensation for victims who suffer comparable losses to bodily integrity, regardless of the source of that loss." Avraham & Kohler-Hausmann, *supra* note 149, at 6–7.

¹⁹⁸ See, e.g., Rabin, *supra* note 17, at 589; Solender, *supra* note 130, at 96.

ernment intervention to provide no-fault benefits remains a chancier proposition, and, at this point, an approach that fails to be grounded in a broader consensus about what fairness and justice require.¹⁹⁹ The “fairness” referred to by this commentator and others is never specifically defined, but it appears to be related to the idea that the NZP does not ensure that every injured party will, as the saying goes, “have his day in court.”²⁰⁰ It is important to note that this criticism of the NZP does not claim that tort suits are fair because they pay claimants what they deserve and no-fault schemes pay them less.²⁰¹ The fairness that critics see in the tort system is entirely based on the fact that every claimant has the right go to court to present his case.

Although the NZP does not provide accident victims the right to appear before a judge and talk about their injuries,²⁰² it does pay prompt compensation to victims without regard to quality of representation or any other factor other than need.²⁰³ One system allows two identically injured victims with the same future earning potential the same opportunity to go to court and claim damages, but pays them vastly different sums depending on the wealth or insurance policies of the people who have injured them. The other pays those same victims the same amount.²⁰⁴ Which system is more fair? Is it really fair to hinder and delay payment to a victim by forcing him through a protracted and antagonistic lawsuit before he is compensated? More likely, these critics are distracted because “the tort system creates the *appearance* . . . of trying to reach individualized results that are fair to all concerned.”²⁰⁵ However, the adversary system belies the success of any such pursuit and the relative “fairness” of the NZP becomes apparent when judged from an outcome-based perspective.²⁰⁶

¹⁹⁹ Rabin, *supra* note 17, at 589.

²⁰⁰ See Boyle, *supra* note 17, at 9 (“[I]ndividualized justice has always been the hallmark of our democracy.”).

²⁰¹ In fact, it has been said of the VCF that “the pervasive influence of the tort perspective of doing individualized justice . . . is apparent on the face of the provision,” and presumably any NZP-style scheme in the United States would have a similar slant. See Rabin, *supra* note 17, at 578.

²⁰² See Part II.A for a description of how the NZP works.

²⁰³ *Id.*

²⁰⁴ The amount paid to a Plan claimant may be less than the amount a fortunate tort plaintiff may receive as a jury verdict. However, the NZP’s ability to compensate more victims than the tort system with lower transaction costs and far less risk of going totally uncompensated is a significant net improvement for accident victims.

²⁰⁵ Henderson, *supra* note 189, at 797 (emphasis added). Henderson argues that the perception of fairness is an important characteristic of any system of compensation, but his very words belie the fact that American tort law has little to do with fairness beyond appearances.

²⁰⁶ It is also interesting to note that a study comparing tort to a limited no-fault plan for medical injuries in a jurisdiction where claimants could choose in which system to pursue their claims found that more claimants who filed tort suits were “very dissatisfied” with their lawyers compared to claimants pursuing the no-fault option. The study concluded that “overall, it appears that tort claimants were less satisfied with their lawyers.” Sloan, *supra* note 185, at 57. Although this is not an actual study of plaintiff perception of the fairness of tort, extreme dissatisfaction with one’s lawyer, if a pervasive problem,

A more acute criticism acknowledges the advantages of the NZP in terms of efficiency and fairness, but points out that Americans might be reluctant to adopt such a scheme simply because the tort system is so engrained: “Apart from the opposition of trial lawyers, public dissatisfaction on fairness grounds with a proposal to embrace a New Zealand-type system would probably be widespread.”²⁰⁷ To the extent that this argument has substance beyond “people like what is familiar,” the idea is that the tort system agrees with American ideology because it is seen as a democratic system where everyone has an equal opportunity to fight for compensation.

However, the American experience with the VCF rebuts this presumption about its population’s ideological preferences. The Victim Compensation Fund was passed without difficulty,²⁰⁸ and the overwhelming majority of eligible claimants opted in favor of compensation from the fund rather than going to court.²⁰⁹ In other words, people²¹⁰ voluntarily gave up their “day in court” in favor of a system where they did not have control and where everyone was treated equally, but where they were guaranteed results.²¹¹

Critics have also noted that Americans oppose deducting collateral sources from their tort awards,²¹² and that this might pose a problem for adopting the Plan in the United States since this deduction is a central part of the NZP.²¹³ However, deducting collateral sources was accepted as part of the VCF.²¹⁴ Further, collateral sources would be fairly indistinguishable from the Plan’s payments since the Plan itself is essentially insurance. This might mean that the private insurance market in the United States would

could certainly lead to an impression of unfairness in the tort system, even while people who have never actually had to file a claim tout the system’s individualism and supposed fairness.

²⁰⁷ Henderson, *supra* note 189, at 798.

²⁰⁸ ATSSSA passed through Congress with astounding speed: it was drafted in forty-eight hours and passed both houses within eleven days. ASS’N OF TRIAL LAWYERS OF AM., *supra* note 63, at 12.

²⁰⁹ Hechler, *supra* note 19, at 20.

²¹⁰ A vast majority of individual claimants chose Fund compensation over a tort lawsuit, but in another sense, the American people as a whole, through their representatives in Congress, also chose Fund compensation over tort lawsuits by making the Fund payout so attractive compared to the tort alternative.

²¹¹ This was probably due in large part to the generous tort-based computation of damages, but any Plan implemented in the future in the United States would presumably have a similar payout schedule. Indeed, as mentioned elsewhere, due to the loss-spreading effects of private insurance, much of what is currently awarded in tort damages comes from the same sources that would be tapped under an NZP-style scheme.

²¹² See Shapo, *supra* note 28, at 812 (“The Fund highlights the twists and turns within the general problem of collateral sources.”).

²¹³ See *supra* note 69 for a definition of collateral sources. See *supra* note 81 for a description of how the NZP and the VCF deducted or included them in awards.

²¹⁴ Specifically, the VCF required deducting all collateral sources, including life insurance benefits. The only amount that was not deducted from each claimant’s award was the amount of premiums that the claimant had actually paid to secure the life insurance policy, a small amount compared to the policy payout.

shrink as people realized that they could claim from the Plan instead of maintaining their own policies.²¹⁵ For top earners, life and other insurance might still be desirable to provide for survivors beyond the maximum payout guaranteed by the Plan. Life insurance benefits, the collateral source that people hold on to most dearly, could be retained for victims in the same manner that they were retained for the VCF without much difficulty at all.

C. "9/11 Was Different"

Some critics believe that the Victim Compensation Fund was a good move by Congress, but at the same time believe that personal injury claims unrelated to major terrorist attacks²¹⁶ should not be dealt with in a similar manner.²¹⁷ These critics argue that the only justification for the VCF was the unprecedented nature of the attacks both quantitatively and qualitatively.²¹⁸ The argument asserts, first, that there were just too many claimants:

[I]f the sheer prospect of tort liability for some 3,000 deaths and many additional serious injuries . . . could have sufficed to throw major players in the airline business into bankruptcy[,] . . . the tort system could well be viewed as inadequate to the task of handling the aggregate personal injury toll of September 11th.²¹⁹

Second, the argument claims that the losses of 9/11 victims and families were somehow more important than everyday losses because a typical case of products liability or medical malpractice does not generate the same nationwide emotional sympathy that the 9/11 attacks did.²²⁰ For these two reasons, so the argument goes, "[a] long and bitter contest over liability, stretching out over a period of years, in which families . . . had nothing but recriminations, bitterness, and frustrations with 'the system,' almost cer-

²¹⁵ For example, liability insurance for personal injury tort suits would almost certainly become uncommon, if not extinct. Lobbying by a well-funded and well-organized insurance industry (perhaps allied with ATLA) against adopting the NZP in the United States might pose another unfortunate political obstacle for proponents of the Plan. See *supra* note 137.

²¹⁶ Some believe that the Fund should not be duplicated even in the case of another terrorist attack of the magnitude of September 11th. Jerry Christmas, *Sept 11 Fund Called a Onetime Congressional Act*, CHI. DAILY L. BULL., Apr. 24, 2003, at 1. Kenneth Feinberg, the Special Master in charge of administering the Fund, also holds this view. However, the rationale that he provides for denying compensation to victims of future attacks is that the American people would not support another compensation scheme because the second attack would not be so unique an event as the first one. Thus, his argument is really that future victims *would* not be compensated, not that future victims *should* not be compensated. See Feinberg, *supra* note 74.

²¹⁷ Rabin, *supra* note 91, at 771.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 772.

tainly would have been regarded as intolerable to the national community.”²²¹

Anyone making the above argument is absolutely correct that the tort system was incapable of handling the claims of the 9/11 victims. However, all of the reasons why the tort system was inadequate for the 9/11 claims are also reasons why the tort system is inadequate for victims of commonplace accidents. If it is cruel to force a 9/11 victim through a long and bitter contest over liability before granting him or her compensation, why is it acceptable to force any other victim through the same contest before granting him or her compensation? It is hard indeed to justify why any one particular 9/11 victim or his family deserves a fast-track recovery without the stumbling block of a tort lawsuit when many thousands of people every year experience similar losses but receive no such special treatment.²²²

When it comes to the amount of damages awarded, one is again struck by the similarities between the experiences of the victims of 9/11 and those of other accident victims, rather than the differences. The following illustration is apt:

[O]ne is entitled to ask whether an office worker’s horror at seeing a plane coming at the ninety-seventh floor of the North Tower is greater than that of a motorist who sees an oncoming car jump the median and, for a few yards, literally fly at him or her. It seems reasonable to believe that, in their last moments, the victims of the Towers were not conceptualizing the insult to the national community of an attack on the homeland but rather coping with their own private hells. . . . [I]t is not manifest that the awfulness of their deaths was qualitatively worse than that of [the rest] of their countrypersons who died from accidents in 2001.²²³

With this in mind, it hardly makes sense to grant generous noneconomic or other damages in the case of the office worker but deny them when considering an everyday highway fatality simply because one victim had the “fortuity”²²⁴ to die in the terrorist attacks while the other was simply killed by an uninsured drunk driver.

As for the volume of claims, the “annual accident toll in the United States dwarfs that of the attacks” and stands at around 90,000 deaths per year.²²⁵ Supporters of the “9/11 Was Different” argument who were afraid of clogging the system with claims from 9/11 should take note that the system is already clogged and that all the problems they foresaw from dump-

²²¹ *Id.* at 771.

²²² This is especially true given the various forms of support—monetary and otherwise—that were made available to the families of victims of the September 11th attacks, but are unavailable to families who have lost members in violent incidents that do not rise to the level of a national tragedy. *See infra* note 228 and accompanying text.

²²³ Shapo, *supra* note 28, at 817.

²²⁴ *Id.*

²²⁵ *Id.*

ing so many claims into court dockets are already happening.²²⁶ The difference between claims arising out of 9/11 and all other claims is merely in perception. The national media focused so much attention on the victims of the attacks that their suffering loomed in the national spotlight while the massive tragedy that takes place piecemeal every year continued to go unnoticed.

Another type of “9/11 Was Different” argument says that although the NZP works in New Zealand, and although the VCF was a success in this country, and despite the substantial similarities in how the two plans work, people in this country would never go so far as to extend the idea behind the VCF to enact a nationwide accident compensation plan for injuries generally.²²⁷ They highlight that September 11th was a unique event in American history, and it was the enormity of the day and the outpouring of support for the victims that made passing the VCF possible.²²⁸ There would not be, so the argument goes, the same kind of support for a more generalized plan.²²⁹

While the above-mentioned critics are correct as to the origins of the VCF, their analysis does not provide any reasons why the VCF should not be used as a model for future tort compensation. Even though a unique national mood was required to create the VCF in the first place, now that Congress and society in general have seen how well it worked, there is no reason why it could not happen again for the next terrorist attack, or why it could not be extended for accidental injuries in general.

Indeed, victims of future terrorist attacks or other major disasters may be in more dire need for compensation than the victims of 9/11, not less, because of all the other types of support that the 9/11 victims received. For example, comparing 9/11 to Hurricane Katrina, Kenneth Feinberg pointed out that private charitable contributions for victims of the hurricane amounted to over \$600 million while around \$2.5 billion was raised by private charities for victims of 9/11.²³⁰ His point was that public support for victims was greater for 9/11 than for any natural disaster, which is undoubtedly true. However, the logical extension of this fact is not that we should avoid creating funds for future mass-accident victims, but that it is precisely

²²⁶ See Saks, *supra* note 187, at 693 (“The interval from injury to compensation averages six years in the State of New York, and those with the most serious injuries typically wait over a decade.”); see also Mullenix, *supra* note 24 (listing various problems rampant in the current tort system).

²²⁷ See Rabin, *supra* note 17, at 577–78.

²²⁸ See, e.g., Boyle, *supra* note 17; Rabin, *supra* note 91. These critics justify the generous compensation of the 9/11 victims compared to everyday accident victims by noting that the terrorist attacks not only injured the people present at the crash sites, but had larger political ramifications by threatening our national sense of invincibility in the world community. The outpouring of support was necessary, so the argument goes, to send a message to terrorists and to shore up national pride after the insult to the national community. According to these critics, the fact that these goals are not present when compensating typical accident victims justifies compensating those victims less.

²²⁹ See, e.g., Boyle, *supra* note 17; Rabin, *supra* note 91.

²³⁰ Feinberg, *supra* note 74.

because future mass-accident victims will not receive the public support that victims of 9/11 received that they need compensation from a centralized fund.²³¹

Most of the 9/11 victims chose Fund compensation over filing tort suits for the simple reason that they thought they would get more money that way than if they sued the airlines or another defendant permitted by ATSSSA.²³² But many everyday accident victims also expect to recover little or no money through tort lawsuits. This can happen when a victim is not injured by another party,²³³ or when the defendant is insolvent, or when the injury was caused by a large company that can successfully defend the suit.²³⁴ Victims of other terrorist attacks are another group who would be happy to have a fund from which to make a claim.²³⁵ Even accident victims who reasonably expect compensation through the courts might choose Plan compensation over litigation because Plan compensation is faster, minimizes risk,²³⁶ and avoids litigation costs. The only victims who would really be against a Plan would be those rare victims who have been lucky enough to be injured by wealthy, poorly represented tortfeasors whose liability is not in question.

Thus, like the VCF, an NZP-style plan would provide compensation for people who otherwise might not be compensated at all, and it would provide guaranteed compensation for people whose recovery via a lawsuit was uncertain. Since the Plan is advantageous for virtually every party in-

²³¹ It is worth noting here that, under the NZP, hurricane victims and their families would receive compensation for injuries and loss of life, but not for property damage. The argument about public support nevertheless applies to all other mass-injury contexts, including, for example, future terrorist attacks or mass products liability. *See supra* notes 54–62 and accompanying text.

²³² *See supra* note 19.

²³³ Some of these victims will probably have health insurance that will cover some of the cost of their injuries even if they are unable to recover damages from a defendant. However, not everyone is completely covered by both health and disability insurance, and if we required universal comprehensive insurance—health, disability, and liability—we would have a system that essentially functions as the NZP. The only difference would be that liability for injuries would still have to be litigated, delaying compensation and incurring transaction costs.

²³⁴ Class action would be an option, but an award from a class action resembles a compensation plan award since, in a class action, everyone gets the same recovery for the same injury and most class members are not required to take any action other than simply signing up as a class member. The only difference is that a class action award will take much longer to arrive.

²³⁵ The victims of the Oklahoma City terrorist bombing readily come to mind as examples. Congress has already taken the significant step of broadening the VCF to include the victims of the 1993 World Trade Center bombing, the 1995 Oklahoma City bombing, the 1998 embassy bombings in West Africa, and the anthrax attacks of the fall of 2001. Mullenix, *supra* note 21, at 1332–33. Thus, the line between 9/11 victims and all other victims for the purpose of determining who deserves compensation and who does not is already blurring.

²³⁶ There is always a risk of receiving nothing. Given the risk-averse nature of people generally, potential plaintiffs would be especially likely to take the sure thing. *See, e.g.*, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 53 (2d ed. 1989) (defining risk aversion and noting that it is generally realistic to assume that people are risk averse, at least when risks are large).

volved on an individual level, it is but a small step to get from that premise to the idea that Americans, as a group, should support its adoption.

D. Lack of Deterrence

Another common criticism of the NZP is its perceived lack of deterrence.²³⁷ One commentator claims that injury rates will inevitably rise if the financial disincentive created by the constant threat of potential lawsuits is removed: “Generally, if actors are not required to pay a fair share of the costs of their activities, including the accident costs, they will tend to over-engage in those activities whose costs they can most successfully escape from paying.”²³⁸ This argument has often been raised in opposition to limited no-fault plans as well.²³⁹

As mentioned earlier,²⁴⁰ punishing people whose negligence has created dangerous situations that result in personal injury is not the only way to reduce the incidence of accidents.²⁴¹ Another way is to prevent the dangerous situations from occurring in the first place. This can be done by monitoring safety standards to ensure that everyone takes sufficient precautions, including assessing fines for noncompliant actors.²⁴² This is, of course, just how the NZP works.

The safety behavior of institutional actors subject to regulation—such as hospitals, product manufacturers, and employers—can be controlled directly by assessing compliance with established safety requirements.²⁴³ Many of these regulations already exist along with appropriate government agencies to enforce them.²⁴⁴ The only change necessary would be to redirect the fines into an account used to pay claims for injuries caused by these institutional actors.

²³⁷ See, e.g., Solender, *supra* note 130, at 104–07.

²³⁸ Henderson, *supra* note 189, at 794.

²³⁹ See, e.g., Saks, *supra* note 187, at 705 (finding that physicians overestimated by a factor of three the likelihood that a malpractice suit would be filed, indicating that tort provides doctors considerable incentive to be careful).

²⁴⁰ See *supra* notes 163–168 and accompanying text for more details regarding the Plan’s deterrence methods.

²⁴¹ It is also quite probably not the most effective or fair method of deterring accidents because it ignores people who “gamble and win” by creating hazards but, through the operation of luck, avoid causing injury. See Avraham & Kohler-Hausmann, *supra* note 149.

²⁴² In the medical malpractice context, one commentator has argued that a centralized agency is the only way to successfully prevent future malpractice injuries because in defending tort lawsuits, doctors deny any wrongdoing and keep their mistakes as closely guarded secrets. If they were not held financially responsible for their mistakes, then they would be more willing to share details about what went wrong and everyone could benefit from more open research into how to prevent future injuries. See Robert Pear, *Group Asking U.S. for New Vigilance in Patient Safety*, N.Y. TIMES, Nov. 30, 1999, at A1.

²⁴³ Examples include the FAA and OSHA. See Federal Aviation Administration, <http://www.faa.gov> (last visited Mar. 9, 2005); Occupational Safety & Health Administration, <http://www.osha.gov> (last visited Mar. 9, 2005).

²⁴⁴ See *supra* note 243.

There are also methods available to curb individual negligence. To take automobile accidents as an example, road accidents can be discouraged by aggressive enforcement of criminal penalties for drunk and other reckless driving habits, and insurance rates can be adjusted to account for driving records.²⁴⁵ The NZP's gas tax, which partially funds the account used to compensate victims of auto accidents, is a particularly clever device because, when combined with experience-rated insurance premiums,²⁴⁶ it provides drivers not only with an incentive to drive carefully, but also an incentive to drive less.²⁴⁷

The situation just described is very close to the system that already exists in the United States. In the auto accident context, compulsory insurance undermines the claim that the threat of damages in a typical two-party accident provides a financial incentive to be careful.²⁴⁸ As a result of these alternative mechanisms, as mentioned above, it has not been shown that switching to no-fault auto insurance affects the accident rate.²⁴⁹ Thus, in this country, accidents are deterred through a variety of mechanisms other than the threat of tort suits, and switching to an NZP-style plan would not be such a revolutionary change.²⁵⁰

Furthermore, September 11th illustrates how a centralized system might be the only effective means of preventing certain types of future injuries. When it became clear that the people actually responsible for the injuries (the Al Qaeda operatives) were unavailable for rendering tort

²⁴⁵ This system uses what are called experience-rated insurance premiums. See Liao & White, *supra* note 21, at 259.

²⁴⁶ *Id.*

²⁴⁷ Thus, it promotes not only an efficient level of *care* with regard to motoring, but also encourages an efficient level of *activity*. Level of activity is the counterpart to level of care, and achieving an efficient level of accidents requires addressing both elements.

²⁴⁸ Todd, *supra* note 32, at 408. This is especially true considering that plaintiffs often only sue for the limit of the defendant's insurance. The counterargument would be that that drivers pay higher insurance premiums if the insurance company deems them to be higher risks because of past accidents. However, this could easily be retained in an American version of the NZP, and thus the NZP would have the same or close to the same amount of deterrence as the current American tort system.

²⁴⁹ See *supra* note 143. Commentators have argued that the reason switching to no-fault auto insurance does not automatically raise accident rates is the reciprocal nature of car accidents that means that a careless driver is as likely to injure himself as another motorist. See *supra* note 143 and the paragraph which follows it in the text for why this intuition is not a compelling argument that the NZP lacks sufficient deterrence.

²⁵⁰ This argument should not be taken to mean that switching to an NZP-style system in the United States would be a wash. Even though the United States already uses many of the same mechanisms as New Zealand to deter dangerous activity, and the economic effects of a typical accident that is completely covered by insurance are similar in the two countries, switching to such a plan would still generate substantial benefits. The NZP has the advantage that tangential third parties cannot be sued for the sake of generating a windfall, and defendants are protected from being sued beyond the limits of their insurance coverage. Even though the typical case in the United States already resembles what happens in New Zealand, there are still many problem cases that can be avoided by switching to a comprehensive plan.

judgments or other punishment, instead of seeking out other parties to blame (e.g., the airlines and airplane manufacturers), Congress focused on the truly meaningful end goals of the bill: compensating the victims and preventing a repeat occurrence. To that end, they set up the VCF and later passed ATSA.²⁵¹ The government realized that it was in the right position to prevent future incidents of the same kind and it accepted the responsibility to keep its citizens safe rather than affixing blame on some other party and forcing them to pay damages.²⁵² Centralized punishment is the main method already used in this country to deter crime and other intentional harms, so the comparison between the VCF and NZP is not really a stretch.

Some have responded to the above argument by saying that it would be too administratively difficult or too costly to implement widespread monitoring of safety standards throughout an entire country: “Even if there were an injury Tsar who sat at a great control board every minute of every day, constantly figuring and refiguring the distributive justice of compensation for such events, this would be a challenge indeed. . . . [I]n practice, a truly comprehensive solution is a chimera.”²⁵³ As a corollary, one commentator has suggested that tort law is actually an efficient way to prevent injuries: “[T]he number of inspectors in a society with an active tort system can be quite small, since every possible injured person is by definition a policeman,”²⁵⁴ but under a no-fault plan, the “number of inspections and inspectors might turn the United States into a police state.”²⁵⁵

These arguments are weakened by the fact that the NZP saves a considerable amount of resources.²⁵⁶ Without paying lawyers fees, discovery costs, court costs and the like, there will be funds available for accident research and prevention.²⁵⁷ Thus, the evidence indicates that the NZP could achieve the same level of deterrence as the current American tort system

²⁵¹ See *supra* note 174.

²⁵² To the extent that the reader believes the airlines were at fault for not doing more to prevent the hijackings, this argument assumes that the percentage fault of the Al Qaeda operatives dwarfs that of the airlines.

²⁵³ Shapo, *supra* note 28, at 818.

²⁵⁴ Solender, *supra* note 130, at 110; see also Henderson, *supra* note 189, at 796 (“[T]he cost of imposing differential levies reflecting such information would be too great.”).

²⁵⁵ Solender, *supra* note 130, at 110. Some have argued that the tort system is the *only* way that certain necessary information about accident prevention will be brought to light and put to use preventing future mishaps. See, e.g., Boyle, *supra* note 17, at 9 (“[C]ivil litigation is the only meaningful and effective deterrent protecting the public.”).

²⁵⁶ Todd, *supra* note 32, at 489.

²⁵⁷ *Id.* A specific study comparing tort law to a no-fault plan for medical malpractice claims in a jurisdiction where claimants could choose whether to file under no-fault or tort found that legal fees in particular were much higher for tort claimants than for no-fault claimants, even though nearly all claimants, whether choosing no-fault or tort, retained counsel to help obtain compensation. The study found that, “[c]ompared to tort, no-fault practically eliminates legal expenses for dispute resolution.” Sloan, *supra* note 185, at 54.

while achieving the significant goals of targeting least-cost avoiders rather than wealthy parties, and saving costs overall.

Hesitation about giving the government responsibility for deterring accidents might also stem from doubt as to whether the government is really in the best position to monitor safety standards and whether it has the right incentives or access to the right kinds of information to do so efficiently. Critics of the NZP might prefer to leave deterrence to the tort system on the theory that since everyone involved in a lawsuit is out for himself, it ought to function like a market and provide efficient incentives for costly activities like gathering information, taking care to avoid accidents, and enforcing accident-prevention strategies. However, these critics fail to realize that the current tort system is anything but an efficient market-style system. Rather, the current tort system is full of inefficiencies resulting from factors such as collective action problems, plaintiffs' attorneys' profit-driven selection of cases to take on, and the ubiquitous effects of luck; it would be naive to assume that such a hodgepodge of deterrent devices was actually efficient or functioned as a market.

Additionally, New Zealand tried a more market-style system in 1998 when it overhauled its accident compensation system by turning over workplace accident insurance to six private insurance providers in the hope that competition would increase the efficiency of the system.²⁵⁸ When they returned workplace insurance to the control of the ACC nine months later, average insurance premiums dropped along with accident rates, providing strong evidence that the ACC was in fact in the best position to control insurance and promote deterrence after all.²⁵⁹

E. Need for Retribution

Some people experience a knee-jerk reaction against the NZP because it does not include an element of retribution against people who have caused accidents or injuries the way tort does.²⁶⁰ (For instance, under the NZP, a negligently run factory where a worker is injured pays no higher fine than a negligently run factory where no one gets hurt.) This lack can

²⁵⁸ See *supra* note 62.

²⁵⁹ The switch to and from private insurance coincided with switches between the political parties controlling a majority of New Zealand's government. Todd, *supra* note 32, at 406. In the first year after the switch back to centralized insurance, the ACC reported a significant surplus of funds. *Id.* In 2004, several of the ACC's accounts operated at a loss in the sense that their levies collected were smaller than their claims for compensation. See ACCIDENT COMPENSATION COMM'N, ANNUAL REPORT (2004), available at http://www.acc.co.nz/wcm001/groups/external_communications/documents/internet/wcm001753.pdf. However, the existence of accounts in default is not evidence of underdeterrence because the plan compensates all accidents, not just those caused by negligent actors who we want to force to internalize costs.

²⁶⁰ In Frank Sloan's comparison of a no-fault plan for medical maloccurrences to the tort alternative, he found that no-fault claimants who received compensation were reasonably satisfied with all aspects of the no-fault system, except the treatment of those responsible. Sloan, *supra* note 185.

be misinterpreted as a lack of deterrence, but the previous section showed how the NZP actually does include sufficient deterrent mechanisms. To understand why retribution is not a necessary part of a compensation scheme, one must remember that the basic purpose of tort and other forms of compensation for injury is to compensate those injured and prevent future occurrences of similar injuries, not to punish wrongdoing. Negligent actors are forced to internalize the costs they have produced because we want to make it too expensive for them to cause those kinds of injuries in the future, not because we find them reprehensible. To the extent that someone has actually done something morally culpable, other civil fines or criminal punishments are the methods by which society will punish the wrongdoer.²⁶¹ Damages paid by a tortfeasor based on a victim's loss cannot be reasonably expected to accurately or fairly punish wrongdoing.

The element that these critics would like to include in the NZP has nothing to do with the goals of tort and accident compensation; they really just want to give accident victims the right to seek revenge for their losses and enjoy the retributive pleasure of assigning responsibility for their injuries to someone else.²⁶² Such an element is certainly present in the American tort system, but it is not a feature of the system that we should preserve. In the case of many accidental injuries, there is simply no responsible party, due to the operation of luck, and the right to assign blame is worthless to the victim. And even when there is a responsible party, under the American "deep pockets rule," the victim is often more likely to seek compensation from someone with money who is not really responsible for an injury than from the real perpetrator, who can sometimes be let off virtually for free.²⁶³ In other words, "the fault theory has developed into a legal fiction."²⁶⁴

In actuality, the Plan does a much better job of targeting the responsible party by focusing on safety standards and injuries and avoiding an obsession about fault or causation that inefficiently and unfairly misplaces blame and responsibility. These types of arguments are similar to the fairness arguments discussed above²⁶⁵ because they do not show a problem with the Plan itself, but merely a problem in the way the plan is perceived.

²⁶¹ Civil and criminal sanctions are not unique to the NZP and, of course, coexist with tort lawsuits in the United States. However, under an NZP-style scheme in the United States, those civil and criminal sanctions could be supplemented or made slightly stricter to account for any deterrent effect lost when punitive damages or other artificially inflated tort awards are abandoned. *See also supra* note 167.

²⁶² They want a victim of a negligent assault to be "entitled to a legal judgment that his right to personal integrity [has] been violated." Henderson, *supra* note 189, at 797; *see also* Bovbjerg & Sloan, *supra* note 9, at 109–10 ("[T]ort claimants, even those who do not obtain compensation, have expressed satisfaction with the tort process. . . . [Tort claimants] were far more likely to be motivated by a desire for retribution than were [no-fault claimants]."); *supra* note 260.

²⁶³ *See supra* note 112 and accompanying text.

²⁶⁴ Todd, *supra* note 32, at 407. In the auto accident context, compulsory insurance usually prevents people who cause accidents from personally paying judgments anyway, although increased premiums do attach a certain degree of blame. *See supra* note 245.

²⁶⁵ *See supra* Part IV.B.

VI. CONCLUSION

New Zealand has taken a unique approach to personal injury, under which tort suits for damages are abolished and, in their place, injured parties are compensated for their injuries from a central fund. Critics have long refused to accept that such a system was possible in the United States, citing problems with fairness, workability, and deterrence. However, the September 11th Victim Compensation Fund, which operated in a substantially similar manner to the New Zealand Plan in several respects, was a renowned success, suggesting that none of the supposed bars to implementing a New Zealand-style system in the United States is impossible to overcome.

Furthermore, since many of the mechanisms on which the NZP relies for loss-spreading and deterrence are already in place in the United States, many victims of common accidents would receive the same satisfactory treatment under an NZP-style system. However, the switch would have a substantial, positive effect in certain problem situations, such as when a victim has been injured by an insolvent defendant or by multiple tortfeasors. Armed with this knowledge, lawmakers can now, finally, honestly consider putting an end to the unfair and unreasonable treatment that the current system of tort law regularly doles out by removing the outdated tort system and installing in its place a comprehensive system of social insurance.

