

COMPENSATING VICTIMS OF MASS DISASTERS THROUGH THE COURT SYSTEM: PROCEDURAL CHALLENGES AND INNOVATIONS

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How best to compensate victims of mass disasters – whether made by man or nature – is a worldwide problem. This article considers the very different approaches in three recent U.S. disasters. In the 2001 9/11 terrorist bombings, in which the wrong-doers could not be reached, the government bore the brunt of the compensation. In the Katrina litigation, where the damage was from the 2005 hurricane, long-term losses had to be recovered through insurance or tort suits, neither of which turned out very satisfactorily for the victims. In the BP Oil Spill litigation, resulting from the 2010 oil spill in the Gulf of Mexico, the court tort system has been the primary source of compensation against BP and its partners that were responsible for the disaster. The ‘claims process’ that has been central to insuring long-term compensation is examined.

Key words: disaster compensation; class actions; multidistrict litigation (MDL); case management; litigation settlement; insurance; government payments; tort liability.

Mass disasters – whether resulting from nature like hurricanes, floods, and earthquakes, or from human error like oil spills and air crashes – are a feature of modern society. How to go about compensating the victims of mass disasters is a pressing question in every country. In most countries, the government undertakes the initial response by providing shelter, food, and medical aid. Government resources may be augmented by aid from private charities and international governmental efforts.

Once the immediate injuries and hazardous conditions of a disaster are dealt with, there remains the question of what should be done to compensate the victims for their personal losses – such as physical injuries, long-term medical conditions, lost income, and destruction of personal and real property. In poorer countries, there may be little compensation for personal losses. In more developed countries, the governments provide certain kinds of compensation, but this can be insufficient to cover all actual losses and restore the victims to their pre-disaster status. Increasingly

in the global economy, insurance is carried by businesses and property owners that will pay compensation for losses from covered occurrences and events. And finally countries increasingly have legal systems that impose liability on individuals, corporations, or governmental entities that are found at fault for causing a disaster and, through the court system, require compensation for victims.

This article will examine the mass disaster situation in more developed countries in which the legal and business climate contemplates the payment of compensation for tort liability or insurance coverage. Depending on the situation, tort liability and insurance coverage may sometimes be the principal (or only) means of getting compensation to victims, or they may only complement governmental programs for restoring victims, in whole or in part, to their pre-disaster condition. This article will consider three recent severe mass disasters in the United States and how compensation for victims was determined and delivered. The process for compensation differed considerably among these three disasters, which provides an insight into the problems and issues involved.

The first disaster – the 2001 9/11 attack on the World Trade Center and Pentagon – was caused by terrorists who could not be held liable for compensation, and therefore compensation would have to come from a mammoth appropriation by Congress administered by a claims facility created for that purpose. The second disaster – the destruction wreaked by Hurricane Katrina in 2005 along the Gulf of Mexico Coast – was an act of nature, although contributed to by arguably negligent conduct of both governmental agencies (like the Federal Corps of Engineer and local levee boards) and private entities (like oil drilling companies). When and how victims received compensation depended on a complicated mix of government programs, insurance proceeds, and liability law suits. These suits were premised on private companies having contributing to the natural calamity (such drilling and dredging practices by oil companies and contamination by enterprises that failed to secure storage tanks and barges). The third disaster – the British Petroleum Oil Spill in 2010 – was caused by *human error* in the conduct of oil extraction by large corporations. The search for compensation involved a complex mix of government aid, private corporate liability, and insurance.

The process by which compensation was sought varied considerably in these three cases. Given the American policy preference for the market place, there has been less government involvement than in mass disasters in other countries. Also given the centrality of litigation for resolving liability in the United States, legal proceedings have been central to determining responsibility and compensation. This brings into play the particular American legal culture that permits ‘entrepreneurial’ law suits promoted by plaintiffs’ lawyers and distinctive American legal procedures for aggregation of similar cases and enhancement of mass settlements.¹⁵⁹

¹⁵⁹ The American Rules of Civil Procedure allow for liberal voluntary joinder of similar claims (Rule 20), consolidation of similar suits (Rule 42), and class actions (Rule 23) in which a class representative is allowed to sue in a single suit on behalf of others similarly situated. As with most human inventions,

This article will particularly explore how those aggregation procedures – such as *class actions* and *multidistrict litigation* – have been used in an attempt to streamline the conduct of mass disaster litigation. It will consider both the benefits and disadvantages of this approach for assigning liability and compensating victims. Finally, it will consider the distinctive American ‘claims process’ which has been a critical procedure for insuring compensation in these three mass disaster litigations.

1. Terrorist 9/11 attacks

The terrorist attacks of September 11, 2001 on the World Trade Center and Pentagon resulted in 2973 deaths. They also resulted in a sizable number of personal injuries and extensive harm to personal and real property and the environment. The disaster was caused by terrorists, and there was an immediate movement in Congress to provide for compensation to the victims and their families for their personal losses. There were claims that the airlines were negligent in their security procedures and that liability could also be based on certain contractor and architect failures. These resulted in a number of law suits that languished after the government compensation scheme was passed (and were ultimately settled). This liability route to compensation was recognized as difficult to establish given that the object of the attacks was the government itself.

Congress passed a broad compensation statute only eleven days after the disaster. The Air Transportation Safety and System Stabilization Act (ATSSSA) created a no-fault compensation scheme for 9/11 victims and a federal cause of action against the fund with exclusive jurisdiction in the federal court for the SDNY.¹⁶⁰ This meant that very different kinds of cases (such as wrongful death, personal injury, property destruction, airline liability, contractor and architect liability, etc) as to very different phases and locations (including damages in neighboring areas) were consolidated together.¹⁶¹

The method of compensation for the 9/11 attacks is perhaps closest what is done in many other countries – the government is the primary or sole source of compensation. This arose from the fact that the terrorist attacks were seen as against the government itself, and the negligence of others was not critical to the disaster. In

these aggregate procedures are not without their problems. American courts have been reluctant to certify class actions for ‘mass torts’ and other ‘mass harms’ because the circumstances under which each individual was injured are often individualized, making a unitary trial impossible. As a result, in recent years courts have increasingly looked to consolidation for managing multiple individual suits. A federal statute provides that all the cases in federal courts arising out of similar conditions can be transferred to a single federal judge. 29 USC para 1407. Such ‘Multidistrict Litigation (MDL)’ has become a principal procedure for disposing of large numbers of similar cases.

¹⁶⁰ Air Transportation Safety and System Stabilization Act (ATSSSA), Pub L No 107-42, 115 Stat. 230 (2001) (codified at 49 USCS para 40101).

¹⁶¹ R Effron, ‘Disaster-Specific Mechanisms for Consolidation’ (2008) 82 Tul L Rev 2423.

addition, insurance policies generally excluded terrorist attacks, and the government undertook to shoulder the burden of compensation.

What is distinctive is the claims process that was set up. Lawyer/mediator Kenneth Feinberg was appointed to head the claims procedure, and he assembled a staff that received the claims of family members and other alleging harm. He took the legislation as requiring him to follow the 'tort model' for compensation, that is, that compensation for loss of life or debilitating injuries would provide compensation for lost wages or profits of the individual. Thus the family of a stock broker or investment banker who died in the World Trade Center received higher payments based on his expected life earning capacity than the family of a fireman or policeman who had a much smaller earning capacity. This was criticized, and in any government compensation scheme in the future there is a case for parity in providing compensation that would not be dependent on the individual earning capacity of the victims. Determining compensation on an individual basis was arduous, and Feinberg often met personally with any claimants and heard their pleas. Ultimately a very high percentage of claimants accepted the awards of the claims facility.

2. Katrina litigation

Hurricane Katrina struck New Orleans on August 29, 2005, and, when levees on city canals broke, flooded 80% of the city. The city with a metropolitan-area population of over a million had to be totally evacuated and closed down for several months. The most severe hurricane in modern American history, Katrina caused billions of dollars in property damage and some 3,000 deaths. Although the initial cause was an act of nature, many different parties and entities were alleged to be responsible for the canal breaches or for compounding the injuries. Within a couple of days, suits began to flood the courts with tens of thousands ultimately filed in federal and state courts. There was great variety among the claimants who suffered harm and among the multiple defendants alleged to be responsible. Most of the suits were filed in the federal court in the Eastern District of Louisiana, and ad hoc consolidation of those cases was ordered by the judges of that district.

All Katrina-related cases pending in the Eastern District of Louisiana that had a relationship to Hurricane Katrina were transferred to Judge Stanwood R. Duval for consolidated pretrial management. The transfer resulted in the consolidation of very disparate kinds of cases, for example, against:

- the federal Corps of Engineers and local levee, sewage and water boards for failure properly to construct and maintain the levees;
- private contractors and dredgers for faulty construction and work on the levees;
- the Corps of Engineers (that is responsible for maintaining navigable rivers and coastal areas in the US) for destruction of wetlands arising out of a major project fifty years before that dug a ship channel (called MrGo) across the wetlands;

- oil and pipeline companies for drilling over many years that resulted in erosion of wetlands;
- insurance companies for refusing to recognize liability for flooding and storm surge.

The suits were based on a wide variety of legal causes of action, including tort, contract, consumer law, state and federal statutes, and admiralty. There were a number of complex legal issues such as governmental liability and immunity, choice of law, and insurance contract construction. Somehow the tens of thousands of cases had to be put into categories with different procedures and time periods established for disposing of each category.

Judge Duval issued a series of opinions on motions to dismiss and for summary judgment determining central legal issues. He ruled against the US and Army Corps of Engineers defense of sovereign immunity from claims they were negligence in the construction and maintenance of a waterway built fifty years before to shorten the passage from the Gulf to New Orleans (the Mississippi River Gulf Outlet). He was later reversed by the Fifth Circuit Court of Appeals, and the Corps and US government were let off the hook. In contrast to the US, most countries do not accord the government sovereign immunity, and thus the government can be held liable from its negligence.

Judge Duval also held that the local levee, sewerage and water boards were not immune from suit under sovereign immunity, and they then settled out most of the claims, usually through payment from their insurance policies. Finally, he found that 'all risk' homeowner's insurance policies were ambiguous as to their usual exclusions for flood and storm surge and refused to dismiss insurance companies. This ruling was also later reversed by the Fifth Circuit.¹⁶² Insurance companies were also victorious in cases in other courts as to the scope of provisions in homeowners' policies that treated most water damage to buildings as having resulted from flood rather than rain, and therefore as not covered under the policies.¹⁶³ Thus despite the existence of private insurance, the federal government ended up being a primary source for compensation through its immediate disaster aid and its federally-financed National Flood Insurance Program.

The importance for case management purposes was that the judge isolated and ruled on key issues of law whose determination was standing in the way of settlement and grouped like cases for trial (although most were ultimately settled). He had the benefit of precedents established in MDL cases by Judge Eldon E Fallon, also of the US District Court for the Eastern District of Louisiana that utilized bellwether trials

¹⁶² *Re Katrina Canal Breaches Litig* 495 F 3d 191 (5th Cir 2007).

¹⁶³ *Tuepker v State farm Fire & Casualty Co* 2007 WL 3256829 (5th Cir 2007) (storm surge accompanying hurricane was within the exclusion in homeowners policies for flood water, and policies' 'anti-concurrent causation clause' was enforceable to exclude compensation for damage resulting from a combination of rain and flood).

and other techniques that could be looked to as models.¹⁶⁴ Having the full spectrum of the Katrina cases before a single judge who devoted most of his time over a period of years to the litigation MDL enabled Judge Duval to see how different pieces of the litigation affected the totality of the cases. It also enabled him to master the highly technical scientific issues that arose in very different contexts and cases. The consolidation clearly reduced the costs of discovery, which could be scheduled to avoid duplication and made available for all the cases.

3. BP Oil Spill Litigation

The BP Oil Spill Litigation presented some of the most challenging issues for court administration of any piece of complex litigation. The explosion on the Deepwater Horizon oil rig in April 2010 resulted in the escape into the Gulf of Mexico of large quantities of oil for 87 days. This severely affected fishing, riparian property in five states along the Gulf (Texas, Louisiana, Mississippi, Alabama, and Florida), the tourist industry, and the livelihood of large numbers of individuals and businesses that depended on servicing those industries. Tens of thousands of claims were filed in suits in state and federal courts across the country, although most were in the states directly affected. They asserted dozens of causes of action based on such areas as tort, contract, consumer, environmental, statutory, and maritime law.

Unlike most single event disasters like plane crashes or bridge collapses, the BP Oil Spill Litigation involved a broad range of claims from death and personal injury to environmental and property damage to economic losses, in a variety of occupations and commercial enterprises. Crafting manageable procedures for judicial resolution of such an amorphous collection of claims fell upon the judge to whom the federal court cases were transferred under by the Panel on Multidistrict Litigation.¹⁶⁵

3.1. Case Management

The Panel on Multidistrict Litigation assigned the litigation to Judge Carl Barbier, a federal judge in the Eastern District of Louisiana, obviously a convenient location because the oil spill occurred eighty miles away. Upon being appointed transferee judge, Judge Barbier began holding conferences with counsel to establish a framework for categorizing and organizing the cases. He appointed plaintiff and defendant liaison counsel, plaintiff and defendant steering committees, and a special

¹⁶⁴ See EF Sherman, 'The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible' (2008) 82 Tul L Rev 2205, 2213–16.

¹⁶⁵ Under the Multidistrict Litigation Act, see n 160, a panel of seven federal judges sitting in Washington, DC can consolidate similar cases and transfer all such cases to one federal district judge anywhere in the country. The transfer is for the purposes of coordinating discovery and other pretrial matters, but transferee judges are admonished to attempt to bring about a settlement before having to transfer the cases back to their original courts.

master. The first status conference was held in September 2010, at which hundreds of attorneys from all over the country attended, spilling over into another room. They represented plaintiffs in the thousands of cases transferred to the MDL (both originally and as ‘tag along’ cases filed after the original transfer order), as well as the defendants named up to that time in the various complaints. The principal defendants named in complaints were:

- the operator of the rig, British Petroleum;
- the owner of the rig Transocean;
- the contractor that worked on the underwater operations and did cement work alleged to have been defective, Halliburton;
- the parties to a joint operating agreement with BP, Anadarko E & P Company and MOEX Offshore 2007;
- the manufacturer of a safety valve, Weatherford International;
- the manufacturer of the blowout preventer, Cameron International Corp.¹⁶⁶

An early central task for managing the litigation was how to divide up the widely varying claims into manageable groupings. The attorneys and court coined the phrase ‘pleading bundles’ to describe the categories to which the cases were assigned. The court approved bundles for a number of claims.¹⁶⁷

The bundles were intended to be flexible and subject to change. They reflected recognition that while all the claims shared some basic core issues, such as the liability of the various defendants for the explosion, they could have significant differences as to other issues and defenses. The bundles were an attempt to group claims with similar issues so that they might be addressed and possibly resolved independently of other bundles. A number of the bundles were characterized by the type of claimant, for example, private individuals, businesses, emergency responders, or governmental entities; or by the nature of the injury, for example, personal injury or death, property damage, economic loss, or clean-up expenses; or by the cause of action, for example, arising under the Oil Pollution Act of 1990 (OPA), state statutory and common laws, and maritime law.

Scheduling of a trial or trials in as complex cases as the BP Oil Litigation was a challenging task. ‘Bellwether trials’¹⁶⁸ of a small number of individual cases have

¹⁶⁶ See R Force, M Davies & JS Force, ‘Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases’ (2011) 85 Tul L Rev 889, 898.

¹⁶⁷ Bundle A, Personal Injury and Death; B, Private Individuals and Business Loss Claims | (broken down into B1, Non-Governmental Economic Loss and Property Damages; B2, RICO pleadings; B3, Post-Explosion Clean-Up Claims; B4, Post-Explosion Emergency Responder Claims); C, Public Damage Claims; D, Injunctive and Regulatory Claims (broken down into D1, Claims Against Private Parties, and D2, Claims Against the Government, Official, or Agency); and E, Designation of Subsequently-Added Cases. Pretrial Order No 11 [Case Management Order No 1] 2–5. *Re Oil Spill by the Oil Rig ‘Deepwater Horizon’ in the Gulf of Mexico, on April 20, 2010* MDL No 2179 (ED La, 19 October 2010) <<http://www.laed.uscourts.gov/OilSpill/Orders/PTO11.pdf>> accessed September 2013.

¹⁶⁸ Bellwether trials are trials of individual representative cases that are part of an aggregate litigation such as a class action or multidistrict litigation. The name comes from the sheep with a bell around its

become a favored technique for giving parties in complex litigation a sense of the strength of their cases, hopefully to lead to settlement. Judge Barbier discussed the use of bellwether trials, but the special circumstance of this case arising out of maritime law led to a relatively early trial date for what could be a comprehensive trial of many of the issues.

Under maritime law, the owner of a vessel (which the BP oil rig was considered) is entitled to file a complaint for a 'limitation' proceeding in which all persons with maritime or state law claims resulting from an oil spill must bring their claims against it in one proceeding.¹⁶⁹ Judge Barbier used the limitation proceeding to schedule a trial that would necessarily determine the major fact issues that were central not only to the maritime limitations claims but also the other statutory and common law claims – encompassing, for example, the responsibility of the various parties. This would have been, in effect, a 'super class action'. It did not ultimately come to pass, as the parties settled on its eve, but it had a concentrating effect on the lawyers to streamline the case that ultimately worked to the benefit of settlement.

3.2. *Claims Process*

Claims facilities are of relatively recent origin, but they have become a central institution in the resolution of complex litigation in the US.¹⁷⁰ The structure and procedures of claims facilities can be quite different depending on the nature and circumstances involved. They are frequently the product of a settlement, but they may also arise out of regulatory or legislative enactments or of insurance, trust, or other contractual obligations.

The principal statutory cause of action in the BP Oil Litigation – the Oil Pollution Act of 1990 (OPA) that established strict liability for anyone who discharges oil – requires a 'responsible party' to set up a claims process for those injured by its discharge, even in the absence of litigation. A little more than a month after the oil spill, BP announced the appointment of Kenneth Feinberg, who had administered the 9/11 claims process, as administrator of an 'independent claims process' for

neck that leads the other sheep in a flock. The purpose is to give the parties in the larger litigation an indication of how the litigation as a whole would be viewed by a jury and thus encourage settlement. An MDL judge may select half a dozen or more bellwether cases, on the recommendation of the parties.

¹⁶⁹ The liability of the owner of a vessel for damages is 'limited' to the value of the vessel. The oil rig, owned by Transocean and leased to BP, was considered to have a value of \$27 million. Transocean filed for limitation, and Judge Barbier set a hearing for February 2012 which would have resulted in the trial of all the major issues. However, the limitation would not have applied if there was gross negligence.

¹⁷⁰ "Claims resolution facility" is a generic term used to describe a wide range of entities that process and resolve claims made against a potential funding source. In the context of a natural disaster, for example, there might be facilities to process claims based upon insurance policies, federal or state statutory or administrative rights, international relief efforts, contractual obligations, and any other basis for receiving economic or noneconomic benefits. These facilities are generally characterized by a large number of claims that are in need of rapid and efficient resolutions' F McGovern, 'The What and Why of Claims Resolution Facilities' (2005) 57 Stan L Rev 1361.

individuals and businesses injured by the oil spill. The announcement was made by President Obama at a press conference following a meeting at the White House with BP representatives that resulted in BP establishing a \$20 billion fund for claims. The agreement between Mr Feinberg and BP was not memorialized in detailed contractual terms, but the Gulf Coast Claims Facility (GCCF) was established under his control and supervision. Mr Feinberg apparently consulted with BP concerning both the substantive and procedural standards for the payment of claims. Although he did not draw a salary, his law firm was paid \$950,000 a month, in addition to expenses and the possibility of further compensation. This fee arrangement was not publicized, and most claimants would not have been aware of it.

The sizable fee arrangement is not objectionable in itself; a corporation can enter into a contract with a private entity to pay well for it to carry out the payment of claims on behalf of the corporation. However, the fee arrangement does reveal a relationship which claimants who were encouraged to go through an 'independent' claims process would have an interest in knowing. Knowledge of the arrangement may or may not make a difference to any particular claimant, but it could be a factor in a claimant's decision as to whether to accept an offer by the GCCF. Highly publicized statements by Mr. Feinberg and BP that he and the claims facility were independent and only had an interest in compensating claimants properly should have been capable of being balanced with this information.

3.3. Court Supervision over Communications with Claimants by Claims Facility

In December 2010, the Plaintiffs' Steering Committee filed a motion with the court to limit conduct of the GCCF concerning public statements and communications with claimants. It objected to a number of features of the claims process being administered by Mr Feinberg, including encouragement of filing a claim in lieu of participating in the court litigation, failure to disclose the relationship between Mr. Feinberg and the facility with BP, and requiring releases of all responsible parties if a claim offer were accepted.

Concerns about defendants' communications with potential litigants or class members in an effort to dissuade them from litigating are not new.¹⁷¹ The objections of the Plaintiffs Steering Committee in the BP Oil Spill Litigation alleged subtle influences to settle by a private claims facility that was not under the authority of the MDL court. Judge Barbier found he had inherent judicial power to ensure the

¹⁷¹ In *Kleiner v First National Bank of Atlanta* 751 F.2d 1193 (11th Cir 1985), the President of a bank that was sued on behalf of a class of borrowers concerning discriminatory rates organized a campaign to contact the borrowers by telephone. The loan officers were directed to 'do the best selling job they had ever done' to persuade the borrowers to opt out of the class action. In a few days, 3,000 borrowers were contacted and 2,800, representing total loans of almost \$700 million, opted out. The court invalidated the opt outs, held the bank's lawyer in contempt, and imposed costs on the bank and a \$50,000 fine on its counsel. The Eleventh Circuit affirmed, stating 'it is obviously in defendants' interest to diminish the size of the class and thus the range of potential liability by soliciting exclusion requests'.

integrity of settlement processes relating to attorneys' fees and communications with potential claimants and issued a remedial order.

The Plaintiffs Screening Committee petitioned Judge Barbier to clarify and limit public statements by Mr Feinberg and the GCCF concerning the independence of the facility and claimants' need for a lawyer in resolving their claims and deciding whether to accept any offer. It cited statements by Mr Feinberg to the effect that claimants would be better off by not litigating and instead resolving their claims through the GCCF. BP opposed the motion, arguing that the MDL court lacked authority to supervise how a defendant like BP goes about settling claims that had not yet been sued on and so had not been subject to the MDL transfer.

Judge Barbier granted a good part of the relief sought. First, he found that the GCCF and its administrator, Mr Feinberg, were not independent of BP, but rather a 'hybrid entity'. The opinion focused on such factors as the appointment of the administrator by BP without input from claimants or the court; the difference in the administrator's role from a 'true third-party neutral' such as a mediator, arbitrator, or special master; the fact that the GCCF and the administrator were not government agents; and the fact that the GCCF sought settlement of claims that fell outside Oil Pollution Act under which BP had been required to set up a claims process.

Judge Barbier ordered the GCCF and Administrator to refrain from: (1) contacting any claimant that they should know was represented by counsel, (2) referring to the GCCF, Ken Feinberg, or his firm as 'neutral' or completely 'independent' from BP, and (3) purporting to give legal advice to unrepresented claimants, including advising that claimants should not hire a lawyer. Any communication with a putative class member should begin with the statement that the individual had a right to consult with an attorney of his/her own choosing prior to accepting any settlement or signing a release of legal rights. It should also disclose to claimants their options if they did not accept a final payment, including filing a claim in the pending MDL litigation. Thus the potential by a defendant that created its own claims process for siphoning off claimants from the remedy available to them in aggregate litigation was significantly curbed.

There may still be justification for the laudable objective of the Oil Pollution Act to get parties responsible for oil spills to pay claims as quickly as possible without the need for court suits. However, the GCCF, created by BP and administered by its appointees, was always subject to the suspicion that it was not truly independent. Despite the protestations of Kenneth Feinberg, potential claimants were wary. The fact that a number were rejected on strict criteria for eligibility based on geographical proximity or for inadequate proof of losses, the feeling grew that the interests of the GCCF were aligned with BP. The fact that an aggressive Plaintiffs Steering Committee was prepared to litigate in hopes of achieving a more expansive approach to liability and damages eventually lead to a settlement in which BP gave up its claims facility for a court-administered one that would have more transparent and claimant-friendly criteria.

3.4. The BP Settlement

On March 3, 2012, less than two years after the oil spill, a settlement was reached between BP and the Plaintiffs' Steering Committee.¹⁷² The case was scheduled to go to trial two days later, and the judge's strict timetable obviously had an impact on the parties' negotiations to achieve settlement before that date. Given the complexity of the litigation, the relatively early settlement was a remarkable achievement.

The settlement replaced the BP claims facility with a new claims facility that would operate under the supervision of the court. Two settlement classes were created. One was an 'economic loss' and 'property damage' class of individuals and businesses affected by the oil spill (such as the fishing and tourist industries and property owners along the Gulf).¹⁷³ The other was a 'medical' class of persons who suffered injury from contact with oil or dispersants (including some 90,000 workers involved in the clean-up).¹⁷⁴ Doubts had previously been expressed as to whether a settlement could be accomplished through a class action by which members had to opt out in order not to be included (as opposed to an MDL-style settlement that would only include those who had filed suit and then opted in¹⁷⁵). But both BP and the PSC were convinced that the two classes were narrowly enough drawn with sufficient commonality that they would pass Fifth Circuit scrutiny. The desire of BP to settle all possible claims rather than just those already filed was a strong inducement to use a class action.

A unique feature of the settlement – the 'risk transfer premium' (RTP) – was established to permit consideration of individual factors that could justify more compensation in individual cases. Proven economic losses would be increased by a multiplier (of up to about 4) to cover such intangible losses as the likelihood of return of oil to property at a later time, consequential damages like lost opportunity losses, emotional distress, inconvenience, and punitive damages.¹⁷⁶

The claims process established by the BP settlement sought more transparency with payments to be based on criteria that would make a more accurate assessments of the harm suffered. Rather precise standards were established for determining 'economic loss' in businesses such as the fishing and tourist industries and by landowners whose property was invaded by oil. The criteria for determining lost wages or profits by the GCCF had been criticized for lack of transparency. The new criteria set out geographic zones based on proximity to the migration of the oil which

¹⁷² Settlement Agreement <<http://www.deepwaterhorizonsettlements.com>> accessed September 2013.

¹⁷³ Economic and Property Damage Settlement <<http://www.deepwaterhorizonsettlements.com>> accessed September 2013.

¹⁷⁴ Medical Benefits Settlement Agreement <<http://www.deepwaterhorizonsettlements.com>> accessed September 2013.

¹⁷⁵ See Sherman (n 164) 2213–16, describing the 'global settlement' approach taken in the *Vioxx* case.

¹⁷⁶ Economic & Property Damage Settlement, Exhibit 15 RTP Chart (Risk Transfer Premium) <<http://www.deepwaterhorizonsettlements.com>> accessed September 2013.

seek a more accurate assessment of damage for various categories.¹⁷⁷ BP estimated that the total claims would be \$7.8 billion, but the settlement did not impose a limit on the amount that the claims facility could award. The settlement also provided for 'medical monitoring' by which persons exposed to the oil (such as 90,000 clean-up workers) or who lived within certain areas reached by the oil or close to beaches, can receive medical checkups every three years for 21 years to determine if they have been adversely affected.¹⁷⁸

A Louisiana attorney who had served as special master in a number of cases, Pat Juneau, was appointed by Judge Barbier to be the Claims Administrator. With multiple offices around the Gulf states and a staff of many hundreds, some of whom had worked in the previous BP claims process, he began processing the claims. The most difficult area proved to be economic loss by businesses. The settlement agreement set out formulae based on the geographical zone in which the business was located and the comparison of sample periods before and after the spill to determine profit or loss. The claimant was given some leeway in selecting the periods, and some businesses were able to show a loss over limited periods while in fact they had profits long-term. BP objected, claiming that businesses that had suffered no injury received windfall payments amounting in some cases to millions of dollars.¹⁷⁹ Judge Barbier upheld the Administrator's interpretation of the settlement agreement, finding that it did not impose a causation requirement for loss or require exact accounting procedures of matching revenue and expenses in the identical periods.¹⁸⁰

The BP Oil Litigation settlement reflected the added leverage that aggregate class litigation is able to bring to bear on a defendant. The initial claims process established by BP imposed stricter standards of proof of injury as well as a causation standard taken from the prevailing tort law in the Gulf states. BP agreed in the settlement to certain objective criteria that presumed causation if those criteria were met. The fact that some claimants received windfalls, at least long-term, was publicly criticized,¹⁸¹ but this avoided the subjectivity, and to an extent uncertainty, of the initial claims

¹⁷⁷ Economic & Property Damage Settlement (n 176), Exhibits 1A–C.

¹⁷⁸ Medical Consultation Programs, Exhibits 12–14 <<http://www.deepwaterhorizonsettlements.com>> accessed September 2013.

¹⁷⁹ See M Fisk & L Calkins, 'BP's Oil Spill Deal Sours as Claims Add Billions to Cost' *Bloomberg* (New York, 5 June 2013) <<http://www.bloomberg.com/news/2013-06-04/bp-s-oil-spill-settlement-sours-as-claims-add-billions.html>> accessed September 2013.

¹⁸⁰ Orders of April 24, 2013 & July 19, 2013 <<http://www.laed.uscourts.gov/OilSpil/OilSpill.htm>> accessed September 2013. See M Fisk & L Calkins, 'BP Says Loss on Spill Claims Appeals Could Scuttle Settlement' *Bloomberg* (New York, 3 August 2013) <<http://www.bloomberg.com/news/2013-08-03/bp-says-loss-on-spill-claims-appeal-could-scuttle-settlement-1-.html>> accessed September 2013.

¹⁸¹ See J Nocera, 'Justice, Louisiana Style' *The New York Times* (New York, 8 July 2013) <http://www.nytimes.com/2013/07/09/opinion/nocera-justice-louisiana-style.html?_r=0> accessed September 2013 ('The next time a big company has an industrial accident, its board of directors is likely to question whether it really makes sense to 'do the right thing' the way BP has tried to').

process. The litigation demonstrates the debate between relying on quicker and more certain criteria, even if some might receive a windfall, and slower and more demanding legalistic standards in compensating victims.

4. Conclusion

Mass disasters – whether made by man or nature – are a reality today, and how best to compensate the victims is of pressing importance. In many countries, disaster relief is left entirely to the government, augmented perhaps by some aid from private charities and/or other countries. Such relief is often just that – immediate relief but without compensation for long-term losses. In the sophisticated global economy of today, there is often reason to look to other sources for disaster aid. The prevalence of insurance means that businesses and individuals take the steps in advance to assure that private funding is available in case of loss. Modern tort law seeks to impose responsibility on parties who have caused injury and who were best able to have avoided it by taking greater care.

In the United States, disaster compensation is often a mix of government payments and private liability imposed through insurance or the tort system. Compensation took very different forms in the three disasters that are considered in this article. In the 2001 9/11 terrorist bombings, in which the wrong-doers could not be required to pay, the federal government bore the brunt of the compensation. In the Katrina litigation, where the damage was primarily an act of nature, long-term losses of property and finances had to be recovered through insurance or tort suits, neither of which turned out very successfully for the victims. In the BP Oil Spill litigation, where the wrong-doer was BP and its partners in the operation of the oil drilling and rig, the tort system has been the primary source of compensation, aided by stringent environmental statutes and the fact that BP is a deep pocket.

The 'claims process' is a fairly distinctive American legal construct that seeks to make responsible parties take the initiative to create an institution for early payment, without the full panoply of formal litigation, and ultimately to fully compensate the victims for both present and future losses. The BP claims process is a paradigm for attempts to work out a fair – yet tough – procedure, augmented by litigation, which will make the victims whole. As with all human constructs, the process has many flaws, and by trial and error it has emerged as an example to be studied and hopefully learned from. The unique American legal procedures for aggregation of cases – class actions and multi-district litigation (MDL) – has played an important role in shaping the result. As always, the interplay of personalities – attorneys, judges, claims administrators, corporate managers – have also greatly affected the end result.

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