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Freedom

Changed Utterly

by **Kenneth P. Nolan**

They were always there, but I never really saw them. The Woolworth Building with its wedding cake white terracotta was a masterpiece, the Statue of Liberty and its shimmering beacon standing alone and strong made me proud. The Brooklyn Bridge with its elegant spiderweb of cables and powerful towers of peaceful granite was soothing. These were the beauties, the classics. These I would notice, look for, point out to the out-of-towners.

The Twin Towers were huge, that's all. Only on the rainy, dreary days did I glance at them. Then the tops would disappear in the clouds like some modern day beanstalk stretching into the heavens.

The downtown Manhattan skyline and its glittering buildings was the backdrop to my life. In the gritty Brooklyn neighborhood where I was raised, the F train was the umbilical cord to the City. You boarded in the subterranean grime only to escape the darkness a few stops later as it climbed an elevated trestle into the light with the most magnificent views of lower Manhattan, a distant, almost alien, world of wealth and power.

And throughout my life, this downtown skyline of shiny skyscrapers remained a constant. They were there when I jogged along the shore, drove the ugly and decrepit Gowanus Expressway, traveled to and from work in midtown. I passed the giant sleek towers daily—ordinary in the day, yet dramatic at night with a patchwork of lights silhouetting the sky.

And then on a bright, cheerful September morn, they were gone, reduced to a pile of twisted steel and broken hearts. Fire and smoke rising from hell just like the good nuns had warned. And amid the debris and rising with the stream of black ash that lazily drifted over my home were the souls of so many fine young Americans.

I had a deposition that Tuesday, so I was in my midtown

office early to prepare. Ordinarily I would have exited the Brooklyn Battery Tunnel a block or so from the towers at the time the first plane struck. But the merciful yet demanding God did not spare all. And by the time I returned home that afternoon, the list of those lost was long and sad. The quiet of that clear night was broken by the keening of the tormented family in the home behind ours. These tears joined ours as we silently prayed for Jimmy Quinn, my 23-year-old cousin, who worked, as he often said, "on top of the world"—the 101st floor of Tower 1.

The phone rang and names were whispered—Little Jimmy Riches, Cap't Vinny Brunton, two of the Langs, Dennis O'Berg's kid, Megan O'Grady's husband . . . And neighbors, one up the block, one down, firefighters, traders, those rotten with luck. And in my tribal Brooklyn world where the FDNY and Wall Street were not simply jobs but sacred vocations, the list never seemed to end. Xaverian, the local Catholic high school, attended by my brothers and son, lost 23 graduates. My 16-year-old daughter Lizzy's classmate was on the front page of the *News* attending her father's funeral. "And did you know the Lynch brothers . . . you know the cop who went back inside, Moira Smith, she grew up on 74th Street . . . remember Charlie Kasper, you played against him in the schoolyard" . . . all too familiar. All too painful.

At first the days were consumed with passionate prayers for miracles. That some way Jimmy and his innocent smile would stroll out of the pit and have another story to add to his endless list. Then the days slowed, the hope faded, the faith questioned. And in the searching eyes of children, there were no soothing answers. As Yeats wrote, "All changed, changed utterly . . ."

During these days with the photos of the missing plastered throughout the city, Congress, on September 22, 2001, passed a bailout bill for the airlines and, almost forgetting the victims, hastily added the September 11th Victim Compensation Fund of 2001. This no-fault alternative to litigation would provide compensation for those injured or killed, through an admin-

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istrative procedure. In exchange, the act barred lawsuits against all but the terrorists and their organizations. This hastily written law provided little detail or explanation. It allowed, however, an award to include both economic and noneconomic loss. How these elements were to be calculated was unclear. But the Fund was to be administered by a Special Master appointed by Attorney General John Ashcroft.

Since our firm specializes in plaintiff wrongful death cases from airline and other disasters, and because we represented many families of Pan Am 103, the 1988 terrorist attack, we were contacted to provide guidance, to interpret the language of "eligible individual," "collateral source," "economic loss," "noneconomic loss." Would it be fair, who can apply, how will it work? Should I sue or enter the Fund? Scared, angry, battered by grief were the widows, parents, siblings. Since this legislation was without precedent, any answer was mere conjecture.

Bob Clifford and I were asked to brief the Department of Justice on issues that would arise from the plaintiffs' viewpoint. And they were myriad. Who is entitled to recover? What is an injury? How would damages be calculated? How would they be distributed? What would constitute a collateral source offset? Would the results mirror the tort system? What documentation would be required? What about stock options, discount rate, consumption, workers' compensation, the incalculable suffering that forced between 50 and 200 to jump? What about those living together but not married? Same-sex couples? Those single without dependents? And on and on and on.

The vague legislation raised more questions than answers. Yet the Fund would have to convince nearly 3,000 skeptical families to enter this program, primarily based on faith in the goodness and integrity of their government, a faith shattered that bright, clear morn.

The September 11 families were primarily young, educated, and wonderful. They all had relatives, friends who were money managers, lawyers, doctors, accountants. The frantic phone calls from the inferno of suffocating smoke and buckling floors were a window into their generosity, their overwhelming love of family.

Trapped with no hope, one calmly told his wife he loved her very much—and then informed her where the life insurance policies were, the stock option plan. I'm not getting out. Tell the kids I love them all very much. Then the phone disconnected.

Another spoke to a relative through a wet towel: I'm not getting out of here. Will you please help care for Sue (due to give birth that week) and the children.

There were no words of self-pity. In often-trembling voices their only thoughts were of their wives, their precious little ones they had seen for the last time.

Those in Tower 2 reassured their loved ones that they were fine, it was the other tower. After all, they were told to stay, everything's fine, return to your desks. Shaken, they described the raging fire, the white paper that so often defines our work eerily floating by, and the many leaping from heat and horror into eternity. In all those poignant conversations, love is the word, the linchpin.

Whether running bravely into the towers or desperately trying to escape, those whose earthly remains disappeared that day were successful in every sense. Family-oriented, loving

spouses, magnificent as mothers, fathers. They attended church, coached T-ball and soccer, worked and played hard surrounded by large and loving family and friends. I've handled hundreds of death cases, most very good and fine people. But no group can compare to the September 11 victims.

Most death is tragedy. But the devastation of September 11 was not in the collapse of the solid concrete and steel symbols of our success, but in the theft of such promise and goodness from so many talented young people. For it was the young, those that will never comb gray hair, who died that cloudless day. And the ripples of anguish spread through wealthy suburbs, the outer boroughs, where the young laugh and play. So the tears flowed freely in Manhasset and Bay Ridge, Hoboken and Staten Island. Most were young husbands and fathers—near perfect at both. Widows, robbed of a secure, happy life, still had to change diapers, pay bills, and drive their kids to school. They were compelled to appear strong, waiting until their children's nightmares ceased before crying silently in the dark. So I spoke on Long Island,

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and in Jersey and New Caanan to cautious, vulnerable, intelligent, determined families who bonded in their misery.

This Fund was new, without precedent. And Congress did not provide much guidance. With mortgages and tuitions to pay, finances were a concern. So the questions flew—my husband made a lot of money, will there be a cap? Traders at Cantor Fitzgerald, Keefe, Bruyette or Sandler & O'Neil made boatloads of money. How will future income be determined in professions where salary is minimal but commissions monumental? And varies year to year? How will the intangibles, the taking out the garbage, mowing the lawn, putting a bandage on a boo-boo, be valued?

We're old and my son lived downstairs. He took us shopping, drove us to the doctors. We relied on him for everything. Who's going to help us now?

My husband would have retired from the Fire Department next year at half-pay and had plans to work his carpentry business full time. Will that be considered?

The questions flew—who's entitled to recover? What damage law applies? How will the monies be divided? And who would do that—the Fund or the probate court? What happens with an infant child's portion? Who manages, oversees those funds?

An impossible task to satisfy everyone, or anyone. And with information trickling out about how porous our borders, how asleep our government, the families felt betrayed and the only visible government face was the Fund. On November 26, 2001, Attorney General Ashcroft nominated Ken Feinberg as Special Master to run the Fund, determine awards, make the dead rise and the tears stop. With a background as a mediator of renown and former chief of staff of Sen. Ted Kennedy's office, Feinberg seemed like a smart but somewhat unusual selection by Ashcroft.

Feinberg plunged right in, meeting families, addressing groups, encouraging applications, trying to soothe the worried. But the task was monumental and strewn with landmines. As soon as he answered a group on Long Island, everyone from Massachusetts to England knew. The Internet was the tool and the families became proficient at organizing and communicating. And like any system, inequities arose. Why should my life insurance payment be a setoff when my husband used our after-tax dollars to plan for his death? The families that had life insurance are penalized, but those without life insurance are not. If my award is \$2 million and I have \$1 million in life insurance, I receive \$1 million. But someone in the same situation without life insurance will receive the full \$2 million. How is that fair?

I gave birth to my son, raised him, loved him for 31 years. His wife knew him for three years, married nine months. Am I not entitled to anything? I don't even have a say in where he's buried.

We were engaged, the date for our marriage was set, we lived together. I'm not even considered?

I don't want money. I want answers. Why didn't the government stop this Bin Laden? Clinton, Bush knew about him for years and did nothing. Why did security at Logan Airport in Boston just wave them through? Why was my husband told by the Port Authority to remain at his desk in Tower 2 when the Port Authority, which runs Newark Airport, knew other planes were hijacked and in the air? Why didn't those

Their spouses and siblings died solely because they went to work.

FDNY radios work in the towers? They didn't function in the first attack in 1993 and still weren't fixed? Why were the towers exempted from the NYC Building Code? If they had more stairwells, all those trapped—estimated at 1,500—may have survived.

Like every mass-disaster litigation, each family's situation is unique. But in litigation, we know most of the rules, the law, the precedent so we can provide advice based on experience. Here, there were no rules, no precedent, and this wasn't an accident, but the worst attack on America in history. And we were repeatedly warned that it would occur.

As a mediator, Ken Feinberg worked with lawyers who knew that the negotiating process was part blarney. The families, however, wanted definitive answers. So if he said he would look into an issue and respond in two weeks, the families were waiting 14 days later. If no response, the families remembered and distrust grew. Within their therapy groups or family advocacy organizations, they were organized and committed.

The Fund was a monetary system. Yet money was not paramount for almost all September 11 families. Instead they sought fairness, honesty, and compassion from a government that, as we now know, failed them. They were good people, most from modest backgrounds, and did not need or want more than what they deserved. They knew that their spouses,

children, siblings died solely because they went to work. They did not want that work demeaned, the decedent's memory minimized. They expected respect and demanded that it be given, for they had lost all and needed an acknowledgment of worth.

I know the value of death actions, having handled hundreds over the years. These were monumental: a 40-year-old trader averaging \$3 million W-2 income for the past five years, two small children; 38, earning \$900,000 with three small kids; 31, married, earning \$225,000. And these weren't unusual. There were hundreds of such individuals—rising at 5 AM, working under intense pressure all day, and then entertaining clients at night. Most from working class backgrounds who only knew work, then came home to bright, beautiful families.

Difficult Decisions

Through his travels Ken Feinberg began to acquire a sense of the monumental problem. Always upbeat, he radiated optimism in the most pessimistic time. Initially he was a bit brusque, concerned but not sensitive to the anguish. He gave lawyer responses to emotional questions. As a result, distrust grew. Families refused to accept his word. So he published interim rules on December 21, 2001, delineating who could make claims and how much they could collect, as well as outlining the method by which claims would be made and awards granted.

For someone to be eligible to receive compensation for personal injuries, the person must have suffered "physical harm" while "present at" the WTC or Pentagon or in the "immediate aftermath." Only those who suffered physical injury and sought medical treatment within 24 hours (later expanded to 72 hours in the Final Rules) would be entitled to recover. This standard is much more restrictive than ordinary personal injury common law standards.

In addition to these regulations, the Special Master published presumptive loss calculation tables, but these tables calculated loss only for income levels up to the 98th percentile of individual income in the United States, or \$231,000. For example, probably one-third of the 658 Cantor Fitzgerald employees who were killed earned more than \$231,000. The families believed that this constituted a maximum award since Feinberg said that awards above this percentile would "rarely be necessary to ensure that the financial needs of a claimant are met." Many felt that those who earned the most would be penalized in the Fund. This belief compounded the agony since the towers were targeted, they knew, because they symbolized our financial success.

From the work-life expectancy table—for a 25-year-old, the expected retirement age was 59—to the growth rate of the victim's earnings—9.744 percent for a 25-year-old down to 3 percent for a victim over the age of 52. The families found these rules to be restrictive and unjust. The rules did not take into account the profile of those who died, many of whom worked as traders or firefighters/police officers. The rules were geared toward those who worked for salary with incremental raises each year. But here, you had a 41-year-old single mother making \$1 million one year, \$350,000 the next, or a 42-year-old fire lieutenant earning \$60,000 but working a second job as a bartender, earning half as much in cash. After 20 years, this cop or firefighter could retire at half-pay tax-free for life and then start another career. The traditional economic model formulated by the Fund and used

in most wrongful death actions was not applicable to many who were murdered that summer day.

With these rules, Ken Feinberg put his foot in the water and quickly withdrew it, for the reception was icy. Yet he kept meeting, explaining that he would consider a child's learning disability, a decedent who had just made partner, the accounting, carpentry, and yardwork that will now have to be paid for.

Despite significant comment and criticism, the Final Rules were released on March 13, 2002, with provisions only slightly more generous than the Interim Rules. Feinberg was hesitant to alter the traditional economic model. Instead, he promised that all of these differing circumstances would be considered before he issued an award. Yet criticisms continued, especially where a flat \$250,000 was awarded for the victim's noneconomic loss and a meager \$100,000 for each child. This was particularly disturbing since so many of the children were infants, and the present value of Social Security payments was a collateral offset. So if a victim had a healthy 17-year-old daughter, the noneconomic award was \$100,000 less a few thousand that this young woman would be paid by Social Security. But if the victim left a six-month-old with health issues, the family would still receive only \$100,000, but the Social Security deduction would be more than \$125,000. The argument was that the families who need the most assistance, those with more and younger children, were being shortchanged.

With so many unresolved—and what were initially perceived as unfair—issues, families were unsure of what to do. They went through a series of emotions, from despair to anger to sadness. Some became activists, others formed therapy groups and bonded with fellow widows. Most struggled to get out of bed each morn, to dress and feed the children, to smile occasionally and to lie when asked how they were doing. Luckily, most had extended families that were there to assist. But no one except each other truly understood.

So the families moved slowly. They interviewed two or three law firms before they retained an attorney. They knew that ATLA and other groups provided pro bono representation, but found that some of those lawyers were inexperienced in death cases and preferred to hire a specialist. Very few accepted the Fund without reservation and entered immediately. They had time to decide and they did not want to waive their right to sue without proof that they would be treated properly. Ironically, those who died were most patriotic, but this tragedy made their families question their government.

During this process, we attorneys met with Feinberg, constantly urging him to be flexible with the rules, with what he considered computing an award. My clients were sophisticated and knew what they would recover in a tort action. They wanted to meet Feinberg, explain the loss, the devastation, the effect on their children. Litigation, I often explain, will only provide compensation. It will never achieve what you want—your smiling son to walk through the door carrying a pizza.

Since the Fund application was Joe Friday-like, "just the facts," we decided to supplement the filing with a brochure that portrayed the decedent not only in economic terms but also with an illustration of what is really important in life—as a person, a husband, daughter, brother, friend. So we compiled photos, obtained written statements from friends,

relatives, and co-workers describing the individual, his attributes and the impact of the loss on the family. We garnered medical, psychiatric, and employment records. An expert economist projected financial loss. We acquired the children's school and medical records. We copied the tender notes from the softball team who named their field after their beloved coach.

Parents, spouses, and siblings wrote moving, adoring testimonials—how they miss the brilliant smile and boisterous laugh, the bear hugs and silly nicknames, the Sunday morning optimism that inevitably turned to familiar despair as the Jets blew another opportunity, the wild parties, the quiet strolls along the shore, and the teaching of the Hail Mary to his sleepy-eyed beauty in her sunflower pj's.

These brochures provided a description of not only economic loss but also the loss of love, guidance, the end of carefree Saturday nights of a beer and burger, of the comforting reassurance that Sally's fever of 103 will eventually end. They told stories of ordinary people living unique and special lives. Not all saints, of course. But fine people doing mostly good.

After much work and many revisions, these brochures contained the essence of the decedent and his family, from the hilarious photos with his college roomies to the family portrait that sits on the piano. Even though we created these, the indecision was such that the families did not want to submit an application. They wanted reassurance that the Fund would not shortchange them. Even though Feinberg promised fairness, they did not know what that meant. With myriad troublesome questions and issues, he had on occasion contradicted himself, so the families wanted proof that



he would consider the intangibles since the written rules were, in their view, harsh and stingy. Deciding whether to sue or enter the Fund was difficult for a bunch of reasons. So everyone waited.

One of my high school friends lost his wife. He had married late and had no children, so he decided to enter the Fund. Adverse to any thought of litigation, he believed that the Fund was best for him both emotionally and financially. This was the test case. So we created a brochure and submitted an unsigned application with all pertinent documentation. After the material was evaluated by the Fund, we arranged for a hearing in March 2003 before Feinberg, where my client testified under oath. Since there was no signed application, this hearing was technically informal.

Feinberg gave a brief description of the decedent, and then summarized her economic loss based on the tax returns and information submitted, highlighting any area that he wanted amplified. He then detailed the collateral offsets—insurance payments, pension, and the \$255 Social Security death payment. I opened with a short introduction, summarizing the couple and their dreams, how they had just purchased a co-op back in Bay Ridge and how she was in the process of furnishing it when she was killed. Tragically, she worked uptown, but was giving a presentation in Tower 1 when the attack occurred.

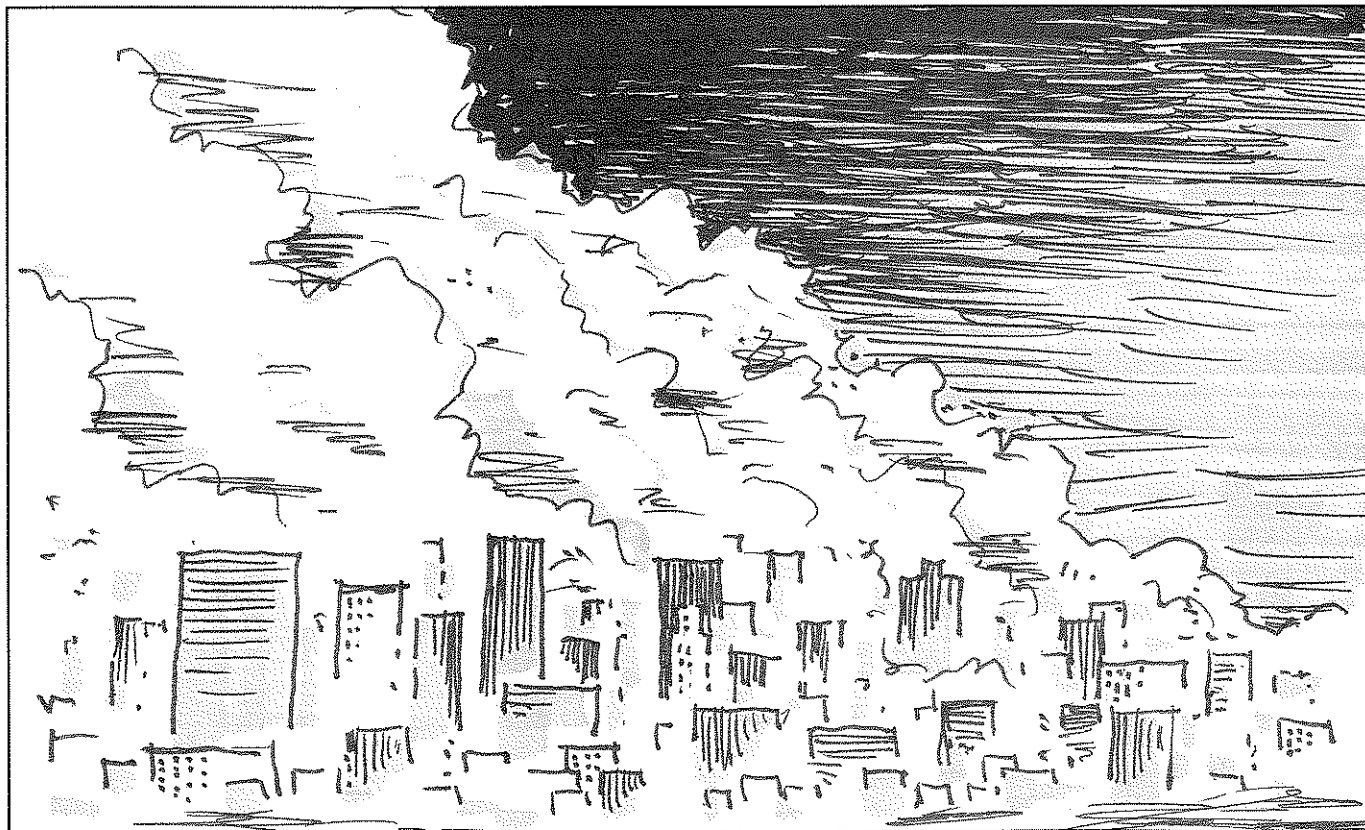
My client then spoke of his love, his loss, his pain. Graciously, he acknowledged how impossible the role of Special Master, how difficult to evaluate a life in monetary terms, and he even apologized for a particularly contentious session in Staten Island where Feinberg was met with derision and rage. Lasting about 45 minutes, the hearing was successful. My client voiced his suffering, explained some economic issues that the rules did not address adequately,

and listened to the Special Master agonize over the many, complex issues compounded by emotion. At the end Feinberg gave a net minimum award after collateral offsets, which was satisfactory to me and my client. And fair.

Pleased that the hearing went well, we signed the application and a few months later received an award letter with a bit more than was promised at the hearing. This confirmed what I had thought—Feinberg's word was good. And I spread the news among my clients who still remained cautious. Our test case was relatively straightforward. No children, years of earnings history within the 98 percentile, well-documented benefits. What was significant was not the calculation, however, but that Feinberg listened, understood, and was relatively flexible.

This did not encourage many others to enter. Instead, they agreed to submit an unsigned application with a brochure. Provide all the information, meet with him and listen to his proposed minimum award. Then they could decide to enter. And gradually a few came forward, met with the Special Master, spoke their souls, listened, and answered his questions. Many still could not take the final step of filing the executed application. Of course, we told our clients that litigation against the airlines and others was not certain of success. Even though we believed we could win such a battle, it would take longer, be more costly, and have no guarantee that the recovery would be substantially greater.

Every month or so, another provided documents, attended a hearing and expressed her agony, her fear, how September 11 transformed a happy, successful family into misery and illness. Feinberg would listen, express compassion, marvel at the courage, the resiliency of the children. Those who met with him proceeded to submit executed applications, receive award letters, and be satisfied with the



process. We met with him in New York, Boston, and Washington, for the fanaticism of the terrorists knew no limits of age, religion, or geography.

Yet Feinberg realized that without a firm deadline, many would never decide. Paralyzed by fear, grief, indecision, whatever, they delayed. December 22, 2003, was the date all applications had to be in. And at the last moment, hundreds were filed. I encouraged all my 125 clients to send in the application, for I knew they would be treated equitably. I also recommended hearings primarily with Feinberg himself or his intelligent, sensitive Assistant Special Master, Debby Greenspan.

Obviously, this was not possible. So after a flood of applications were submitted at the last minute, volunteer attorneys conducted the sworn hearings. PriceWaterhouseCoopers accumulated and digested the economic data. We were in constant contact with them, talking many times each day, responding to requests for pension and income information, original death certificates, providing medical documentation of little Charlie's juvenile diabetes. The process became streamlined as trust grew and procedures became known.

Of course, not all those affected by the attacks died. One miracle of that morning is the number who escaped both towers before the collapses. The seriously physically injured and those rescue workers who developed respiratory problems during the cleanup also submitted claims. The stories of being trapped, burned, looking for an exit, knowing others could not escape, although well-publicized, were distressing and haunting when that person sat next to you. Since there were so few seriously injured individuals and injuries—burns over 30 percent of the body—and the inquiries are more difficult to quantify, these cases presented problems for the Special Master.

In these injury cases, we provided photos, extensive physician affidavits detailing the diagnosis and prognosis, schedules of surgical procedures, and brief yet descriptive summaries of each. We even videotaped a treating surgeon's statement to help the Fund understand the magnitude of treatment. Effective of course, but not as much as the sight of the scars, the Jobs bandage, the client's recitation of jet fuel cascading into the elevator.

Feinberg dealt with them with sensitivity. He was particularly understanding to those in the parochial world of the FDNY who lost so many. Three of my firefighter families lost sons who had followed their fathers into this service, one leaving a CPA career to run into burning buildings from which everyone else is fleeing. One father, a battalion chief with three firefighter sons, barely survived both collapses. The other two fathers spent months at the site, vainly hoping to save someone, not leaving until the site was clear, until the battered yet empty bunker gear with the yellow lettering of the names all were found. Only then could a funeral be held with the crushed helmet placed on the casket before the altar.

Like so many, Feinberg had trouble understanding the allure, the camaraderie of the FDNY. Actually, it's a modern-day religious order with its hierarchy, uniforms, financial security—but more importantly, friendship, courage, and service to others. The attraction is such that just recently a few fire officers, who retired on disability after September 11, sued to return to the job even though

they would earn less. They would prefer to work in a dangerous job for less money than stay home and watch the Mets lose again.

So except for one client with unusual circumstances, all our clients entered the Fund. We rushed to complete the brochures, respond to PriceWaterhouseCoopers, hold hearings. And we did. The hearings became routine in the procedures, but heartwrenching each time. And Feinberg worked like a maniac. If we needed to be in front of him, we would schedule ten or so hearings in a day, starting at 9 AM and each lasting a half hour since there was never enough

The stories were haunting when that person sat next to you.

time. The tears flowed, the anguish was revealed, the anxiety confessed. He would listen, tilt his head back, and try to reassure, tell them he would consider the handicapped child, the devastated mother, the loss of security, the loss of guidance. They needed to bare their emotions, to talk about the perfect daughter and how Jim used to make me laugh. And I don't laugh anymore, Mr. Feinberg.

So we struggled through the hearings, received awards, disbursed the money, and tried to ensure that it was invested properly. Rarely were there disputes since most had intact families. Problems did occur especially in fractured families and, on occasion, between a widow and her in-laws, especially if there were no children. These battles were transferred to probate court where they usually settled, but not without tension and ugly accusations. Sadly, some litigation continues, the product of long-held animosity or, perhaps, the inability to deal with sudden devastation.

In the end, the generous American people paid a total of almost \$7 billion to the 2,973 who died. The 2,878 death awards averaged \$2.1 million and ranged from \$250,000 to \$7.1 million. A total 2,675 injury awards were granted, primarily to rescue workers, another 1,800 were denied. These awards ranged from \$500 to \$8.7 million. Approximately 100 families whose relatives died opted for traditional litigation, primarily those who were passengers on the planes. The Fund closed June 15, 2004, and those involved returned to their routines.

For most, of course, the Victim Compensation Fund was a minor part of this terrible horror. A horror repeated in Madrid and London and, most likely, again in New York. But the Fund did not exacerbate the suffering and may have helped ever so slightly in healing. And when I walk the gum-stained sidewalks of Bay Ridge, I'm on streets named in honor of those who left for work and never returned—Mark D. Hindy, Constantine "Gus" Economos, Moira Smith, Pamela C. Boyce, Billy Lake, Kathleen Hunt Casey. The saloons advertise the golf outings, the 5K races, the charity events in the memories of these who were once young. But on those same streets children play and laugh and grow. Yet peace comes dropping slow for all the rest. □