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AARON TWERSKI: PRACTICAL WISDOM AT GROUND ZERO

Anthony J. Sebok

ABSTRACT

This Article celebrates Professor Aaron Twerski's "practical wisdom" in crafting a solution (with Jim Henderson) to a problem faced by Judge Alvin Hellerstein in the 9/11 First Responder cases. The problem was that Congress did not include these plaintiffs within the Victims Compensation Fund ("VCF") despite there being every reason to suspect that the interaction of workers' compensation law and tort law, if left to operate on their own, would generate a politically unacceptable outcome. Despite his clear misgivings—expressed decades earlier—about allowing those who control the workplace to enjoy the benefits of limited liability guaranteed by workers' compensation while shifting the cost of their own carelessness onto third parties, Professor Twerski devised a settlement that, in effect, did exactly that. This Article explains how the settlement achieved a certain degree of justice by permitting prudence to prevail over principle.

The opportunity to honor Professor Aaron Twerski is an opportunity to highlight a remarkable aspect of his character—his sense of judgment. By judgment, I mean something different from his scholarly achievements or knowledge of the law. The former is well-documented by his extensive history of law review articles and honors that form the foundation of this Symposium. The latter is evidenced by Aaron's masterful treatment of products liability law, the generations of students who learned from him, and the many parties who benefited from his expertise as a consultant in litigation. Scholarship and legal expertise are not found in many people, but the purpose of the institutions of our profession, from the law schools to the law firms to the American Law Institute, is to identify and amplify the voices of great scholars and those with great legal skills, empowering them to leave a lasting impact on the world. Judgment is something different; sometimes, it is possessed by great scholars and those who have masterful command of some field of law, but not always.

The concept of judgment I am using is borrowed from Aristotle, that of *phronesis*, sometimes translated as "practical wisdom":

Now it is thought to be the mark of a man of *practical wisdom* to be able to deliberate well about what is good and expedient . . . not in some particular

respect, e.g., about what sorts of thing conduce to health or to strength, but about what sorts of thing conduce to the good life in general.¹

The hallmark of practical wisdom is the ability to resist the temptation to rely on a single technique to resolve a problem and the ability to balance various independently valuable virtues.² Justice Louis Brandeis recognized a modern version of phronesis in his description of legal judgment. According to Brandeis, “[T]he use of the reasoning faculties in the study of law is very different from their use, say in metaphysics,” and the lawyer’s treatment of facts differs “from the scientist or the scholar.”³ Justice Brandeis believed, as Aristotle did, “that practical judgment [phronesis] was an important virtue that was best cultivated through a process of experience and reasoned reflection.”⁴

Aaron’s capacity for practical reasoning can be seen in how he approached his work as a Special Master in the 9/11 First Responder Litigation. Before discussing that work in more detail, I will note the limitations of my analysis. First, there were two Special Masters, and any attribution to Aaron entails the same to Professor Jim Henderson. Given the record left behind from their work, which includes two articles co-authored with Federal District Judge Alvin Hellerstein, as well as the materials they filed with Judge Hellerstein to assist him in the matter, it is safe to say that Aaron and Jim agreed on enough that it is appropriate to use materials of which Jim was a co-author as a fair representation of his views.

The second limitation that must be mentioned as a preliminary matter is more serious: All Special Masters operate within the limits of the task set out for them by the judge to whom they report. Notwithstanding the formidable reputations and achievements of both Special Masters recruited by Judge Hellerstein, the Judge was in firm control of their work product. It is likely that Judge Hellerstein took their counsel, but as a matter of both theory and practice, the 9/11 First Responder cases were the Judge’s responsibility, and, in a very real way, the Judge would bear responsibility for the choices the three of them would make in a way that the professors would not. Still, having said those caveats, I will hazard the following claim: The Special Masters in the 9/11 First Responder cases aligned with the fundamental values brought to the case by Judge Hellerstein. The fact that the Special Masters and the Judge published two academic articles jointly explaining and defending the

1. ARISTOTLE, *THE BASIC WORKS OF ARISTOTLE* 1026 (Richard McKeon ed., 1941) (emphasis added).

2. “To reference a philosophical contrast . . . from . . . Gilbert Ryle, [phronesis] involves both a *knowing-how* as well as a *knowing-that*.” John T. Valauri, *Dialectical Jurisprudence: Aristotle and The Concept of Law*, 3 DREXEL L. REV. 415, 453–54 (2011) (emphasis added).

3. LOUIS D. BRANDEIS, *The Opportunity in the Law*, in *BUSINESS A PROFESSION* 329, 331 (1925).

4. Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 33 (1995/1996) (citing David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 654–55 (1983)).

specific steps designed by the Special Masters (and adopted by the court) suggests that Aaron saw the results of the litigation as a faithful expression of his own views of how the law should handle the problem posed by the cases—and therefore the result he helped produce can be seen as part of a whole career.

The rough outlines of the 9/11 cases can be quickly sketched out. The aftermath of the attacks on September 11, 2001, included cleanup efforts that were unparalleled in the history of the United States.⁵ The scale of the devastation was immense.⁶ The cleanup effort, which was largely complete by November 2002, was estimated to have cost \$1.5 billion.⁷ In addition, the cleanup took place in what was considered by many to have been a battlefield.⁸ While the task facing civilians after the bombing of cities in the Second World War was broader in terms of geographical area, the cleanup was similar in that where the airplanes had crashed in New York loomed in the American mind as a place where, since a devastating attack on the nation had occurred, a strong national response was demanded. The task fell to civilians, including municipal police, firefighting, and sanitation departments, to respond. The motivation behind the mobilization of the cleanup workers at Ground Zero was to honor the dead by searching and removing human remains and to prove the nation's resilience and determination to “fight back.”⁹ This motivation clearly ran alongside the practical concerns of municipal health and safety as well as the repair and reuse of commercial property.

Nearly 10,000 of these World Trade Center (WTC) responders, volunteers, and survivors filed suit in the United States District Court for the Southern District of New York (or their claims were consolidated there), seeking damages for injuries to their lives and health.¹⁰ Plaintiffs sued several different defendants, including:

5. Approximately thirty million square feet of buildings were destroyed or damaged. See Jason Bram, James Orr & Carol Rapaport, *Measuring the Effects of the September 11 Attack on New York City*, 8 ECON. POL'Y REV. 5, 5 (2002).

6. Total loss (property, business interruption, aviation, and medical care) was estimated at \$38 billion to \$50 billion, “making it the costliest U.S. disaster in the past two decades”—greater than the nation's largest hurricane or earthquake. *Id.* at 18.

7. *Id.* at 11.

8. See Eric D. Miller, *Finding Meaning at Ground Zero for Future Generations: Some Reflections A Decade After 9/11*, 86 INT'L SOC. SCI. REV. 113, 119 (2011) (“Comparisons between the Gettysburg Battlefield Memorial and Ground Zero are quite fair in that they both represent sites of massive carnage in American History.”).

9. “Every life lost on 9-11 in the rescue *and clean-up*, and the ensuing military engagement is proof that freedom isn't free.” Tom Rivers, *Albion 9/11 Service Honors 'Heroes'*, THE DAILY NEWS (Sept. 12, 2012) (emphasis added), https://www.thedailynewsonline.com/news/albion-9-11-service-honors-heroes/article_5bd94d51-b76a-50da-9d4d-3bc872cac368.html (quoting N.Y. State Assemblyman Steve Hawley).

10. Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012) (discussing *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520 (S.D.N.Y. 2006)).

1. the City of New York (which coordinated all the work of the WTC site through the City's Department of Design and Construction) (NYC, New York City, or the City);
2. the Port Authority of the States of New York and New Jersey (the owner of the WTC site);
3. four of the City's major contractors (Bovis Lend Lease, AMEC Construction Management, Tully Construction Company, and Turner Construction Company) and their many subcontractors who undertook the recovery work; and
4. various entities with a property interest in buildings at and around the WTC site, including Verizon Communications, Consolidated Edison, the Silverstein Entities, and the Westfield Entities.¹¹

The plaintiffs claimed that NYC, its contractors, and other defendants were negligent in monitoring the air and assuring proper safety at Ground Zero, especially in failing to provide appropriate respiratory protection equipment and ensuring its proper use.¹²

One might assume that the Air Transportation Safety and System Stabilization Act (the Act or ATSSSA) would have clearly included the injuries of those who participated in the cleanup efforts.¹³ The most visible feature of the Act has been the no-fault Victim Compensation Fund (the VCF or the Fund), which was established "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001."¹⁴ The relevant portion of the Act required that:

To establish eligibility, a person must have been either a member of the flight crew or a passenger on one of the hijacked airplanes or

- (A) an individual who—
 - (i) was present at the World Trade Center . . . the Pentagon . . . or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and
 - (ii) suffered physical harm or death as a result of such an air crash. . . .¹⁵

11. *Id.* at 129 n.7.

12. Jean Macchiaroli Eggen, *Toxic Torts at Ground Zero*, 39 ARIZ. ST. L.J. 383, 412 (2007).

13. Air Transportation Safety & System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 (Supp. I 2001)).

14. *Id.* at § 403.

15. *Id.* at § 405(c)(2)(A).

The term “immediate aftermath” has been defined as twelve hours after the crashes, except for rescue workers, for whom it has been defined as ninety-six hours after the crashes.¹⁶ The reason for the longer period for rescue workers was “in recognition of their heroic efforts and their selfless reasons for being at the sites, and [of] the high level of danger and difficulty during the first four days of rescue operations.”¹⁷

The regulations promulgated pursuant to the Act defined “physical harm” in such a way that relatively few persons claiming injuries associated with the cleanup were eligible for the Fund.¹⁸ The requirement that the injured person be evaluated by medical personnel shortly after the attacks excluded most toxic exposure claimants. Recognizing that those involved in the cleanup could not take advantage of the VCF, Congress, in 2003, allocated \$1 billion for a “captive insurance company or other appropriate mechanism for claims arising from debris removal.”¹⁹ The policy named the City and a long list of contractors as insureds, providing coverage for lawsuits and associated liability expenses.²⁰

The ATSSSA established a federal cause of action “for damages arising out of the hijacking and subsequent crashes” on September 11.²¹ Furthermore, this federal cause of action was “the exclusive remedy for damages arising out of” those events.²² In accordance with this provision, Congress established exclusive jurisdiction in the United States District Court for the Southern District of New York for all disputes arising out of the events of September 11, 2001. Actions brought by responders in New York state court were removed by the defendants—the Port Authority, the City, and the WTC property holders—to the Southern District of New York,

16. 28 C.F.R. §104.2(b) (2006); *see* Eggen, *supra* note 12, at 414 (“The term ‘immediate aftermath’ has been defined as twelve hours after the crashes, except for rescue workers, for whom it has been defined as ninety-six hours after the crashes.”).

17. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274, 66,276 (Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104).

18. The regulations define “physical harm” as follows:

- (1) The term physical harm shall mean a physical injury to the body that was treated by a medical professional within 24 hours of the injury having been sustained, or within 24 hours of rescue, or within 72 hours of injury or rescue for those victims who were unable to realize immediately the extent of their injuries or for whom treatment by a medical professional was not available on September 11, or within such time period as the Special Master may determine for rescue personnel who did not or could not obtain treatment by a medical professional within 72 hours; and
 - (i) Required hospitalization as an in-patient for at least 24 hours; or
 - (ii) Caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement.

28 C.F.R. § 104.2(c) (2001).

19. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 517 (2003).

20. *See* Eggen, *supra* note 12, at 417.

21. Air Transportation Safety & System Stabilization Act § 408(b)(1).

22. *Id.*

pursuant to the Act's jurisdictional provision, and some of the plaintiffs moved to remand their cases to state court.²³ Judge Hellerstein remanded some, but not all, of the actions.²⁴ The court recognized that some of the claimants were present at the WTC in the immediate aftermath of the attacks, whereas other claimants arrived later or claimed exposure to toxic substances at a remote location, such as the Fresh Kills Landfill. Accordingly, the court held that the Act preempted the state court claims of only those plaintiffs exposed at the WTC site and those whose claims arose up to September 29, 2001.²⁵

The Second Circuit interpreted the jurisdictional provision of the Act to preempt the state forum for all damages arising out of the September 11 attacks, thus recognizing an exclusive federal cause of action for all workers claiming respiratory injuries.²⁶ However, this did not mean those workers would be able to participate in the VCF—only that their tort actions would be shunted into the Act. Another feature of the federal action created by the Act was the statutory cap on damages, implemented through aggregate limits on the liability of the enumerated Ground Zero defendants.²⁷ With the potential of thousands of exposure claims entering the tort system over a period of years or decades, the aggregate caps could have been exhausted early, especially through verdicts for persons injured or killed in the attacks and the exposed persons who happened to become ill earlier. This phenomenon could have left thousands without recovery, even if their claims were legally cognizable in all ways. New York City, for example, had no insurance beyond the Captive Fund created by Congress.²⁸

While it is clear why the plaintiffs preferred state court over governance under the Act, two questions remain: Why did this group of plaintiffs even need tort law? What about workers' compensation? This group of plaintiffs arguably fell within the category of individuals meant to be removed from the tort system as part of the “grand bargain” struck in workers' compensation.²⁹ Key to this early twentieth-century tort reform was the concession by both sides of the labor/capital divide that workplace injuries were exceptionally difficult to adjudicate under common law negligence and that, in light of this fact, it benefitted both sides to address workplace injuries through a compensation scheme.³⁰ This bargain made sense precisely

23. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357, 360 (S.D.N.Y. 2003).

24. Hellerstein et al., *supra* note 10, at 135.

25. *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d at 360.

26. *In re WTC Disaster Site*, 414 F.3d 352, 377 (2d Cir. 2005), *aff'g in part, dismissing in part* 270 F. Supp. 2d 357, 380 (S.D.N.Y. 2003).

27. See Eggen, *supra* note 12, at 416–17.

28. *Id.*

29. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS AND THE REMAKING OF AMERICAN LAW* (2004).

30. See Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS L. REV. 891, 904–05 (2018).

because of the self-contained nature of the risk over which the parties bargained: In general, only workers would be present at the workplace where these risks could materialize, and only employers would be responsible for providing compensation (in sums much smaller than what tort law allowed) for all injuries resulting from the materialization of such risks, regardless of fault. At the time, giving up tort as an option may not have seemed like much of a sacrifice, but historians have accepted that both sides, including workers (or their representatives), knew what they were giving up:

Employers gained predictability, a fully insurable risk . . . and immunity from any tort liability. Although their insurance costs rose, the costs could be passed on to consumers (the popular view at that time) or to workers (particularly those without unions) in the form of lower wages (the dominant economists' view). Insurance companies acquired a large new market. Injured workers and their families theoretically gained guaranteed though limited benefits for obvious traumatic injuries (or deaths) that would otherwise lead to destitution. Benefits were to be measured based on partial replacement of losses associated with reduced earnings or earning capacity only - eliminating the possibility of larger damages based on pain and suffering or other non-economic losses.³¹

The simplest answer is that nothing in the Act explicitly disturbed the operation of workers' compensation. Where there was a dispute over the application of New York's workers' compensation statute, the Act directed it, along with all other lawsuits, to Judge Hellerstein.³² It is also the case that while workers involved in the cleanup were not prevented from pursuing workers' compensation for injuries suffered during the cleanup, "workers' compensation systems, designed to handle workplace injuries like broken arms, [were] not well suited" to handle the type of workplace injuries that brought the plaintiffs to sue under the Act.³³ There was no question about whether these claims satisfied the criteria of employment.³⁴ And, according to a study published in 2007, despite early concerns about whether the workers' compensation insurance system could cover all the claims that would arise from the cleanup, "[t]hat assessment turned out to be wrong."³⁵

In fact, given New York law on when a medical condition that is not sudden and accidental is still covered within workers' compensation, one would think that the respiratory syndromes complained of by many of the

31. *See id.*; *see also* PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION, 9-20 (2000).

32. *See, e.g.*, *Greene-Wotton v. Fiduciary Tr. Co. Int'l*, 324 F. Supp. 2d 385 (S.D.N.Y. 2003).

33. John Howard, *The World Trade Center Disaster: Health Effects and Compensation Mechanisms*, 16 J.L. & POL'Y 69, 111 (2007).

34. *See id.* at 114 ("Employers who directed their employees to respond to the WTC disaster were required under existing NYS Workers' Compensation laws to provide compensation to those employees who were injured as a result of those activities.").

35. *Id.* at 113. In addition, Congress provided the New York State Workers' Compensation Board \$175 million after the attack.

plaintiffs would fall squarely within the category of an Occupational Disease covered by workers' compensation. New York State defines an occupational disease as "resulting from the nature of employment and contracted therein."³⁶ To qualify for workers' compensation benefits under an occupational disease theory, the disease must be a direct result of the actual nature of the employment and inherent to the work.³⁷ If the source of the illness or medical condition was indeed sudden and accidental—such as the employer's failure to provide protection—the plaintiffs could still recover workers' compensation by characterizing the injury as resulting from "Personal Injury by Accident."³⁸

However, it is important to note that regardless of the technical classification of workplace injuries, workers' compensation is not designed to facilitate claims for diseases like asthma, reactive airway dysfunction syndrome, pulmonary diseases, or cancers. On top of the requirement to notify the employer within thirty days of the accident, there is a two-year statute of limitations on filing workers' compensation claims.³⁹ Many cleanup workers did not become aware that the adverse health conditions they were experiencing could be related to their work until after the statutory time for filing workers' compensation claims had elapsed. Finally, a significant portion of the plaintiffs in Judge Hellerstein's chambers were not even covered by workers' compensation. In New York, police and firefighters are not within the workers' compensation statute.⁴⁰ A notable example of this is New York City police detective James Zadroga, who passed away in January 2006 at the age of thirty-four from pulmonary disease. Zadroga spent a month at Ground Zero searching the debris for human remains. In the autopsy report released in April 2006, the medical examiner in Ocean County, New Jersey, concluded that to "a reasonable degree of medical certainty . . . the cause of death in this case was directly related to the 9/11 incident."⁴¹

Therefore, it should not be surprising that the roughly 10,000 workers injured at the cleanup sought compensation in addition to workers' compensation.⁴² The economic reality is that workers frequently pursue tort remedies against "third parties" who are tortiously connected to the

36. N.Y. WORKERS' COMP. LAW § 2(15) (McKinney 2023).

37. See *Harman v. Republic Aviation Corp.*, 82 N.E.2d 785, 786 (N.Y. 1948).

38. Howard, *supra* note 33, at 115.

39. *Id.*

40. See, e.g., N.Y. WORKERS' COMP. LAW § 3 (McKinney 2023) (New York City police officers are not eligible to receive workers' compensation benefits under the New York State Workmen's Compensation statute. The same is true of firefighters); see *Weiner v. City of New York*, 922 N.Y.S.2d 160, 165 n.2 (App. Div. 2d Dept. 2011).

41. Anthony DePalma, *Debate Revives as 9/11 Dust Is Called Fatal*, N.Y. TIMES (Apr. 14, 2006), <https://www.nytimes.com/2006/04/14/nyregion/debate-revives-as-911-dust-is-called-fatal.html>.

42. See Hellerstein et al., *supra* note 10, at 135.

workplace injury. Aaron recognized this early in his career when, in a 1985 article outlining the benefits of a national products liability statute, he discussed “The Crisis of Conflicting Reparation Systems—Torts and Workers’ Compensation.”⁴³ The problem, in Aaron’s eyes, was that

In most states, an employer who pays workers’ compensation benefits to an employee injured at the workplace while operating a piece of defective machinery has a subrogation lien against the plaintiff’s ultimate tort recovery from the product manufacturer. The employer retains this lien even if it was primarily responsible for the injury.⁴⁴

This is “intolerable” because the product manufacturer—a third-party defendant—pays for the employer’s tortious responsibility to the worker, *even if the employer is as much at fault—or more at fault—than the third-party defendant.*

In 1985, Aaron proposed curing this problem by treating workers’ compensation as a collateral source that must be deducted from the third-party defendant’s liability and prohibiting the third-party defendant from suing the employer for contribution.⁴⁵ He observed that this reform was neutral from the perspective of the plaintiff, who would, in the end, receive the same net compensation. However, this assumes that the employer always pursues their lien against the employee, which is not always the case (and, in fact, did not occur in the 9/11 First Responder Litigation). Still, it is worth asking why Aaron found the old rule “intolerable.” He provides a clue in this sentence: “Manufacturers justifiably complain that under most state rules the most guilty party [the employer] often walks away from the lawsuit without contributing anything to the plaintiff’s recovery.”⁴⁶

Aaron’s intuition then was that the original political insight of no-fault—that workers and employers should compromise by opting out of tort—was being used by employers to shift some of those costs onto third-party defendants who never made that bargain. It must be remembered that in the mid-1980s, “conventional” tort law was still moving towards a place where a manufacturer could be held liable for a worker’s economic and non-economic damages without proof of negligence.⁴⁷ Workers’ compensation treats *workplace* risks differently than other risks, including those associated with products *used in the workplace*. It was based on a political decision—a bargain—that workers would receive less compensation so employers would

43. Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REFORM 575, 614 (1985).

44. *Id.*

45. *Id.* at 616–17 (The proposed statute would “[s]ubtract[] the workers’ compensation recovery from the tort recovery . . . [and] preclude a manufacturer from bringing a contribution action against an employer.”).

46. *Id.* at 614–15.

47. 9 DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS’ COMPENSATION: LAW & PRACTICE § 23:26 (4th ed. 2022), Westlaw.

enjoy a surplus shared with society. Aaron was extremely sensitive to any doctrinal tactic allowing workplace risks to be shifted onto defendants whose products were used in the workplace.⁴⁸

What does this have to do with the 10,000 plaintiffs before Judge Hellerstein and Aaron's role in securing a large settlement on their behalf? The ATSSSA did not alter the underlying substantive law that Judge Hellerstein had to apply. The plaintiffs were not suing their employers (although police and firefighters could theoretically do so); they were suing the City of New York and others as property owners or under New York's Labor Law, which provides extensive protections for workers injured at workplaces controlled by entities other than the employer.⁴⁹ The defendants were third parties, in the sense Aaron discussed in 1985, but not the producers of products used by workers at the workplace. They were either the possessors of property that became temporary workplaces or the principals who controlled the work of the plaintiffs' employers. Furthermore, in theory, almost none of the claims against the defendants were in strict liability, although one could argue that, in New York, liability under the labor laws occupies the same liminal zone between strict liability and negligence that Aaron detected in many design defect cases.⁵⁰

Still, there was much about the approach taken by the Special Masters that reflected a self-conscious agenda to make the third-party defendants pay for costs that would have otherwise been covered under either workers' compensation or the VCF. Had the latter been extended to the plaintiffs by Congress, as with lawsuits against the airlines and the Port Authority, most workers might have accepted compensation in exchange for waiving the right to sue. While the former did not operate to the exclusion of suing third parties, many of the same issues deemed immaterial for determining whether a worker "deserved" compensation under workers' compensation drove the plaintiffs' argument for compensation in tort. "Employers are responsible for providing a safe workplace," said David Worby, the lawyer whose firm represents the workers. "But the majority of workers at Ground Zero were given nothing, or had masks that didn't work."⁵¹ The plaintiffs focused on any carelessness by any party causally connected to workplace conditions they were obliged to endure by their employers:

48. See Twerski, *supra* note 43, at 616. "It does not, however, violate basic principles of fairness to recognize that when a no-fault system operates side-by-side with a fault system, it is best to permit each system to work separately." *Id.*

49. See *Zimmer v. Chemung Cty. Performing Arts, Inc.*, 65 N.Y.2d 513 (Ct. App. 1985).

50. Unlike Labor Law § 240(1) (the so-called scaffold law), neither "Labor Law § 200, which is a codification of the common-law duty to provide workers with a safe place to work, nor Labor Law § 241 (6), which requires that workers be provided with 'reasonable and adequate protection and safety', impose strict liability upon property owners." *Eriksen v. Long Island Lighting Co.*, 653 N.Y.S.2d 670, 671 (App. Div. 2d Dept. 1997).

51. Anthony DePalma, *Air Masks at Issue in Claims of 9/11 Illnesses*, N.Y. TIMES (June 5, 2006). <https://www.nytimes.com/2006/06/05/nyregion/05masks.html>.

[T]he greatest impediments to compliance [with workplace safety] were the confusing guidelines and spotty enforcement efforts. . . . [I]n November 2001 the various government agencies and private contractors entered into a partnership: OSHA agreed not to issue fines or citations, and the contractors vowed to follow regulations. . . .

The compliance problem at ground zero was regularly brought up at daily safety committee hearings held by the city with other agencies and private contractors. But without strict enforcement, the situation never improved. Frustrated contractors doubted that anything short of “having workers’ mothers on site to admonish them to comply would be effective,” according to records of one of the meetings cited in the legal documents.

Mr. Worby, the lawyer . . . argued that even if doing so was impractical in the first chaotic days after the attacks, rigorous standards could have been imposed in the many months that followed.⁵²

The likely proportionate share of *legal* responsibility of the defendants—especially the City of New York—would probably not exceed that of the employers themselves. This is for numerous reasons, which can be briefly summarized. First, there was uncertainty about the degree to which the workers were at fault for failing to protect themselves.⁵³ Second, questions arose regarding the ability of general contractors and landowners to prove that they had delegated responsibility for safety in accordance with New York’s Labor Law. Finally, and most significantly, immunity issues loomed large for nearly all defendants.⁵⁴ “These defendants sought to take advantage of the exceptions to the waiver of state sovereign immunity under New York’s disaster response laws, as well as federally granted immunity provided under the Stafford act, so they moved to dismiss the plaintiffs’ claims.”⁵⁵ “On October 17, 2006, the court issued an Order both denying in part and granting in part the defendants’ motion for summary judgment.”⁵⁶ As Aaron and his co-authors explain,

52. *Id.*

53. *See id.*

After the masks arrived at ground zero, it soon became apparent that distributing them was easier than getting workers to wear them. At that time of passion and heroism, putting on any kind of respirator or mask was an expression of concern about personal safety—and for many that seemed selfish and unpatriotic in the midst of unimaginable disaster. . . .

Id.

54. Hellerstein et al., *supra* note 10, at 139.

55. *See* Howard, *supra* note 33, at 120–21 (“The defendants filed a motion to dismiss the plaintiffs’ claims based on both state and federal laws providing immunity for actions taken in response to the WTC disaster, including the New York State Defense Emergency Act, New York Disaster Act, Stafford Act, and common law and derivative federal immunities.”).

56. *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 547–62 (S.D.N.Y. 2006).

The defendants then petitioned the Second Circuit for a writ of mandamus to halt the district court proceedings pending the appeal of Judge Hellerstein's immunity ruling. The Court of Appeals initially granted a temporary stay of proceedings, and several months later a permanent stay, in order to review the immunity issues. Arguments were then heard on October 1, 2007. Five days later, the Second Circuit lifted the stay, allowing the tort cases to proceed to trial.⁵⁷

To summarize: The legal responsibility that third-party defendants might have borne under New York tort law had the claims been fully adjudicated and apportioned could have been zero and certainly would have been less than that of the employers. As Aaron and his co-authors noted, Judge Hellerstein's rejection of the initial settlement was due partly to his dismissal of the City's concerns about potential future latent claims not covered by the settlement.⁵⁸ This decision was unlikely based on any discernible difference between the nature of the injuries suffered by the current plaintiffs and future plaintiffs; it most likely was the result of the court's candid assessment of the likely legal responsibility of the City, considering factors that applied equally to the current plaintiffs, especially immunity defenses.⁵⁹

The defendants could have made a credible case that they were being asked to bear a share of responsibility for workers' compensation far greater than that which would otherwise be rightfully borne by the employers. However, the Special Masters understood their mission to be one of providing compensation, not an adjudication of the legal merits of the plaintiffs' claims.⁶⁰ This perspective is reflected in the explicit overemphasis placed by the Special Masters on the severity of injury, despite recognizing that the severity of injuries among the plaintiffs, who received the largest settlements, did not correlate with any of the usual factors that correlate with

57. Hellerstein et al., *supra* note 10, at 141.

58. New York City wanted to hold back almost half of its insurance in the event of future litigation. *Id.* at 158.

59. *Id.* at 170.

60. The references to "managerial judging" are a little opaque in the "9/11 Responders' Tort Litigation" article; it leaves open the possibility that Judge Hellerstein may have still hoped for the bellwether cases to serve as an efficient vehicle for the full adjudication of all the issues in the case, including the defendants' immunity defenses. *See generally id.* But elsewhere, Aaron and his co-authors suggest that Judge Hellerstein hoped that the unique discovery orders issued would lead to a settlement based on the detailed severity information gathered by the Special Masters. *See* Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 WASH. U. L. REV. 653, 662 (2013) [hereinafter *9/11 Litigation Database*].

The size of a litigation database depends heavily on the objectives the court and the parties want it to serve. If the objective is merely to choose representative cases for early discovery and trial, it is not necessary to create an elaborate database. If the primary objective is to encourage settlement, more information is necessary.

Id.

the defendant's culpable responsibility. As Aaron and his co-authors reported:

It is axiomatic in toxic tort cases that the length and intensity of exposure to toxins correlate positively and strongly with the severity of the injury to the person exposed. However, searches in the database revealed that the dates on which the plaintiffs were exposed (early-only, early-and-late, or late-only) and the total lengths of exposure (twenty hours or two thousand hours) did not correlate strongly with the numbers or seriousness of injuries. The percentages of serious injury were essentially flat across groups of plaintiffs distinguished on the basis of when they started and how long they worked on the site.⁶¹

Furthermore, upon reviewing the discovery order that led to the database, it became evident that the Special Masters did not need to ask the plaintiffs about whether and how they were trained to work on the cleanup or even whether they had respirators and, if so, whether and how they were trained to use them.⁶²

The consensus, reflected at this Symposium, is that the approach adopted by Judge Hellerstein and executed by Aaron and Jim Henderson yielded the best possible result for the nearly 10,000 plaintiffs in the lawsuit. Given that most of the money used in the settlement of the tort claims came through a special appropriation by the federal government to fund the insurance out of which New York City paid its liabilities, one could say that Aaron's work simply paralleled that of Ken Feinberg, who administered the VCF, or even that of a workers' compensation board. To the extent that Aaron recognized that the moment required him to use the language and apparatus of tort litigation to achieve these results, he demonstrated the sort of judgment we should praise—the ability to exercise practical wisdom as the situation requires.

61. Hellerstein et al., *supra* note 10, at 154–55.

62. *9/11 Litigation Database*, *supra* note 60, at 661–62. For example, “questions regarding how the plaintiffs were trained for their work elicited vague responses due to the passage of time and were ultimately unhelpful,” and “questions inquiring into the dates and times a responder received a respirator were not of great significance.” *Id.*