

*Grau en Dret*  
Treball de fi de Grau (21067)  
Curs acadèmic 2012-2013

**JUDICIAL ROLE IN MASS-TORT LITIGATION:  
DAMAGE COMPENSATION ASSESSMENT**

WORLD TRADE CENTER SITE LITIGATION  
V.  
11-M TERRORIST ATTACKS JUDGMENT

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### **DECLARACIÓ D'AUTORIA I ORIGINALITAT**

Jo, Anna Rosell Abadia certifico que el present treball no ha estat presentat per a l'avaluació de cap altra assignatura, ja sigui en part o en la seva totalitat. Certifico també que el seu contingut és original i que en sóc l'únic autor, no incloent cap material anteriorment publicat o escrit per altres persones llevat d'aquells casos indicats al llarg del text.

Anna Rosell Abadía  
Barcelona, 14 de juny de 2013

## ***ABSTRACT***

*This paper analyses and compares two different models of damage compensation in mass-tort litigation through the study of two leading cases from different legal systems: World Trade Center Site Litigation and Audiencia Nacional Judgment 65/2007, from 31<sup>st</sup> October.*

*Due to the complexity generated by a mass-tort case, the judge has been required to assume an active role in both proceedings. As a result, two different innovative judicial techniques have been applied, which will be the main object of this paper analysis.*

*In World Trade Center Site Litigation the court has used its inherent “managerial judging” powers in a pre-trial stage to move lots of resources to encourage and achieve a fair damage compensation settlement for the plaintiffs, whose injuries resulted from cleaning efforts in 11-S terrorist attacks site.*

*In Audiencia Nacional Judgment 65/2007, from 31<sup>st</sup> October, the court awarded high damage compensation amounts to direct victims from 11-M terrorist attack within an advanced ad hoc distribution compensation method that can be compared with Damage Schedules Act, which is a standard instrument applied in road accident damage compensation.*

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## INTRODUCTION

Mass-tort litigation takes place when a single tort harms a large number of people. These cases can arise from pharmaceutical product torts, toxic torts or from diverse natural or human catastrophes, like terrorism.

Traditional legal mechanisms to solve mass-tort cases have proven to be unsatisfactory, especially when it comes to damage compensation assessment. To sort this out, the judiciary has started to explore some new methods aiming at victims' proper and fair compensation. Thus, two recent leading mass tort-cases, World Trade Center Site Litigation and *Audiencia Nacional Judgment*<sup>1</sup> 65/2007, from 31<sup>st</sup> October (referred as 11-M Terrorist Attacks Judgment) provide the perfect scenario to analyze judges' role in assessing mass-tort damage compensation.

These two cases, coming from two different legal traditions, have been chosen due to the similarity on the facts that they present. Both massive-tort catastrophes have led thousands of victims and have been originated by terrorist attacks, which have had a deep impact in the media and in their respective societies.

However, it is relevant to note that World Trade Center Site Litigation is a pre-trial civil proceeding, whose victims are a result of cleaning efforts from the terrorist attacks site, while 11-M Terrorist Attacks Judgment involves a criminal ruling, whose plaintiffs are direct victims of terrorism.

This paper is divided in three main Sections. The first two Sections focus on the study and on the analysis of the methodology that each judge applies in order to award fair damage compensation according to his legal system.

Section 1 looks at "In World Trade Center Site Litigation", where a set of managerial judging techniques were used to achieve a fair settlement for the plaintiffs. The Judge in charge of the case, Alvin K. Hellerstein and two of the Special Masters that helped him, justified the court managerial decisions in "Managerial Judging: The 9/11 Responders Tort Litigation".<sup>2</sup> This paper has been used as a reference in this first part.

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<sup>1</sup> SAN 65/2007, de 31 de Octubre. Sumario número 20/04 del Juzgado Central de Instrucción núm.6. Rollo de Sala núm. 5/05. Ponente: Don Javier Gómez Bermúdez.

<sup>2</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski. "Managerial judging: the 9/11 responders' tort litigation." *Cornell Law Review*, Vol 98, No. 1, September 2012 and *Brooklyn Law School, Legal Studies Paper* No. 298.

Section 2 is focused on 11-M Terrorist Attacks Judgment, led by Judge Bermúdez, who set damage compensation amounts in a complete and advanced way.

The last Section, aims at providing an analytical point of view between the innovative judicial techniques that have been used in each case to award compensation. In addition, some other Spanish legal instruments to compensate damages will serve as comparison elements.

## **SECTION 1: WORLD TRADE CENTER SITE LITIGATION**

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### **1.1. INTRODUCTION**

On the morning of 11<sup>th</sup> September 2001, Islamic terrorist group Al-Qaeda launched an attack against the United States. Two aircraft were deliberately flown into the two main towers of the World Trade Center in New York City,<sup>3</sup> commonly known as the Twin Towers.

These symbolic attacks shocked the whole world, and had a deep impact among American society.

As a result of those tragic facts, substantial damages were caused. Not only there was a 3.000 loss of life, but also lower Manhattan area was badly damaged and partly destroyed provoking the spread of hundreds of thousands of tons of toxic debris, which had to be removed.

Beginning in late 2002, legal disputes arose because of injuries caused by the exposure to debris' toxins during the removal efforts of the site. There were tort actions from more than 10.000 plaintiffs for fatal or debilitating illnesses. The defendants in these cases were the City of New York; Port Authority of New York and New Jersey, which owned the twin towers; some private contractors who supervised removal works; and several corporations employed to transfer the debris to a landfill.<sup>4</sup>

Even though the United States Congress created a no-fault Victim Compensation Fund (VCF), the overwhelming majority of 11<sup>th</sup> September tort litigation claimants did not satisfy the necessary requirements to benefit from this Fund, due to the fact that they did not suffer physical harm in

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<sup>3</sup> BBC. "History: the 9/11 terrorist attacks"

[http://www.bbc.co.uk/history/events/the\\_september\\_11th\\_terrorist\\_attacks](http://www.bbc.co.uk/history/events/the_september_11th_terrorist_attacks)

<sup>4</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

the immediate aftermath of the plane crashes because they were not treated by medical professionals within the following 72 hours. As a consequence, in 2004, the Congress created an Insurance Company (named Captive) that provided \$1.1 billion dollars to protect the City of New York and its contractors from tort claims arising from debris removal.

Litigation and settlement of these claims took place in the United States District Court for the Southern District of New York, under the presidency of Judge Alvin K. Hellerstein.

This judge had to deal with one of the most complex cases in the history of American mass-tort litigation with 10.000 cases that presented diverse facts, 300 varieties of diseases and different degrees of exposure to indeterminate toxins. Time and resources necessary to solve on a case-by-case basis were disproportionate.

Not only the court was concerned about the difficulty of moving forward all cases with a huge amount of different facts to take into account, but also about the possibility of ending up with an unfair settlement that offered the victims unsatisfactory compensation.

To successfully manage such a non-class mass tort case involving so many interrelated variables and reach a fair settlement, the court had to innovate in its institutional capacity and employ some sophisticated methods named “managerial judging”. Managerial judging includes a set of techniques that allow the judge narrow issues on the merits, avoid time and litigation expenses, and induce to a more efficient settlement.

Thanks to these techniques, Judge Hellerstein was able to move lots of resources, hire some experts and obtain detailed information from all victims, which would be used to create a complex database where injured would be classified. He was also able to place adequate mechanisms to allow all plaintiffs to receive information upon which to base their decisions to join settlement.<sup>5</sup> Moreover, he was entitled to determine that the first settlement agreement was not fair enough for the plaintiffs, because it provided too little for the plaintiffs and too much for the lawyers. Therefore, he rejected it.

Finally, in late 2010, after settlement amounts were increased and fees lowered, the court gave its approval. 99% of the claims were settled for between \$625 million and \$712.5 million dollars.

The following sections will focus on how the court managed to classify all injuries to be able to reach a fair settlement that compensates all victims in a proper manner. To do so, it is important to

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<sup>5</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.



start analyzing the frame of managerial judging. Then, study carefully the managerial methods that judge Hellerstein and its experts created to elaborate a database. At last but not least, inquire into managerial powers towards settlement.

## **1.2. FRAME OF MANAGERIAL JUDGING**

Managerial judging is an ad hoc prerogative available to judges, which includes a wide variety of techniques that aim to reach the fairest result and avoid the high expenses of civil litigation.<sup>6</sup> Thus, the court takes over significant substantive aspects of the litigation that are ordinary left to the parties to manage.<sup>7</sup>

Although it has existed for many years in the United States, its practice has increased in recent years because of the growing concern over litigation delay and expense, and the fact that Federal Rules of Civil Procedure do not incentive litigants to narrow issues for trial. Because of the inefficient judicial system and the growth of alternative dispute resolution procedures,<sup>8</sup> judges assumed a new role, where they are conceived not only as traditional legal decision makers or mere facilitators, but also as “managers”, activists or mediators, who take decisions not based on the legal merits of the parties’ positions. This implies that judges have to take into account the economic reality and the fact that procedural resources are limited, as a way to finally reach “business-like” basis decisions.

Although managerial judging appeared to narrow issues in litigation, it has quickly evolved to a technique useful for settling cases. Thanks to this, judges have discretionary power to impose procedural costs on particular litigants to stimulate settlements, which are considered to be in the best interest of justice. This evolution was predictable because the cost of litigation is a critical factor that affects decisions to settle.

Managerial judging in settlement finds its legal basis in two main sources. First, in Federal Courts inherent authority, which is grounded on “necessity”. US Supreme Court described the district court’s power to dismiss as one of “ancient origin”,<sup>9</sup> which was necessary to prevent undue delays. Second, in Rule 16 of the Federal Rule of Civil Procedure, where judges find authority for judicial participation in settlement. This rule is extremely important to defend managerial judging

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<sup>6</sup> E. Donald Elliott. “Managerial Judging and the Evolution of Procedure.” 53 *U. Chicago Law Review* 306 (1986).

<sup>7</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>8</sup> Daisy Hurst Floyd. “Can the Judge do that? The Need for a Clearer Judicial Role in Settlement.” *Arizona State Law Journal*. 26 *Ariz. St. L.J.* 83 (1994)

<sup>9</sup> *Link v. Wabash Railroad* (Supreme Court in 1962) 370 U.S. at 626.

for settlement, because it establishes “that the judge actively manage all phases of a case to expedite dispositions, discourage waste, facilitate settlements, and promote the quality of justice”.<sup>10</sup> This provision validates what most judges were already doing: it includes settlement as a matter for discussion during pre-trial conferences.

Some examples of managerial judging techniques include requiring written evidence sustaining each element of the claim, or imposing sanctions for actions that a judge later finds that are improper, or even setting a firm trial date that limits the amount of time. This will incentivize attorneys to establish priorities and narrow the areas which are truly relevant. All of those techniques increase the cost of exercising some procedural rights, aiming to get rid of unsubstantial and unimportant actions.<sup>11</sup>

There are also a wide amount of managerial techniques used by judges to achieve settlement that vary from talking with both lawyers about settlement or setting a settlement conference, to more coercive techniques such as penalizing or threatening a lawyer for a refusal to settle. Judges act within its authority when they facilitate settlement but outside of it when they coerce settlement. It is important that judges take into account that the line between facilitation or encouragement to settlement and coercion is vague. For this reason, while encouraging settlement, judges have to try to maintain impartiality and avoid acting with abuse or bias.<sup>12</sup>

Managerial judging has also faced several criticisms. Some of them point out that it drastically modifies the contours of lawsuits in a discretionary manner in an early stage. As a consequence, the judge can be arbitrary and prejudice the case, closing off some relevant lines of substantive inquiry. Moreover, the judge has the opportunity to abuse of managerial judging because he is enabled to narrow issues in an ad hoc way without any procedural safeguards: managerial decisions are immune from appellate review.

Even though the critics, without managerial judging results would be worse because the actual system would not be able to resolve disputes in a fair, efficient and timely manner.

There are some theories to improve managerial judging which suggest promoting judicial education by developing guidelines to assist judges making managerial decisions. They also promote the reform of civil procedure rules and the Code of Conduct for US judges, aiming to obtain a clearer guidance regarding their involvement in settlement and the appropriateness of

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<sup>10</sup> Alvin K. Hellerstein. “Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted”. *Columbia Journal of Law and Social Problems*. Vol 5, No 4.

<sup>11</sup> E. Donald Elliott. *Supra* at 5.

<sup>12</sup> Daisy Hurst Floyd. *Supra* at 5.

certain judicial behaviors. Finally, another interesting alternative consists in appointing two separated judges: one for trialing the case and the other to handle settlement discussions.<sup>13</sup>

### **1.3. WHY APPLY MANAGERIAL JUDGING IN THIS CASE?**

In cases of mass-tort litigation, where judges deal with a huge amount of plaintiffs who have claims that vary on their merits, potential recoveries, interests and expectations<sup>14</sup>, efficient management becomes a priority.

Managerial judging intervention in this case was consistent with a liberal interpretation of Rule 16 of Federal Rules of Civil Procedure. In addition, there are several factors that justify judicial intervention like the fact that an impasse had occurred and unless the court intervened, valid claims would never be vindicated for procedural reasons. Judicial intervention would make it possible for an extrajudicial bargaining process to reach a fair settlement because the court is able to be impartial and work as a guarantor of basic fairness.<sup>15</sup>

In the present case, the settlement agreement required 95% of approval of eligible plaintiffs to be ratified. Because a single law firm represented most part of the plaintiffs with differing interests and tended to act following its own needs and concerns, the court had to ensure that litigants received fair information and conflict-free representation.

Moreover, the case had gone on for seven years and plaintiffs' counsel were under financial pressure to settle because of their small size<sup>16</sup> and the amount of loans to finance the high cost of litigation.

Thus, it was extremely important to ensure that victims received fair settlements.

For this reason, Judge Hellerstein employed its managerial powers and took advantage of some methods to “democratize”<sup>17</sup> the process and to ensure full and fair spread of information through all the plaintiffs. To carry this out, a legal ethics expert was appointed to monitor communications between plaintiffs and their lawyers; frequent conferences and hearings, where anyone in attendance could ask questions or suggest items for discussion were organized to provide full and

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<sup>13</sup> Daisy Hurst Floyd. *Supra* at 5.

<sup>14</sup> Alvin K. Hellerstein. *Supra* at 6.

<sup>15</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>16</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>17</sup> Alvin K. Hellerstein. *Supra* at 6.

fair information concerning the settlement; summaries, case management orders, documents and motions on important issues were heard in open court.

Because it was not easy to focus on more meritorious claims or on cases where substantial injuries were involved, Judge Hellerstein managerial powers also intervened to create procedures to ensure even and equal treatment among the entire span of cases by focusing on the development of discovery proceedings. Courts dealt with the problem of distinguishing between claims of lesser and greater merit and the severity of the claimed injuries.<sup>18</sup>

To solve such mass-tort litigation, the court carried out the following managerial steps

#### **1.4. MANAGERIAL TECHNIQUES IN WORLD TRADE CENTER SITE LITIGATION**

##### **1.4.1. Core Discovery Order**

In 2006, after three years dealing with unsuccessful traditional approaches to pleading and discovery, Judge Hellerstein decided to move forward to managerial methods. The judge was convinced that sufficient information had not already been obtained to allow the parties to discuss a reasonable settlement.<sup>19</sup>

The Court was mainly facing vagueness and ambiguity of complaints and was not able to discern which claims involved serious injuries. It was thought that unambiguous and undisputed facts were a prerequisite to serious settlement discussions.

As a consequence, the court appointed two special masters vested with the prerogative of developing a core discovery order.

Special masters appointed were Dean of the Hofstra Law School, Aaron D. Twerski and Professor James A. Henderson, Jr. of Cornell Law School,<sup>20</sup> in accordance to Rule 53 of Federal Rules of Civil Procedure. Their main task was to organize cases, so they were able to move forward.

For this purpose, the court also issued a core discovery order requiring responses to a number of important questions. Thanks to these interrogatories, fundamental facts of cases were provided.

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<sup>18</sup> Alvin K. Hellerstein. *Supra* at 6.

<sup>19</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>20</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

Plaintiffs ranged in age from eighteen to seventy four, and they had been exposed to different combinations of toxins depending on the site they worked, causing different types of diseases. Plaintiffs' counsel was required to provide the following:<sup>21</sup>

- Specific details of what acts or omissions the victim alleged and how those acts or omission caused plaintiffs injury
- Where and when each plaintiff worked in connection with on-site debris removal
- The nature and severity of injuries alleged.
- When the injuries manifested themselves
- Which health care providers treated the plaintiff
- Which was the medical diagnosis
- Full medical records going back to 1995.
- Identify the entity that hired the plaintiff
- Specify the type of work the plaintiff was engaged to perform
- Specify the type of work the plaintiff actually performed
- To whom the plaintiff reported to on a day-to-day basis
- Who directed plaintiff's work on a day-to-day basis.
- Detailed information regarding the availability of personal protective equipment and instructions for its proper use.

Finally, the order required plaintiffs to produce information regarding the compensation, if any, they had received from collateral sources for the injuries they suffered at any of the World Trade Center sites.

On the other hand, defendants were required to answer many of the same questions asked to plaintiffs. They had to provide details of the type of work they engaged and its insurance coverage details. If there were any discrepancies between the parties' responses, further discovery would be carried out.

Because parties made numerous objections and did not provide conclusive answers, the court indicated that a lack of compliance with the requirements of the core discovery order would allow the opposing party to move for sanctions, including the dismissal of cases.

After collecting all the required information, special masters created two main innovative instruments in order to handle and organize all the information and with the main objective of obtaining an overview of the entire plaintiff population: a Severity Chart and a database.

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<sup>21</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

### 1.4.2. Severity Chart

Special masters developed a Severity Chart<sup>22</sup>, which is a method for ranking injuries according to their relative severity. This Chart supplied objective criteria because it was based in medical criteria and included all those injuries alleged with greatest frequency. To find out these criteria, the court relied on publications of the American Medical Association (AMA) and the American Thoracic Society (ATS).

Even though over 387 diseases were found, severity could not be established for all of them. As a consequence, several diseases were selected. Among them, three main categories can be set through the following Chart.

Diseases of the lower respiratory system	Asthma, chronic obstructive pulmonary disease (COPD), emphysema, interstitial lung disease and reactive airways dysfunction syndrome (RADS)
Diseases of the upper respiratory system	Laryngial diseases and chronic rhinosinusitis
Diseases of the gestive tract	Gastritis, esophagitis and gastroesophageal reflux disease (GERD).

The Severity Chart ranked injuries from 0 (less severe) to 4 (most severe) and was formed by three sub-charts.

- ⇒ Chart One ranks all severities of all diseases. However, it only includes plaintiffs tested by AMA or ATS criteria. Each disease creates a category, although it does not compare severities across the disease categories. Therefore, it does not measure the monetary value of the injuries because it only provides information about the current illnesses.
- ⇒ Chart Two deals with plaintiffs that previously had diseases enumerated in Chart One, but have either been cured or ameliorated.

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<sup>22</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

⇒ Chart Three captures injuries where AMA or ATS tests have not been performed.

Note that the Severity Chart did not include some diseases like cancers or cardiac problems. This is justified because it is highly speculative to establish causal nexus between exposure to toxins at the World Trade Center site and this sort of diseases. In addition, the variety of severity of these diseases is too great to rank it within objective criteria.

Thanks to the Severity Chart, the elaboration of the following database became easier. Moreover, the court was able to provide an assessment of the severity of each individual plaintiff's claimed injuries. This instrument has turned to be very useful to decide which cases were appropriate for early trial and it has also been a significant factor in moving the parties toward settlement.

### **1.4.3. Database**

To be able to move forward all cases it was extremely necessary that parties and the court had easy access to accurate and reliable information. This is why Judge Hellerstein decided to create an electronically searchable database<sup>23</sup> that collected all the information available and made it accessible to all plaintiffs and to the own court.

With this purpose, the court, by applying its managerial powers, hired a neutral entity with experience and expertise in using computer technology for dealing with complex data processing issues.

Then, the court turned to the task of selecting which kind of information would be introduced and how the data would be organized.

In December 2008, after hearing plaintiffs and defendants, special masters chose the 368 questions among the entire information that would be incorporated in the database.

In order to accelerate the process and get all 368 questions answered by 10.000 plaintiffs, a rigorous schedule was set. Plaintiffs were divided in five groups of 2000. Each group was required to fill the database fields in a limited period of time. This process was subsequently repeated until all groups had submitted all fields' information. Eventually, the entire database was completed by 1<sup>st</sup> January 2011.

Afterwards, Special Masters were able to select the 200 most severe cases from each of the 5 groups and additional 25 cases involving injuries that did not appear in the severity, like cancers or cardiac

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<sup>23</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

problems. The reason for choosing these extra 25 cases was the fact that the court sought early discovery and trial from broader range of injuries, including non-severity Chart plaintiffs.

From the most 200 severe cases, six of them were chosen by the parties and the court to be used as bellwether trials.

Plaintiffs chose cases where victims had been on the site for significant periods of time and who alleged serious respiratory injuries. Thus, it was easier to prove causality relationship between the on-site exposure and the disease.

On the contrary, defendants picked up plaintiffs on their fifties, with short exposures to the site and who sometimes had serious preexisting respiratory issues.

Bellwether trials provided counsel the opportunity to evaluate the strengths and weaknesses of their arguments and evidence.

Thanks to this database, it was set a comprehensive plan for discovery and trial for all 10,000 victims over a period of 2 years. The database was a very important element to achieve settlement because it accomplished two main goals.

First, it induced the parties to settle because it provided the basis for an informed selection of cases for early discovery and trial. Therefore, if an imminent settlement was not achieved, the court would start trialing cases, starting by the most severe ones.

Second, the database helped parties to settle because it allowed them to assign values across various categories of claimed injuries.

#### **1.4.4. First Settlement: Rejection by Judge Hellerstein**

While 30 individual cases were being selected towards early trial, parties became even more pressured to work out a settlement.

Thanks to the database and the Severity Chart, both parties were able to bargain with full information and plenty of resources until reaching a settlement on March 11<sup>th</sup> 2010 of over 10,000 claims against New York City and its contractors for \$575,000,000<sup>24</sup>, if at least 95% of the eligible individual plaintiffs accepted it. There were several factors that led to this settlement.

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<sup>24</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.



Early information from the database indicated that the majority of plaintiffs had not suffered serious injuries. Statistical analysis confirmed that only 20% of the plaintiffs manifested severe injuries. As a consequence, those who had been seriously injured would be fairly compensated without the need of exceeding the available funds from defendants.

There were many uncertainties that made settlement a more attractive alternative on both sides.

Defendants were afraid that juries on the first trials might deliver a verdict including high compensation, which would render more costly to settle further cases.

Ultimately, regardless of who might win at trial, it was certain that lots of issues would be raised on appeal. Therefore, it would take years to obtain a final resolution.

Even though parties found in settlement the best option to solve the dispute, on March 19<sup>th</sup> 2010 Judge Hellerstein declined to approve the settlement proposal because of finding it unfair.

#### **1.4.5. Grounds to Reject the Settlement**

To motivate his decision, Judge Hellerstein pointed out that a desire for an early mass settlement might compromise the potential for maximizing individual settlements.<sup>25</sup>

Moreover, he argued that although defendants insurance had \$1.1 billion dollars to settle the claims, they only offered about \$600 million and reserved \$500 million to protect themselves against claimants who manifested injuries in the future. Under the judge's point of view the funds reserved for future contingencies were too much.

The judge was also concerned about the fees, due to the fact that plaintiffs' counsel was able to recover 1/3 of the awards after deduction of expenses. Thus, the settlement agreement provided too little for the plaintiffs and too much for the lawyers.<sup>26</sup>

In addition, minimal compensation amounts were established for those plaintiffs who suffered from cancer, because of the difficulty of linking these injuries with on-site exposures. Although the court acknowledged that there were causation problems regarding these illnesses, they thought that adjustments should be carried out.

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<sup>25</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>26</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

This decision was highly controversial and judge's authority to reject the settlement was questioned.

Counsel argued that the court lacked authority to interfere within the settlement agreement. On the one hand, defendants would have to increase their offer if they wanted to keep on negotiating. On the other hand, plaintiffs' lawyers would have to reduce their fees.

The court believed that it possessed the inherent authority to review the settlement and to reject it if necessary in the interest of fairness.

The legal basis for the court's authority to deny the settlement agreement has been caught between two federal rules, neither of which could be sensibly applied to this litigation.

First, Rule 23 of the Federal Rules of Civil Procedure gives trial judges authority to pass on the fairness of a settlement or to reduce attorneys' fees. This provision has been designed to apply in cases that qualify as class actions. However non-class mass-tort litigation shares several characteristics with class actions and have been referred as quasi-class actions. Therefore, they are subject to the court's power to ensure justice and fairness.

Second, Rule 41 of the Federal Rules of Civil Procedure, which broadly allows parties to withdraw actions by means of voluntary settlements, presumes that the attorney deals with his clients as individuals who take substantial part in the decision. In the present case, where 10.000 plaintiffs were involved, they were only able to opt in or out of a settlement where recoveries were fixed for each pre-determined category of injuries.

Even though there was a legal gap, the court had to find a balance. Given that Judge Hellerstein had played a managerial role by constructing the Severity Chart and the database, he certainly had sufficient factual grounds to reject the settlement. In addition, the court was aware that plaintiffs law firms were under financial pressure because of their small size and limited resources. As a result, the court managerial powers aimed to lead to the fairest possible result for plaintiffs, which in this case were mostly public heroes.

#### **1.4.6. Final Settlement**

Parties finally understood that they would have to make adjustments in order to avoid a long lasting appellate litigation and reach a new agreement. Thus, they required the assistance of

special masters to work out a settlement that would meet with court approval<sup>27</sup>.

Eventually, the court approved a final settlement on June 10<sup>th</sup> 2010. The agreement required the participation from at least 95% of all eligible plaintiffs to become effective. In effect, 99% settled.

Cases that were in court when the agreement became final were dismissed with prejudice. Plaintiffs who participated in the settlement will not be able to sue any of the settling defendants again in the future for claims arising from World Trade Center debris removal.

However, litigation is still going on for a small number of plaintiffs who opted out of the settlement and plaintiffs who filed new tort claims after the agreement was completed. Furthermore, there will be future claimants whose injuries will manifest in the years to come<sup>28</sup>.

The new agreement had been ameliorated. First, the settlement value to the plaintiffs was increased by \$125 million dollars. Second, plaintiff's counsel agreed to reduce their fees from 33% to 25% of an individual plaintiff's recovery. Thus, plaintiffs ended up receiving an extra \$55 million dollars.<sup>29</sup>

This time the court accepted the settlement proposal because they felt that although not perfect, the level of benefits was acceptable enough. Moreover, they realized that if they wanted to increase plaintiffs' compensation, their authority would be challenged on appeal, resulting in years of delay and depriving plaintiffs of recoveries.

## **1.5. COMPENSATION**

Under the settlement agreement, the defendants insurance named Captive, agreed to contribute a minimum of \$625 million<sup>30</sup>.

### **1.5.1. Eligible plaintiffs**

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<sup>27</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>28</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>29</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>30</sup> This amount could reach \$712,5 million depending upon various factors: for every extra 1% of plaintiffs to the required 95% that join the settlement, \$12.5 million dollars would be added. Moreover, the Captive agreed to pay an additional \$25 million if future lawsuits were limited to a certain number<sup>30</sup>, which would be distributed among plaintiffs with the most serious injuries.

To be able to become an eligible plaintiff to participate in the settlement, it was necessary to file a law suit against any of the defendants, show having suffered an injury and prove service at the World Trade Center site after the terrorist attacks.

Eligible plaintiffs were classified in three different Master Dockets by the court. This classification mainly used to distribute \$625 millions of settlement compensation.

- ⇒ Master Docket 100 received \$514.8 million for plaintiffs. It contains claims concerning respiratory injuries as a result of working at ground zero or on transportation to debris to landfills.<sup>31</sup>
- ⇒ Master Docket 102 received \$6.1 million for plaintiffs. It includes cases brought against property owners that surround ground zero for respiratory injuries resulting from the exposure to various toxins while cleaning those buildings.
- ⇒ Master Docket 103 received \$18.2 million for plaintiffs. It deals with cases where multiple geographic locations of injury were alleged. Thus, it includes cases where the court did not know whether include them in docket 100 or 102.
- ⇒ The rest of the funds were destined to special cases. \$62.5 million were reserved for permanently disabled plaintiffs in all three Master Dockets, creating the “Permanent Disability Fund”. The other \$23.4 million were kept for the Cancer Insurance Policy.

All eligible plaintiffs received an initial payment of \$3.250. Furthermore, they were able to apply for a cancer insurance policy that would cover up to \$100.000 for certain types of blood and respiratory cancers before 2025.

### **1.5.2. Qualifying plaintiffs**

Moreover, there were additional payments for eligible plaintiffs who were also qualifying plaintiffs. To become a qualified plaintiff an independent panel of doctors would examine each plaintiff following an accurate and efficient procedure and would determine if the illness that a

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<sup>31</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

plaintiff had was a qualifying injury<sup>32</sup>. The Allocation Neutral is the institution in charge of deciding how plaintiffs' claims are valued. They pay out money to qualifying plaintiffs taking into account proofs of each individual injury.

These injuries were sub-divided among severity levels, which were based upon objective tests used by medical experts to decide how severe an illness was.

### 1.5.3. Tiers classification

Classification of eligible plaintiffs was divided into four levels of "Tiers" to determine the amount each plaintiff was to receive. Note that injuries that qualifying plaintiffs were only included in tiers two, three and four.

The following Chart includes a description of plaintiffs pertaining to each Tear.

<b>No qualifying plaintiff</b>	<b>Tier 1</b>	Plaintiffs who are eligible for fear of suffering future injuries as a result of debris removal work.
<b>Qualifying plaintiff</b>	<b>Tier 2</b>	Plaintiffs whose qualifying injury requires only a physical diagnosis
	<b>Tier 3</b>	Plaintiffs whose qualifying injury may require basic proof or a physician diagnosis
	<b>Tier 4</b>	Plaintiffs whose qualifying injury requires strict proof. Usually, Tier 4 injuries tend to be more serious and worth more money per plaintiff. Therefore, Tier 4 plaintiffs need to submit more documentation to establish some "adjustment factors" that will individualize the recoveries.

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<sup>32</sup> Qualifying injuries include Chronic Obstructive Pulmonary Disease, Interstitial Lung Disease, Asthma, RADS, Laryngitis, Pharyngitis, Chronic Rhinosinusitis, Upper Digestive Conditions, Sleep Disorders, Death, Cancer, Cardiac Conditions, and Restrictive Lung Disease, namely "qualified injuries".

The following Chart illustrates how plaintiffs would be compensated according to the Tier and the Master Docket they belong to.

<b>Tier 1</b>	Initial payment of \$3.500 + option to apply the Cancer Insurance policy.		
<b>Tier 2</b> “Accelerated Final Payment”	Initial payment of \$3.500 + option to apply the Cancer Insurance policy.		
	Master Docket 100 \$4.250	Master Docket 102 \$1.085	Master Docket 103 \$1.625
<b>Tier 3</b> “Accelerated Final Payment”	Initial payment of \$3.500 + option to apply the Cancer Insurance policy		
	Master Docket 100 \$7.750	Master Docket 102 \$2.170	Master Docket \$3.250
<b>Tier 4</b>	Initial payment of \$3.500 + option to apply the Cancer Insurance policy		
	“Interim Payment” + “Final Distribution”		

Some of the Chart contents need further explanation:

⇒ Tier 2 and Tier 3 plaintiffs shall be entitled to get additional compensation from the “Accelerated Final Payment” if they satisfy proof requirements.

⇒ Tier 4 plaintiffs can achieve a maximum compensation of over \$1 million. They will receive no less than \$1.000 more than plaintiffs in Tier 3 of their Master Docket. In addition, if they have a second qualifying injury they will receive more money.

Qualifying plaintiffs in Tier 4 will receive two sorts of additional payments.

- First, an “Interim Payment”, which consists in 40% of the projected “Final distribution” based on the plaintiff’s qualifying injuries as determined by the medical experts. This compensation will be partially received as soon as possible, while claims are evaluated through an allocation process, which took around a year once the settlement became final.
- Second, a “Final Distribution” based upon each plaintiff total score. Plaintiffs receive a certain number of points for each qualifying injury, named “Base points”. Those points will go up or down depending upon the adjustment factors of each plaintiff, including plaintiff’s age, pre-existing conditions, and smoking history. Total score will combine all individualized plaintiffs factors.

Thanks to this method a consistent valuation that prioritizes plaintiffs injuries is ensured. Tier 4 plaintiffs' receive whatever remains after plaintiffs in Tiers 1 to 3 have received their fixed amounts. Thus, compensation distribution favors the most seriously injured plaintiffs because Tier 4 plaintiffs' receive approximately 95% of the settlement total.

Eligible plaintiffs are bound by all terms and conditions of the settlement agreement once they sign it. Therefore, they cannot back out if they do not like the final value that the Allocation Neutral has determined for them.

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## **SECTION 2: AUDIENCIA NACIONAL JUDGMENT 65/2007, FROM 31<sup>ST</sup> OCTOBER**

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### **2.1. INTRODUCTION**

On the morning of March 11<sup>th</sup> 2004, ten bombs were detonated on four trains heading into Atocha, Madrid's main train station.<sup>33</sup> As a result, 192 people were killed and nearly 1.800 were injured. It was the worst Islamic terrorist attack in European history.<sup>34</sup>

This attack was carried out just three days before Spanish general election. As a consequence, a lot of controversy arose between the two main political parties, which accused each other of distorting evidence for electoral reasons.<sup>35</sup>

Spanish judiciary official investigation found that the bombings were performed by a group of North Africa men inspired on Al-Qaeda. Although there has been much speculation that Al-Qaeda leadership was involved in the attacks, no direct relationship has been established.

Those Islamic terrorists were assisted by a group of Spanish criminals who provided the dynamite needed for the bombings.

*Audiencia Nacional* Judgment<sup>36</sup> 65/2007, from 31<sup>st</sup> October, led by Judge Javier Gómez Bermúdez, named 11- Terrorist Attacks Judgment, criminally condemned 18 people who

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<sup>33</sup> Damian Corrigan. Madrid Bombings, March 11 2004 - A Timeline of Events. *About.com Guide*. November 21, 2011.

<http://gospain.about.com/od/spanishlife/a/madridbombtime.htm>

<sup>34</sup> The worst Islamist attack in European History. *The Guardian*. 31 October 2007.

<http://www.guardian.co.uk/world/2007/oct/31/spain>

<sup>35</sup> The worst Islamist attack in European History. *The Guardian*. 31 October 2007.

<http://www.guardian.co.uk/world/2007/oct/31/spain>

<sup>36</sup> SAN 65/2007, de 31 de Octubre. Sumario número 20/04 del Juzgado Central de Instrucción núm.6. Rollo de Sala núm. 5/05. Ponente: Don Javier Gómez Bermúdez.

participated in the attacks. According to the Spanish Criminal Code,<sup>37</sup> all those who are found responsible for a crime, are also liable for the consequent damages. In this case, the court has established causal nexus between March 11<sup>th</sup> 2004 attacks and 192 deaths and 100 injured. Thus, the condemned are severally and jointly liable of the compensation.

However, in terrorism cases there is a high risk that the convicted turn to be insolvent. In the present case, this occurred on the 17<sup>th</sup> July 2009.

This is one of the reasons why Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism was enacted. Its main aims are, first, to honor victims of terrorist attacks; and second, to achieve the State's assumption of the obligation to compensate victims of terrorism when reparation is not satisfied by those who are criminally responsible. This allocation on the state is described as extraordinary<sup>38</sup> and does not involve assumption of any subsidiary liability by the state.<sup>39</sup> The State's duty to pay compensation arises from solidarity, not from responsibility.<sup>40</sup>

The state assumption of the obligation to pay claims against perpetrators is conditioned to a fundamental requirement: the victims or their relatives, who are entitled to compensation, must transmit their right to be compensated for the perpetrators.<sup>41</sup> Therefore, the State is subrogated in plaintiffs' position.<sup>42</sup>

## **2.2. COMPENSATION**

The court fixed a compensation of 900.000€ for the families of those who were deceased as a consequence of the attacks.<sup>43</sup>

Given the extraordinary number of plaintiffs and the diversity of their injuries, it was impossible to consider individual circumstances from each of the plaintiffs. As a result, the Court, led by

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<sup>37</sup> Provisions 116 and 109 and following from Spanish Criminal Code (Ley Oránica 10/1995, de 23 de noviembre del Código Penal).

<sup>38</sup> Provision 2.1 from Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism.

<sup>39</sup> Provision 2.3 from Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

<sup>40</sup> Oriol Mir Puigpelat. "Indemnizaciones a las víctimas del terrorismo". *Indret 1/00*.

<sup>41</sup> Marc R Lloveras. "Indemnizaciones a las víctimas del terrorismo. Evolución normativa y aplicación jurisprudencial". *Indret 3/2002*. Working Paper n1 92. Julio de 2012.

<sup>42</sup> Provision 8 from Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

<sup>43</sup> Auto de 2 de Noviembre de 2007 de la Audiencia Nacional, Sala de lo Penal, Sección 2<sup>a</sup>. Sumario número 20/04 del Juzgado Central de Instrucción núm. 6. Rollo de Sala núm 5/05. Ponente: Don Javier Gómez Bermúdez.



judge Javier Gómez Bermúdez, established a system based in 12 groups, where compensation for the injured was fixed in between 30.000€ and 1.500.000€. <sup>44</sup>

To create the 12 different levels from injured people, the court took into account some criteria like the severity of the injuries and the healing time needed by each plaintiff. Moreover, plaintiffs' physical and psychological damages were used as a corrective to increase compensation.

Besides the 12 groups, the court made an exception for the especial case of Laura Vega, a young woman of 29 years old that remains in a permanent vegetative state after the explosions, whose relatives will receive 1.000.000€ compensation. In addition, 250.000€ will be deposited for her treatment and health care.

### 2.3. COMPENSATION ANALYSIS

The following Chart makes easier to understand how the court managed compensation by clearly summarizing all data. <sup>45</sup>

GRUPO	CARACTERÍSTICAS	MÍNIMO	CANTIDAD POR DÍAS QUE TARDARON EN CURAR	SECUELAS
1 y 2	Grupo 1: Lesiones leves y que han requerido un periodo de curación corto y que no sufren secuelas (hasta 30 días de curación) Grupo 2: Lesiones más importantes que han requerido un periodo de curación mayor, pero que no han <del>de</del> secuelas (más de 30 días de curación y menos de 100)	30.000€	300€	
3	Lesiones que han requerido largos periodos de curación y/o secuelas (más de 100 días de curación sin secuelas o menos con secuelas).	30.000€	300€	10.000€ por secuelas
4	<i>A partir de aquí los siguientes grupos incluyen lesionados con secuelas progresivamente más graves.</i> Lesiones y secuelas más importantes que grupo anterior	30.000€	300€	15.000€ por secuelas
5	Presentan lesiones y secuelas más importantes que grupo anterior	30.000€	300€	30.000€ por secuelas
5		30.000€	300€	50.000€ por secuelas
6	Lesiones y secuelas más importantes que grupo anterior	30.000€	300€	70.000€ por secuelas
7	Presentan lesiones y secuelas más importantes que grupo anterior	30.000€	300€	90.000€ por secuelas
8	Lesiones y secuelas más importantes que grupo anterior	30.000€	300€	110.000€ por secuelas
9	Presentan lesiones graves y secuelas importantes	30.000€	300€	300.000€ por secuelas
10	Lesiones muy graves y secuelas muy importantes	30.000€	300€	500.000€ por secuelas
11	Personas con lesiones gravísimas y secuelas muy importantes, con grandes limitaciones funcionales	30.000€	300€	750.000€ por secuelas
12	Lesiones extremas <i>Forman parte de este grupo Laura Vega García y 7 personas más.</i>	30.000€	300€	900.000€ por secuelas

*+ parientes consanguíneos en primer grado (padres y hermanos) de Laura Vega: conjuntamente 1 millón euros por su estado vegetativo + depósito 250.000€ para la atención de Laura Vega.*

<sup>44</sup> SAN 65/2007, de 31 de Octubre. Supra at 20.

<sup>45</sup> SAN 65/2007, de 31 de Octubre. Supra at 20.

The court has distributed compensation in three main compensation amounts, which vary through the 12 levels, and rank lower (Group 1) to higher (Group 12). Note that the court ruling<sup>46</sup> mentions Group 5 twice and sets two different amounts. Because the second amount is the one that best fits and does not alter the final results of the Chart, it is congruent to pick up this value as correct and reject the first amount.

First, the court has established a fixed amount of 30.000€ that each of the injured pertaining to any of the 12 groups is entitled to receive.

In addition, all injured plaintiffs will receive 300€ for each day that injuries caused by the attack took to heal.

Finally, group 3 to 12 will receive some extra amount because of the physical and psychological damages that the attacks left them. Thanks to this category, plaintiffs damages are differentiated: the more physical and psychological damages a plaintiff presents, the higher he will qualify in severity level and the higher amount he will receive.

The judgment<sup>47</sup> does not provide any justification to the compensation distribution. The following sections will aim to provide some possible explanation on how the court has determined the amounts of those three main categories. To support this reasoning, Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism and the Damages Schedules Act<sup>48 49</sup> that sets the amounts for compensation in road accidents, are going to be referred.

Damages Schedules Act establishes a mandatory and objective assessment system based on scales to compensate personal injuries coming from road accidents. Since this system appeared in 1995<sup>50</sup>, courts have applied this scale to other sort of accidents<sup>51</sup>. Thus, it has become a very useful tool for judges to determinate compensation for non-pecuniary damages because it is easier and more efficient than establishing compensation on a case-by-case basis.

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<sup>46</sup> SAN 65/2007, de 31 de Octubre. Supra at 20.

<sup>47</sup> SAN 65/2007, de 31 de Octubre. Supra at 20.

<sup>48</sup> Damages Schedules Act (Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el Texto Refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor)

<sup>49</sup> Resolución de 7 de enero de 2007, de la Dirección General de Seguros y Fondos de Pensiones, por la que se publican las cuantías de las indemnizaciones por muerte, lesiones permanentes e incapacidad temporal que resultarán de aplicar durante 2007, el sistema para valoración de los daños y perjuicios causados a las personas en accidentes de circulación.

<sup>50</sup> Ley 30/1995 de 8 de noviembre, de ordenación y supervisión de los seguros privados.

<sup>51</sup> Álvaro Luna, Sonia Ramos, Ignacio Marín. "Guía de Baremos Valoración de daños causados por accidentes de circulación, de navegación aérea y por prisión indebida". *InDret* 3/2006. N 360. Julio de 2006.

The assessment in Damage Schedules Act divides compensation in three groups, depending on if they are a result of death (Chart I and II), of permanent injuries (Chart III and IV) or temporary disability (Chart V). Each of these three categories has its own basic compensation Chart and an extra Chart with correction factors that can increase or decrease the compensation amount depending on each plaintiff circumstances.

Note that the Damages Schedules Act amounts are updated each year. “Two judgments of the Spanish Supreme Court’s Civil Chamber<sup>52 53</sup> have established a new judicial doctrine on the assessment of damages arising from road accidents injuries”.<sup>54</sup> Those sentences establish that injuries suffered in a road accident are assessed according to the legal regime in force at the moment in which they were caused, but in order to establish the final award they should be monetarily assessed at the moment of the hospital discharge. Because of the difficulty to apply these criteria, 2007 values are going to be picked up as a model, which correspond to the time when the 11<sup>th</sup> March ruling was issued.

Note also that Law 32/1999 of 8<sup>th</sup> October of solidarity with the victims of terrorism, from now on Law 32/1999, has recently been modified by Law 29/2011, of 22<sup>nd</sup> September, which integrates recognition and protection to victims of terrorism. However, the latter is not going to apply in this analysis because of the principle of non-retroactivity. The law that applies to this case is Law 32/1999 because it was the one that was in force when the trialed facts happened in 2004.

### **2.3.1. Moral damages**

All plaintiffs will receive a compensation of 30.000€, independently of the severity of their injuries.

This fixed amount may be justified as moral damages, due to the fact that the court is dealing with a serious offence that has a broad social impact.

In the 11-M Terrorist Attacks Judgment some justification is provided. The court points out that terrorism implies terrible crimes, which aim at attacking the state and its social structure as a whole. As a consequence, victims and goods attacked by terrorist action become a mere

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<sup>52</sup> STS 430/2007, de 17 abril. (RJ\2007\3359). Ponente: Encarnación Roca Trias

<sup>53</sup> STS 429/2007, de 17 abril. (RJ\2007\3360). Ponente: Encarnación Roca Trias

<sup>54</sup> Sonia Ramos González. “Aplicación temporal de los baremos en accidentes de circulación: la fecha del siniestro determina los puntos por secuela y la del alta médica, su valor”. *Indret* 4/2007. Octubre de 2007.

instrument. As well as causing victims and their families physical and emotional suffering, terrorist attacks create a climate of fear in the entire community.

Furthermore, the court includes material and moral damages to compensation by extending provision 110 from the Criminal Code<sup>55</sup> that includes that “the obligation to compensate for damages caused by a criminal offence can be achieved through restitution, damage reparation, or material and physical damage compensation”.

In a general sense, moral damage concept is equivalent in what is referred in common law as pain and suffering. Common law countries may also award punitive damages. This concept has no equivalence in civil law. Consequently, when moral damages are awarded it is not considered how culpable or blame the actions were.<sup>56</sup>

Moral damages may be awarded without prejudice to compensation for material damages.

Two main distinctions of moral damages may be done: subjective moral damages, that imply how the injured was impacted or affected about what happened; and objective moral damages which imply the lost of prestige in the community and the lost of reputation.<sup>57</sup>

### ***2.3.1.1. The Problematic Exclusion of Moral Damage from the Law 32/1999 of Solidarity with the Victims of Terrorism***

Law 32/1999 limits State’s obligation to compensate victims of terrorism to physical and psychophysical damages.<sup>58</sup>

Psychophysical damages are the psychological perturbation effects produced to a victim of a wrongful act. They differ from moral damages, which can be awarded even if no physical and psychological damages appear<sup>59</sup>. In groups 1 and 2, where the plaintiffs have only suffered minor injuries without any sort of physical or psychological effects, the fixed amount of 30.000 is also awarded. The absence of requirement of physical and psychological damages to obtain this amount makes this compensation fit within the category of moral damages.

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<sup>55</sup> Provision 110 from Spanish Criminal Code

<sup>56</sup> Angel R. Oquendo. Latin American Law (University Casebook). Chapter 10: civil law remedies: moral damages.

<sup>57</sup> Angel R. Oquendo. Chapter 10. Supra at 24.

<sup>58</sup> Provision 2.2 and provision 6 from Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

<sup>59</sup> Schick estudio jurídico. “Las pautas para fijar las indemnizaciones por accidentes del trabajo fundados en el derecho civil”.

However, moral damages are clearly excluded even if they have been established by judgment.<sup>60</sup>

It is undeniable that 30.000€ amount compensation, which are awarded indiscriminately to all plaintiffs, fall into moral damages. As a result, it looks like the exclusion of moral damages award has no effect in this case because Judge Bermúdez, as most of judges tend to do, does not distinguish between moral and physic damage and consequently, he does not directly express that 30.000€ amount correspond to moral damages.

### ***2.3.1.2. Moral Damage Analysis in Damages Schedules Act***

It is not clear if moral damages are recognized in the Charts established by the Damages Schedules Act because basic compensation amounts for permanent injury (Chart III) and temporary disability (Chart V.A) tend to include physical and moral damages in a single compensation amount, without taking into account personal, social or economic circumstances of the injured.

In addition, Chart IV and V.B establish some corrective factors for compensation for permanent injuries and temporary disability. Through these correctives the court is entitled to award an additional compensation to cases where extraordinary moral damages or pecuniary damages arise.

One of the permanent injury correctives of Chart IV, for instance, awards compensation for complementary moral damages. This category compensates those who suffer severe physical and psychological damages, who rank separately 70 points and concurrently 90 points out of 100 from the Chart 3 basic compensations. This justifies the adjudication of such extraordinary moral damages.<sup>61</sup>

Another example from Chart IV correctives is the moral damage infringed to the family from the victim, when the situation of the latter modifies the life of his family.

Thus, the specific reward of moral damages in the Damages Schedules Act requires something extraordinary that alters the life of the victim as a consequence of the accident.

There is no doubt that in the present case something out of the ordinary has happened to the victims, who have experienced the effects of terrorism. However, it does not seem that the court

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<sup>60</sup> Marc R Lloveras. *Supra* at 21

<sup>61</sup> Javier López y García de la Serrana. "La regulación de los daños en accidentes de circulación en España" *XXVIII Congreso de la Asociación Hispano-Alemana de Juristas*. Bamberg 6, 7, 8, 9 y 10 de Junio de 2012

has taken Damages Schedules Act as a reference for awarding moral damages. While in the Damages Schedules Act moral damage compensation is disseminated and requires some physical and psychological damages or modification in the victim's life, the ruling of Judge Bermúdez establishes a fixed amount independently of the victim's circumstances. Thus, the court is taking into account that the present case deals with more dramatic facts than traffic accidents and that victims of terrorism require moral damage compensation independently of the alterations that the attack has brought to their lives.

### **2.3.1.3. Moral Damage Analysis in Intentional Damage cases**

The compensation amount established in the present case, 30.000€ does not resemble to any of the moral compensation sums awarded in other intentional damage cases.

Most of the rulings that deal with terrorism crimes, according to Law 32/1999, do not award moral damages. They just compensate physical<sup>62</sup> and psychophysical<sup>63</sup> damages.<sup>64</sup>

Analyzing moral damages awarded in relation to other sort of crimes such as rape, which also cause tragic effects and implies wrongful injury by the defendant, does not provide comparison criteria. In these kind of cases the Court is likely to easily grant moral damages without requiring any finding or taking into account the extent of the injury.<sup>65</sup> This is justified, like in terrorism cases, by the enormity of the offence and the social rejection of this crime.

Although rulings dealing with rape crimes tend to award moral damages due to the traumatic effects left on the victim, they do not follow any compensation standard. In general, the amount of compensation for the victim moral damages may be established in a discretionary manner by the court<sup>66 67</sup>. For instance, while analyzing different judgments for rape crimes the amount of compensation may discretionary vary taking into account specific circumstances<sup>68 69</sup>.

Several provisions regulate compensation for victims of violent and sexual crimes.

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<sup>62</sup> SAN de 18 marzo 2005 (RJCA\2005\653) Ponente: Lucia Acín Aguado.

<sup>63</sup> SAN de 23 junio 2005 (RJCA\2005\982) Ponente: Lucia Acín Aguado.

<sup>64</sup> SAN de 1 octubre 2003 (RJCA\2004\238) Ponente: Pedro Jesús García Garzón

<sup>65</sup> Fernando Gómez Pomar. "Daño Moral". *InDret 1/00*

<sup>66</sup> STS 396/2002 de 1 marzo (RJ\2002\4118) Ponente: Diego Antonio Ramos Gancedo

<sup>67</sup> STS130/2000 de 10 abril. (RJ\2000\3439). Ponente: Adolfo Prego de Oliver y Tolivar

<sup>68</sup> SAP Madrid 127/2012 de 10 diciembre (JUR\2013\18791). Ponente: Don José Joaquín Hervás Ortiz.

<sup>69</sup> STS 681/2007 de 10 julio (RJ\2007\5160). Ponente: Joaquín Delgado García.

The Strasbourg European Convention on compensation for victims of violent crime, from November 24<sup>70</sup> points out that when compensation cannot be effectively carried out by other sources the State shall contribute to compensate. Moral damages are not included in this compensation.

Law 38/1998, of 27 November on aid and assistance to victims of violent crime and sexual freedom<sup>71</sup> and RD 738/1997, of 23 May, which approves the Regulation on aid and assistance to victims of violent crime and sexual freedom<sup>72</sup>, establish the obligation of the State to provide some minimum monetary support. However, the State is not responsible for the offences, and therefore, it may not award moral damages. This agrees with Law 32/1999, but differs with the treatment that the ruling gives to terrorism victims.

Although any legal instruments provides any pattern that serve to justify the 30.000€ compensation amount, the nature of the 11<sup>th</sup> March attacks, which have been qualified as the worst in Spanish history, become a sufficient reason for the court to award indiscriminately this amount to all victims.

### **2.3.2. Temporary disability**

Compensation for temporary disability is awarded to all plaintiffs with the amount of 300€ for each day that the injuries were still on recovery.

As an element of comparison, Chart V from the Damages Schedules Act, which contains the valuation rules of temporary injuries suffered as a result of a traffic accident, may be employed.

Chart V is divided in two main parts. While part V.A contains basic compensation for temporary disability, part V.B establishes correction factors, which increase or decrease the basic compensation according to specific case circumstances.

Basic compensation establishes a compensation amount for each day that the victim has been disabled as a consequence of the injuries suffered in the accident.

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<sup>70</sup> Strasbourg European Convention on compensation for victims of violent crime, from November 24, 1983 (ratified by Instrument October 20, 2001 , BOE of December 29, 2001)

<sup>71</sup> Ley 38/1998, de 27 de noviembre, por la que se modifica la composición de la Comisión Nacional de Ayuda y Asistencia a las Víctimas de Delitos Violentos y contra la Libertad Sexual.

<sup>72</sup> Real Decreto 738/1997, de 23 de mayo, por el que se aprueba el Reglamento de ayudas a las víctimas de delitos violentos y contra la libertad sexual.

Damages Schedules Act distinguishes different situations with a different amount of compensation. If the victim remains in the hospital as a consequence of their temporary injuries, higher compensation is going to be awarded each day, exactly 61,97€ according to 2007 values. If the victim does not need to stay in the hospital, but remains in a preventive state, 50,35€ per day are going to be adjudicated. Impeditive state takes place when the victim is not entitled to carry out its habitual life activity. Finally, if the victim does not need to stay in the hospital and does not remain in a preventive state, compensation will rate 27,12€.

The present case differs with the amounts awarded in the Damages Schedules Act for several reasons.

First, it sets a fixed amount of 300€ per day without taking into account any circumstances like hospitalization or preventive state. Consequently, all injured may receive this compensation until their final injuries are determined.

Second, the court has been generous in awarding a total sum of 300€, while temporary injured according to the Damages Schedules Act may receive a maximum of about 60€. It is self evident that the crimes at stake are not comparable and therefore, it justifies the different compensation amounts.

Thus, 300€ compensation for temporary disability becomes a judiciary scale set up for this concrete case, given its exceptionality. Because it is an ad hoc scale, it will not bind any other cases.

### **2.3.3. Physical and Psychological Damages**

The 11<sup>th</sup> March Terrorist Attacks Judgment classifies injuries through 12 levels, depending on their severity. Plaintiffs with physical and psychological damages rank from group 3, which includes plaintiffs with lower physical and psychological damages, to group 12, which deals with extremely severe injuries. Physical and psychological damages compensation oscillates in between 10.000€ and 900.000€.

As a way understand why the court created those 12 levels and awarded such compensatory amounts, several legal instruments will be referenced due to the fact that they provide some compensation standards that can bring some light to this analysis.



### **2.3.3.1. Physical and Psychological Damages and Terrorist Crimes**

Law 32/1999 establishes the State's obligation to compensate victims of terrorism, according to the reparation amount granted in a final judgment. If there is not a final judgment yet or the final judgment does not fix a compensation amount, the standard amounts established in Law 32/1999 will be awarded. In addition, any final judgment dealing with damages caused by terrorist attacks has to respect Law 32/1999 standard amounts as a minimum, although it can set higher sums.<sup>73</sup>

The following Chart presents the standard compensation amounts awarded by Law 32/1999:

<b>Concept</b>	<b>Euros</b>
Death	250.000
Severe Disability	500.000
Permanent Absolute Disability	180.000
Permanent Total Disability	100.000
Permanent Partial Disability	75.000

Note that for permanent non-disabling injuries the system of Schedules is referred.<sup>74</sup> Therefore, Damages Schedules Act will apply.

In the case at hand, the court has already fixed compensation amounts, which are higher than the standards set by Law 32/1999 and also to compensation awarded in other rulings where terrorism is involved. For instance, STS 1<sup>st</sup> October 2003<sup>75</sup> awards 150.253,03€ to a terrorism victim whose physical damages include, among others, spinal hemisection that affects its lower extremity. This kind of injury would qualify level 9 in the present case, and consequently, 300.000€ compensation would be awarded.

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<sup>73</sup> Provision 6.2 Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

<sup>74</sup> Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el Texto Refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor

<sup>75</sup> SAN de 1 octubre 2003 (RJCA\2004\238) Ponente: Pedro Jesús García Garzón

### **2.3.3.2. Physical and Psychological Damages and Damages Schedules Act**

Chart III from the Damages Schedules Act sets basic compensation for permanent physical injuries through a system that ranks physical and psychological damages 1 (less compensation) to 100 (more compensation), and distinguishes different amounts depending on the victim's age: the older the victim is, the less he will receive.

The amounts provided in Chart III tend to underestimate damages. For this reason, the basic compensation for permanent physical injuries in Damages Schedules Act are far from the ones awarded by Judge Bermúdez.

To solve that, Chart IV establishes corrective factors to basic amounts set by Chart III. Thanks to these factors, basic compensation may increase and get closer to compensation amounts awarded by judge Bermúdez. To prove this, *Section 2.3.6.* will provide some practical examples.

Finally, Chart VI<sup>76</sup> classifies physical damages in eight different chapters that group physical injuries in different parts of the body. Eventually, there is a Special Chapter devoted to aesthetical damages.

### **2.3.4. Material damages**

In the present case, basic material damage compensation is subject to proof: it depends on expert opinions and documentation submitted by parties. Once proof is submitted, the execution sentence will determine the material damage compensation amount. In addition, the court awards compensation for future expected expenses, which will consist in 10% of the total material damage compensation amount.

Material damages are not included in any of the Charts from the Damages Schedules Act, but they are awarded due to the principle of full compensation. However, it is necessary to provide proof to establish the compensatory amount.

Note that as mentioned above, Law 32/1999 limits State's obligation to compensate victims of terrorism to physical and psychophysical damages.<sup>77</sup>

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<sup>76</sup> Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor

<sup>77</sup> Provision 2.2 and article 6 from Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

### **2.3.5. Laura Vega's exceptional case**

As an exception, due to the extreme severity of the injuries, Laura Vega relatives receive a compensation of 1.000.000€. In addition, 250.000 will be deposited for her treatment and health care.

It is important to take into account that Laura Vega already receives 900.000€ because of Group 12 physical and psychological damages' compensation, where extreme injuries fit. As a result, her relatives' compensation does not answer to any sort of physical injury. Therefore, 1.000.000€ compensation only fits within the category of moral damage.

Corrective factors from permanent damages (Chart IV Damages Schedules Act) do not include any compensation for relatives. Thus, Laura Vega relatives' compensation looks more alike to death compensation in Damages Schedules Act. This may be justified by the permanent vegetative state of the victim.

In addition, 250.000€ compensation for Laura Vega's treatment fits within the category of material damage because the compensation will be aimed at paying health expenses.

### **2.3.6. Judge Bermúdez Compensation Amounts v. Damages Schedules Act**

This Section aims at providing some Damage Schedules Act compensation examples to serve as a comparison element with the amounts awarded by Judge Bermúdez to terrorism victims.

To carry out this analysis, two real cases pertaining to different Groups of severity have been picked up.

#### ***2.3.6.1. Group 4 Damages case***

The present analysis has chosen one of the cases that rank Group 4 from 12, according to the plaintiff injuries' severity level. In the 11-M Terrorist Attacks Judgment the following information from the plaintiff has been provided:

- His injuries required 96 days to heal:  
⇒ 1 hospitalization day

- ⇒ 35 impeditive days
- ⇒ 60 partial impeditive days

- Permanent physical damages: hearing loss and tinnitus

Because the judgment only provides the name and the injuries suffered by each of the plaintiffs, the following information needed for the analysis has been presumed according to average criteria:

- Victim of 30 years old
- Annual income of 50.000€

#### 2.3.6.1.1. Judge Bermúdez Compensation Amounts

Plaintiffs included in Group 4 will receive the following compensation amounts:

<b>Concepts</b>	<b>Compensation (euros)</b>
Minimum awarded to all plaintiffs (moral damage)	30.000
Physical and psychological damage from Group 4 (permanent injuries)	15.000
Temporary disability: 96 days x 300€	2.880
<b>TOTAL</b>	<b>47.880</b>

#### 2.3.6.1.2. Damages Schedules Act

The following Chart shows the compensation amount resulting from applying 2007 Damages Schedules Act and Chart VI.<sup>78</sup>

<b>Concepts</b>	<b>Compensation (euros)</b>
<b>Permanent injuries</b>	
1. Basic compensation (Chart III)	
• Hearing loss: 10 points	

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<sup>78</sup> Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor

<ul style="list-style-type: none"> <li>Tinnitus: 3 points</li> </ul> <p>To obtain final punctuation this formula is applied:</p> $\frac{(100 - M) \times m}{100} + M$ <p>The result is 12,7 → 13 points 30 points x 808,93€/point</p>	10.515,96
<p>2. Correction factors (Chart IV)</p> <ul style="list-style-type: none"> <li>Economic damage: 50% from basic compensation</li> <li>Permanent injuries that imply a disability for the day to day activities of the victim: Partial</li> </ul>	5.257,98 16.537,11
<b>Temporary disability</b>	
<p>1. Basic compensation (Chart V)</p> <ul style="list-style-type: none"> <li>Hospitalization days: 1 day x 61,97€</li> <li>Impeditive without hospitalization: 35 days x 50,35€</li> <li>Not impeditive without hospitalization: 60 days x 27,12</li> </ul>	61,97 1762,25 1627,2
<p>2. Correction factors (Chart V)</p> <ul style="list-style-type: none"> <li>Economic damage: 50% form basic compensation</li> </ul>	1725,71
<b>TOTAL</b>	<b>37.488,18</b>

### 2.3.6.2. Group 12 Damages: Laura Vega's case

The present case analyzes one of the cases that rank Group 12, which includes the most severely injured. Laura Vega's case is emblematic because she is the plaintiff who suffers the most severe injuries in the 11<sup>th</sup> March terrorist attacks, and therefore, the plaintiff that achieves higher compensation.

In the judgment the following information from the plaintiff that has been picked up for this analysis is provided:

- His injuries required 180 days to heal:  
⇒ 180 hospitalization day
- Permanent physical damages: persistent vegetative state. Important aesthetic damage.

Because the judgment only provides the name and the injuries suffered by each of the plaintiffs, the following information needed for the analysis has been presumed according to average criteria:

- Victim of 30 years old
- Annual income of 50.000€

2.3.6.2.1. Judge Bermúdez Compensation Amounts

Plaintiffs included in Group 12 will receive the following compensation amounts:

<b>Concepts</b>	<b>Compensation (euros)</b>
Minimum awarded to all plaintiffs (moral damage)	30.000
Physical and psychological damage from Group 4 (permanent injuries)	900.000
Temporary disability: 180 days x 300€	54.000
<b>TOTAL</b>	<b>984.000</b>

2.3.6.2.2. Damages Schedules Act

The following Chart shows the compensation amount resulting from applying 2007 Damages Schedules Act and Chart VI:<sup>79</sup>

<b>Concepts</b>	<b>Compensation (euros)</b>
<b>Permanent injuries</b>	
1. Basic compensation (Chart III)	
• Permanent vegetative state: 10 points 27.774,29 x 30 = 83.228,7	
• Important aesthetic damage: 50 points 1756,15 x 30 = 52.684,5	

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<sup>79</sup> Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor

When dealing with aesthetical damages, the formula explained above does not apply. Aesthetic damages result is added to permanent injuries result. <sup>80</sup>	135.913,2
2. Correction factors (Chart IV)	
• Economic damage: 50% from basic compensation	67.956,6
• Permanent injuries that imply a disability for the day to day activities of the victim: Permanent Absolute	165.371,17
• Severe disabled: permanent physical damages that need the assistance of others	330.742,34
<b>Temporary disability</b>	
1. Basic compensation (Chart V)	
• Hospitalization days: 180 day x 61,97€	11.154,6
2. Correction factors (Chart V)	
• Economic damage: 50% form basic compensation	5.577,3
<b>TOTAL</b>	<b>716.715,21</b>

### **2.3.6.3. Analysis of the results: loss of income?**

If we compare both damage compensation methods, the distance among final amounts is only of about 10.000€, meaning that Damages Schedules Act example comes closer to the compensation awarded by Judge Bermúdez.

However, this approximation is due to the fact that Damages Schedules Act example has not only taken into account basic compensations that tend to underestimate. It has also incorporated some corrective factors that allude to the loss of income like economic circumstances that affect the ability to work of the victim, or permanent disability to carry out any day-to-day professional activity. It also includes the need of assistance of others by the victim and housing or vehicle adaptation.

As a result of this analysis, it can be concluded that one possibility to explain the high compensation amounts awarded in 11<sup>th</sup> March case is that judge Bermúdez also included some sort of corrective factors in the compensation, like loss of income. In addition, Spanish tort law system based in article 1902 from the Spanish Civil code calls for the compensation of all

<sup>80</sup> Álvaro Luna Yerga. Sonia Ramos González. “Accidentes de circulación más baratos para el causante y más caros para la victim. Modificación de los baremos por la Ley 34/2003”. *InDret 01/2004*. Working Paper no: 188. Enero de 2004

damages.<sup>81</sup> Under this principle of full compensation for the damage caused, road accident compensation should include loss of profits.<sup>82</sup>

Nevertheless, the court does not expressly manifest the inclusion of loss of income compensation in the judgment.

In conclusion, if Judge Bermúdez has merely included physical and psychological damage in the amounts awarded, his compensation would be excessive in comparison to basic compensation awarded in Damages Schedules Act, which is an instrument that sets standard compensations.

### **3. ANALYSIS**

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#### **3.1. CONVERGENCE MOVEMENT IN COMMON LAW AND CIVIL LAW JUDICIAL ROLES**

This paper has analyzed damage compensation in mass-tort litigation through the study of two leading cases stemming from two different legal traditions that face several differences.<sup>83</sup>

In civil law tradition the judge is in charge of the analysis of the facts. As a consequence, the decision maker is engaged and is entitled to move the process forward.

Common law is an adversarial system: the judge allows lawyers to present the case and fight against each other in order to define the facts. This system has faced some criticism because attorneys' goal is not to find out the truth, but to get the best result for their clients.

As a result, common law judges have become more engaged, especially in class action cases where a settlement is involved. Therefore, a movement towards convergence has started.

#### **3.2. SIMILARITIES**

The reason for choosing World Trade Center Site Litigation and 11-M Terrorist Attacks Judgment as comparative models is based on the facts similarities.

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<sup>81</sup> Oriol Mir Puigpelat Supra 21

<sup>82</sup> STS de 25 marzo 2010. RJ\2010\1987. Ponente: Juan Antonio Xiol Rios.

<sup>83</sup> Latin American Law. Angel R. Oquendo. Chapter 11: Histories and Visions of Procedure



In a short period of time two terrorist attacks by Islamic forces shocked the whole world. These attacks have been considered the biggest in their respective countries and have had a deep impact in the society

As a consequence, a large number of victims became plaintiffs that needed to be compensated for having suffered this catastrophe. Thus, courts from both countries were overwhelmed with claims filed by lots of plaintiffs (about 1800 in Spain and 10.000 in the US) who suffered a wide variety of injuries with different severities. This situation led to two mass-tort litigation cases, which have been considered one of the most complex cases in the history of their own respective countries mass-tort litigation.

Mass-tort cases are a challenge for courts, which have to deal with diverse pleadings and different evidences for each plaintiff damages. In addition, time and expense to solve the case run against the court making it impossible to solve on a case-by-case basis.

As a result, judges need to explore some methods to work this situation out. In the cases at hand, to sort mass-tort litigation problems out and given the extraordinary events that were being trialed, both courts proceeded in different innovative ways through ad hoc instruments. The only aim was that victims received proper and fair compensation.

While in the US a mechanism to encourage fair settlement compensations for more than 10.000 plaintiffs was set, in Spain a criminal ruling awarded fair compensation to terrorism victims.

### **3.3 DIFFERENCES**

#### **3.3.1. Different plaintiffs, defendants and legal instruments**

Even though both cases arose as a result of terrorist attacks, they present different plaintiffs, defendants and legal instruments used by courts to award compensation on victims.

While in Spain plaintiffs were direct victims of terrorism, in the US they were indirect due to the fact that their injuries appeared as a result of cleaning the World Trade Center zone.

On the one hand, 11<sup>th</sup> March case involves a criminal judgment against the perpetrators of the attack. Defendants are terrorists although compensation is awarded by the State who is

extraordinary<sup>84</sup> obliged to pay without assuming subsidiary liability<sup>85</sup>. This duty arises from solidarity and requires the State subrogation in plaintiffs' position<sup>86</sup>.

On the other hand, in World Trade Center Site Litigation there is no criminal case and no judicial ruling. Everything happens in a pre-trial civil phase where the judge uses managerial judging techniques to achieve a fair settlement. In this case defendants are, among others, the City of New York and contractors in charge of removal works.

In Spain, parties are also entitled to reach a settlement according to article 19.2 from *Ley de Enjuiciamiento Civil*,<sup>87</sup> which allows parties to reach a settlement that the judge will approve if some formal requirements are met.<sup>88</sup>

While in World Trade Center Site Litigation Judge Hellerstein managerial powers allow him to encourage settlement and also to reject it based on his fairness perception, in Spain the judge does not have managerial powers and his intervention is more limited because he can only reject a settlement if it is illegal.

### **3.3.2. Causal nexus**

11-M Terrorist Attacks Judgment establishes existence of causal nexus between the terrorist attacks performed by the defendants, who have already been held criminally liable, and the damages suffered by the victims. Consequently, the judge is entitled to determine compensation amounts.

On the contrary, in World Trade Center Site Litigation there is no ruling or proof that establishes causal nexus between the defendants and the diseases from the plaintiffs.

Even though some objective criteria tests are established for some injuries, certain cancers or cardiac problems causal nexus are highly speculative.

Therefore, Hellerstein carries out his managerial powers assuming that there is causal relationship between debris removal works and the plaintiff's injuries.

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<sup>84</sup> Provision 2.1 Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

<sup>85</sup> Provision 2.3 Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

<sup>86</sup> Provision 8 Law 32/1999, of 8<sup>th</sup> October of solidarity with the victims of terrorism

<sup>87</sup> Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (LEC)

<sup>88</sup> Provision 206.2,2 from Ley de Enjuiciamiento Civil (LEC)

### **3.3.3. Judicial managerial powers**

Judge Hellerstein and Judge Bermúdez shared the same challenge and the same goal: to obtain fair compensation for terrorism victims while dealing with a mass-tort litigation case.

However, they use very different methods given the particularities of each case.

Judge Hellerstein makes use of managerial judging powers in such an innovative way that he has even written a paper<sup>89</sup> to justify this process. To conduct more than 10.000 cases discovery proceedings, he carries out a series of pre-trial measures.

First, judge Hellerstein issues a Core Discovery order to obtain information from all plaintiffs and defendants to be able to classify them according different factors and consequently, award compensation according to each plaintiff circumstances.

Core Discovery order would fit within the juridical Spanish concept “*Diligencias preliminares*”<sup>90</sup> that the judge orders to obtain all information necessary to file a suit in the future.

Second, he creates a Severity Chart, which selects injuries alleged with more frequency and ranks them according to their relative severity. Severity levels are also used in 11-M Terrorist Attacks Judgment to establish 12 compensation groups.

Finally, judge Hellerstein creates an electronic Database that has to be filed by all plaintiffs within a schedule method that plans to complete all fields in 2 years. When first responses were provided, the court was able to decide which cases would go on early trial because of the severity of injuries involved.

The creation of this Database was the greatest achievement of Judge Hellerstein. Thanks to it, the court was able to overcome its inability of dealing with 10.000 cases because they had a method to decide which cases were more relevant and had to be decided first as bellwether trials. The aim of starting trialing cases was to put some pressure on parties to reach a fair settlement and avoid expenses that time was causing on plaintiffs.

In addition, the database would help the parties to settle because it establishes compensations amounts through the assignation of values across categories of claimed injuries.

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<sup>89</sup> Alvin K. Hellerstein, James A. Henderson, Jr. Aaron D. Twerski, *Supra* at 2.

<sup>90</sup> Provision 256 from Ley de Enjuiciamiento Civil (LEC)

US Managerial judging powers have achieved a great extent in this case. Even though there was no direct legal basis, Judge Hellerstein was able to reject the First Settlement that parties submitted because he was acting out of the very best of intentions and protecting the very vulnerable plaintiffs.

In 11-M Terrorist Attacks Judgment the judge exercises its discretion through the establishment of compensation amounts. This discretion exists in any assessment of physical damages outside the Damages Scales Act. Therefore, in Spain the judges do not have managerial powers. As a result, they are not able to move so many resources, hire experts like Special Masters to organize the process, or create such a complex database.

### **3.3.4. Comparison of the Compensation Method**

World Trade Center Site Litigation and 11-M Terrorist Attacks Judgment victims' compensation take into account the severity of the injuries. Both courts want to award the maximum to most severe injured.

Judge Bermúdez is able to apply his discretion by setting compensation amounts, while in the US the parties have to establish the amounts through a settlement that later will have to be approved by the judge.

The cases at hand follow different methods. US system is more complex, but also the amount of plaintiffs is 5 times higher than the Spanish case. However, some comparison can be established between the two compensation amounts.

#### **3.3.4.1. Moral Damages**

11-M Terrorist Attacks Judgment establishes 30.000€ compensation to all plaintiffs, independently of their injury. World Trade Center Site Litigation sets a basic payment of 3.500\$ for all plaintiffs and the option to apply Cancer Insurance Policy. To get this basic payment it is not necessary to have a qualifying injury.

Everything points out that these basic amounts awarded in both cases are moral damages in Spain and pain and suffering in the US. This kind of compensation is awarded because of the

exceptionality of the terrorism offence and its social impact.

#### ***3.3.4.2. Physical and Psychological Damages***

11-M Terrorist Attacks Judgment rank injuries severity from Groups 1 to 12, while World Trade Center Site Litigation case ranks them in four Tiers. Groups 3 to 12 in Spain and Tiers 2 to 4 in the US receive progressive additional compensation according to their severity.

While in the US the settlement only sets fixed amounts for Tiers 2 and 3, leaving 95% of the funds for Tier 4, in Spain the court sets fixed amounts for absolutely all of the victims.

Both judges priority has been to compensate the most seriously injured. Thus, Hellerstein approves a settlement where the distribution was made by allocating the gross amount (95%) to Tier 4 plaintiffs, which are those most seriously injured. In Spain, Laura Vega, who is the most seriously injured, and her relatives, also receive an extraordinary compensation.

While in the US the compensation has been established by a bargain between plaintiffs and defendants until reaching an amount that the court found fairly enough, in Spain the court has fixed the amounts in a discretionary manner. It has been generous if we compare it with compensation awarded in other Spanish legal instruments.

#### ***3.3.4.3. Damages Schedules Act Comparison***

Even though Judge Bermúdez had the possibility of setting compensation amounts without distinguishing what kind of damages he was awarding, he established several distinctions that have some similitude with Damage Schedules Act classification.

In both cases the same damage categories were directly or indirectly compensated: moral damages, permanent physical and psychological damage, and temporary disability. However, Damages Schedules Act is more accurate.

After having numerically tested the distance between quantities awarded in a standard scheduled legal instrument such as Damages Schedules Act and 11-M Terrorist Attacks compensation, some conclusions can be raised.

First, temporary disability compensation amounts are much more higher in Judge Bermúdez compensation.

Second, physical and psychological damage compensation in 11-M Terrorist Attacks is far from basic permanent injuries compensation in Damages Schedules Act. Therefore, it looks like the court has awarded an exorbitant and excessive compensation.

If some corrective factors like loss of income were added to the basic compensation, the result would come closer to Judge Bermúdez compensation. As a consequence, it is a possibility that physical and psychological damage compensation in this case may be explained if judge Bermúdez included loss of income in the compensation, according to full compensation of damage theory.

Finally, while Bermúdez sets 30.000€ moral damage compensation to all plaintiffs, Damage Schedules Act includes moral damage in basic compensation amounts. Therefore, the latter does not establish a separated specific compensation for moral damages.

In any case, 11-M Terrorist Attacks compensation amounts are higher than any scheduled legal instrument because the court, through its discretion, has been able to individualize the amounts, taking into account the exceptionality of the case.

#### ***3.3.4.4. Spanish mass-tort litigation: Colza case***

Spanish judiciary has also dealt with other mass-tort litigation cases. One of the most outstanding is the Colza case, in which more than 20.000 people were injured and 330 were death as a result of having taken colza oil.<sup>91</sup> Thus, causality nexus was proven between oil manufacturers and victims' diseases.

Unlike in 11-M Terrorist Attacks Judgment, in this case the State was held subsidiary responsible because of its public officials fault.<sup>92</sup>

Criminal judgment of Colza case establishes 10 different sorts of compensation, explained in the following Chart:

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<sup>91</sup> Francisca Sauquillo y José Manuel Gómez Benitez. "La sentencia de la colza. El caso del aceite tóxico". *El país Archivo*. 1 de Junio 1989.

[http://elpais.com/diario/1989/06/01/espana/612655207\\_850215.html](http://elpais.com/diario/1989/06/01/espana/612655207_850215.html)

<sup>92</sup> Emilio Jiménez Aparicio. La ejecución de la sentencia de la colza I. *InDret 1/2003*. Working Paper no: 112. Enero de 2003

<b>Category</b>	<b>Compensation amount (euros)</b>
Plaintiffs with injuries that lasted between 1 and 15 days	901,52
Plaintiffs with injuries that lasted between 16 and 30 days	1.803,04
Plaintiffs with injuries that lasted between 31 and 60 days	3.606,07
Plaintiffs with injuries that lasted between 61 and 90 days	5.409,11
Plaintiffs with injuries that lasted more than 90 days and that did not imply permanent disability	108.182,18
Plaintiffs with partial permanent disability to carry out his regular work	150.253,03
Plaintiffs with total permanent disability to carry out his regular work	240.404,84
Plaintiffs with total and permanent disability to carry out any kind of work	450.759,08
Plaintiffs with severe disability	540,910.89
Relatives or affected by death of each person	90.151,82

11-M Terrorist Attacks Judgment and Colza case Judgment establish classifications that take into account the severity of the injuries.

However, Colza case establishes a more rudimentary compensation system because it sets a single amount for each category. In addition, it does not distinguish between moral and physical damage.

In conclusion, 11-M Terrorist Attacks Judgment has proven to be one of the most evolved cases in Spanish jurisprudence relating damage compensation in mass-tort litigation, given the fact that the judge distinguishes different damage categories and does not only award a single amount where all damages are included.

## **CONCLUSION**

Through the previous Sections two complex and symbolically significant cases involving mass-tort damage compensation for human catastrophes, have been analyzed and explained in detail.

Note that World Trade Center Site Litigation is a pre-trial civil proceeding whose victims injuries are presumed to be a consequence of debris removal from terrorist attacks site, while 11-M Terrorist Attacks Judgment involves a criminal ruling, whose plaintiffs are direct victims of terrorism.

To avoid mass-tort litigation problems and award fair compensation for victims, both judges have played an active role and have applied different innovative mechanisms in their respective legal systems.

US technique in dealing with mass-tort cases is far more sophisticated than the Spanish one, but it is also capable of moving more resources. Thus, Judge Hellerstein was able to make use of managerial judging powers in an innovative way. His main achievement was the creation of a complex database that led parties to settle.

Unlike in Spain, US judiciary is extremely involved and is able to control the fairness of settlement agreements. However, 11-M Terrorist Attacks Judgment has proven to be a case where the judge also plays an important judicial role in terrorism mass-tort damage compensation, even though not exerting such evolved managerial powers.

Both cases compensation systems take into account moral damages, which are named pain and suffering in common law. In addition, they rank physical and psychological damages compensation according to their severity, like in Colza case. However, the latter awards a single compensation amount.

Bermudez ad hoc compensation system distinguishes different categories from damages. To try to give an explanation to the amounts awarded in this case, Damages Schedules Act has been used as a helpful element of comparison.

To end up, it is certain that mass-tort cases will continue to challenge our courts. The cases analyzed provide an example of methods involved to make easier the judges' goal to obtain a fair compensation for terrorism victims.



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