

The Value of Human

BY ARDIAN GILL

Kenneth Feinberg's book *What Is Life Worth?* chronicles the process of trying to compensate the survivors of the victims of 9/11 and how it changed him.

IT WAS SHORTLY AFTER 9 A.M. on that bright September day when Meena took a call from her husband on a high floor of the World Trade Center. "I'm cornered and can't get out," he told her.

Three anguished years later, she and her son were handed government checks totaling \$1.9 million. The saga of how a bill was rushed through Congress in the immediate aftermath of the horror of 9/11 and resulted in those checks being passed to Meena and to the kin of 5,561 other victims is the subject of *What Is Life Worth?* a book by Kenneth R. Feinberg, the man who had the sole authority and awesome task of distributing the money.

Amazingly, Congress set a limit on neither the size of the individual awards nor the total paid, the payments coming from general revenues rather than from a specific appropriation.

Judging solely from the title, one might think the task was routine, a question life insurance underwriters answer every day: How much death benefit is appropriate for a given insured? We soon learn how far from routine this task was.

Congress established the Victim Compensation Fund as part of the Air Transportation System and Safety Stabilization Act. Its intent was less to aid the victims' survivors than to keep them from suing the airlines and bringing them to bankruptcy, something they are managing to do all by themselves, thank you very much. (One of the conditions of receiving money from the fund was an agreement not to file suit.) Thus a more descriptive title might have been, "What Will You Take to Stay Out of Court?" The burden of answering that question was made vastly more

complex than a life underwriter's because non-economic compensation had to be calculated as well, what we laymen know as "pain and suffering." Cast your mind over some jury decisions on that score and you'll realize how disparate their conclusions have been.

Feinberg applied for the job of special master, offering as qualifications his having served as mediator on a number of occasions, most notably between the chemical companies and Agent Orange victims of the Vietnam War. It would be fair to wonder how a Kennedy Democrat (he was Ted Kennedy's chief of staff) ever came to be considered for the job in the younger Bush's administration. Then again, if we reflect that he would be a target for all the criticism that would come with the job, it's not hard to accept that Attorney General Ashcroft embraced Feinberg's candidacy, sweetened as it was by his taking the job pro bono. Two attorneys, members of his firm, also served without pay, as did a newly



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minted graduate of Pennsylvania Law, looking for an interesting assignment. To this group Ashcroft added two members of the Justice Department staff (“Trust but verify”), one of them Dick Cheney’s son-in-law.

For the formidable administrative chores, Feinberg solicited bids from five firms and awarded a contract to PriceWaterhouse Coopers. PWC established a special office near Washington and satellite offices throughout the country. At one point, PWC had more than 400 people on the job, eventually collecting more than \$76 million in fees and expenses. It sounds a lot compared with Feinberg’s expenses of only \$400,000, but if you do the math it’s only about \$60,000 annually per head—cheap for consultants.

Feinberg takes us through his thought process (“I refused to exercise Solomonic judgment”) in deciding to broad-brush the pain-and-suffering awards, settling initially on \$250,000 for each death, plus \$50,000 (later upped to \$100,000) for each of the vic-

tim’s dependents. More individual consideration was to be given to the injured, such as severe burn victims. A few were eventually awarded more than \$8 million.

After considering both economic and non-economic loss, Congress added what the author calls “a statutory curveball”: All life insurance, pensions, Social Security, death benefits paid by employers, workers’ comp, 401(k)s, and the like were to be deducted. Feinberg pins this on Sen. Don Nickles (R-Okla.), but the bill passed the house with only three dissents, so the entire Congress was complicit. Sen. Jon Corzine (D-N.J.) introduced an amendment to repeal, but it died in committee.

This provision caused the most trouble, even leading to two lawsuits against Feinberg, both dismissed. It also caused employers to threaten to withhold payment from their own funds. When Feinberg tried to deduct charitable payments as well, all hell broke loose and he had to cave. Workers’ comp companies demanded

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reimbursement, so that deduction was dropped as well. The widow of one firefighter, incensed at the life insurance deduction, attacked him personally: “I spit on you and your children.”

Pilloried

It took six weeks for his legal team (is the collective noun an “argument of attorneys”?) to hammer out regulations and claim forms. With characteristic understatement, or perhaps unconscious irony, the author says: “We made a concerted effort to create a simple claim form, but were not entirely successful.” The form topped out at 31 pages. According to Feinberg, it was “...long enough to intimidate some traumatized family members and [to] infuriate others.”

To bring the process to the victims’ relatives, town meetings were held throughout the country, Feinberg attending 900 himself and his staff another 600. Meena went to several. At the first meeting, she was accompanied by an older brother who had flown from India to offer moral support. He left the meeting shaking his head in disbelief at Feinberg’s matter-of-fact, even jocular attitude before an audience of the bereft.

He wasn’t alone. *New York Times* articles of the day quoted participants’ criticism of Feinberg’s “personal management style,” his “hard-sell style,” and the “emotional price exacted by Feinberg’s conduct.” A *Times* article in December 2001 recounts an exchange at one meeting: When asked, “What is life worth?” he flippantly replied, “You’d have to be a rabbi or a priest to try to answer that.”

If the word “pilloried” didn’t exist, it would have been invented just for Feinberg. A year after the *Times* article cited above, that paper would quote other complaints: “He breaks promises, delays decisions repeatedly, provides conflicting guidance”; he “talks out of both sides of his mouth.”

A man named Wolf, who had lost his wife on 9/11, took his criticism to the web, starting a site called “Fix the Fund.” To his credit, Feinberg tells a tale or two on himself, one of them where he announced to the grief-stricken audience that the fund was “the only real game in town.” This gaffe provoked one of the many instances of hostility he would encounter, this time in the hallway after a town meeting: “I see that your name is Feinberg. Well, we don’t need *your kind* on Staten Island.”

Also to his credit, he learned from his experiences, morphing from a “hard-sell” numbers guy to an intent listener and empathetic arbiter. The book details this personal catharsis as well as taking the reader through the determination process. When Meena met with him personally toward the end of the ordeal, she found him compassionate and receptive, even encouraging her to include in her claim the loss from her husband’s futures options, which expired without value, as she had not known they even existed.

Feinberg placed the emphasis on need, and therein hangs a tale: In a *Times* op-ed piece in early 2002, a spokesperson for two

investment banking firms that had lost 133 employees between them argued that economic loss, not need, should be the criterion for awards. Presenting documents related to bonuses and stock options, future prospects, etc., such firms sought to justify awards of \$20 million or more, one beneficiary angrily inviting Feinberg to visit a Long Island estate to see what was required to maintain the family’s former lifestyle.

An organization of forensic economists (yes, there are such things) formed a committee to criticize Feinberg’s proposed settlements as “profoundly unfair to high-salaried victims,” a “welfare package,” “badly skewed,” asserting that he had “wildly overestimated the future growth of young victims’ paychecks.” Feinberg stoically rejected such arguments and, determined to compress the range of awards, succeeded in topping death settlements at around \$7 million with an average of \$2.1 million. As for skewness, judge for yourself; the median wasn’t too far from the mean at \$1.7 million.

The numerically oriented will find the appendix of the book rewarding. The awards are broken down in numerous ways with both tables and graphs. Here we discover that awards for deceased victims who had annual income of \$4 million or more averaged \$6.4 million while those with zero income averaged \$800,000. There are several inconsistencies between the text and the tables in this regard, possibly because Feinberg had to rely on preliminary figures. Missing from the appendix, though the text says otherwise, is a sample worksheet with which beneficiaries could calculate their probable awards. This would have been helpful in understanding the numbers behind the results.

We Grieve Together

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The chapter on these questions is one of the most interesting and heart-rending. Some biological parents refused to take phone calls from their sons’ fiancées whom they had earlier embraced. Feinberg philosophizes that it wasn’t about money but frustration: The fiancée deprived of a “life’s partnership that would never be” while “the parents tried to deny any living symbol of a future that would never be.... It was the only way they could cope.”

In meeting with fiancées, he could offer little beyond the usual platitudes, e.g., “You have your whole life ahead of you,” concluding that “In the end, I emphasized the value of memory...a link to a happier past. Memory...became the most valuable anodyne in my small chest of pain relievers.” So, to his surprise, he fell into the role of rabbi or priest that he had earlier rejected.

The book offers insights into cultural and attitudinal differences across the country and across the globe (there were 249 foreign claims). In contrast to the hostility on Staten Island, in Virginia he found the families, mostly military, “remarkably civil,”

focusing on group rather than individual concerns. In California, he found that in the questions the word “We” replaced “I.” An example: “We grieve together.” In Sacramento the audience held hands and prayed silently. Feinberg admits that he found these regional differences discomfiting, admitting, “I was more comfortable in the combative world of New York.”

In London, he found another attitude entirely—skepticism and incredulity. “Do you mean to tell us, Mr. Feinberg, that your government is prepared to give each of us \$2 million...What’s the catch?” In his personal interviews, he encountered another difference in attitudes, in this case about religion. They ranged from “Either there was no God or God had betrayed them” to “refortified faith.”

Closure

The book concludes with a couple of questions: Was the fund a success? Should it serve as a precedent for future disasters? Was the formula appropriate?

As to the first question, he proclaims the fund a “stunning success the valedictorian of all compensation programs, public or private.” While this sounds immodest, the figures bear him out. Ninety-seven percent of eligible families filed claims for the deceased victims, eventually receiving \$6 billion in tax-free compensation. Another billion went to 2,682 injured out of 4,400 claimants. He doesn’t tell us about the other 1,718.

You’re right to wonder about those who neither filed nor sued. One answer is the inability to cope: “Just leave it [the application] on the table, Mr. Feinberg, I’ll deal with it later.” Alternatively, the recognition that money cannot replace life. “It’s ghoulish and repulsive” or “It’s hush money.”

The expenses were only 1.2 percent of the awards, which Feinberg points out compares favorably with the expenses-to-disbursements ratio of charities. Recalling that the purpose of the fund was to minimize lawsuits, its success is clear: Fewer than 90 people opted to sue. Even his harshest critics came around. Wolf changed the name of his website to “The Fund Is Fixed.” Feinberg lists five reasons for claiming success, including: “The fund offered certainty without significant delay, allowing families the option of a type of ‘closure.’” The book, we can conclude, is Feinberg’s own closure.

Should the experiment be repeated in connection with Katrina’s devastation, for example? While that tragedy was obviously not in his thoughts, he does refer to the earlier World Trade Center bombing, to Oklahoma’s Murrah building explosions, to the Cole incident, the Johnstown Flood, etc. He concludes that the fund should not be a precedent. (While he declares the Fund a “unique response,” there was a precedent in U.S. history—compensation for homes burnt by the British in the war of 1812.) He bases this conclusion on some rather vague and waffly reasons: “Free choice... self-reliance... inconsistent with liberty... unsound public policy... A statutory no-fault program extended to a wide range of injuries would undermine personal responsibility.” I guess he would repeal no-fault auto insurance.

Equally unconvincing to this writer are his arguments that workers’ comp be the model in the event Congress does see fit to enact similar legislation: same amount for every victim, no deduction for insurance, etc. Then he waffles again, allowing that

if the amount is too small it won’t keep people out of court. And if it’s large enough to accomplish that purpose, it “would not pass political muster.” But isn’t that exactly what happened 11 days after 9/11?

Never mind. Perhaps it’s better to embrace the conclusions of someone who went through three years of thankless and unremunerative hell than to jump to our own conclusions. The cliché is that the only certainty is change, so how did the experience change Feinberg?

He radically downsized his law firm and abandoned mediation of disputes between *Fortune* 500 companies. He opted instead to take only interesting assignments, such as disputes about alleged sexual abuse in the Roman Catholic Church or cases of complaints of racial discrimination. He teaches torts at several universities and does not plan too far ahead, reflecting his experience with the randomness of death.

The book is not without faults, some suggested above, but anyone interested in this journey through a complex and hastily conceived experiment, with no guidelines and/or in the personal journey from dispassionate mediator to compassionate companion, should read this book.

As for Meena, she and her son have not yet been able to spend the money they received from the fund, leaving it for a bank to attend to. In seven years, when her deferred annuity matures, she may finally be able to deal with it.

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