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*continued from "Wrongful Death"*

#### Loss of parental care and guidance

Children who have lost a parent as a result of someone's negligence are entitled to recover damages for their loss of parental care and guidance. It is the attorney's job to elicit testimony to demonstrate not only the things that the parent did for the child, but, far more importantly, what kind of parent he or she was. A monetary award is cold comfort to a child who has lost a parent, but it is the only recompense the law allows. As attorneys, it is our job to make sure that these children get every penny to which they are entitled.

#### Conscious pain and suffering

The estate of the decedent is also entitled to recover damages for the the conscious pain and suffering that the decedent endured prior to death.

To recover damages for conscious pain and suffering, the attorney must demonstrate not only that the decedent was alive for a period of time follow-

ing the accident, but also that he had some awareness of his pain. This may be elicited through eye-witness accounts, as well as through expert testimony based upon medical records and even the autopsy report.

#### Proving that the accident caused death

In some cases, it is indisputable that the death was the result of an accident. But in some cases, the defendant argues that the death had nothing to do with the prior accident. In these cases, we must provide medical documentation linking the death to the accident.

We are fighting precisely this fight on behalf of the estate of the firefighter who succumbed to depression brought on by the severe ankle injury which ended his career with the FDNY. It is our job to make the jury realize that this firefighter's death was caused by the truck which hit him. To prove this link, we have had a psychiatrist review all of the firefight-

er's medical records. Unfortunately, the suicide note is not admissible evidence. However, based upon these records, and other evidence including interviews with some of our client's fellow firefighters, and the timing of the news that he was being terminated, our expert has concluded that the accident was the competent cause of our client's death.

#### Summary

The laws surrounding death claims are often criticized as being antiquated. This is in part because the value of the case is so often tied to the financial worth of the decedent, and also because the grief and pain that the survivors endure is not compensable. However, the emotional testimony that often surrounds these cases can certainly impact the award. An experienced personal injury attorney plays a critically important role in maximizing the recovery to the family.

# FIREFIGHTERS' NEWSLETTER

THIS DOCUMENT CONTAINS IMPORTANT INFORMATION ABOUT FIREFIGHTER RIGHTS



## SPECIAL MASTER APPOINTED FOR ZADROGA VICTIM COMPENSATION FUND

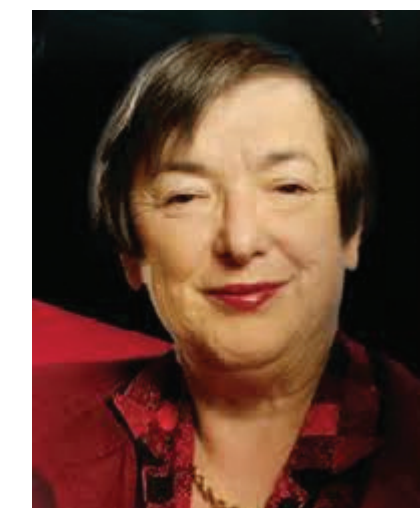
At last! After five months of anticipation, Attorney General Eric Holder has appointed Shiela Birnbaum to serve as Special Master of the September 11<sup>th</sup> Victim Compensation Fund. A partner at the prominent law firm Skadden, Arps, Slate, Meagher & Flom, Ms. Birnbaum earned the moniker "Queen of Torts" by successfully representing corporations against mass tort claims. But she also has experience working with victims and family members of those killed in the 9/11 attacks. In 2006, she served as a mediator for 95 9/11 cases, a process she handled with great empathy. She gained the trust of those family members, ultimately settling 92 of the cases for \$500 million.

In her new role as Special Master, she will have to decide how the \$2.8 billion fund will be allocated to victims. Thus, she will decide how much victims should receive for various ailments, as

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Michael Barasch and Joe Zadroga



Sheila Birnbaum, New Special Master

## HOW MUCH ARE WRONGFUL DEATH CASES WORTH?

#### How are monetary damages computed?

At the age of 34, our client, a firefighter, was seriously injured in an off-duty motorcycle accident. He desperately wanted to return to work, and underwent two surgical procedures to rebuild his shattered ankle. Plates and screws were put inside his leg in order to mend the fractures. Months of painful physical therapy followed. A year later, the hardware was removed. More painful therapy followed. Tragically, after all of this, he learned that he had developed necrosis at the site of his injury, which meant that the ankle bones in the fractured joint were dying. As a result, he was told that he would never return to full duty. He received a "commissioner's letter" advising him that he had to retire. These events were too much for him to bear. He spiraled into a despair so deep, that he ultimately took his own life. His suicide note confirmed that he took his own life as a result of the accident.

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**This is the FORTY-SIXTH edition of the BARASCH McGARRY SALZMAN & PENSON NEWSLETTER... attorney advertising which presents topics of interest to firefighters. For questions, additional copies, or more information about topics raised in this newsletter, call or write:**

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*"You protect us...we protect you."*



continued from "Special Master"

well as which illnesses will be covered under the fund, and which will be excluded. She has already exhibited a willingness to listen to victims' advocates. She has spoken with Mike Barasch, and is anxious to meet our client, Joe Zadroga, whose son lends his name to the Zadroga Act.

#### **FIGHTING FOR RULES THAT ARE FAIR AND MORE INCLUSIVE**

We eagerly await Ms. Birnbaum's release of the proposed rules that will govern the fund, which she has said will be issued "as soon as possible." There will be a period of public comment during which time Ms. Birnbaum will consider objections to the proposed rules. We expect to meet with her several times between now and the fall, when the final rules are supposed to be published.

We will continue to fight for rules that are fair to rescue workers, who were disproportionately affected by the 9/11 at-

tacks. In the coming weeks, we will have a better idea of where Ms. Birnbaum stands on several key issues. As we reported in our last newsletter, we have asked the Department of Justice to permit firefighters to make supplemental claims to the fund if their injuries worsened, or if they have suffered new disabling injuries since they last applied. We have also asked that the fund compensate those firefighters who developed certain cancers believed to be linked to 9/11 exposure. Dr. David Prezant of the FDNY Bureau of Health Services has written a report linking certain cancers to exposure to WTC toxins. The report is due to be released on the 10<sup>th</sup> anniversary of the 9/11 attacks. Ms. Birnbaum has indicated that she will review this report before deciding whether certain cancers would be included.

Finally, we have asked that the fund compensate those individuals who suffer from post-traumatic stress disorder ("PTSD") stemming from the attacks.

Ms. Birnbaum has indicated that PTSD will only be compensated if it is accompanied by a physical injury, a requirement that we believe is unfair to rescue workers, some 62 of whom have been found disabled by the 1B Board for their WTC PTSD.

We are pleased that a special master has been appointed, but the hard work of ensuring that the eventual rules are fair and inclusive is just beginning. We will keep you updated as the rules develop.

Our law firm represented over 1,000 rescue workers and firefighter widows and we recovered over \$500 Million for them from the original Victim Compensation Fund. No law firm in the country obtained more money for its clients than we did. We currently represent over 750 clients for their Zadroga claims. We will continue to fight our hardest for them, to ensure that they receive fair compensation for their injuries.

## **(NOT) RESTING IN PEACE**

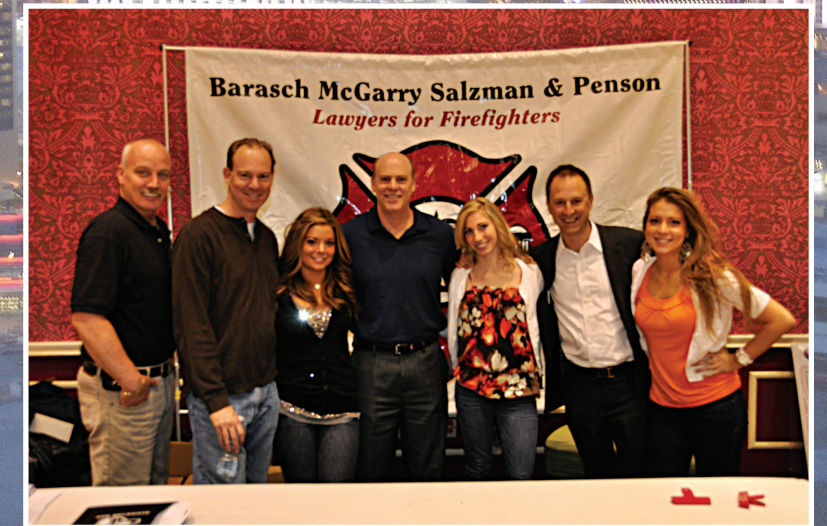
We will not rest until every active firefighter takes advantage of our offer to draft a simple Will and Living Will for them, FREE. The only thing it will cost you is maybe 20 minutes of your time.

Do what over 1000 of your brothers have done and give us a call today.

Do the right thing for your family!

# Thanks to all of you who visited us at the UFA Delegate Convention.

## It was our pleasure to see you in Atlantic City.



continued from "Wrongful Death"

We are saddened by the death of our client, and we thought it important to tell his story. After an injury, medical treatment tends to focus on healing the body. But, the ravages of physical injuries are often painful not just to the body, but also to the mind. It is now the loved ones he left behind who are seeking justice from the court.

#### **Legal remedies for family members**

When a person has died as a result of someone else's negligence, certain family members are entitled to commence a wrongful death lawsuit, seeking compensation for the loss. These lawsuits are tremendously important to family members. They not only deliver financial help when it is sorely needed, they sometimes bring answers, and at least some measure of justice. But you might be surprised at how the courts determine the value of these cases.

For example, it shocks most people to learn that New York law does *not* allow family members to recover damages for the grief they endure as a result of the loss of their loved one. That is a burden that the family must shoulder without the help of the courts.

What follows is an explanation of the damages that *can* be recovered through a wrongful death lawsuit, and how they are typically calculated.

#### **Loss of financial support**

Family members are entitled to recover the financial support that they would have received from their loved one (the decedent), had he not died. As you might imagine, this varies greatly from case to case. The value of the case is determined not simply by what the person earned, but also by what he could be expected to earn in the future, and how much of this would have been used to support the family. For example, a person who is married with children would likely contribute virtually all of his salary to his family. To prove what the future support would have been, lawyers must establish the decedent's income and future earning capacity, as well as the likelihood that he would have continued to support the family member.

Typically, future earning capacity is calculated by an economist, who will determine what the decedent's lifetime

earnings would have been, had the accident not happened. The economist considers things such as salary history, worklife expectancy, benefits, education, the likelihood of promotions, and the decedent's work habits. It is up to the attorney, together with the economist, to ensure not only that the calculations are accurate, but also that they take into account those aspects of the decedent's life that made him unique.

#### **Loss of household services**

Families are also entitled to recover the value of the services that were performed by the decedent before he passed away. These services might include things like helping to care for children, cleaning, cooking, shopping, gardening, painting, making repairs, and any number of other tasks. Since most firefighters have spare time to devote to their families, it is up to the economist and the attorney to ensure that these services are not undervalued. Without a skilled attorney and a competent economist, this aspect of the case could be undervalued or lost altogether.

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