Subsection 10 of §26-41-03, N.D.C.C., defines the term "occupying" as follows:

> *26-41-03. Definitions.* — As used in this chapter, the following definitions shall apply: . . . .
>
> 10. "Occupying" means to be in or upon a motor vehicle or engaged in the immediate act of entering into or alighting from the motor vehicle.

Although the legislature may not have contemplated this particular type of accident, a fair reading of the terms used would indicate that they would have provided for coverage had they considered it. This position is supported by §26-41-03(11), N.D.C.C., which defines the operation of a motor vehicle as follows:

> 11. "Operation of a motor vehicle" means operation, maintenance, or use of a motor vehicle as a vehicle. Operation of a motor vehicle does not include conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the injury occurs off the business premises, or conduct in the course of loading and unloading the vehicle unless the injury occurs *while occupying it.* [Emphasis added.]

Section 26-41-03 excludes from coverage persons servicing or repairing a vehicle when in the course of business. The obvious reason for that exclusion is that a person injured in the course of the business of servicing a vehicle would be protected by the workmen's compensation laws. This is consistent with the purpose in making no-fault insurance mandatory: namely, expanding the umbrella of insurance coverage to protect a wider group of people. . . .

The legislature expressly excluded certain persons from coverage in §26-41-08, N.D.C.C., which provides:

> *Persons not entitled to benefits.* — Basic or optional excess no-fault benefits shall not be payable to or on behalf of any person while:
>
> 1. Occupying any motor vehicle without the expressed or implied consent of the owner or while not in lawful possession of the motor vehicle.
>
> 2. Occupying a motor vehicle owned by such person which is not insured for the benefits required by this chapter unless uninsured solely because the insurance company of such owner has not filed a form pursuant to subsection 2 of section 26-41-05 to provide the basic no-fault benefits required by this chapter.
>
> 3. In the course of a racing or speed contest, or in practice or preparation thereof.
>
> 4. Intentionally causing or attempting to cause injury to himself or another person.

Nothing in §26-41-08, N.D.C.C., indicates a legislative intent to exclude from coverage a person occupying his own car who is injured in a hunting accident.

In Paragraph XI of the findings of fact, the trial court noted that the State of North Dakota issues in excess of 102,000 general hunting licenses yearly, and in excess of 40,000 deer licenses on an annual basis. Section 20.1-01-05, N.D.C.C., makes it unlawful to carry any firearm with a cartridge in its chamber while in or on a motor vehicle. Because it is required by law and also constitutes safe hunting procedure, the acts of loading a gun when alighting from a car and unloading a gun before entering a car are common practices in North Dakota. It is foreseeable that accidents like the one in the instant case will happen and the Auto Accident Reparations Act should provide coverage absent an expressed legislative declaration to the contrary. It appears that the

legislature took special care in using the term "occupying a motor vehicle" in enacting Chapter 26-41, N.D.C.C., and the plain meaning of that term indicates that coverage exists in this case.

Judgment affirmed.

NOTES TO STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. PEIFFER, OBERLY v. BANGS AMBULANCE, INC., AND WEBER v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.

1. *Goals and Purposes of Automobile No-Fault Insurance System.* Workers compensation systems and automobile no-fault systems provide benefits without regard to fault and preclude access to the ordinary tort system. The cases in this chapter all refer to the legislative purposes for the two systems. Are the legislative goals the same? Do differences in the purposes explain any differences in the operation of the systems?

2. *Limits on the No-Fault System.* The New York statute discussed in Oberly v. Bangs Ambulance, Inc. allows a victim access to the traditional tort system if the victim suffers: (1) "significant disfigurement," (2) "permanent loss of use of a body organ, member, function or system," (3) "permanent consequential limitation of use of a body organ or member," or (4) "significant limitation of use of a body function or system." Prior to *Oberly*, New York decisions had made it clear that an injury had to cause a significant harm to be characterized as significant disfigurement, permanent consequential limitation of use, or significant limitation of use of a body function or system. That background would explain why the plaintiff, who suffered only bruising, cramping, and pain, responded to the defendant's summary judgment motion by abandoning all of the serious injury standards except for the "permanent loss of use of a body organ, member, function or system" standard.

How does narrowing the application of clauses like the one interpreted in *Oberly* further or thwart the primary purposes of establishing a no-fault system for automobile-related injuries?

3. *Scope of the No-Fault System.* The causal connection test described in Weber v. State Farm Mutual Automobile Insurance Co. limits the range of accidents to which the automobile no-fault system applies. The North Dakota statute supplies language defining what accidents will be included. What statutory language and what evidence supported the court's conclusion that the injury should be covered by the no-fault system? If the plaintiff had injured himself with a knife while trying to have a snack in the passenger seat of the automobile, would the no-fault system provide for compensation?

4. *Attention to Statutory Language.* Defining the scope of no-fault coverage requires careful attention to the statutes requiring that coverage. For example, Colorado's statute requires insurance companies to cover certain relatives of the insured when they are "injured in an accident involving any motor vehicle" but does not require coverage for motorcycles. In a case where the plaintiff was injured when he rode a motorcycle and collided with a truck, the Colorado Supreme Court held that because the accident involved a motor vehicle (the truck), provisions of an insurance policy that purported to deny coverage violated the statute. See DeHerrera v. Sentry Insurance Co., 30 P.3d 167 (Colo. 2001).

Perspective: Applying No-Fault Concepts to Medical Injuries

Proposals to treat medical injuries in a no-fault framework are necessarily complex. Responding to a study that showed most medical injuries in hospitals are related to failures to observe and learn from errors and to emphasis on individual conduct rather than systemic causes of error, David M. Studdert and Troyen A. Brennan have made the following suggestions in *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 Am. J.L. & Med. 225 (2001):

> To be successful in the current environment . . . the push to gather more detailed information on errors and their causes must contend with practitioners' wariness of reporting events that may leave them open to accusations of negligence. Both anecdotal and empirical evidence suggest that providers are less willing to disclose information about errors they make or see when a punitive atmosphere prevails. Fear of blame among those individuals closest to errors thus poses a major obstacle to design and implementation of patient safety initiatives. This cost, together with ongoing concerns about the performance of the medical malpractice system, underscore the need to consider alternative systems that are better able to compensate injured patients and promote high quality healthcare. . . .
>
> The major alternative to the current tort system is the no-fault model. . . . In the medical arena, various forms of no-fault are firmly established in health care systems abroad: New Zealand and Sweden have operated no-fault systems for compensating medical injury for more than 25 years, and Finland, Denmark and Norway for more than a decade. Several small medical no-fault schemes have also been implemented in the United States to compensate specific injury types, including the Florida and Virginia schemes for birth-related neurological injury and the National Vaccine Injury Compensation Program. . . .
>
> Workable compensation criteria are fundamental to any no-fault scheme. Adverse events occur in approximately three to five percent of hospitalizations; the budget for compensating every one would be prohibitive. In any system some uninsured costs will inevitably rebound to the injured patient. But whereas tort systems seek to confine compensation to events in which negligence caused injury, no-fault schemes offer compensation to a wider class of events. In the considerable terrain of medical injury types that lies between all adverse events and only negligent ones, the threshold for compensation in foreign no-fault systems varies.
>
> We believe that the Swedish example of basing eligibility for compensation on the avoidability of the event is the most rational basis to compensate, and also the one that best facilitates quality improvement in medicine. While "avoidability" is a subjective determination like negligence, the Swedish experience suggests that their decision-making processes have been successful in applying it to separate eligible claims from ineligible ones. With the benefit of many years of experience, the Swedes are able to identify many types of claims that should reasonably be compensated on the strength of basic information about the circumstances of the incident and the nature of the disability suffered.

D. Statutory Responses to Specific Rare Injuries

A federal statute provides compensation to victims of injuries caused by certain vaccines. Money for the compensation comes from a tax on vaccines, and the statute establishes methods that are intended to allow for quick and easy adjudication of claims. A person who accepts an award under this statute is barred from seeking damages in the ordinary tort system. Another federal statute provides compensation to victims of the September 11, 2001 terrorist attacks. Awards under that statute are funded by general revenues rather than a specific tax. Schafer v. American Cyanamid Co. describes many of the important aspects of the vaccine statute in the context of a dispute about whether a loss of consortium suit may be brought under ordinary tort principles when the primary victim of a vaccine-related injury has accepted compensation under the act. The September 11th Victim Compensation Fund of 2001 statute shows how principles related to those applied in the vaccine statute and also in workers' compensation cases were adapted to the context of providing compensation to victims of terrorism.

SCHAFER v. AMERICAN CYANAMID CO.

20 F.3d 1 (1st Cir. 1994)

BREYER, C.J.

The National Childhood Vaccine Injury Act, 42 U.S.C. §§300aa-1 to 300aa-34, provides a special procedure to compensate those who are injured by certain vaccines. The Act bars those who accept an award under that procedure from later bringing a tort suit to obtain additional compensation. The question before us in this appeal . . . is whether the Act also bars the family of such a person from bringing a tort suit to obtain compensation for their own, related, injuries, in particular, for loss of companionship or consortium. Assuming that state law permits such suits, we find nothing in the Act that explicitly or implicitly bars them. And, we affirm the similar determination of the district court.

The National Childhood Vaccine Injury Act represents an effort to provide compensation to those harmed by childhood vaccines outside the framework of traditional tort law. Congress passed the law after hearing testimony 1) describing the critical need for vaccines to protect children from disease, 2) pointing out that vaccines inevitably harm a very small number of the many millions of people who are vaccinated, and 3) expressing dissatisfaction with traditional tort law as a way of compensating those few victims. Injured persons (potential tort plaintiffs) complained about the tort law system's uncertain recoveries, the high cost of litigation, and delays in obtaining compensation. They argued that government had, for all practical purposes, made vaccination obligatory, and thus it had a responsibility to ensure that those injured by vaccines were compensated. Vaccine manufacturers (potential tort defendants) complained about litigation expenses and occasional large recoveries, which caused insurance premiums and vaccine prices to rise, and which ultimately threatened the stability of the vaccine supply.

The Vaccine Act responds to these complaints by creating a remedial system that tries more quickly to deliver compensation to victims, while also reducing insurance and litigation costs for manufacturers. The Act establishes a special claims procedure

involving the Court of Federal Claims and special masters (a system that we shall call the "Vaccine Court"). A person injured by a vaccine may file a petition with the Vaccine Court to obtain compensation (from a fund financed by a tax on vaccines). He need not prove fault. Nor, to prove causation, need he show more than that he received the vaccine and then suffered certain symptoms within a defined period of time. The Act specifies amounts of compensation for certain kinds of harm (e.g., $250,000 for death, up to $250,000 for pain and suffering). And, it specifies other types of harm for which compensation may be awarded (e.g., medical expenses, loss of earnings).

At the same time, the Act modifies, but does not eliminate, the traditional tort system, which Congress understood to provide important incentives for the safe manufacture and distribution of vaccines. The Act requires that a person injured directly by a vaccine first bring a Vaccine Court proceeding. Then, it gives that person the choice either to accept the Court's award and abandon his tort rights (which the Act transfers to the federal government), or to reject the judgment and retain his tort rights. He can also keep his tort rights by withdrawing his Vaccine Court petition if the Court moves too slowly.

The Act additionally helps manufacturers by providing certain federal modifications of state tort law. For example, it forbids the award of compensation for injuries that flow from "unavoidable side effects"; it frees the manufacturer from liability for not providing direct warnings to an injured person (or his representative); it imposes a presumption that compliance with Food and Drug Administration requirements means the manufacturer provided proper directions and warnings; it limits punitive damage awards; and it requires that the trial of any tort suit take place in three phases (liability; general damages; punitive damages).

The upshot is a new remedial system that interacts in a complicated way with traditional tort lawsuits.

For present purposes, the relevant facts are simple. Lenita Schafer's small child, Melissa Schafer, received an oral polio vaccine distributed by American Cyanamid in October 1988. Lenita subsequently contracted polio (she and her family think) from Melissa's vaccine. About one year later, in December 1989, all three members of the Schafer family (Lenita, Melissa, and Lenita's husband, Mark) petitioned the Vaccine Court for compensation. In April 1990, Mark and Melissa withdrew their petitions (with permission of the Vaccine Court) and began this lawsuit against American Cyanamid, seeking damages under Massachusetts tort law for loss of Lenita's companionship and consortium. Lenita, who did not withdraw her petition, eventually accepted a $750,000 award from the Vaccine Court for her own injuries, thereby giving up her right to bring a tort action. At that point, American Cyanamid asked the district court to dismiss Mark's and Melissa's suit on the ground that Lenita's acceptance of the Vaccine Court award barred not only a later tort action for her own injuries, but also a later tort action by family members for related injuries. The district court denied the motion. We review that denial. . . .

Cyanamid concedes that this case focuses upon Mark's and Melissa's damages, not Lenita's; that Lenita received Vaccine Court compensation for her own damages, not Mark's or Melissa's; and that the Act's language explicitly bars Lenita, but not Mark or Melissa, from bringing a tort action to recover their own damages (which, we specify, will not duplicate Lenita's). Nonetheless, it argues that to permit Mark or Melissa to bring their own tort action (for related damages) would so seriously interfere with the

Act's basic purposes that we must read the Act as implicitly barring those actions, just as it explicitly bars Lenita's. [The argument] has two essential elements — an important federal purpose and a significant state interference. And, we shall try to set forth these two elements of Cyanamid's argument in light of the Act's legislative history, and as persuasively as possible.

First, an important federal purpose of the Act is to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market. . . .

Evidence in the hearing record indicated that compensation-related price increases or manufacturer withdrawal would cause serious harm. Vaccines benefit those who are vaccinated, and they have public benefits as well — when parents vaccinate their own children, they also help stop the spread of a disease that can injure others. And, even though vaccines themselves cause a small number of serious injuries or deaths, their widespread use dramatically reduces fatalities. . . .

The upshot is that, because vaccines benefit so many (and harm so few), even small vaccine price increases, if followed by even a small decline in vaccinations, can cause more public harm through added disease than the sum-total of all the harm vaccines themselves cause through side-effects. For this kind of reason, the argument goes, Congress was importantly motivated not only by the desire effectively to compensate side-effect victims, but also by the desire to keep vaccine prices fairly low by reducing compensation costs.

Second, the availability of a state tort remedy for relatives of a victim interferes with the Act's efforts to lower manufacturers' costs. The Act seeks to achieve its cost-reducing purpose, not by denying compensation to victims (indeed, it imposes a tax upon vaccines in order to fund compensation), but by reducing the litigation and insurance costs related to lengthy, complex tort procedures and random large tort awards. . . .

But, Cyanamid points out, almost every victim has a family. And, almost every vaccine-related injury to a child will adversely affect the life of that family. In Cyanamid's view, if family members can bring a tort suit for loss of say, a child's companionship, even after the child accepts a Vaccine Court award, they will do so.

Cyanamid then says (and this is the most difficult part of Cyanamid's argument) that to permit a victim's family to bring a tort law case — even where the victim obtains a Vaccine Court award — threatens seriously to undermine the Act's "cost-related" advantages. The result will be a system in which manufacturers must pay both the Vaccine Court's easily-obtained compensation awards (through a tax) and also face large tort claims from family members. The latter means the very kind of large occasional tort awards and the kind of litigation costs that Congress hoped to diminish. Cyanamid concludes that the Act implicitly must hold family members to the election of the physically-injured victim. If that victim receives an award and can no longer pursue a court claim, then neither can the victim's family.

Cyanamid's argument is not without force, but ultimately it does not persuade us, either as a matter of statutory interpretation or in terms of pre-emption law. First, one cannot easily interpret the statute as Cyanamid wishes, for the Act has no language at all that one might read as creating a bar to the type of suit before us. To the contrary, the Act subsection that creates the tort action bar says that it does not apply to this kind of lawsuit. The language that creates the bar, §300aa-11(a), says: "no person may bring a civil action for damages" (except in accordance with the

Act's Vaccine-Court-related rules) until a Vaccine Court petition "has been filed." It then states specifically that "this subsection" (i.e. the subsection with the tort action bar):

> applies only to a person who has sustained a vaccine-related injury or death and who is qualified to file a petition for compensation under the Program.

42 U.S.C. §300aa-11(a)(9)....

Second, the Act's legislative history does not point directly toward the "policy" conclusion that Cyanamid wishes us to draw. The legislative history says nothing at all about family members' tort suits. Its discussion of general purposes, as we have pointed out above ... indicates two major purposes, namely, providing compensation for victims and maintaining low vaccine costs. How does Cyanamid's argument take account of the "victim compensation" objective? Because the Vaccine Court does not provide a remedy for family members, to accept Cyanamid's argument would require us to conclude that Congress, without anyone saying a word about it, intended to deprive family members of all compensatory remedies. At the same time, the second leg of Cyanamid's argument — the claim that permitting this kind of suit would significantly interfere with Congress's cost control objective — has no specific empirical support in the legislative record; and, the claim does not prove itself....

Third, to accept Cyanamid's argument — that the Schafer family cannot collect both a Vaccine Court award and loss of consortium tort damages — would create judicial inconsistency. The Vaccine Court has held that a parent can both obtain a loss of consortium "award" from a state court (or the settlement of a state law claim) and also obtain compensation for her vaccinated (and injured) child from the Vaccine Court. The Vaccine Court cases all involve families that brought the tort suit first, before the child accepted Vaccine Court compensation. But, it is difficult to find any policy that would justify permitting a family to bring a suit before the Vaccine Court awards compensation to a direct victim, but not after.

... Cyanamid's arguments are better made to Congress than to this court. We agree with the district court that the Act, as currently written, does not bar the suit before us.... And, its order refusing to dismiss the case, therefore, is Affirmed.

NOTES TO SCHAFER v. AMERICAN CYANAMID CO.

1. ***Limitations on Tort Suits.*** The Vaccine Injury Act discourages use of the traditional tort system in two main ways: by offering compensation in exchange for a victim's right to bring a suit and by changing the rules that would apply in a suit if a victim did decide to litigate. What limitations on tort suits does the act impose, and how do the limitations alter typical state rules for products liability cases?

2. ***Causation.*** The statute establishes two methods for showing that a victim's injury was caused by a vaccine. Causation is treated as established if the facts of a victim's case fit the parameters in a Vaccine Injury Table adopted as part of the statute and supplemented later by administrative regulations. The Table lists types of vaccines, types of reactions, and time periods within which those reactions must occur in order for causation to be established. The other method allowed under the statute is the "non-Table" method, under which a victim may introduce evidence to show that a vaccine did cause an injury even though the injury was not manifested within the time periods specified in the Table.

In a case where a victim's death was shown to have been caused both by a vaccine and by a different medical condition unrelated to the vaccine, a court has held that a vaccination is a legal cause of a harm if it is a substantial factor in bringing about the harm and is also a but-for cause of the harm. The court adopted causation principles from the Restatement (Second) of Torts. See Shyface v. Secretary of Health & Human Services, 165 F.3d 1344 (4th Cir. 1999).

SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

Pub. L. No. 107-42 (Sept. 22, 2001)

SEC. 403. PURPOSE

It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.

SEC. 404. ADMINISTRATION

(a) In general.—The Attorney General, acting through a Special Master appointed by the Attorney General, shall—

(1) administer the compensation program established under this title[.]

SEC. 405. DETERMINATION OF ELIGIBILITY FOR COMPENSATION

(a) Filing of claim.—

(1) In general.—A claimant may file a claim for compensation under this title with the Special Master. The claim shall be on the form developed under paragraph (2) and shall state the factual basis for eligibility for compensation and the amount of compensation sought.

(b) Review and Determination[.]

(1) Review.—The Special Master shall review a claim submitted under subsection (a) and determine—

(A) whether the claimant is an eligible individual under subsection (c);

(B) With respect to a claimant determined to be an eligible individual—

(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and

(ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

(2) Negligence.—With respect to a claimant, the Special Master shall not consider negligence or any other theory of liability.

(c) Eligibility.—

(1) In general.—A claimant shall be determined to be an eligible individual for purposes of this subsection if the Special Master determines that such claimant—

(A) is an individual described in paragraph (2); and

(B) meets the requirements of paragraph (3).

(2) Individuals. — A claimant is an individual described in this paragraph if the claimant is —

(A) An individual who —

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash;

(B) an individual who was a member of the flight crew or a passenger on American Airlines flight 11 or 77 or United Airlines flight 93 or 175, except that an individual identified by the Attorney General to have been a participant or conspirator in the terrorist-related aircraft crashes of September 11, 2001, or a representative of such individual shall not be eligible to receive compensation under this title; or

(C) in the case of a decedent who is an individual described in subparagraph (A) or (B), the personal representative of the decedent who files a claim on behalf of the decedent. . . .

(3) Requirements. —

(A) Single claim. — Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.

(B) Limitation on civil action. —

(i) In general. — Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.

(ii) Pending actions. — In the case of an individual who is a party to a civil action described in clause (i), such individual may not submit a claim under this title unless such individual withdraws from such action by the date that is 90 days after the date on which regulations are promulgated under section 407.

NOTES TO SEPTEMBER 11TH VICTIM COMPENSATION FUND STATUTE

1. ***Elements of Compensation Fund Statutes.*** Compensation fund statutes define those eligible for compensation, typically require recipients to forgo compensation that might otherwise have been available, and establish procedures for making awards. How does the September 11th Victim Compensation Fund Statute treat each of these elements?

2. ***Findings of Fact.*** The statute requires determinations of (1) whether an individual was injured in one of the terrorist-related air crashes, and (2) what economic and non-economic losses that injury caused. The first of these determinations is likely to be straightforward. What complications might be related to the second determination?

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