Compensating without Aggravating: On the Anti-Therapeutic Impact of Injury Compensation Processes and the Responsibility of Lawyers

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Presentation Outline

• Compensation is ‘bad for health’
• Changes in system (legislation) can have impact on health outcomes
• Operational changes within a given system (policies & professional responsibilities) can have impact on health outcomes
• This raises important questions for the law
• Questions about the restorative objectives of compensation systems
• Questions about lawyers ethical and professional responsibilities to the wellbeing of clients
• Consequences for research agenda, teaching and training
Compensation is ‘bad for health’

Injured people who are involved in compensation procedures recover less well than those with similar trauma who do not claim compensation.

E.g.:

- more mental complaints
- poorer physical recovery
- less RTW

Caveat: although the weight of the evidence points clearly in the same direction, not all studies find these effects, almost all are observational, their quality and evidential power varies (e.g. Grant & Studdert, 2009), more research is needed, and in particular: involvement of legal scholars and more sophisticated designs.
Compensation is ‘bad for health’

Also within the population of those claiming compensation, many studies have shown correlations between differences in health outcomes and particular factors of the compensation procedure in question.

- Fault-based compensation vs no-fault schemes
- Lump sum payments vs intermittent payments
- Litigation processes vs out-of-court settlements
- Lawyer engagement
- Adversarial and stressful interactions
- (Repeated) Medical assessments

Particularly important to defeat the prevailing belief that worse outcomes are an unavoidable consequence of financial compensation per se (‘secondary gain’) and cannot be defeated by other means than curbing eligibility.
Legislative change can have impact on health outcomes

- Saskatchewan tort system for traffic injuries changed to no-fault system (Cassidy et al, 2000)
  Caveat: subject to critical remarks on methodology, e.g. Grant & Studdert, 2009

- Legislative reforms to the New South Wales transport accident compensation scheme (Cameron et al, 2008)
Operational changes within a given system can have impact on health outcomes

Novel approach towards claims handling for people injured in road traffic crashes by a compulsory third party motor vehicle insurance company in New South Wales (Schaafsma et al, 2012)

i.e.:
- early intervention service
- early psychological risk screening
- facilitating early RTW
- clear and direct communication
- acknowledgement
- proactive dispute resolution
Qualitative studies: the experience of injured persons

- Complex interaction between personal-, health care-, workplace- and compensation systems obstructs recovery and return to work
- Claims and settlement process particularly frustrating
- The more adversarial, the more aggravating
- Power imbalance and stigmatization
- Dependency on legal representative assisting with claims process
Qualitative studies: the experience of injured persons

- Sense of entitlement and injustice
- Need for ‘acknowledgment’ and other non-pecuniary needs
- Perceived lack of trust about having to prove an injury or disability
- Strong dislike of medico-legal assessments
- Inability to move on with life during the claims process
- It takes too long!
Explanatory theories

- **Secondary Gain**
  Being involved in compensation creates a (generally unconscious) incentive to remain unwell

- **Secondary Victimisation**
  Being involved in compensation is a stressful and aggravating experience, hampering recovery

- **Biopsychosocial explanatory model**
  Being involved in compensation involves psychosocial factors weakening resilience and enforcing sick role

(These theories clearly involve overlapping phenomena)
Possible anti-therapeutic factors

- Focus on financial compensation vs rehabilitation and re-integration
- Necessity of asserting eligibility => increased perception of symptoms
- Adversarial interactions => power imbalance, experience of injustice, loss of sense of control
- Medical assessments => promotion of sickness behaviour, identification with diagnoses, repetition of message of inability
Possible anti-therapeutic factors

• Creation of focus on impairment and past, vs on abilities and future

• Complexity of interactions ⇒ dependency on others, loss of sense of control, demoralization, loss of ability to cope

• Negative experience of treatment by other party (impersonal, mistrust, disrespect, cynicism) ⇒ indignation, digging in, demoralization about getting well

• Unresolved sense of injustice ⇒ anger, frustration, demoralization

• Delay ⇒ habituation of all these negative factors
Implications for compensation system design

- Focus on compensation or on rehabilitation => what is primary goal / obligation?
- Complexity and duration => ‘quick and dirty’ might be better
- Adequacy of information, quality of communication => avoid disempowerment
- Personal contact and perceived fairness => avoid demoralization
- Probably the more adversarial, the more anti-therapeutic
- Dispute resolution mechanisms => proactive and non-adversarial
- Promotion of emotional recovery => keep view of the whole person
- Medical assessments => are probably particularly anti-therapeutic
- Need to engage a representative => loss of control, independence, resilience

=> How can research promote changes?
And what within a given system?

Compensation agency / insurance company / loss adjusters:

- Ethics: what does possible negative health impact mean for professional standards?
- Economics: to what extent could more focus on recovery and rehabilitation be cost-effective?
And what within a given system?

Compensation agency / insurance company / loss adjusters:

- Legal:
  What are implications of rule that recovery takes precedence over compensation?
- What about the *liable* party’s duty to mitigate damages?
- Can e.g. bath faith disputation or delay constitute a separate wrong?
- How can remedies be made possible?
- Should there be a paradigm shift of the obligations of a liable party?

=> How can research promote changes?
And what about the injured person’s lawyer?

- Injured person’s lawyers perceive themselves as ‘the good guys’
  => relatively unreceptive to inconvenient truth that they share responsibility for a harm causing system

- Injured person’s lawyers have:
  - direct relationship of trust with their clients
  - direct influence regarding adequate communication, information, client involvement and expectation management
  - ample opportunities to steer events and take initiatives

=> within given system, injured person’s lawyers are perhaps more in a position to ‘make the difference’ than any other party
Fundamental shortcoming of lawyers in PI process: Lawyers focus solely or primarily on financial outcome (where applicable, contingency fees even create direct conflict of interest with client)

- Implicit encouragement of disability and sickness behaviour

- Prioritizing as a matter of course of steps beneficial to financial recovery yet detrimental to health and rehabilitation (e.g. medical assessments, any tactic involving delay and stagnation)

- Neglect of non-pecuniary needs. Attorneys “often treat what plaintiffs describe as their aims as something ephemeral, and regularly urge clients not to pursue such goals as emotional or moral vindication” (Relis 2007)

- “Lose perspective of the whole person who is their client” (Schatman 2009)
Questions for injured person’s lawyers

• What does the attorney’s duty to inform his client involve?
• What does the clients dependent position mean in this context?
• Do attorneys have a duty to protect their clients from additional harm?
• How would such duty relate to the client’s self determination (in theory and in practice)?
• Can anti-therapeutic expectation management (‘we get the most out of your claim’) constitute breach of contract?
• What non legal services could or should a attorney provide?
• Is there a market for an explicitly therapeutic PI law practice?

=> How can research promote changes?
Research efforts to help making things better

- The perspective of clients on their lawyers
  [=> presentation Kiliaan van Wees tomorrow 8:15 A.M.]
- Empowering PI Clients in engaging legal representation
- Enabling plaintiff lawyers to improve their services
- Empowering PI Clients during Compensation Process
- Multidisciplinary Compensation Health Research
  [=> presentation Nieke Elbers]
- Code of Conduct Resolution of Personal Injury Claims
  [=> presentation August Van]
- Code of Conduct Open Disclosure and Resolution Medical PI Claims
- Operational Strategies for Open Disclosure and Resolution of Claims
- Apology research