The Anti-Therapeutic Effects of Compensation Procedure and the Responsibilities of Lawyers

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=> Nothing to disclose
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. Harris et al, 2005)

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.
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Association Between Compensation Status and Outcome After Surgery
A Meta-analysis

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Compensation status is often associated with poor outcome after therapeutic intervention. This association has been noted since the late 19th and early 20th centuries in conditions compensated through litigation, such as railway spine, and with the introduction of workers' compensation laws in industrialized countries. The association has been investigated in metanalytic reviews regarding outcomes after head injury and treatment for chronic pain but not for outcome after surgery. Divinity of opinion exists: some authors believe that seeking compensation is not a major predictor of outcome, yet others have found that compensation is the strongest predictor of poor outcome. Since it is not possible to perform a randomized controlled trial for compensation, conclusions can be drawn only from observational data. This may allow selection bias and confounding due to, for example, differing demands and expectations in patients who receive compensation.

However, any association between compensation status and outcome is important, not only clinically, as it may influence clinical decision making, but also economically, as workers' compensation and insurance costs form a significant part of the costs of government and business. We hypothesize that patients who receive compensation are more likely to have an unsatisfactory outcome after surgery.
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
- Litigation processes vs out-of-court settlements
- Lawyer engagement
- Adversarial and stressful interactions
- (Repeated) Medical assessments
- Stress levels
- Experience of injustice

Particularly important to defeat the 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)

- 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
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Abstract

Background: Regaining good health and returning to work are important for people injured in road traffic crashes and for society. The handling of claims by insurance companies may play an important role in the rate at which health recovers and return to work is actually attained.

Methods: A novel approach towards claims handling for people injured in road traffic accidents was compared to the standard approach. The setting was a large insurance company (NRMA Insurance) in the state of New South Wales, Australia. The new approach involved communicating effectively with injured people, early intervention, screening for adverse prognostic factors and focusing on early return to work and usual activities. Demographic and injury data, health outcomes, return to work and usual activities were collected at baseline and 7 months post-injury.

Results: Significant differences were found 7 months post-injury on ‘caseness’ of depression ($p = 0.004$), perceived health limitation on activities ($p = 0.03$), and self-reported return to usual activities ($p = 0.01$) with the intervention group scoring better. Baseline general health was a significant predictor for general health at 7 months (OR 11.6, 95% CI 2.7-49.4) and for return to usual activities (OR 4.6, 95% CI 2.3-9.3).

Conclusion: We found a few positive effects on health from a new claims handling method by a large insurance company. It may be most effective to target people who report low general health and low expectations for their health recovery when they file their claim.

Keywords: Road traffic injuries, Claims handling, Rehabilitation, Health status, Return to work
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 (e.g. Sullivan et al, 2014)
- Medical assessments => promotion of sickness behaviour, identification with diagnoses, repetition of message of inability
Possible anti-therapeutic factors:

- Focus on financial compensation vs. rehabilitation and reintegration.

- Necessity of asserting eligibility leading to increased perception of symptoms.

- Adversarial interactions with power imbalance, experience of injustice, and loss of sense of control.

- Medical assessments promoting sickness behavior, identification with diagnoses, and repetition of the message of inability.

Keywords: Perceived injustice, Adverse recovery outcomes, Disability.
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
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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 procedural justice => info, voice and respect
- 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

- Research into the perspective of clients on their lawyers
- Empowering PI Clients in engaging legal representation
- Enabling plaintiff lawyers to improve their services
- Empowering PI Clients during Compensation Process
- Multidisciplinary Compensation Health Research
- Improving Code of Conduct Resolution of Personal Injury Claims
- Improving Code of Conduct Open Disclosure and Resolution Medical PI Claims
- Operational Strategies for Open Disclosure and Resolution of Claims
- Apology research