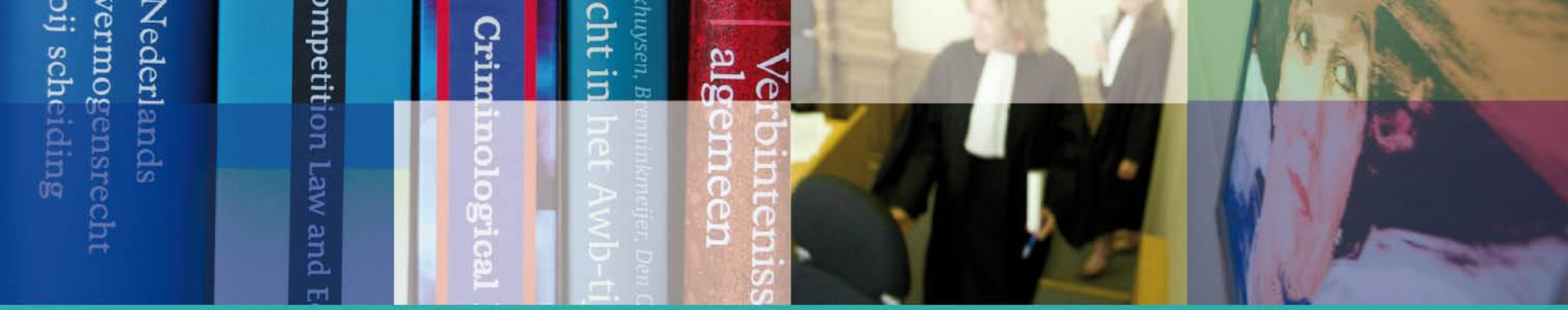
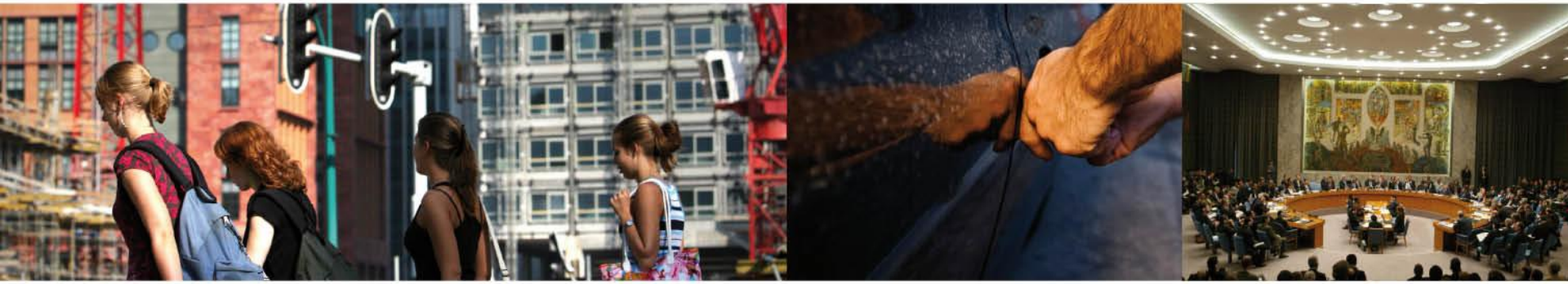


ICLAM 2016 Maastricht

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



Arno Akkermans
Amsterdam Centre for Comprehensive Law

=> 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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REVIEW

Association Between Compensation Status and Outcome After Surgery

A Meta-analysis

Ian Harris, FRACS(Orth)
Jonathan Mulford, MB,BS
Michael Solomon, FRACS
James M. van Gelder, FRACS
Jane Young, PhD

Context Compensation, whether through workers' compensation or through litigation, has been associated with poor outcome after surgery; however, this association has not been examined by meta-analysis.

Objective To investigate the association between compensation status and outcome after surgery.

Data Sources We searched MEDLINE (1966-2003), EMBASE (1980-2003), CINAHL, the Cochrane Controlled Trials Register, and reference lists of retrieved articles and textbooks, and we contacted experts in the field.

Study Selection The review included any trial of surgical intervention in which compensation status was reported and results were compared according to that status. No restrictions were placed on study design, language, or publication date. Studies were selected by 2 unblinded independent reviewers.

Data Extraction Two reviewers independently extracted data on study type, study quality, surgical procedure, outcome, country of origin, length and completeness of follow-up, and compensation type.

Data Synthesis Two hundred eleven studies satisfied the inclusion criteria. Of these, 175 stated that the presence of compensation (workers' compensation with or without litigation) was associated with a worse outcome, 35 found no difference or did not describe a difference, and 1 described a benefit associated with compensation. A meta-analysis of 129 studies with available data (n = 20 498 patients) revealed the summary odds ratio for an unsatisfactory outcome in compensated patients to be 3.79 (95% confidence interval, 3.28-4.37 by random-effects model). Grouping studies by country, procedure, length of follow-up, completeness of follow-up, study type, and type of compensation showed the association to be consistent for all subgroups.

Conclusions Compensation status is associated with poor outcome after surgery. This effect is significant, clinically important, and consistent. Because data were obtained from observational studies and were not homogeneous, the summary effect should be interpreted with caution. Compensation status should be considered a potential confounder in all studies of surgical intervention. Determination of the mechanism for this association requires further study.

JAMA. 2005;293:1644-1652 www.jama.com

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,"[1,2] and with the introduction of workers' compensation laws in industrialized countries.[3-5] The association has been investigated in meta-analytic reviews regarding outcomes after head injury[6] and treatment for chronic pain[7] but not for outcome after surgery.

Diversity of opinion exists: some authors[8,9] believe that seeking compensation is not a major predictor of outcome, yet others[10-14] 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

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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

Operational … have impact … an

Novel approach … traffic crashes b… company in Ne… i.e.:

- early intervention
- early psychologic
- facilitating early R
- clear and direct c
- acknowledgemer
- proactive dispute

Schaafsma *et al. BMC Public Health* 2012, **12**:36
http://www.biomedcentral.com/1471-2458/12/36

BMC Public Health

RESEARCH ARTICLE Open Access

Changing insurance company claims handling processes improves some outcomes for people injured in road traffic crashes

Frederieke Schaafsma, Annelies De Wolf, Areen Kayaian and Ian D Cameron*

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 ($p = 0.04$), 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

Background

Injuries due to road traffic crashes happen often and have a major impact on the individual and on society [1].

The effect of financial compensation on health recovery and return to work for people injured in traffic accidents has been studied extensively over the last 10 years [2-4]. Not only financial compensation but also the approach of claims handling by an insurance system towards injured people may have effect on health recovery and return to work. Recently, Casey et al. concluded that the claims management process could be improved by the inclusion of health outcome information at claim notification which would assist in identifying those at risk of delayed recovery [5]. Clear communication, professional assistance besides quick estimation of the severity and prognosis of the injury may also help speed up the health recovery and limit costs for insurance companies and health care systems. Insurance companies should provide financial assistance as well as health care assistance for best results and help the injured person to find the best treatment. They require a regulatory framework to assist this.

In New South Wales Australia compensation under the third party insurance scheme is available where people are killed or injured as a result of a motor vehicle

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 ant

- Focus on finan integration
- Necessity of as of symptoms
- Adversarial inte of injustice, loss of sense o
- Medical assess r, identification w bility

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Perceived Injustice and Adverse Recovery Outcomes

Michael J. L. Sullivan · Esther Yakobov · Whitney Scott · Raymond Tait

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Abstract Research is accumulating highlighting the negative impact of perceptions of injustice on health and mental outcomes associated with pain. To date, the relation between perceived injustice and adverse pain outcomes has been demonstrated with individuals suffering from a wide range of debilitating pain conditions. This paper summarizes what is currently known about the negative impact of justice-related appraisals on recovery trajectories following injury. The paper also addresses the processes that might underlie the relations between perceived injustice and adverse pain outcomes. Given the research indicating that perceived injustice is a powerful predictor of disability, it follows that interventions that yield reductions in perceived injustice should be associated with reductions in disability. Of concern, however, is that perceptions of injustice do not appear to respond to current treatment approaches used in the management of pain and disability consequent to injury. It is argued that a paradigm shift in approaches to evaluation and treatment might be required in order to yield meaningful reductions in perceived injustice. Such a paradigm shift might entail broadening the targets of assessment and intervention beyond the 'perceptions' of the injured individual to include potential external sources of injustice (e.g., employer, insurer, health care provider) in the treatment plan.

Keywords Perceived injustice · Injury · Compensation · Disability

The potentially devastating consequences of musculoskeletal injury have been described in numerous reports (Chapman & Gavrin, 1999; Keogh, Nuwayhid, Gordon, & Gucer, 2000). For some individuals, life following injury will be characterized by significant and persistent physical and emotional suffering (Berglund, Bodin, Jensen, Wiklund, & Alfredsson, 2006; Nederhand, Hermens, Ijzerman, Turk, & Zilvold, 2003). In addition, post-injury life might be replete with loss experiences, including the loss of employment, the loss financial security, the loss of independence, and the loss of sense of identity (Harris, Morley, & Barton, 2003; Lyons & Sullivan, 1998). While some of these losses might be temporary, others might be permanent (Evans, Mayer, & Gatchel, 2001; Suissa, 2003; Watson, Booker, Moores, & Main, 2004).

Clinical anecdotes abound of persistent pain sufferers who feel they have been victimized either as a direct result of their injury, or indirectly by injury-related sequelae (Aceves-Avila, Ferrari, & Ramos-Remus, 2004; Bigos & Battie, 1987; McParland, Eccleston, Osborn, & Hezseltine, 2011; Waugh, Byrne, & Nicholas, 2014). An Internet search quickly reveals numerous attestations that emphasize the injustice of living with pain: "*What did I do to deserve this?*", "*I wish he could see what he has done to my life*", or "*Nothing will ever make up for what I have gone through.*" Such attestations reflect at once elements of the magnitude of loss, the irreparability of loss, and a sense of unfairness (McParland & Whyte, 2008; Sullivan et al., 2008).

Surprisingly, it is only within the last decade that justice-related appraisals have become the focus of systematic enquiry in the domain of injury and pain (Brown, Bostick, Lim, & Gross, 2012; Chibnall & Tait, 2009; McParland & Eccleston, 2013; Scott, Trost, Bernier, & Sullivan, 2013; Sullivan et al.,

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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

Possible ant

- Creation of foc … es and future
- Complexity of i … oss of sense of control, demora
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- Unresolved ser … moralization
- Delay => habit

Research

Original Investigation

Relationship Between Stressfulness of Claiming for Injury Compensation and Long-term Recovery

A Prospective Cohort Study

Genevieve M. Grant, LLB, PhD; Meaghan L. O'Donnell, PhD; Matthew J. Spittal, PhD; Mark Creamer, PhD; David M. Studdert, LLB, ScD, MPH

IMPORTANCE Each year, millions of persons worldwide seek compensation for transport accident and workplace injuries. Previous research suggests that these claimants have worse long-term health outcomes than persons whose injuries fall outside compensation schemes. However, existing studies have substantial methodological weaknesses and have not identified which aspects of the claiming experience may drive these effects.

OBJECTIVE To determine aspects of claims processes that claimants to transport accident and workers' compensation schemes find stressful and whether such stressful experiences are associated with poorer long-term recovery.

DESIGN, SETTING, AND PARTICIPANTS Prospective cohort study of a random sample of 1010 patients hospitalized in 3 Australian states for injuries from 2004 through 2006. At 6-year follow-up, we interviewed 332 participants who had claimed compensation from transport accident and workers' compensation schemes ("claimants") to determine which aspects of the claiming experience they found stressful. We used multivariable regression analysis to test for associations between compensation-related stress and health status at 6 years, adjusting for baseline determinants of long-term health status and predisposition to stressful experiences (via propensity scores).

MAIN OUTCOMES AND MEASURES Disability, quality of life, anxiety, and depression.

RESULTS Among claimants, 33.9% reported high levels of stress associated with understanding what they needed to do for their claim; 30.4%, with claim delays; 26.9%, with the number of medical assessments; and 26.1%, with the amount of compensation they received. Six years after their injury, claimants who reported high levels of stress had significantly higher levels of disability (+6.94 points, World Health Organization Disability Assessment Schedule sum score), anxiety and depression (+1.89 points and +2.61 points, respectively, Hospital Anxiety and Depression Scale), and lower quality of life (−0.73 points, World Health Organization Quality of Life instrument, overall item), compared with other claimants. Adjusting for claimants' vulnerability to stress attenuated the strength of these associations, but most remained strong and statistically significant.

CONCLUSIONS AND RELEVANCE Many claimants experience high levels of stress from engaging with injury compensation schemes, and this experience is positively correlated with poor long-term recovery. Intervening early to boost resilience among those at risk of stressful claims experiences and redesigning compensation processes to reduce their stressfulness may improve recovery and save money.

Supplemental content at jamapsychiatry.com

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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