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The Great Trade-off in Workers' Compensation: Perceptions of Injustice by Those Experiencing Persistent Pain

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Abstract

Introduction. Some claimants harbor perceptions of injustice about the way they have been treated. In particular, those with ongoing and disabling pain have been generally dissatisfied by the way they have been managed by the systems designed to offer them financial compensation. **Aim.** In this paper we aim to explore possible factors that may contribute to their dissatisfaction. **Method.** We review the historical development of the various systems in which monetary compensation was awarded for personal injury. **Findings.** In the latter years of the 19th century, a significant trade-off occurred in the German workers' compensation systems. On the one hand, employers accepted the principle of no-fault insurance and agreed to provide injured workers with monetary compensation and medical treatment. On the other hand, employees agreed to relinquish the right to sue their employer for negligence. However, awards under this legal system did not include assessments for ongoing pain, humiliation, or loss of social status as were incorporated in previous systems. **Conclusion.** Although the Prussian and German approach provided a utilitarian model for similar systems around the world, its failure to include some long-established benefits of a moral nature may have contributed to the current perceptions of injustice expressed by many injured workers experiencing persistent pain.

Key Words: Workers' Compensation, Personal Injury, Pain, Perceived Injustice

Introduction

"The redress of wrongs is primal and precedes the pursuit of welfare in the jurisprudence of nations. Talion, the ancient penalties of a life for a life, eye for an eye, etc., was retaliation for injuries among equals. The Book of Exodus extended a humane interest for the lower social strata in establishing penalties for injuries inflicted by a master on his servant" [1 p158].

Because pursuing a humane interest to redress of wrongs appears to be an innate characteristic of humans, it is appropriate to review evidence that supports this claim and its relationship to personal injury compensation.

Concept of Justice in Human Development

Behavioral research indicates that young children can develop a moral stance that allows them to recognize, protest against, and respond appropriately to injustice or harmful behavior, not only when it is directed toward themselves but also in third-party situations [2]. They are able to grasp concepts of harm and unfairness even before their ability to articulate these concepts in their judgements [2–4]. As a corollary, early in their development, children can know when they are being fairly treated.

The Primacy of Justice

In his landmark publication, philosopher John Rawls affirmed, "Justice is the first virtue of social institutions as truth is of systems of thought" [5 p3]. His work is viewed as a response to the particular circumstances of modernity, where although pluralism is highly valued, equality of citizenship is also guaranteed [6]. This value

of equality specifies, "No individual may be sacrificed for society's greater good [and that] this assurance is not to be compromised" [6 p283].

However, in real-life situations in Western societies, tension has always been in evidence between utilitarian principles aimed at maximizing benefit for the larger number of the population and the moral requirement to help those less well-off [7]. Evidence of this tension in the context of workers' compensation will be provided below.

Morality and Social Justice

From ancient times, there have always been those whose principal role is to prompt and encourage their communities to become involved in the various issues of justice that might be current at the time. For example, the biblical prophets believed a strong link existed between divine promise and social justice, which became a religious matter grounded in a theological claim about God [8]. To some extent, this is still the case today, as evidenced by witnesses in legal proceedings being asked to swear an oath of truthfulness on their preferred "holy book" before giving their evidence in court.

The philosopher Thomas Nagel [9] argued that the moral (ethical) dimension of one's personal conduct could be considered from two standpoints—the impersonal collective and the personal. The former produces a powerful demand for universal impartiality and equality, whereas the latter "gives rise to individualistic motives and requirements which present obstacles to the pursuit and realization of such ideals" (9 p4).

Nagel [9] did not see how these two standpoints could ever be reconciled, an opinion which reinforces the psychological tension mentioned above

"When we try to discover reasonable moral standards for the conduct of individuals and then try to integrate them with fair standards for the assessment of social and political institutions, there seems to be no satisfactory way of fitting the two together. They respond to opposing pressures which cause them to break apart." (9 p4–5)

Assessment of Perceived Injustice

Sullivan [10] suggested that a person's decision to seek compensation or pursue litigation might be a proxy for perceived injustice. To explore this possible association, he devised and developed the 12-item scale Injustice Experience Questionnaire (IEQ).

Contained within the 12-item IEQ are six statements relevant to blame or unfairness in relation to the person's experience. Respondents are invited to consider the strength of the following statements: "I am suffering because of someone else's negligence." "It all seems so unfair." "Nothing will ever make up for what I have gone through." "Robbed of something very precious." "I may never achieve my dreams." "I can't believe this has happened to me."

The more recent research of Sullivan et al. [11] proposes that perceived injustice consequent to injury might represent one of the strongest predictors of problematic outcomes. Injured individuals who report high levels of perceived injustice also experience more intense pain and more severe depression and are less likely to return to work. They display more pain behavior and rate themselves as being more severely disabled. Perceptions of injustice are also associated with the persistence of posttraumatic stress symptoms [11].

Perceived Injustice by Those Experiencing Chronic Pain

Using the IEQ in a cross-sectional study of 475 people in the community reporting pain associated with a variety of medical conditions, Martel et al. [12] found that perceived injustice was significantly associated with pain intensity, disability, and psychological distress and was negatively associated with pain acceptance. These authors did not specifically mention whether any of the people included in the study were in receipt of, or were planning to apply for, personal injury compensation. However, their findings explain why such people might think they have been unjustly or unfairly treated in any system of personal injury compensation or financial support.

Organizational Justice in the Context of Workers' Compensation

Interpersonal justice is one of the four key dimensions of organizational justice related to the claim-making process [13]. This dimension refers to perceptions of politeness and respect shown in the interactions between relevant authorities and claimants. The dimension of distributive justice concerns the perceived fairness of outcome: that of procedural justice reflects the fairness of the processes that lead to the outcome and that of informational justice refers to the fairness of provision of information regarding procedures and outcomes. Failures to provide relevant and timely information, erratic payment of economic benefits, overtly adversarial methods of dispute resolution, and perceived indifference of claims agents are important organizational concerns for injured workers [14].

Health Effects of Perceived Injustice

Perceptions of injustice can have a significant impact on the physical and mental health of a person of any age experiencing pain [11].

The Scope of Perceived Injustice

Carriere et al. [15] suggest that perceived injustice embraces an appraisal of the severity and irreparability of pain-related losses, a sense of being unfairly treated, and attributions of blame for these losses. The clinical contexts in

which these issues have been documented in adults include, but are not limited to, work-related low back pain, "whiplash injury," fibromyalgia, and rheumatoid arthritis, as well as "chronic pain" in children and adolescents.

Health Effects in Adults

Carriere et al. [15] found perceived injustice to be significantly associated with anger, poor physical function, current opioid use, and pain-related outcomes and negatively associated with "pain acceptance." Other recent studies documenting the impact of perceived injustice on therapeutic outcomes include those of Guimmarra et al. [16] and Trost et al. [17].

Collie et al. [18] offered further evidence that perceptions of unfairness in decision making with respect to their compensation claims (and social insurance) negatively influenced both the health of claimants and their return-to-work outcomes. Decisions were viewed equitable when they were unbiased, accurate, and consistent and when the person was given a "voice" during decision making. Collie et al. [18] did not consider the possibility that the experience of pain could have been a factor influencing claimants' perceptions of being unfairly treated.

However, Ioannou et al. [19] concluded that perceptions of injustice are largely due to human factors rather than systems per se. Those with lower education, fewer financial resources, less flexible work options, histrionic personality, and trait anger were said to be more vulnerable to this effect.

They attributed such perceptions to the difficulty compensation claimants have in coping with pain and the associated high levels of psychological distress.

These and other studies [20] lend support to the growing consensus of researchers that there are negative health consequences for injured people who are involved in compensation systems, and particularly so for those experiencing persistent pain [21].

Health Effects in Children and Adolescents

Whenever children or adolescents perceive they have been treated unjustly, they often demonstrate high levels of functional disability and psychological disturbance that negatively affect their performance in many social areas, including their schooling [22]. Violation of their naïve belief systems by circumstances that suggest the world is not a just and fair place encourages the emergence of feelings of injustice.

By the age of 5 years, children should be able to employ the social rules of fairness in their interactions with others [23]. Social rejection as the result of chronic pain may exacerbate any feelings of being treated unjustly and thereby elicit anger and antisocial behavior, which may carry over into adult life [24].

Historical Overview of Compensation for Personal Injury

While perceptions of injustice can have adverse effects on the health of compensation claimants, it is important to explore how these perceptions might have originated. This is particularly so for those experiencing chronic pain.

Early Compensation Schemes

Mesopotamia. The earliest written records indicate that compensation for bodily injury dates as far back as approximately 2050 BCE. The Nippur Tablet No. 3191 outlines the law of Ur-Nammu, King of the city-state of Ur in ancient Sumeria, which provided monetary compensation for specific injuries to bodily parts [25].

Another early compensation scheme based on the Hammurabic Code dates from the Babylonian King Hammurabi (1792–1750 BCE). A schedule was devised outlining the specific "awards" for particular injuries while retaining the principle of Lex Talionis (the law of retaliation) [26].

The Code was applied differently to each level of society: the upper classes were fined, the middle classes were also fined but servitude was an option in the case of debt, and the lower classes faced death, torture, or corporal punishment. For peasants and slaves, this legal system was not intended to be for redress of grievances but rather for the administration of severe punishment.

Ancient Greece. In contrast to the approach of the Pythagoreans (circa 530 BCE), Aristotle (384–322 BCE) rejected the ancient *talio* conception of retributive justice, which up until then had been strictly based in terms of blood revenge and compensation between primitive clans [27].

Aeschylus' *Oresteia* (5th century BCE) is known for being the first play to promote justice in the modern sense. The playwright describes the transition from a political order governed by the ancient law of talion to a system of justice based on fair judgement:

"By encouraging an offended person to spill blood for blood—or an eye for an eye as we would say today—the law of talion gave little place for authentic justice and often led to bitter chains of events which left behind violence and resentment amongst communities" [28 p2].

The *Oresteia* argues that by applying the same perverse logic as employed by murderers,

"The very conceptions of right or wrong would not apply anymore. Murder would not be a crime but a simple amoral violent act to which another equally violent act could respond. Justice must therefore always be upheld even in the most painful instances, when quite oddly, life might seem unfair" [p2]

Roman Empire. The codification of Roman law commenced with a set of laws inscribed in 451–450 BCE on

12 bronze tablets, known as the Twelve Tables. The original text is lost, but future writers modernized them in line with changing legal circumstances [29]. Table VIII concerned delicts (civil wrongdoings) and torts (wrongful acts causing injury to a person). A person who injured another was exposed to retaliation, but the effects of this were mitigated by the fact that in many cases the injured party could only seek compensation for the injury suffered [29]. According to Halpin [30], there is evidence that the term *iniuria* ("a wrong") was extended in scope from physical assault alone to embrace other harms caused to the victim, including changed opinions of others toward him.

The penalty recommended in the Twelve Tables for a violent act ranged from retaliation in kind for a limb that was permanently disabled to a monetary fine if a bone was merely broken. However, the magistrates (praetors) allowed the injured person to put his own estimate on the wrong, thus leaving it to the magistrate's discretion to fine the defendant either according to the sum so named by the plaintiff, or for a lesser amount [31].

Importantly, pain and emotional distress caused by the action of the defendant also attracted monetary compensation, as did behavior that deliberately affronted the dignity of another person [32]. The magistrate would also allow a case to proceed on the basis that the act or conduct of another person had caused injury to a plaintiff's reputation or had wounded his feelings. However, because the monetary penalties in the Twelve Tables were not altered, with the falling value of money, they eventually became worthless.

Evolution of the Roman legal system culminated in the Codes of Justinian [529 CE], which contained a comprehensive statement of the Roman statutory and case law as it stood at the end of the ancient world. The rules of Roman law formed the basis of many guidelines of the Anglo-American common law [33]. It is evident that injured claimants (particularly from the upper class) were eligible for compensation for pain and suffering, as well as for loss of their reputation.

Talmudic Era. A detailed exposition of the principles of compensation for injury can be found in the Talmud,[1] which spans a period from 200 BCE to 700 CE. During this time, the oral tradition of the Jewish people (known as the Mishnah Torah) was formalized in writing by succeeding generations of sages. The sages viewed the law as an expression of the life of man and not merely abstract theory. Rabbinical courts, known as *beth din* (House of Judgement), administered the law.

The Talmud consists of 63 chapters within six categorizations. Tractate Bava Kamma deals with Nezikim, the civil and criminal law. The laws regarding torts and damages are to be found in chapter 8.6 [34].

1 The Talmud is a collection of writings that covers the full gamut of Jewish law and tradition, compiled and edited between the third and sixth centuries.

The Mishnah Torah (83 b) rules that a person who injures a fellow man becomes liable to him for up to five items: damage (depreciation), pain, medical costs, loss of livelihood, and humiliation [34].

According to the Talmud, if physical damage was permanent, regardless of whether the accident was unavoidable, compensation for the damage was payable. But unless the person's action was deliberate, there was no liability to compensate for pain, medical care, or loss of employment. The threshold for humiliation was even more stringent in that the assailant must have intended to humiliate the victim.

The methods for determining the amounts payable under each heading were outlined as follows.

Damages (Injury). The court assessed each injury by considering the value of the injured person as a slave being sold in the marketplace and a valuation made as to how much the person was worth previously and how much the person is now worth. By this method, monetary compensation was due for the bodily harm actually caused.

In his comprehensive commentary contained within the Talmud, the medieval Rabbi Rashi (Schlomo Yitzchaki) suggested that when the victim is a skilled worker, the payment for physical damage be small, as he can regain his livelihood following recovery. On the other hand, a menial laborer should receive a larger amount as his value on the slave market would be very low.

Pain. Compensation for pain inflicted by an offender was calculated by estimating how much a man of equal social standing would need to be paid for him to undergo the pain. Another way of assessment was to estimate how much the injured person would be willing to pay to forego the pain.

Where pain was associated with loss of a body part, judges were advised to consider the following scenario: if the wounded man had been sentenced to have his hand (for example) amputated, how much would he be willing to pay to have it removed under the influence of an anesthetic, rather than to have it "rudely hacked off."

Healing. The offender was obliged to pay the plaintiff's medical expenses. Treatment was to be administered only by a competent physician who would charge an appropriate fee for his services. However, if the patient disobeyed the physician and his condition worsened, the man who injured him was not obligated to provide him with further medical treatment.

Loss of Time from Work. In calculating loss of wages during the period of incapacity, the court considered the injured person as if he were a "watchman of cucumber beds." The reasoning behind this was that even a lame or one-armed person could be employed in this capacity. If the injured person would be unable to walk around the patch, he could function in a lesser occupation, such as a gatekeeper.

The injured person's previous employment was not considered because compensation had already been paid for the value of his injured bodily part. If the person had not been in employment (through either being wealthy or lazy), no compensation was payable to him under this category.

Humiliation (Degradation, Shame). Compensation was payable under this heading provided it was caused by a physical act. In principle, amounts were to be determined in accordance with the relative status of the offender and the offended. In fact, it proved impossible to formulate hard and fast rules: it all depended on who is put to shame and by whom.

In summary, Talmudic Law preserved the eligibility of injured claimants to receive compensation for pain and suffering, as well as for loss of their honor and damage to their reputation.

Compensation Schemes in the Middle Ages (5th-15th Century CE)

In the early Middle Ages, the legal systems of the Germanic tribes included detailed "catalogs of forfeits" (comparable to modern Tables of Maims) in compensation for certain physical injuries and loss of sensory functions [35]. The perpetrator had to pay the forfeit to the injured person or, in the case of manslaughter, to the clan of the dead person and thus avert the feud that otherwise faced him. The law codes were designed for a society that was stratified on the basis of castes determined by descent or kinship, ranging from royalty and nobility down to the peasants.

Lex Salica (Salic Law) was compiled around 500 CE by Clovis, the first Frankish king. The Franks were a group of Germanic peoples that settled in the lower regions of the Rhine River. Lex Salica remained the basis of Frankish law throughout the early medieval period and influenced the future European legal systems, representing a bridge between Roman law and the laws of the Germanic states [36].

In the Lex Saxonum (c. 802 CE), the list of physical injuries ranged in severity from loss of single digits—differentiated between thumb, forefinger, small finger, and the other fingers—up to loss of the person's life. Bilateral deafness was classified on the same level as bilateral blindness; the loss of both hands, both feet, both testicles, and death [35].

A basic tenet was its emphasis on payment of compensation adequate to restore the claimant to his or her previous state, including the matter of honor. The worth of each victim was different, according to whether they were Frank or Roman, free or enslaved, young or old, female or male [36].

As feudalism gradually became the primary structure of government during the late Middle Ages in Europe, the compensation schedules of antiquity were gradually replaced. The often-arbitrary benevolence of the feudal lord determined which injuries merited financial recompense [25]. The concept of compensation for the lowly worker was bound up in the doctrine of *noblesse oblige*, whereby an honorable lord would care for his injured serf [25].

In the Arabic world, the Talmudic tradition continued to be in evidence, but with an important addition. The Jewish scholar Moses ben Maimon, known as Maimonides, argued that the iniquity of the guilty party was not forgiven until he had asked for and received the victim's forgiveness.

In *The Laws of Injury and Damages*, Maimonides [37] outlines the further obligation of the guilty party:

"One who causes bodily injury to his fellow cannot be compared to one who damages his goods. For once the damage to the goods has been made good, the guilty party has made atonement, whereas he who causes bodily injury to his fellow, though he has paid him the five dues (injury, pain, medical care, loss of time, shame) . . . His iniquity is not forgiven until he has asked the victim's forgiveness and been forgiven" [verse 9].

The Era of Industrialization

With the industrialization of European countries, occupational injuries became commonplace. The ancient liabilities for injuries (fault-grounded liability) were modernized and revised to provide for a more universal and predictable remedy for industry- and transport-related injuries that was no longer based on demonstrable fault [38].

As workers' compensation systems continued to evolve, their scope for awarding damages was deliberately narrowed when injured workers were denied the possibility of receiving compensation under the heading of shame ("humiliation") [39]. Furthermore, compensation for pain and suffering (i.e., nonpecuniary loss) was restricted to the law of delicts (torts) under the German civil code [38].

Prussian Social Reform. During the 19th century, the Prussian government instituted a program of social reforms. Coal miners benefitted from an advanced insurance system that provided them with medical treatment in the case of illness or accident, payments during time lost from work, and an invalid pension for permanent disablement [39]. In return, employers expected greater productivity, loyalty, and discipline, as well as no unions and no strikes [40].

By the 1840s, the government had introduced new forms of guilds that covered not only artisans and craftsmen but also factory workers. These guilds managed pension funds to cover economic loss occasioned by illness, infirmity, and old age.

Germany's Workers' Compensation Insurance System. In 1881, at the behest of Germany's Chancellor Otto von Bismarck, Kaiser Wilhelm I wrote to the German Parliament, "Those who are disabled from work by age

and invalidity have a well-grounded claim to care from the state."[2]

Sickness insurance was the first of the new laws that were instigated and enacted. The second law, which dealt with industrial accidents, was introduced in phases between 1881 and 1884 [41]. These new laws aligned with the German Imperial Liability Act (Reichshaftpflichtgesetz—RHPflG) of 1871.

As Brüggemeier observed: "An ethically neutral mechanism of distribution of risks and losses is replacing the honorable culture of individual responsibility" [38 p3].

The contributions to this legislation from "the classic villains of German history" [41 p56] need to be acknowledged, albeit for the selfish reasons that motivated them. This group includes the Junkers (agrarian landholders from noble families), steel makers and other industrialists, mine owners, reactionary politicians, and commercial cartels. Their influence was counterbalanced by the "nameless Prussian and German judges who reinterpreted the Prussian 1838 Railroad Law to protect the working classes [41 p56]."

Bismarck, who was an important lumber merchant and paper manufacturer, hoped that the German government would subsidize the high cost of accidents with revenue derived from its monopoly in the production of tobacco [42]. This proposal was voted down by Parliament. Therefore, the costs were initially borne by the employers, who passed them on to consumers.

But as Bismarck argued in the Reichstag[3]: "If the state occupies itself at all with accident insurance, then the present system is just too expensive ... it must strive for the least expensive form." His then political rivals were Marxists and other parties with socialist agendas who "feigned a concern for the working man" [41 p2].

Nevertheless, in the case of workers' compensation, Bismarck was prepared to borrow some of the ideas of his political rivals to integrate the new class of industrial workers and their trade unions into the society of imperial Germany [38]. The legislation was designed to encourage safer workplaces and to reduce industrial accident rates.

Subsequently, the costs were contained by "loss spreading" through commercial insurers. The insurance fund rather than the injured plaintiff would bear the cost of unavoidable accidents. This scheme allowed flexibility in the allocation of damages to injured workers as well as adjustability of insurance contributions from employers [43].

2 Available at: https://www.ssa.gov/history/ottob.html.

3 Stenographic Report on the Proceedings of the Reichstag, 5th Legislative Period, 4th session 1884, 6th meeting, March 15, 1884. Berlin: Printing Office of the *Norddeutschen Allgemeinen Zeitung* (Pindter), 1884, vol 1, pp 72–78.

Workers' Compensation Systems in the 20th Century

The Great Tradeoff. By the end of the 19th century, the United States had become the world's leading industrial nation. However, the incidence of industrial accidents was also higher than that of other industrialized nations like England and Germany [38]. The legal remedies offered by the common law of torts failed to meet the needs of injured workers.

During the second decade of the 20th century, an agreement was reached between labor and industry that was necessary for the proper functioning of a workers' compensation system [41]. In what was known as The Great Tradeoff, the employer agreed to pay medical bills and lost wages regardless of fault. The employee agreed to give up the right to sue. Permanently disabled workers could receive periodic payments equivalent to two-thirds of their annual salary, and if the accident proved fatal, their widows and orphans received the payment. Compensation for pain and suffering was deliberately excluded [38].

Schedules for Monetary Compensation. Commercial insurers were instrumental in developing schedules that were supposed to turn the loss of a bodily part into a surrogate for lost earning capacity [44]. The schedules were developed by a form of pseudo-rationality involving measurements of bodily functions and calculations to turn injuries into percentage ratings. They related to each other in a scale of relative severity and finally converted into money.

The schedules bore no relationship to the widely varying economic consequences of such injuries to workers with different positions in the labor market [44]. Thus, impairments became numbers to be subtracted from the presumed wholeness of the individual. Of course, there were no generally acceptable mechanisms for translating work-related disability arising from ongoing pain into monetary awards. Likewise, there was not a mechanism for awarding compensation to injured workers for any loss of their social status and their humiliation.

The German program became the model for workers' compensation legislation in many other countries, including the United Kingdom [44], the United States [25, 45], Canada [46], and Australia [47]. There were and still are many differences in the details of their operation that relate to how compensation awards are determined and how disputes are adjudicated. Although these differences are beyond the scope of this paper, the underlying principles are similar.

In countries where employer liability for no-fault workers' compensation has been legislated, compensation for noneconomic losses (such as pain and suffering and erosion of dignity) may not be items for specific compensation.[4] Exceptions are the systems of workers' compensation in Switzerland and Sweden [48] and in one Australian jurisdiction (Comcare—the National

Authority for Work Health and Safety and Workers' Compensation) [47]. However, in each of the eight Australian states, the respective systems of workers' compensation have excluded monetary awards for chronic pain.[5]

The legal right to preserve one's reputation, to restore one's honor, and to receive an apology is found only in the People's Republic of China, articles 2 and 15 of the workers' compensation laws.[6]

From our historical overview, we suggest that any removal of the items of pain, humiliation, and loss of social status from systems of monetary compensation may be fundamental to explaining current perceptions of injustice by claimants, along with the associated adverse health effects and poor rehabilitation outcomes.

Issues for Reflection

A Yearning for Talion?

The ancient belief in punishing those responsible for injuring others has not disappeared [27]. This belief may be responsible for not only the increasing amount of litigation but also illness behavior becoming one of the many psychosocial determinants of the outcome of injury and illness, of which anger is one [49].

Anger. Mayou [49] attributed the anger of compensation claimants to a perceived lack of concern by those believed to be responsible for their injury. The purported moral neutrality of the systems in which matters of monetary compensation are now determined has removed the requirement for a claimant to receive an apology. The formula of forgiveness proposed by Maimonides no longer appears to be relevant. Whether it was ever practiced is a moot point.

The Importance of Maintaining One's Honor. Apart from its obvious value in providing the means of a worker's subsistence, the amount paid in wages together with the nature of the work performed can both determine the social status and maintain the self-esteem of the worker [6]. Maintaining one's social status in the community can be regarded as a matter of honor or dignity, which is relevant in the context of workers' compensation.

When people who have been wronged seek legal redress, they also demonstrate their vulnerability and, in so doing, can place their honor in jeopardy: "To request compensation or even to invite apologies are courses of action which involve risk to honor if they are not adopted, with the implication that they cloak a demand for satisfaction" [50 p30].

Issue of Fairness. Essentially, the perception of being treated fairly is the outcome of a comparison made by workers between what they actually receive and what they think they deserve to receive. Those who have been injured in the context of their employment can be faced with uncertainty as to whether they will be stereotyped as malingerers or even as criminals [51].

Moral Neutrality? The belief that current systems of workers' compensation are morally neutral is in fact far from the truth [45]. A claimant disabled by chronic pain can face formidable challenges to obtaining compensation. These include the medico-legal considerations involved in establishing eligibility for compensation, a potential for the distortion of contemporary science and medicine, and the ever-present risk of being stigmatized [45]. The current systems appear to emphasize the health benefits of an early return to work while seeming to overlook the impact of pain on a worker's ability to work [45].

Should Injured Workers Receive Compensation for Pain and Suffering? For historical reasons, the focus of the no-fault nature of workers' compensation jurisdictions has naturally been on a person's loss of work capacity and assessment of impairment in relation to the person's employment. However, reasons given to explain why pain and suffering are no longer compensable items in some systems are as follows:

1. It is impossible to accurately assess these factors in the same way that physical impairments are measured [52].
2. Allocation of limited resources to those with the most severe and unequivocal impairments should be encouraged [53].
3. A belief that payment of monetary compensation determined by persistent pain and suffering could be a significant barrier to recovery and may even promote persistent illness and disability [54].
4. Access to benefits may expose claimants to suggestions of malingering and the risk of stigmatization [45].

Clinical Considerations. From their professional standpoint, medical practitioners and other health care providers are morally obligated to provide care to their patients and to do no harm. Yet, it has proven difficult for some clinicians to meet this obligation when they practice within the constraints (financial, temporal, emotional, and clinical) imposed on them by complex systems of workers' compensation [55, 56].

Doctors traditionally understand the relationship they develop with their patients as one reliant on trust and duty. Patients "give" themselves to them at certain

4 In legal contexts, "pain and suffering" is broadly construed to permit recovery of damages under laws of torts not only for physical pain but also for erosion of dignity and humiliation.

5 Safe Work Australia. Comparison of workers' compensation arrangements in Australia and New Zealand, 27th edition, 2019. Available at: https://www.safeworkaustralia.gov.au/doc/comparison-workers-compensation-arrangements-australia-and-new-zealand-2019.

6 Available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn136en.pdf.

moments in their lives and especially so when they feel incomplete, imperfect, damaged, or disabled.

In the setting of workers' compensation, the physician provides services within a complex system that goes far beyond the provision of health care to a specific individual [57]. Nevertheless, the adverse health effects of perceived injustice to specific individuals are well known and merit serious medical concern. Although it is rarely discussed, suicide of claimants is a reality within workers' compensation systems [58]. In this context, the "ethics of care" moral principle applies: "The morally correct action is the one that expresses care in protecting the special relationships that individuals have with each other." [59 p104].

However, for injured workers who perceive they have been unjustly treated by those responsible for the operation of the system, there is little their doctor can do to restore this loss of dignity. Codes of medical ethics have given way to the "business ethic" of cost containment and profitability [60].

Calls for Reform

Achieving distributive justice in resource allocation on the basis of need, equity, and equality is a fundamental issue [61]. When injured workers perceive this has not been the case, they will continue to complain long after they have been deemed "healed," "released," or "fit to return to work" [62].

On these and other grounds, there have been repeated calls for reform of the current fragmented systems of workers' compensation systems in the United States, where each state administers its own system with no federal oversight. This lack of uniformity contrasts to the Federal Employees Compensation Act that covers all federal employees [63, 64].

It is argued that a truly national program of compensation in the United States would provide identical coverage of health care and adequate loss-of-earnings benefits for all occupational injuries and illnesses.[7] Such a program would, at least in theory, ensure that injured workers are compensated equitably through a national set of benefits, with uniform incentives for them to return to work [63]. However, the proposed national model[8] does not explicitly address the issue of compensation for ongoing pain and suffering, nor does it address the significant moral issues we have identified.

The Fundamental Dilemma

A state of psychological tension has always existed for judicial decision makers. On the one hand is their desire to retaliate on behalf of those who have been injured, and on the other hand is their responsibility to be seen to fairly allocate monetary compensation for the losses sustained by claimants. Such tension highlights the dilemma previously described by Nagel [9], whereby the impersonal and the personal standpoints cannot be reconciled. This is a particular problem for decision makers in workers' compensation systems where subjective factors such as the presence or absence of pain, and the consequent inability to work, need to be fairly adjudicated [65].

Toward an Ideal System

From her extensive review of workers' compensation systems around the world, Lippel [46] highlighted numerous issues needing careful consideration to ensure that fair compensation is awarded in a way that respects the dignity of the workers.

In her opinion, such systems would better serve the needs of those who were injured if they (1) provided nonadversarial access to adequate benefits and health care; (2) ensured the protection of claimants by preventing stigma and restoring balance; (3) used appropriate scientific evidence in the determination of compensability; and (4) applied appropriate means for return to work.

However, the task of achieving such major changes within long-established systems that have evolved to meet local needs will be extremely difficult. Moreover, it is unrealistic to expect restoration of workers' rights that were traded off over a century ago.

Conclusion

The Prussian and German governments' decision to formulate an economic model for workers' compensation has had far-reaching implications for injured workers. From a societal standpoint, the pragmatism underlying this model may be perceived as positive and fair. However, this does not apply to the individual standpoint, particularly for those whose inability to work can be attributed to ongoing pain, as well as for those who are faced with loss of their social status and humiliation. These are moral issues with adverse health consequences that are unlikely to be resolved within the current systems of workers' compensation. Nevertheless, major reforms of these complex and long-established systems will be needed if they are to provide a less uncertain and more dignified path for the injured worker.

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