HART STUDIES IN PRIVATE LAW

UNEXPECTED CONSEQUENCES OF COMPENSATION LAW

Edited by
Prue Vines and
Arno Akkermans

UNEXPECTED CONSEQUENCES OF COMPENSATION LAW

This book explores the performance of compensation law in addressing the needs of the injured. Compensation procedure can be dangerous to your health and may fail to compensate without aggravation/creating other problems. This book takes a refreshing and insightful approach to the law of compensation considering, from an interdisciplinary perspective, the actual effect of compensation law on people seeking compensation. Tort law, workers' compensation, medical law, industrial injury law and other schemes are examined and unintended consequences for injured people are considered. These include ongoing physical and mental illness, failure to rehabilitate, the impact on social security entitlements, medical care as well as the impact on those who serve – the lawyers, administrators, medical practitioners etc. All are explored in this timely and fascinating book. The contributors include lawyers, psychologists, and medical practitioners from multiple jurisdictions including Australia, the Netherlands, Canada, Italy and the UK.

Volume 34 in the series Hart Studies in Private Law

Unexpected Consequences of Compensation Law

Edited by
Prue Vines
and
Arno Akkermans

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2020

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Unexpected Consequences of Compensation Law (Conference) (2018 : University of New South Wales) | Vines, Prue, 1956- editor. | Akkermans, A. J., editor. | University of New South Wales. Faculty of Law, host institution.

Title: Unexpected consequences of compensation law / edited by Prue Vines and Arno Akkermans.

Description: Oxford, UK ; New York, NY : Hart Publishing, 2020. | Series: Hart studies in private law ; volume 34 | "This book arose out of a symposium held at the University of New South Wales, Sydney, Australia in March 2018"—ECIP introduction. | Includes bibliographical references and index.

Identifiers: LCCN 2020015559 (print) | LCCN 2020015560 (ebook) | ISBN 9781509927999 (hardcover) | ISBN 9781509928019 (ePDF) | ISBN 9781509928002 (EPub)

Subjects: LCSH: Damages—Social aspects—Congresses. | Compensation (Law)—Social aspects—Congresses. | Personal injuries—Law and legislation—Congresses. | Workers' compensation—Law and legislation—Congresses.

Classification: LCC K923.A6 U54 2020 (print) | LCC K923.A6 (ebook) | DDC 344.01/21—dc23

LC record available at https://lccn.loc.gov/2020015559

LC ebook record available at https://lccn.loc.gov/2020015560

ISBN: HB: 978-1-50992-799-9
ePDF: 978-1-50992-801-9
ePub: 978-1-50992-800-2

Typeset by Compuscript Ltd, Shannon

CONTENTS

PART III
APOLOGIES

PART IV
RESPONSIBILITIES OF LAWYERS

CONTRIBUTORS

Arno Akkermans is Professor of Private Law and Director Amsterdam Law and Behavior Institute and of the Amsterdam Centre for Comprehensive Law, Faculty of Law, Vrije Universiteit, Amsterdam, Netherlands.

Nicola Brutti is Professor of Comparative Law in the Department of Political Science, Law and International Studies at the University of Padua, Italy.

Kylie Burns is Associate Professor and Deputy Head of School (Learning and Teaching) Griffith Law School, Griffith University, Nathan, Queensland, Australia.

Ian Cameron is Professor of Rehabilitation Medicine, Faculty of Medicine and Health, and Head of the John Walsh Centre for Rehabilitation Research, at the University of Sydney, Australia.

Robyn Carroll is Professor of Law and Deputy Head (Community and Engagement), University of Western Australia Law School, Perth, Australia.

Alex Collie is Professor and Director of the Insurance Work and Health Unit, School of Public Health and Preventive Medicine, Monash University, Melbourne, Australia.

Genevieve Grant is Associate Professor, Director of the Australian Centre for Justice Innovation and a Convenor of the Law, Health and Wellbeing Group, Faculty of Law, Monash University, Melbourne, Australia.

Rosamund Harrington is Lecturer in Occupational Therapy at the School of Allied Health, Faculty of Health Sciences, Australian Catholic University, Banyo, Queensland, Australia.

Christopher Hodges is Professor of Justice Systems and Head of the Swiss Re Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford. He is a supernumerary Fellow of Wolfson College, Oxford.

Katherine Lippel is Canada Research Chair in Occupational Health and Safety Law, Civil Law Section, Law Faculty, Professor, University of Ottawa, Ottawa, Canada.

Ellen MacEachen is Associate Professor and Associate Director of the School of Public Health and Health Systems, University of Waterloo, Ontario, Canada.

Jennifer Schulz Moore is Associate Professor and Director of Learning and Teaching, Faculty of Law, and Associate of Faculty of Medicine, University of New South Wales, Sydney, Australia.

Christine Parker is Professor in the Faculty of Law, Melbourne University, Australia.

Clare Scollay is a PhD candidate, Faculty of Law, Monash University, Melbourne, Australia.

Sonja Senthanar is Postdoctoral Research Fellow, The Partnership for Work, Health and Safety, University of British Columbia, Vancouver, Canada.

Prue Vines is Professor of Law and Co-Director Private Law Research & Police Group in the Faculty of Law, University of New South Wales, Sydney, Australia.

PART I

Introduction

1

An Overview of Some Unexpected Consequences of Compensation Law

PRUE VINES AND ARNO AKKERMANS*

I. Introduction

Compensation law concerns the legal recognition of wrongs which cause harm and the giving of compensatory awards in recognition of the wrong and the harm. The area of personal injury is particularly significant and is often thought of as the primary area of compensation law, with a focus on negligence, workers' compensation and other schemes; but other areas of private law are also significant where personal injury and/or economic loss may arise. Thus compensation law may encompass a range of causes of action and a large range of systems, all of which are aimed at compensating persons for their harms. Unfortunately, it has become clear that even where the aims of the compensation systems are met, there are often unintended and unexpected consequences of compensation which may badly affect the person who is supposed to be compensated.

Knowledge of these unintended and unexpected consequences has been in existence since the 1970s and earlier, but until recently there was very little systematic discussion of these issues outside Law Commission and Law Reform body[1] reports. Amongst legal academics, the work of Patrick Atiyah in Britain, including *The Damages Lottery* and *Accidents, Compensation and the Law*[2] is one example of

* Prue Vines is Professor and Co-Director, Private Law Research and Policy Group at the Faculty of Law, UNSW Sydney. Arno Akkermans is Professor of law at Vrije Universiteit Amsterdam and director of the Amsterdam Law and Behaviour Institute (A-LAB).

[1] For example, *Royal Commission on Civil Liability and Compensation for Personal Injury: Report* (Pearson Report) (London, HMSO, 1978) and its earlier counterparts; *Compensation for Personal Injury in New Zealand*: *Report of the Royal Commission of Inquiry* (Woodhouse Report) (New Zealand, 1967); *National Rehabilitation and Compensation Scheme Committee of Inquiry* (Woodhouse Report Australia) (Canberra, AGPS, 1974).

[2] P Atiyah, *The Damages Lottery* (Oxford, Hart Publishing, 1997); *Accidents, Compensation and the Law*, written by Patrick Atiyah and first published in 1970. He wrote the first four editions and Peter Cane then took over. It is now in its 8th edition, (Cambridge, Cambridge University Press, 2013). See also T Ison, 'The Therapeutic Significance of Compensation Structures' (1986) 64(4) *The Canadian Bar*

significant attention being paid to the actual workings of the compensation system and its real impacts on the people involved in it. Dutch academics have been interested in this for some time.[3] Others have begun to pay attention to the issues which may be 'under the radar', such as how costs affect this area, how insurance affects it and how the structure of legal systems may affect it.[4] Academic discourse on unexpected consequences is only beginning to become systematic and to involve more than legal academics. We are now beginning to see the development of systematic empirical work evaluating the 'side-effects' of compensation law coming from not only legal academics but also from academics in medicine, epidemiology, psychology and sociology. One of these new interdisciplinary research fields is Compensation Health Research, studying the anti-therapeutic effects of legal arrangements and procedures on the victims of accidents who have suffered injury. It is the mission of Compensation Health Research to provide more detailed understanding and higher quality evidence of what exactly causes the detrimental effects of compensation procedures and how they can be restrained, in order to enable informed changes in policy, case law, the modus operandi of the legal profession and relevant institutions, and to inspire legislative change. Australia has been a leader in this field and there is a significant development of international research and collaboration of which this book is a part.

This book arose out of a symposium held at the University of New South Wales, Sydney, Australia in March 2018. It included a range of researchers from the various fields of law, medicine, epidemiology, psychology and sociology and included Australian, Dutch and Italian participants, and research carried out in those countries and in the USA and New Zealand. In this book we have also been able to include an English and Canadian perspective on the field. Much of the discussion

Review; T Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation* (London, Staples, 1968).

[3] NA Elbers et al, 'Do Compensation Processes Impair Mental Health? A Meta-Analysis' (2013) 44:5 *Injury*, 674, doi.org/10.1016/j.injury.2011.11.025; NA Elbers et al, 'What Do We Know about the Well-being of Claimants in Compensation Processes?' (2012) 33:2 *Recht der werkelijkheid* 65, ssrn.com/abstract=2562343; AJ Akkermans, 'Reforming Personal Injury Claims Settlement: Paying More Attention to Emotional Dimension Promotes Victim Recovery' (2009) *Torts & Products Liability eJournal*, dx.doi.org/10.2139/ssrn.1333214; NA Elbers et al, 'Procedural Justice and Quality of Life in Compensation Processes' (2013) *Injury* 1431, doi.org/10.1016/j.injury.2012.08.034; AJ Akkermans and KAPC van Wees, 'Het letselschadeproces in therapeutisch perspectief: hoe door verwaarlozing van zijn emotionele dimensie het afwikkelingsproces van letselschade tekortschiet in het nastreven van de eigen doeleinden' (2007) *Tijdschrift voor Vergoeding Personenschade* 103; SD Lindenbergh and AJ Akkermans (eds), *Ervaringen met verhaal van schade. Van patiënten, verkeersslachtoffers, geweldsslachtoffers, burgers en werknemers* (Civilologie / Civilology, 7) (Den Haag, Boom Juridische uitgevers, 2014).

[4] R Lewis, 'Insurers and Personal Injury Litigation: Acknowledging "The Elephant in the Living Room"' (2005) 1 *Journal of Personal Injury Law* 1; R Lewis, 'The Influence of Insurers upon the System of Compensation for Personal Injury' (2005) 20(2) *Insurance Research and Practice* 16; R Lewis, 'Litigation Costs and Before-the-event Insurance: The Key to Access to Justice?' (2011) 74(2) *Modern Law Review* 272; R Lewis, 'Strategies and Tactics in Litigating Personal Injury Claims: Tort Law in Action' (2018) 2 *Journal of Personal Injury Law* 113; J Morgan, 'Tort, Insurance and Incoherence' (2004) 67(3) *Modern Law Review* 384.

concerns issues which are common to not only most common law jurisdictions, but also to civil law jurisdictions.

II. Promising More than Law Can Deliver?

Taking tort law and personal injury law as the paradigm of compensation law, we are all very much aware that the law often promises more than it can deliver. The harm that compensation law sometimes wreaks on the people involved in it ranges from the mental and physical injury caused by stress to the parties who are in the compensation system – which might be relatively unsurprising but, as becomes abundantly clear from several chapters of this book, is to be considered a central factor for negative health impact on claimants – but also to the vicarious harm done to lawyers and administrators acting for plaintiffs, and occasionally defendants. For parties, long delays and their associated uncertainty may create stress, which can create significant psychological or physical injuries separate from the original injury that led to the claim or suit. Sometimes this may also lead to addictions or other unhelpful outcomes. Other unexpected consequences include the creation of a situation where lawyers advise their clients not to apologise following some kind of adverse incident. This was not an intended outcome of the law, but remains a significant issue in civil liability. Other unexpected consequences include situations where the law falls short – for example, where damages awards are insufficient to support an awardee for the time they were expected to last. The consequences of administrative processes used to carry out compensation law in systems such as workers' compensation and motor accidents systems can also be unexpected and unintended. The processes of insurance and the operation of compensation law in interacting with insurance is another area where sometimes unexpected consequences arise.

The actual area in which the compensation law is operating may have significant effects on the dynamics, which might create unexpected consequences. Personal injury caused by a traffic accident and that caused by medical malpractice may be experienced very differently by the parties concerned – for example in medical malpractice there will often be a previous relationship which may affect the view of what the best outcome is. Particular areas may also be differentially insured, so that sporting injuries might be treated very differently from traffic accident injuries. There may be different approaches in relation to individuals affecting outcomes and systemic effects. Different expectations and different personnel and different institutions and systems may interweave to create quite different outcomes. In this book we attempt to scrutinise the warp and weft of this weave in order to illuminate the issues.

Two very significant issues concern the identification of what should be compensated for and the identification of what amounts to, or can be regarded as, compensation. The law has been slow to identify emotional issues as part of

the discourse of law. The traditional view of damages, in common law and civil law jurisdictions alike, has been that monetary damages are given to compensate for wrongs, and that the damages are awarded in recognition mostly for physical harm which has created deficits in a person's life which can be made up for by money. This is not to say that legal systems have not recognised emotional harm, but they have been slow to recognise even catastrophic psychiatric illness, and slower yet in most jurisdictions to recognise emotional harms of lesser seriousness. Non-economic loss or general damages has traditionally been awarded in a way which de-emphasises them, and recent tort reforms in the United States and Australia in particular, have placed thresholds and caps on such damages. The reality of emotional harm is only beginning to be recognised,[5] both as a matter of the harm the law recognises and compensates for, but also in respect of the unintended harms that the legal system inflicts. These, of course, may be physical, economic and emotional.

III. This Book

This book aims to consider in some detail the range of issues that may arise unexpectedly from the ordinary processes of compensation law. It is divided into several parts. There is an Introduction, then a section on current shortcomings of personal injury compensation systems. Part III concerns apologies, and Part IV considers the responsibilities of lawyers.

A. Some Current Shortcomings of Personal Injury Compensation Systems

Part II starts with Chapter 2, 'Achieving Justice in Personal Injury Compensation: The Need to Address the Emotional Dimensions of Suffering a Wrong' by Arno Akkermans. He outlines the psychological consequences of suffering a wrong and the ensuing emotional and moral needs of personal injury victims, and argues that compensation procedures generally fail to address these needs but instead often exacerbate them, leading to the experience of injustice and considerably increasing the risk of secondary victimisation. As a growing body of evidence suggests that perceived injustice plays a central role as a predictor of worse health and recovery outcomes, this failure is not only problematic from a justice point of view, but should also be addressed to mitigate the anti-therapeutic effects of compensation procedures. Akkermans submits that these issues go beyond the differences between fault-based and no-fault compensation regimes, and elaborates on possibilities to

[5] See H Conway and J Stannard, *Emotional Dynamics of Law and Legal Discourse* (Oxford, Hart Publishing, 2019).

make claims resolution psychologically more responsive and intelligent regardless of what kind of system is involved, fault-based or no-fault. He identifies adversarialism as a common noxious element, and suggests proactive claims resolution as an antidote, and changing the roles in the game by having assessments carried out by neutral third parties as the most thorough countermeasure. Other suggestions are to provide a broader scope of services than monetary compensation only, to promote personal contact between those involved in the harm-causing incident, and to promote restorative and procedural justice.

The point of view of a medical researcher considering the relationship between compensation and health is taken in Chapter 3, 'Compensation and Health' by Ian Cameron. He discusses an extensive range of the literature on the subject, setting out the approach taken by the World Health Organization and its sub-organisations. He notes that it is well known that participation in injury compensation schemes may be associated with limited recovery after injuries sustained in motor accidents and other settings. He discusses the empirical data which suggest that this is likely to be a causal relationship rather than a mere correlation. In his chapter he synthesises the findings of all available Compensation Health Research and considers the mechanisms which may underlie the negative effects. Cameron concludes that health and recovery after injury can be improved by appropriate injury insurance scheme design, and suggests some possible useful interventions.

Alex Collie's Chapter 4, 'Apples, Oranges and Bananas' considers a range of Australian compensation schemes from the standpoint of psychology, drawing on a number of empirical studies which show that aspects of the particular design of a compensation scheme really matter to the outcome for the claimant and that no-fault schemes appear to produce superior health or recovery outcomes compared with fault-based schemes. His investigation considers the individual within the context of the complex social system we all live in. Work disability is affected by all the interactions in this social system and the 'control' in the system may be highly dispersed or not in an expected place. This can make the relatively simple analyses which are envisaged by the legal system wholly inadequate. The rapid rate of change of legislation in Australia's workers' compensation systems contributes to a situation which is extremely complex. The chapter reports the results of a major study of participants in workers' compensation schemes across Australia. The results themselves show that often the changes to workers' compensation schemes suffer from a lack of understanding of the extent of the complexity involved and may not achieve the correct goals, or only one of a multiple number of goals – for example, reducing costs as a goal is quite often achieved, but it is often at the expense of rehabilitation or return to work, despite legislative attempts to do both. The research summarised in this chapter suggests that there is substantial scope to improve workers' compensation schemes through more effective practices and policy settings, leading to better health outcomes and significant economic and productivity gains.

Katherine Lippel, Ellen MacEachen and Sonja Senthanar in Chapter 5, 'Workers' Compensation in Canada: Experiences of Precariously Employed

Workers in the return to Work Process after Injury' bring us a view from Canada of workers' compensation schemes across different provinces. They discuss the experiences of precariously employed workers in the return to work process after injury, which is an interesting comparison to Alex Collie's chapter on Australian workers' compensation systems and return to work patterns. In Canada each province has its own workers' compensation system. They compare the systems in Quebec and Ontario which differ in relation to the requirements for return to work. In Quebec the employer has the right but no obligation to offer modified work, whereas in Ontario both parties are required to cooperate so that theoretically an employer could be penalised for failing to offer work (although this appears to rarely happen). In Ontario much litigation occurs in relation to the modified work process. Particular aspects of each regime give rise to obvious differences in what happens to workers. For example, in Quebec, benefits are higher than those in Ontario, which meant that sometimes it was not worthwhile for claimants in Ontario to make a claim for what would be a very low benefit. For Quebecois claimants benefits are higher and last longer than in Ontario and this gives the Quebec employer a clear incentive to take the worker back. The picture is extremely complex, which is part of the problem: lawyers may not know who is entitled without extensive investigation in Ontario, workers may be confused, and complex systems may allow employers to duck their obligations, or indeed may create a situation where they are not able to understand their obligations. Lippel et al find that the economic incentives in both systems seem to become finalities in themselves, regardless of the aims of the workers' compensation system itself.

What happens to lump sum compensation when the plaintiff spends their money on housing? In Chapter 6, 'Safe as Houses? Lump Sum Dissipation and Housing', Kylie Burns and Ros Harrington look at this aspect of the effects of lump sum dissipation, This is a very common way for people to use a lump sum, but it is very likely to lead to the person having insufficient resources to manage ordinary living and as many of these people are denied social security, they may become destitute. The authors' research involved a detailed study of the impact of spending lump sums on housing by analysis of social security appeal cases in the Administrative Appeals Tribunal in Australia. They first critique the justifications for lump sum damages, showing how seriously impeded these are by social security rules of various kinds. Lawyers' support for lump sum damages should not be dismissed as (entirely) self-interested – many factors create the desire for lump sums, including people's sense of autonomy and the wish to be free of unwarranted state interference. These are also reasons people spend money on housing. Burns and Harrington show that the social security response to people doing this is to argue that they are 'double-dipping' because their lump sum was supposed to be used for income support and spending on housing is characterised as not income support. This narrow characterisation ignores the cultural and emotional value of housing and the fact that income is often ultimately spent on housing.

Chapter 7 is by Christopher Hodges. It is entitled 'Achieving a Just Culture that Learns and Improves' and it tackles a number of the barriers to open justice

in relation to compensation law, particularly in relation to medical malpractice. Hodges regards this as a situation where there are two clashing institutional cultures: the medical and legal systems. The legal system is focused on individual wrongs, and deals with those after the event, often on the (wrong) assumption that this will deter poor behaviour in future, while the medical system is a *systems* culture where things may go wrong not because of one individual, but because of the nature of the system and where investigation of the *system* is more often what is required. Hodges discusses the evidence of what patients want and various approaches from NHS and other systems, and from behavioural sciences to argue where the possibilities of creating a culture that actually *learns* from its mistakes might lie. His analysis makes clear that both a fault-based system and an adversarial process present strong barriers both to openness of clinical staff with patients about what happened and why, and to medical learning so that future mishaps can be avoided on a wide scale. Hodges submits that 'fault and adversarial systems are old technology', and discusses more efficient mechanisms for delivering compensation to those who qualify, and for delivering further functions, especially caring responses, explanations and apologies, aggregating data on adverse events and feeding back information on how to improve both practice and culture in healthcare. He concludes that the traditional legal system is incapable of delivering these objectives.

B. Apologies

The next part, Part III, concerns the treatment of apologies. As an unexpected consequence of compensation law, apologies are a particular issue deserving of investigation. The unexpected thing is the common advice of lawyers to clients not to apologise, which is a consequence of the fear of liability. The compensation systems rarely mention apology and indeed may ignore the subject altogether, but this treatment of apologies comes out of the legal arrangements constituting the compensation system. The fear is always that an apology might mean that liability has been admitted. That is an evidential matter which is not considered particularly here. However, it is well known that apologies in certain circumstances may reduce litigation, or at least increase the likelihood of early settlement. One unexpected consequence of compensation systems which is considered in the chapters on medical and psychological consequences is the failure to pay attention to the extra harms suffered by people who suffer personal injury – these include humiliation, hurt to their sense of justice, and so on. Apologies may operate as remedies in these situations.

Chapter 8, 'An Incentive Based Approach to Apologies and Compensation' by Nicola Brutti, considers whether apologies could be regarded as having any real relevance to a legal system such as Italy's. He points out that apologies come from the moral domain and are almost never referred to in the Italian Civil Code. As a comparative lawyer he suggests that the fact that common law countries have recognised apologies in various ways may allow the Italian legal system to allow

the gradual emergence of similar recognition. Can they be remedies? And if so, on what legal basis? He uses the work of Guido Calabresi to consider the possibility that apologies might be used to impact the consequences of an unlawful act. Protecting apologies may create an incentive to do this and this might be preferable to mandatory or commanded apologies in civil law systems. Despite the risk that incentivising apologies like this might commodify them, there may still be a value in using apologies in this way, and Brutti argues that cultural and legal system differences should be taken into account in determining what the particular legal system or society considers is the proper subject of an apology.

Taking a different tack in Chapter 9, 'Compensation for Intangible Loss: a Closer Look at the Remedial Function of Apologies', Robyn Carroll argues that apologies should be considered as a non-monetary way to compensate for personal injury. The recognition of apologies as matters of morality and of emotional compensation might give apologies an extra role in healing as compensation, allowing a greater recognition in the law of the need for healing the emotional impact of a wrong. She considers whether fault and intention are both relevant to the possibility of using apologies as remedies, whether it is helpful to think of the law relating to apologies as providing incentives for self help in compensation systems, and whether either of these is preferable. In noting that it is fault rather than intention that is relevant, and that apologies do provide incentives for self-help, she argues that there may be concerns if those incentives lead to reduction in the amount of compensation in response to apologies – because under-compensation is a constant problem in the law – but that apology-protecting laws seem to remain the best response to allow parties autonomy in respect of both compensatory and remedial functions.

C. The Responsibilities of Lawyers

Part IV concerns the professional responsibilities of lawyers. A first question of interest is the extent to which personal injury compensation systems use or allow lawyer representation. Clare Scollay, in Chapter 10, 'Exploring the Dynamics of Legal Use in Compensation Systems', explores the influence of compensation schemes and legal services market factors on how claimants use legal services for compensation issues. She notes that most international evidence has focused on person-level factors but little attention has been paid to systemic factors that shape legal use. For example, how do market factors affect claimants' use of legal services for compensation law? How much are lawyers embedded in compensation systems? Some are highly routinised and it is expected that there will be little use of lawyers – indeed lawyers may be banned – while in others lawyers are regarded as 'angels' (as in Chapter 13 by Jennifer Moore). Scollay notes that factors in system design which increase stress and complexity may lead to more lawyer use by complainants. Her chapter is an extremely useful view of the systemic factors which are often ignored in considering how compensation processes affect claimants. She concludes that there is a need to increase the accessibility of legal services

and alternatives to legal services, but also a need to look beyond the engagement of legal services and support claimants to select the most appropriate method of problem resolution: this might not be legal services, as lawyers are not always the most appropriate source of guidance for claimants.

In Chapter 11, 'Addressing the Problem of Lump Sum Compensation Dissipation and Social Security Denial: The Lawyer Contribution', Prue Vines considers what lawyers can do to address the situation described in chapter 6 by Kylie Burns and Ross Harrington, where people who have been awarded lump sum compensation run out of money. This is seemingly an egregious example of unexpected consequences of compensation law, since the rule for awarding compensation is to put the plaintiff back in the position he or she would have been in had the wrong not occurred. Vines notes a number of systemic issues which could be addressed by lawyers, including changing settlement processes, altering how costs are created and explained to clients, and changing the way lump sum compensation amounts are communicated to social security. Given that many of these people run out of money but are denied social security, this is a significant issue that deserves serious attention.

In Chapter 12, Genevieve Grant and Christine Parker consider the ethical implications of findings from empirical research linking compensation systems with major personal stress and poor health outcomes amongst injury claimants. How should lawyers respond to the knowledge that the compensation process may do harm? The authors draw on Parker and Evans' four ethical approaches to lawyering to analyse the potential responses lawyers might make: The Adversarial Advocate, the Responsible Lawyer, the Ethics of Care and the Moral Activist. They suggest that, in addition to implementing aspects of the canvassed ethics of care approach, lawyers need to take responsible lawyering and moral activist responsibility for justice of the existing system and its accompanying institutions. A key focus for their work should be the opportunity to work collaboratively with schemes, insurers and regulators to implement improved cultures and practices. While attention is often drawn to the lawyer as advocate for the individual client, lawyers also contribute to system design, change, reform and evaluation, through advocacy by peak bodies, liaison and reference groups, having input into policies and protocols that shape how claims are managed and processed and the compensation system is implemented as a matter of practice. These opportunities could be used to promote initiatives such as dispute resolution systems that are about a more integrated and holistic sense of justice – including restorative justice and apology where appropriate.

Ending this book with a most encouraging note, Jennifer Moore in Chapter 13 discusses empirical research about New Zealand and American patients' and family members' experiences of the role of lawyers in non-litigation approaches to medical injuries. This shows that lawyers can play an important role in facilitating resolution after medical injury. In contrast to the overwhelming literature which depicts lawyers as 'devils', this chapter reveals that competent lawyers, who approach resolution after medical injury as a collaborative process, may play a

vital role in facilitating fairness, creating opportunities for injured patients to be heard, and restoring trust between injured patients and health care providers. This might be epitomised by the description by injured patients and family members of their lawyers as 'angels'. This narrative is encouraging for lawyers, injured patients, family members, and health care providers. The discussed research highlights the valuable role of lawyers who promote resolution and restore trust in the therapeutic relationship. As health care organisations strive to provide care that meets patients' needs, an opportunity exists to include competent and collaborative lawyers in resolution processes after medical injury.

IV. Conclusion: Not So Unexpected?

We hope that this book will serve to alert lawyers, medical practitioners and legislators who develop the policies and laws which manage compensation in the various legal systems, that these systems are hugely complex and have a very significant impact on their participants. A person applying for compensation seeks what seems to be a simple goal – to make their situation better by being given compensation to help them lead their life. But very often the compensation system itself becomes the problem that the injured participant has to solve. Many people have non-pecuniary goals as well in engaging compensation systems, and the failure of these systems to address those needs seems to be an important factor for falling short in achieving their restitutionary goals. We would hope that these situations would become not so unexpected as this research might suggest, and that people become better aware of the multiple unexpected consequences that can materialise. This involves an assignment for professionals from several different disciplines. By conducting research that zooms in more detail on to compensation trajectories and the experiences of those who navigate them, psychologists and health researchers might shed more light on how compensation systems can be made more successful in achieving their mission in restitution, recovery, and rehabilitation. Compensation Health Research seems to have only just begun to gain more insight into the complex relationship between compensation systems and health outcomes. This relationship needs to be unravelled in more detail to allow the evidence found to be given the weight it deserves for the operation and design of compensation systems. But as Chapters 10–13 in particular illustrate, it is above all lawyers in various roles who have a major responsibility to improve the functioning of existing compensation systems and to contribute to the design of better ones. And of course, planners and policy makers, and legislators should also consider the complexity of compensation systems and their consequences thoroughly when creating systems and changing them. In a speedy world this is obviously a difficult matter, but this book should establish how important it is for the people these systems are aimed at, that the consequences of the compensation law are known, thought about and become not so unexpected.

PART II

An Agenda for Change? Some Current Shortcomings of Personal Injury Compensation Systems

2

Achieving Justice in Personal Injury Compensation: The Need to Address the Emotional Dimensions of Suffering a Wrong†

ARNO AKKERMANS*

Research shows that perceived injustice is an important predictor of worse health and rehabilitation outcomes after injury. Fault-based injury compensation schemes are considered to be generally more anti-therapeutic than no-fault schemes. This chapter starts from the submission that the fault or no-fault basis of schemes is not necessarily decisive for the level of adversarialism of claims handling procedure, and that a more detailed knowledge is required of the mechanisms that lie behind the negative correlation of adversarialism with recovery and health outcomes. It recounts some findings in empirical studies on reconciliation and the elements and effects of apologies, to extrapolate these to the process of the resolution of injury claims. The emotional and moral impact of suffering harm as a result of a committed wrong as identified in these studies, is compared to the properties of the process of the out of court resolution of injury claims. After it is concluded that these properties generally do not address this impact but instead often increase it, several options are identified to tackle these anti-therapeutic effects. These options involve several aspects of the process of the resolution of injury claims, such as taking responsibility by taking and keeping the initiative, providing recovery-focused services, promoting personal

† I am deeply indebted to Liesbeth Hulst, and must also acknowledge the contribution of Susanne van Buschbach, as this chapter consists to a considerable extent of further thoughts on earlier collaborative research, published in AJ Akkermans and JE Hulst, 'De niet-financiële impact van schadetoebrenging en hoe daaraan tegemoet te komen' (2014) *Tijdschrift voor Vergoeding Personenschade* 102, and JE Hulst et al, *Excuses aan verkeersslachtoffers. Een onderzoek naar baten, effectiviteit en methode van het bevorderen door verzekeraars van het aanbieden van excuses aan verkeersslachtoffers* (Den Haag, Boom Lemma uitgevers, 2014). I also wish to acknowledge the support of Alfred Allan, professor of psychology at Edith Cowan University in Perth (WA), who reassured me of my fears of being on thin ice here and there in my extrapolation of the outcomes of psychological research.

* Professor of law at Vrije Universiteit Amsterdam and director of the Amsterdam Law and Behavior Institute (A-LAB).

contact between the person responsible for the harm-causing event and the victim, promoting participation of the victim in the resolution process, having assessments carried out by neutral third parties, and more in general promoting the experience of procedural justice.

I. Introduction

A growing body of evidence of the impact of justice-related appraisals on recovery trajectories following injury, shows that perceived injustice is a powerful predictor of worse outcomes.[1] It seems to be increasingly likely that perceived injustice is an appraisal process that is central to physical and psychological outcomes in the context of rehabilitation after injury.[2] Perceived injustice is of course also undesirable in itself. It has been suggested that fault-based injury compensation schemes are generally more burdensome and anti-therapeutic for the individuals that have to resort to them than are no-fault schemes.[3] This is generally attributed to the fact that fault-based schemes involve more adversarial interactions, as claimants have to prove liability, causality and financial consequences. I have no reason to question these assumptions,[4] but I think that in order to contribute to the improvement of compensation systems a more detailed understanding is required of the experiences of injured claimants and of the mechanisms that can make those experiences

[1] MJL Sullivan et al, 'Perceived Injustice and Adverse Recovery Outcomes' (2014) 4 *Psychological Injury and Law* 325; C Orchard et al, 'How Does Perceived Fairness in the Workers' Compensation Claims Process Affect Mental Health Following a Workplace Injury?' (2019) *Journal of Occupational Rehabilitation* 1; NA Elbers et al, 'Differences in Perceived Fairness and Health Outcomes in Two Injury Compensation Systems: A Comparative Study' (2016) 16 *BMC Public Health* 658; NA Elbers et al, 'Procedural Justice and Quality of Life in Compensation Processes' (2013) *Injury* 1431; A Collie et al, 'Injured Worker Experiences of Insurance Claim Processes and Return to Work: A National, Cross-sectional Study' (2019) 19 *BMJ Public Health* 927; E Yakobov et al, 'The Role of Perceived Injustice in the Prediction of Pain and Function after Total Knee Arthroplasty' (2014) 155 *Pain* 2040; MJ Sullivan et al, 'Pain, Perceived Injustice and the Persistence of Post-traumatic Stress Symptoms during the Course of Rehabilitation for Whiplash Injuries' (2009) 145 *Pain* 325; MJ Sullivan et al, 'Perceived Injustice: A Risk Factor for Problematic Pain Outcomes' (2012) 28 *The Clinical Journal of Pain* 484; MJ Sullivan et al, 'Perceived Injustice is Associated with Heightened Pain Behavior and Disability in Individuals with Whiplash Injuries' (2009) 2 *Psychological Injury and Law* 238; KR Monden et al, 'The Unfairness of it All: Exploring the Role of Injustice Appraisals in Rehabilitation Outcomes' (2016) 61:1 *Rehabilitation Psychology* 44.

[2] Monden et al, above, n 1.

[3] Elbers et al (2016), above, n 1; K Lippel, 'Therapeutic and Anti-therapeutic Consequences of Workers' Compensation Systems' (1999) 22 *International Journal of Law and Psychiatry* 521.

[4] Which is not to say that these assumptions are generally accepted. Shuman has pointed out that in theory, the adversarial system has the potential to perform better in promoting procedural justice than first-party insurance and no-fault systems. See EW Shuman, 'The Psychology of Compensation in Tort Law' (1994) 43 *Kansas Law Review* 39. He also notes that 'How well the process in fact fulfills that idealized goal in each case may be a matter of some dispute' (ibid, p 64). Indeed. It seems to me that in the reality of everyday life, the adversarial process more often than not completely fails to fulfil that idealised goal. Yet Shuman's interesting observations certainly deserve more consideration than space permits me to give here.

so negative.[5] This involves going beyond the fault/no-fault divide. Whether a system is fault-based or not is, strictly speaking, only a difference in the legal basis of the substantive rights of claimants to compensation – the payment trigger, so to speak. The extent to which this is necessarily also decisive in terms of the kind of procedure by which claims are handled is an interesting question. I would like to submit that it is not. It is only tradition that might make us suppose otherwise. There are plenty of claims and entitlements that are not based on anyone's fault which are resolved in a most adversarial way. One only has to think of private disability insurance, but of course there are many other examples.[6] And conversely, it seems perfectly possible – at least in theory – to resolve a fault-based claim in a non-adversarial manner, while fully honouring all the requirements intrinsic to fault-based compensation, such as the establishment of fault, causality and damage. For example, an interesting – although probably too feeble – legislative effort to this effect has recently been made in the Netherlands with regard to the resolution of medical malpractice claims.[7] That, for instance, fault has to be established, does not necessarily imply that the relevant facts have to be established on the basis of a process of submission and refutation in which both the initiative and the burden of proof lie with the plaintiff, whose claim will be rejected if he does not present sufficient facts to support it or fails to present sufficient proof. It is perfectly possible for an insurer or an agency actively to investigate all aspects relevant to the claim, take the initiative in the discovery of facts, and to complement or even correct in good faith the presentations made by the claimant. I must add, however, that I think that in any system, fault or no-fault, it can be problematic to establish that the claimant is continuing to experience significant disability.

Once one is willing to open up to the possibility that there is nothing inevitable in the way claims are to be handled, either in a fault-based or in a no-fault system, many questions come to the fore. If non-adversarial procedures produce better outcomes in terms of perceived justice, recovery and health, why do we have adversarial ones at all? What particulars determine the level of adversarialism of a procedure, and what mechanisms lie behind the negative correlation with recovery and health outcomes? What does it take to change claims handling procedure for the better?

[5] See eg E Kilgour et al, 'Interactions between Injured Workers and Insurers in Workers' Compensation Systems: A Systematic Review of Qualitative Research Literature' (2014) 25:1 *Journal of Occupational Rehabilitation* 160.

[6] Another example is workers' compensation. According to Lippel et al is the promise of no-fault workers' compensation systems for non-adversarial relations between workers, employers and the systems themselves in many cases 'a chimera'. See K Lippel et al, 'Workers' Compensation in Canada: Experiences of Precariously Employed Workers in the Return to Work Process after Injury', Ch 5 of this book. See also K Lippel, 'Preserving Workers' Dignity in Workers' Compensation Systems: An International Perspective' (2012) 55:6 *American Journal of Industrial Medicine* 519; Kilgour et al, above, n 5.

[7] BL Laarman and AJ Akkermans, *Compensation Schemes for Damage Caused by Healthcare and Alternatives to Court Proceedings in the Netherlands. The Netherlands National Reports to the 20th General Congress of the International Academy of Comparative Law, Fukuoka, Japan, 22–28 July 2018*, available at dx.doi.org/10.2139/ssrn.3143320.

I can, of course, not even begin to discuss all these questions in this chapter, but there is one particular issue that I would like to elaborate on here, and that is the emotional and moral impact of suffering harm as a result of a wrong being committed, the possible ways to address this, as identified in empirical studies on reconciliation and apologies, and what these insights could possibly tell us about the process of the resolution of injury claims. As this brings together apology research and research on compensation and health, I think it is an appropriate perspective for this book.

II. The Impact of Suffering Harm as a Result of a Wrong Being Committed

It should be noted that not all injury claims result from being subjected to a wrong, as in no-fault contexts one can also be eligible for compensation when no other party was involved in the incident that caused the injury, and it might even be that the injured person blames himself severely for occasioning his injury and the ensuing predicament of his loved ones. Nonetheless, also in a no-fault system, many claims will originate in an incident for which someone else is to blame,[8] and my estimate would be that they generally constitute the vast majority.

It is a constant outcome of research into the motives and experiences of injured persons pursuing a claim for damages, that financial compensation is often not reported as their sole or even primary motive. Research has revealed a variety of non-financial needs and motives, such as for clarification of what has happened, acknowledgement of fault, the taking of responsibility for the incident and its consequences, the offering of apologies, seeing justice done, and preventing the same incident from occurring again.[9] Depending on the circumstances, these aspirations need not be less significant than the objective of receiving a fair and honest

[8] See LJ Ioannou et al, 'Traumatic Injury and Perceived Injustice: Fault Attributions Matter in a "No-fault" Compensation State' (2017) 12:6 *PLoS ONE*: e0178894, doi.org/10.1371/journal.pone.0178894; NA Elbers et al, 'Does Blame Impede Health Recovery after Transport Accidents?' (2015) 8(1) *Psychological Injury and Law* 82, doi.org/10.1007/s12207-015-9215-5.

[9] T Relis, 'It's Not about the Money, A Theory on Misconception of Plaintiffs' Litigation Aims' (2017) *Pittsburgh Law Review* 1; AJ Akkermans, 'Reforming Personal Injury Claims Settlement: Paying More Attention to Emotional Dimension Promotes Victim Recovery' (2009) *Torts & Products Liability eJournal*, dx.doi.org/10.2139/ssrn.1333214; C Vincent et al, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343:8913 *Lancet* 1609; T Relis, *Perceptions in Litigation and Mediation. Lawyers, Defendants, Plaintiffs, and Gendered Parties* (Cambridge, Cambridge University Press, 2009); JK Robbennolt and VP Hans, *The Psychology of Tort Law* (New York, New York University Press, 2016) 17 ff; AJ Akkermans and KAPC van Wees, 'Het letselschadeproces in therapeutisch perspectief: hoe door verwaarlozing van zijn emotionele dimensie het afwikkelingsproces van letselschade tekortschiet in het nastreven van de eigen doeleinden' (2007) *Tijdschrift voor Vergoeding Personenschade* 103; JL Smeehuijzen et al, *Opvang en schadeafwikkeling bij onbedoelde gevolgen van medisch handelen* (Amsterdam, Vrije Universiteit Amsterdam, 2013); SD Lindenbergh and AJ Akkermans (eds), *Ervaringen met verhaal van schade. Van patiënten, verkeersslachtoffers, geweldsslachtoffers, burgers en werknemers (Civilologie / Civilology, 7).* (Den Haag, Boom Juridische uitgevers, 2014).

compensation. In the Netherlands, this is sometimes summarised by the metaphor that an injured person is also 'overdrawn on his emotional bank account'.[10] The suggestion made here is that compensation is required not only on the monetary level but also on the emotional one.

It is stating the obvious to say that suffering injury from an accident can have a serious psychological impact. No research seems needed to establish that. But if one asks oneself how to best understand these psychological consequences and how they could be addressed, there is quite some empirical psychological research on the impact of suffering a wrong and the effects of apologies that could be useful. I do not present anything of a proper review of this research here,[11] but in a collaborative study I conducted with a research psychologist some time ago,[12] we concisely summarised existing theoretical perspectives on the psychological consequences of suffering a wrong roughly as follows.

A. Relational: Restoration of Status

First, psychological research suggests that a harm-causing event disturbs the balance between victim and perpetrator, which is accompanied by moral and emotional discomfort for both parties. An important notion is that a victim feels affected in his 'status' by a damage-causing event.[13] This status is also described as social power or relative value of the victim in relation to the perpetrator. A harm-causing event affects victims in their perception of being an autonomous, respected, significant social player who is treated fairly and whose rights and identity are respected. Victims feel inferior regarding their power, honour, self-esteem, and perceived control, and may experience feelings of victimisation or anger. According to the needs-based model of reconciliation of Shnabel and Nadler, victims must restore their sense of status and power.[14] Shnabel and Nadler submit that victims want perpetrators to acknowledge their responsibility for the

[10] This metaphor, widely used in a variety of contexts, derives from the concept of 'emotional bank account' coined by the American author Stephen Covey, see www.stephencovey.com.

[11] Overviews are offered by: D Slocum et al, 'An Emerging Theory of Apology' (2011) 63:2 *Australian Journal of Psychology* 832; A Allan and R Carroll, 'Apologies in a Legal Setting: Insights from Research into Injured Parties' Experiences of Apologies after an Adverse Event' (2016) 1 *Psychiatry, Psychology and Law* 10; A Allan et al, 'Interpersonal Apologies: A Psychological Perspective of Why They Might Work in Law' (2017) 7:3 *Oñati Socio-Legal Series* 390, ssrn.com/abstract=3003880.

[12] AJ Akkermans and JE Hulst, 'De niet-financiële impact van schadetoebrenging en hoe daaraan tegemoet te komen' (2014) *Tijdschrift voor Vergoeding Personenschade* 102 and JE Hulst et al, *Excuses aan verkeersslachtoffers. Een onderzoek naar baten, effectiviteit en methode van het bevorderen door verzekeraars van het aanbieden van excuses aan verkeersslachtoffers* (Den Haag, Boom Lemma uitgevers, 2014).

[13] N Shnabel and A Nadler, 'A Needs-based Model of Reconciliation: Satisfying the Differential Emotional Needs of Victim and Perpetrator as a Key to Promoting Reconciliation' (2008) *Journal of Personality and Social Psychology* 116. Shnabel and Nadler use the terminology of resources theory, which classifies the resources that are exchanged in social interactions into six categories (love, status, services, goods, information and money) and suggest that the resource that is threatened in victims falls into the category of status (ie the need for relative power).

[14] Shnabel and Nadler, above, n 13.

injustice that they have caused, and thus meet the victims' need to have their status restored. Perpetrators, too, experience psychological discomfort for having caused harm to someone. They suffer from moral inferiority and may feel guilt, shame or repentance. Being a perpetrator threatens one's image as moral and socially acceptable. Perpetrators want to restore their moral image and would actually hope for a friendly gesture from the victim. One major way the emotional needs of both parties can be met is through the offering and accepting of apologies. I will return to the healing power of apologies later.

B. Moral: Confirmation of the Violated Norm

A second implication of suffering a wrong presented in psychological studies is that victims would need (re)confirmation of the values that underlie the violated norm. This may sound somewhat abstract, but in fact is easy to imagine: anyone who apologises for his behaviour confirms that what he did was wrong; anyone who does not apologise could be perceived as not recognising that it was wrong. The most immediate satisfaction of this need might be the confirmation of the violated norm by the perpetrator himself, but confirmation from elsewhere can also be effective. This second implication of suffering a wrong seems to be in line with the first, as confirmation of the violated norm will generally contribute to the restoration of the victim's status.

C. An Example to Illustrate these Effects

A simple example may illustrate these effects. Imagine that in the hall of a railway station you are knocked over by someone running to catch his train. You hurt yourself, damage your clothes, and for a moment you lie on the floor in the sight of all onlookers before you manage to get up. Now imagine two scenarios for the events which follow: (1) the person who knocked you over continues running without any signs of caring about anything; (2) the person who knocked you over halts immediately, turns around, acts as embarrassed as you are, assists you in getting up, apologises, inquires whether you are hurt, and offers to reimburse costs in case of any damage to your clothes. It seems quite clear that scenario 1 will be much more offensive to you – even humiliating – than scenario 2. This may illustrate both the element of loss of status, and the suitability of apology to restore that status. In scenario 1 an element of 'denial' of the violated norm is also clearly recognisable: a person who just continues running seems to suggest that there is nothing abnormal about what happened. In scenario 2 the element of the confirmation of the violated norm is equally perceptible: a person who responds in that way clearly acknowledges that what occurred is something that was not supposed to happen.

III. Apologies

A. The Healing Power of Apology

It seems rather obvious that apologies can make a lot of difference. This is sometimes summarised by speaking of 'the healing power of apology'.[15] This chapter is not the place for an extensive discussion of the research literature on the healing effects of apology and forgiveness. Apologies express responsibility, as well as confirmation of the violated norm, and thus meet the psychological needs of victims mentioned above.[16] A principal result is the increased willingness to reconcile. Research literature offers many empirical indications for the assumption that in the case of personal injury also, apologies will have positive effects. Apologies can reduce negative emotions and perceptions of the injured party about the event that caused his injury and the responsible person, and create more room for a constructive, conciliatory attitude. Reducing negative emotions and attitudes will also mean that injured persons will be less inclined to seek justice through litigation.[17] In particular, Jennifer Robbennolt's empirical studies offer clear indications that apologies contribute to a more constructive attitude of injured parties with regard to claims settlement and to a smoother claims resolution process.[18] There are also ample indications that by diminishing the experience of injustice, apologies will promote recovery.[19]

B. The Content of Apologies

Research literature indicates that there is no formula for a 'perfect' apology. An apology is effective when it is considered 'good enough' by the injured party. Whether this is the case depends on several aspects identified in the literature, such as the sincerity, the content, and the focus of the apology, and multiple variables relating to the parties involved and the circumstances in which the apology takes place.[20] As for the content of apologies, researchers have differed considerably as to the specific number and names of its components. A concise

[15] Eg A Lazare, *On Apology* (Oxford, Oxford University Press, 2004).

[16] This is an enormous simplification. For a comprehensive overview see Allan et al, above, n 11.

[17] P Vines, 'Apologising for Personal Injury in Law: Failing to Take Account of Lessons from Psychology in Blameworthiness and Propensity to Sue' (2015) 4 *Psychiatry, Psychology and Law* 624.

[18] JK Robbennolt, 'Apologies and Legal Settlement' (2003) 102 *Michigan Law Review* 460; JK Robbennolt, 'Apologies and Settlement Levers' (2006) 3 *Journal of Empirical Legal Studies* 333; JK Robbennolt, 'Apologies and Medical Error' (2009) 467 *Clinical Orthopaedics and Related Research* 376.

[19] MJL Sullivan et al, 'Perceived Injustice and Adverse Recovery Outcomes' (2014) 4 *Psychological Injury and Law* 325.

[20] Allan and Carroll, above, n 11.

classification distinguishes between three elements, which can be summarised as affirmation, affect and action:[21]

1 affirmation: recognising responsibility for the transgression and its consequences;
2 affect: expressions of remorse and sympathy for the injured party;
3 action: to actually take remedial measures.

The most powerful is a 'full' apology containing all three elements but each of them separately has an autonomous effect. The first element seems to be the most important, and all three elements reinforce each other. Recognising responsibility is more effective than merely showing sympathy. Apologies that acknowledged responsibility led to less negative and more positive perceptions and emotions about the perpetrator and the incident than when only sympathy was expressed. Only an expression of sympathy was generally better than no apology at all. It seems, however, quite possible that, when sympathy is expressed but the wrongfulness of the behaviour is not acknowledged, injured parties might for example consider recurrence of the transgression more likely. Taking remedial measures (in our context: the offering of compensation) reinforces the other elements by adding to their credibility. Victims form impressions of the character and sincerity of the perpetrator on the basis of both his actions and his statements. A perpetrator who takes remedial measures seems to be accepting responsibility and/or feel remorse and sympathy not only in words but also in deeds. In our context, apologies will have to be offered in addition to – and not instead of – compensation. The offering of only compensation or only apologies was found to be less effective than the combination of the two.[22]

IV. Procedural Justice

There is one particular element of perceived justice that has been researched extensively over recent decades, and that is procedural justice. Procedural justice literature shows that people form a subjective opinion about the justice and fairness of procedures and rules (in our case: of claims resolution) and are particularly sensitive to whether they are treated in an honest, respectful manner (in our case: primarily by the agency or insurer).[23] The key constructs that are considered to be decisive for the experience of procedural justice are: voice, trustworthy motives, dignity and respect, and neutrality in decision making. An abundance of evidence demonstrates that the subjective judgement people make

[21] Slocum et al, above, n 11; Allan and Carroll, above, n 11.

[22] TG Okimoto and TR Tyler, 'Is Compensation Enough? Relational Concerns in Responding to Unintended Inequity' (2007) 10:3 *Group Processes & Intergroup Relations* 399.

[23] JW Thibaut and LJ Walker, *Procedural Justice: A Psychological Analysis* (New York, Wiley, 1975); TR Tyler, *Why People Obey the Law* (New Haven, CT, Yale University Press, 1990).