Traumatic Brain Injury

Following a motor vehicle accident
Research Topic

Comparison of At-Fault and No-Fault Motor Vehicle Insurance in Access to Benefits for Claimants Sustaining Traumatic Brain Injury
Study

Examines how the design of an MVA insurance compensation system affects access to benefits for claimants who have sustained a TBI from an automobile accident.

Focus on the factors within a claims management process and its affect on claimant recovery.
Claims Management Process

AF Phase

MR Phase

At-Fault Section A

No-Fault Section B

CA Phase

DR Phase

2014-03-25
Three Main Questions

1. Is there a difference between at-fault and no-fault MVA insurance compensation systems in claimants’ access to health care benefits, on overall systems measures of adversarialness, cost, responsiveness, and recovery?

2. Is there a difference between MVA claimants with mild as contrasted with moderate to severe degrees of TBI on overall MVA system measures of adversarialness, cost, responsiveness, and recovery?

3. What are the significant key factors that help explain such differences pertaining to the first two questions, and who are the significant key players who participate in the claims management process to address these key factors?
Researcher’s Perspective

Power Imbalance

Claimant

Insurer
**Literature Review**

**Understanding purpose(s)**
- At-fault system
- No-fault system
- Threshold No-fault system

**Analyzing 6 influential studies**
1. The Columbia Study (1932)
2. Automobile Accident Cost and Payments (AACP) Report (1964)
3. Keeton & O’Connell Plan (1965)
4. Osgood Hall Study (1965)
5. The Saskatchewan Report (1973)

**Understanding benefits accessed by TBI claimants**
- MVAs remains one of the leading causes of TBI
- More severe TBI patients now survive because of major medical advancements in care
- Few studies have addressed access to benefits in an MVA compensation system for TBI claimants
- Focus has been on return to work and time to claims closure
- None have done a comparative analysis on TBI injury severity
Methods

Study Design
- Mixed methods: QUAN/Qual measures
- 2 x 2 design – at-fault vs no-fault system by mTBI vs Mod/Sev TBI

Approach
- Document review of closed TBI insurance claims files

Data Collection & Analysis
- Three part analysis – which I will describe in more detail
Four Dependent Variables

- Adversarialness
- Responsiveness
- Cost
- Recovery
Variables Defined

- **Adversarialness**: Degree of opposition in a dispute measured by a scale of “indicators” that seem to influence degree of opposition.

- **Cost**: Percentage (ratio) of the final settlement to the total available policy limit for a claim minus administrative fees.

- **Responsiveness**: Time interval between the date a “request type” was made and the date a response was given (maximum 547 calendar days).

- **Recovery**: Time interval between the date a claimant returned to work and the date of the MVA (maximum 732 calendar days).
Three Part Data Analysis

**Part I**
- Analysis of at-fault compared to no-fault systems on each of the four dependent measures
- Analysis of mild compared to moderate/severe TBI on the four DVs

**Part II**
- Examination of effect of key factors / key players on DVs found to be significant for the TBI groups

**Part III**
- Examination of the effect of key factors / key players on DVs found to be significant for the two types of MVA systems
Results: At-Fault vs No-Fault

Part I

- Significantly greater adversarialness and higher cost in the at-fault system compared to the no-fault system
- Responsiveness and recovery showed no significant difference – so set aside

Part II and III

Key Factors & Key Players

Key Factors: Contributory Negligence/Cause, Adversarialness (higher), Cost (higher)

Key Players: Defence Lawyer, Journalist, Insurer (external), Insurance Adjuster, Police

Their influence on Dependent Variables
AF Phase: Key Factors/Players

**KEY FACTORS**
- Contributory Negligence/Cause
- Adversarialness (higher)
- Cost

**KEY PLAYERS**
- Defence Lawyer
- Defence Lawyer
- Liability / Insurance Cover
- Contributory Negligence/Cause
- Adversarialness (higher)
- Cost (higher)
- Defence Lawyer
- Insurer (external)
- Witness
- Engineer
- Police
- Journalist
- Insurance Adjuster

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Liability / Insurance Cover
Contributory Negligence/Cause
Adversarialness (higher)
Cost

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MR Phase: Key Factors/Players

**KEY FACTORS**
- Adversarialness (higher)
- Cost
- Discrepant Health Information

**KEY PLAYERS**
- Family Physician
- Case Manager
- Adversarialness (higher)
- Cost

**Primary Treatment**
- TBI vs. Other Injury

**Hospital – LOS**
- Family Physician
- Case Manager
- Psychiatrist
- Psychologist / Psychiatrist
- Neurologist

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DR Phase

KEY FACTORS

- Adversarialness (higher)
- Cost (higher)

Issue(s) in Dispute

Parties Involved in Settlement Negotiation

KEY PLAYERS

- Adversarialness
- Cost (higher)

- Judge / Mediators

Parties Involved in Settlement Negotiation

- Insurer (internal other)
- Claimant
- Insurer (Re-insurer)
- Defence Lawyer to Insured Driver
- IME HCP (Defence)
- IME HCP (Plaintiff)
- Plaintiff Lawyer
- Economic Specialist
- Surveillance Investigator
- Judge / Mediators
- Defence Lawyer to Plaintiff
- Future Care Specialist
- Insured Driver
- Examination for Discovery Witnesses

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Results: mTBI vs Mod/Sev TBI

Part I

• Significantly greater cost and longer recovery for claimants with moderate/severe TBI as compared with Mild TBI (mTBI) claimants

Part II and III

• Quantitative and qualitative analysis by TBI severity

• Plus additional factors
By TBI Severity
(mTBI or Moderate / Severe TBI)

**KEY FACTORS**
- Cost (higher)
- Recovery (longer)

**Type of Health Care Accessed:**
- Multidisciplinary Care
- Community-based care
- Discrepant Health Information (for mTBI Claimants)

**Primary Treatment:**
- TBI
- Community-based care

**Community Based HCPs**
- Physiatrist (Rehabilitation Physician)
- Case Manager
- Family Physician
- Neurologist
- Psychologist / Psychiatrist
- Discrepant Health Information

**Hospital LOS**

**Primary Treatment: TBI vs. Other Injury**

**Type of Health Care Accessed**
- Multidisciplinary Care

**Cost**
- Recovery (faster)

**Neurologist (for mild TBI Claimants)**

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Additional Factors

**KEY FACTORS**
- Cost (higher)
- Recovery

**Claimant Relationship to Insured Driver**
- (mTBI group)

**KEY PLAYERS**
- Mediator / Judge (moderate / severe TBI group)
- Cost (Lower)
- Recovery (faster)

- Mediator / Judge (mTBI group)

- Claimant Relationship to Insured Driver
Discussion: Major Highlights
Context of Findings

- Spoiler alert – none of the findings will come as any real surprise BUT this is the first study to:

- Quantitatively examine at-fault and no-fault MVA systems on measures of:
  - Cost, adversarialness, responsiveness, and recovery for TBI claimants

- Quantitatively and qualitatively examine key factors and key players and their association to the dependent variables
Discussion: No-Fault vs At-Fault

- Higher adversarialness significantly associated with:
  - **Plaintiff party tactics** pertaining to
    - Discrepant health information
    - Relationship between claimant and insured driver
  - **Defence party tactics** pertaining to
    - Contributory negligence / Cause
    - Managing policy limits
On claims with limited hospital health care records:
- Plaintiff lawyer sought independent medical assessments (IMEs)
  - Often TBI diagnosis changed using claimant-described, post traumatic amnesia (PTA)
- Defence lawyers sought IMEs
  - Findings of no TBI impairment caused by MVA
- Resulted in claims files full of discrepant health care information
- This occurred of the majority of mTBI claims less on mod/severe claims
Claimant Relationship to Insured & Higher Adversarialness: Another Plaintiff Party Tactic

- The factor of relationship best explained using moral hazard
  - a change in behaviour when compensation is available
    - In this study - both claimant or HCP behaviour
- None of the mTBI claimants in the at-fault system were related to the insured (at-fault) driver
  - Claimant more apt to exaggerate injury
  - Claimant less apt to disclose accurate health care information
- Opposite held true for Mod/Sev TBI claimants who were related to insured driver
Contributory Negligence/Cause & Higher Adversarialness: A Defence Party Tactic

- Insurance adjuster hired defence lawyer, who then gathered information about:
  - Claimant’s pre and post accident condition; and
  - Other factors that could have contributed to the injuries being claimed

- Claimants saw this as inequitable:
  - The insured, being fully blameworthy for the MVA, is not out a penny for his actions, but the claimant, because of his own blameworthiness, has to accept less in compensation (Fleming, 1992)
Policy Limits & Higher Adversarialness: Another Defence Party Tactic

- When the actual loss was likely to exceed policy limit:
  - Insurance adjuster informed the insured driver that any excess amount will likely be the insured’s responsibility to pay
  - This angered the insured drivers: “Isn’t this why I have insurance in the first place – to protect my interest if I cause an accident”?

- By transferring loss back to an insured driver the insurer risks a bad faith claim
  - “However imperfect [the tort system is], the overriding purpose remains compensation, not retribution, or punishment” (Fleming, p. 236)
Mild TBI vs Moderate /Severe TBI

Key factors & higher Cost
- Type of health care accessed – multidisciplinary care
- Primary treatment – TBI (community-based)
- Discrepant health information (mild TBI claimants)

Key factors & longer return to work (RTW)
- Longer hospital LOS
- Primary treatment – TBI (community-based)
Health Care & Higher Cost For Mod/Severe TBI Claimants

- Majority of claimants with moderate/severe TBI:
  - Accessed health care services along the entire continuum of care
    - EMS at the MVA scene
    - ICU care
    - In-patient rehabilitation for neuro/trauma care
    - Community-based care for multi-disciplinary care
    - Primary treatment for TBI
- Few mTBI claimants sought this degree of care
  - Few had any treatment of TBI
Claimants who had a longer hospital LOS also took longer to return to work (recovery):

- This included some moderate and all severe TBI claimants:
- Settlement costs included pain & suffering and future loss of income

Majority of mTBI claimants recovered and faster:

- Settlement costs were substantially reduced for pain and suffering and most had no future loss of income

Examinations for discovery revealed actual injuries and loss:

- Part of the process in which discrepant health information was corrected
Conclusion

Rights Versus Needs
Rights

- All claimants in Alberta’s at-fault system who were not liable for the MVA had the right to sue the insured driver who was liable.

- Claimants with mTBI: compensated for pain and suffering.

- Claimants with moderate TBI: compensated for pain and suffering, loss of past income, and some for future loss of income.

- Claimant with severe TBI accessed the most through at-fault system to include above awards and award for past and future cost of care.

- Those who were unrelated to insured driver received less than those who were related.
Needs

- Claimants with mTBI accessed a few hundred dollars in the no-fault in way of accident benefits
- Only claimant with severe TBI accessed the most through the no-fault system
- Claimants with severe TBI who were liable for the MVA received the least (by hundreds of thousands of dollars) because they could only claim accident benefits in the no-fault system
How Far Have We Come

- The findings of this study support the findings of the previous studies: claimants who are severely injured but who cannot find fault of another are under-compensated; whereas those who have sustained less injury but can find fault are over-compensated.

- Add-on no-fault benefits are inadequate for those who are severely injured and who are liable for the accident.
Implications

Insurance system

IBC could use the findings to show that initial diagnosis of TBI immediately post MVA followed by multidisciplinary TBI treatment throughout the continuum of care is an essential feature of a claim for a TBI.

Health care system

Need to avoid the build-up of discrepant health care information

- Accurate diagnosis of TBI using a compliment of measures (GCS and objective PTA scores)
- Review of pre-accident health records (demand these from plaintiff counsel)
- Question whether a moral hazard has been created
Recommendations

Government and Judicial system
- Develop regulations that compel lawyers to immediately disclose claimant health care information if that information includes pre-accident claims for compensation

Claimants (and their family)
- Work with TBI associations to get the amount of accident benefits increased in the Alberta system for severe TBI injury (based on initial ICU GCS scores)
Notable Study Limitations

- Small sample size for a quantitative analysis
- Using a proxy of Section B claims as a “no-fault system”
- Clustering moderate TBI with severe TBI claims
- Conceptualization of the dependent variables
- Method of identifying claims files for the study