



SYNOPSIS

LIVING BEYOND ITS USE BY DATE: THE LIMITATIONS OF THE PRESENT FRAMEWORK OF WORKERS' COMPENSATION AND SOME PROPOSALS FOR CHANGE

Associate Professor Alan Clayton

Key words: Limitations of current system. Proposals for change.

Purpose of your paper: To facilitate a debate upon possible structural and other changes necessary to address limitations of the current framework of workers' compensation to meaningfully deal with the needs and challenges of contemporary work arrangements.

Synopsis:

Introduction

Workers' compensation emerged in the last two decades of the nineteenth century as a response to the carnage, in terms of injury and death, wrought by the infrastructure and work processes of then contemporary industrial capitalism. This response fashioned a framework for dealing with occupational trauma that is still strongly imprinted upon current Australian workers' compensation arrangements.

This legacy framework involves answers to 'who' is covered 'for what' in 'which circumstances'. The responses have generally been in terms of a 'worker' for an 'injury' (defined as to include disease conditions) 'arising out of or in the course of' the worker's employment and where there is a designated level of causation between the employment and the injury ('significant'/'substantial contributing factor'; 'real, proximate or effective cause' etc).

Issues

(a) Coverage

The distinction between a worker and an independent contractor (between a contract of service and a contract for services) made meaningful sense at the end of the nineteenth century where a majority of the workforce was engaged in some form of manual labour and was subject to the clear control of an employer as to the manner in which the work was to be undertaken.

Over the course of the twentieth century the robust coherence of this distinction came under increasing pressure from two main areas. First schemes grappled with coverage of persons whose occupational status did not fall easily under the common law definition of 'worker' (eg taxi drivers). Secondly, there was pressure to provide a vehicle to compensate persons injured while engaging in socially desirable but voluntary activity (eg volunteer fire fighters, jurors etc). As well schemes had to grapple with coverage issues for those engaged in work activities where there was no easily ascertainable employer (eg jockeys, waterside workers engaged on a pick up basis, etc). There has thus emerged in each of the Australian jurisdictions (with differences between the jurisdictions) a list of 'deemed workers' to address these situations. Additionally each jurisdiction specifically excludes (largely on opaque policy grounds) a designated range of occupational situations from coverage. This is particularly the case of professional sportsmen but then, somewhat confusingly, jurisdictions then provide deemed coverage to some persons engaged in particular sports (eg boxing).



The more significant issue lies not so much with the area of 'deemed' coverage but with the increasingly protean nature of work arrangements and the accompanying nature of supervision and control of such arrangements such that there has become a progressive blurring of the distinction between a worker (contract of service) and independent contractor (contract for services). This is complicated by asymmetries of economic power whereby the person paying for work services attempts to formally structure the relationship as that of principal and contractor (thereby avoiding a range of employment-related costs such as leave and workers compensation entitlements) for a person who spends all or most of their week working for such 'principal'. There are, of course, formal anti-avoidance measures in place but these require enforcement and the recent experience of many sectors of precarious employment, such as the fast food industry, show that there are gaping chasms in the enforcement of work-related entitlements.

(b) Injuries and disease conditions and their work-relatedness

The early workers' compensation schemes provided coverage for 'personal injury by accident' which resulted in denial of coverage for many disease conditions such as lead poisoning because they were contracted by gradual process rather than as the result of a traumatic event. The legislative response was through the enactment of 'disease schedules' listing a range of conditions and an accompanying description of occupations or industrial processes and a shifting of the onus of proof. However, in Australia, the disease schedule process has essentially become ossified with one jurisdiction not having updated its schedule in more than half a century.

The legal treatment of what is an 'injury' a 'disease' and a disease that can also be characterized as an injury has become extremely complicated, leading to protracted litigation in NSW for more than two decades, culminating in the High Court decision in *Zickar v MGH Plastic Industries* where the High Court itself split 4-3 on the issue.

More generally, there has been a significant change in the overall mix of compensation claims between traumatic injury and psychological injury and illness. Particularly as a result of technological innovation, automation and robotization, the incidence of traumatic injury has declined, while, for a complex suite of reasons, that of psychological injury and illness has increased. This has presented challenges for schemes and they have struggled to provide adequate and effective approaches and processes for identifying, treating and returning to work persons suffering from these conditions. This has been exacerbated by the fact that, overall, schemes have not had within their claims management agencies, sufficient staff with the skills and experience for effectively managing these claims. Such shortages have often extended to the allied health sector dealing with workers' compensation claims. Furthermore, dispute resolution services have similarly struggled with these issues.

(c) Lack of focus on primary prevention

Unlike some European schemes, primary prevention has been largely absent from the perceived remit of workers' compensation schemes. This role has been seen to be the preserve of the occupational health and safety inspectorate. To the degree that a prevention approach has been seen to be associated with workers' compensation schemes it has been thought to lie with the impact of experience-rated premiums. However empirical investigation of the effect of experience rating, when controlled for changed industrial structures and change during the period of the longitudinal study, has shown almost no positive safety impact. On the other hand, experience rating has been shown to be associated with gaming behavior on the part of employers (including claims suppression) and an increased level of disputation within the system.

Discussion

1. The issue of federalism

In Australia, like the United States and Canada, workers' compensation is primarily configured at the sub-national (State and Territory) level. The only time that this configuration was in danger of being



disturbed was during the Whitlam Government when legislation providing for a national accident compensation system, following the Australian Woodhouse Reports, came within one day of being enacted. Since then there have been numerous initiatives aimed at achieving some or greater harmonization of arrangements among and between schemes, but, to date, the outcomes of such initiatives have been largely confined to more peripheral and uncontroversial issues.

Whatever the merits of a single national approach – and there are many – this presentation proceeds on the pragmatic basis that any meaningful change on major issues is only likely to occur within the current federal framework.

2. Coverage

There is merit in exploring how the complexities stemming from the current framework relating to coverage can be largely transcended through a more functional approach that allows coverage of work activity rather than by reference to work status (worker vs independent contractor). There a range of models including approaches taken in Germany, New Zealand and Switzerland.

3. Injuries and disease conditions and their work-relatedness

This is a many layered issue. Ultimately, the long or longer term approach to effectively dealing with these issues involves a sophisticated strategy that harnesses wider community approaches that increase protective factors and reduce risk factors, interacting with healthy and respectful workplace cultures and a service system that can quickly and effectively intervene and support, through quality and appropriate initiatives, the treatment of the relevant condition and their reintegration in a work role that minimizes the iatrogenic consequences of involvement with the compensation system. In short, the fashioning of a public health model of accident compensation.

A medium-term goal would be for schemes to have as a prime goal significantly increasing their capability and capacity, in terms of the skills, expertise and experience of personnel working within these schemes, to effectively deal with the consequences of workplace trauma and illness. This should involve everyone in the system. Assisting employers achieve healthy workplace cultures is the major determinant of early and sustained return to work (Michigan Disability Prevention Study).

There are also some quick wins. One would be for all schemes to adopt as a disease schedule, the deemed diseases list developed by Professor Tim Driscoll in August 2015 for Safe Work Australia.

4. Primary prevention

The failure to develop a significant primary prevention role is a major blight on Antipodean workers' compensation schemes. There have been significant and successful programmes and approaches fashioned by a number of schemes in Europe that could be drawn upon by Australian schemes. These include initiatives by the Caisse Regionale d'Assurance Maladie (CRAM) in France and the German Berufsgenossenschaften which will be briefly discussed in this presentation.