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Sustainability of Common Law

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"The reports of my death have been greatly exaggerated." Mark Twain

Abstract

Common law access and design has remained a controversial issue for nearly thirty years, as many schemes have been reviewed, reformed, reviewed again. One expert recently gave the somewhat depressing pronouncement that you just had to change a scheme every five years.

In the last five years I count four significant changes to common law entitlements in our workers compensation and motor accident schemes. Between 1985 and 1990 I count ten.

Sustainability has become a key word in all scheme objectives. With all the changes and variations, what can we say about sustainability in relation to common law?

Summary of Lessons

1. All but one jurisdiction in Australia has limited common law since 1985, some of them several times.
2. Six schemes have abolished common law access, and three had it reintroduced within three years following a change of government.
3. When scheme costs (hence premiums) are rising there is pressure for reform, and common law is most often the first target.
4. Restricting common law access to those with serious injuries is by far the most common response, and is now the norm.
5. The threshold for defining serious injury becomes the most important decision, and threshold erosion has often led to further need for reform.
6. With one exception, all the thresholds currently in use are based on Whole Person Impairment using AMA Guides – evidence that this is the most sustainable approach
7. There is one notable exception to lesson 6. In Victoria a narrative threshold has been used since 1989 (motor) and 1999 (workers) without change.
8. Other forms of limitation, such as elections, excluding heads of damage and limiting quantum, are not the most important factors in sustainability.
9. Effective litigation procedures and legal cost rules are very important, and this area can use more work.

Where to next?

15 years ago I predicted the gradual removal of common law from our injury schemes. As the quote at the start highlights, I was wrong.

Common law, limited to serious injuries and with a range of measures on quantum and process, appears to be favoured by most of our jurisdictions. The most recent example of this is QLD workers, where the government announced a change to common law access based on new serious injury thresholds just days prior to

finalising this paper. Our challenge is to manage the sustainability of this structure, with effective design, monitoring, management and interventions.

Acknowledgments

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1 Introduction

1.1 Background

In 19th century British law, the only way an injured person could receive 'compensation' was through common law, which involved suing a negligent party (if any) that caused the injury.

For workers, this changed during the twenty five years leading up to 1915. English-speaking countries – including Australian states – created specific workers' compensation laws that provided compensation for work-related injuries regardless of negligence.

From this very time, the issue of the relationship between the no fault entitlements and the common law opportunity to sue for negligence became an issue. In Britain and Australian states, the two rights co-existed. In the USA, however, what is known as the 'grand bargain' resulted in a trade-off where, in exchange for introducing no fault workers compensation, the right of an employee to sue the employer for negligence was removed.

In the case of motor accidents, this history does not exist, because motoring did not exist to any extent. In the case of motor accidents, common law was the natural means of compensation. It was only between the First and Second World Wars, as motor vehicle use grew rapidly, that specific insurance laws were introduced. These laws were not responding to any inadequacies in the common law principles of compensation, only the fact that many motor vehicle owners did not have the wealth to pay and so many accident victims were unable to get any compensation.

The motor laws, therefore, were only compulsory insurance laws (hence the 'Compulsory Third Party' label), which ensured that the ability to sue for negligence would be backed up by the ability to actually get the money. These laws did not deal with the entitlements to compensation.

1.2 Australia Flirts with Universal No Fault

In 1974 New Zealand introduced perhaps the most radical reform in personal injury compensation – the ACC scheme. It entirely removed common law actions for personal injury and, forty years later, the nation shows no desire to return to common law.

While much has been said about this fascinating scheme, the only point I wish to make in this paper is one that many people do not remember, and which relates to Australia.

In 1974 and 1975 Australia came 'that close' to adopting its own version of the ACC at a national level, following a report by Sir Owen Woodhouse and a Law

Reform Commission inquiry. If it were not for the sudden end to the reforming government of Gough Whitlam, we might be in a very different space today.

1.3 What are the Motivations for Changing a Scheme?

Many of the reports and inquiries into compensation schemes are full of ideological debate about common law and the no fault alternatives. This paper proposes that, in this context at least, economics trumps ideology:

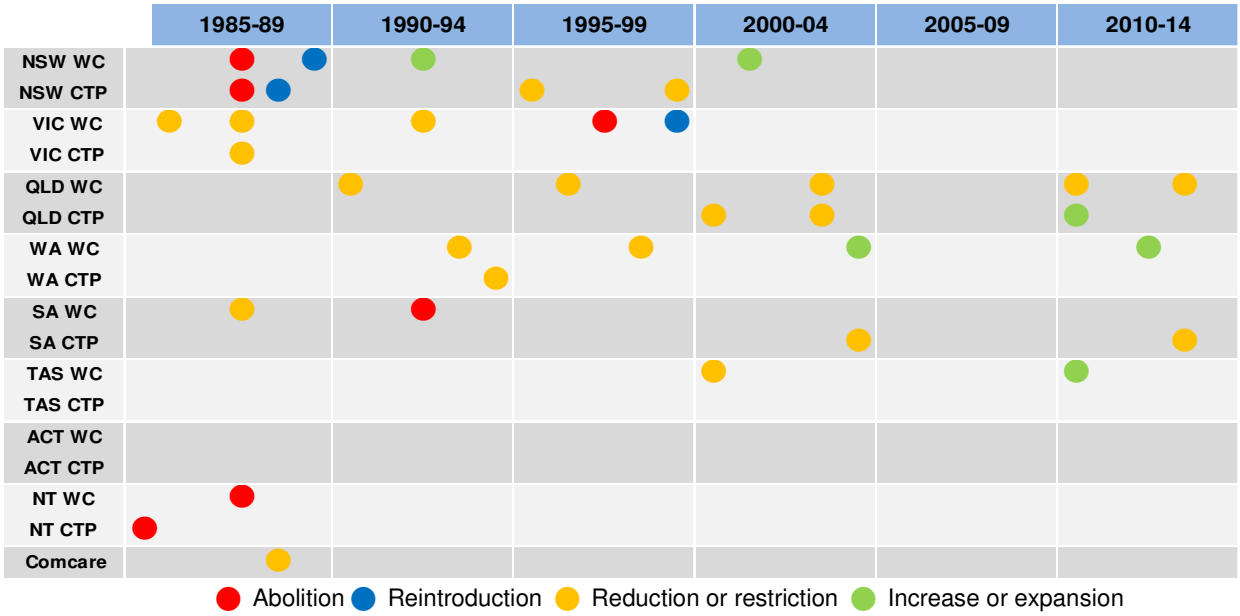
- The fundamental sustainability equation is to balance the competing interests of injured people and premium payers
- Anxiety rises when premiums rise and interest groups advocate for change
- Reform motivation is mainly to reduce scheme cost, and hence premiums
- If premiums are reasonably stable, there is little impetus for reform, although recently a stable but high premium has been enough to generate action based on 'state competitiveness'. The actuarial discipline of 'full funding' also has a role to play here.
- The main criterion for judging sustainability is therefore whether the cost of the scheme (not just the cost of common law) is increasing to a painful level.

While there are legitimate and interesting policy issues, the remainder of this paper deals with the economic side of the equation – just another example of the control that the 'dismal science' has over our lives.

2 The Last Thirty Years in Australia

From around 1985, the growing cost of workers compensation and CTP schemes in several states led to radical and controversial reforms[1]. Common law entitlements were an important, but far from the only, aspect of the reforms that were hotly debated and, in some states, resulted in seismic changes.

In a brave (but possibly futile) attempt to capture the 'big picture', the chart below summarises the changes to common law entitlements for workers compensation and motor accidents schemes. There is so much information there, and so many variations, that it is very difficult to see any themes.



Some observations that can be drawn from this chart are:

- The pace of change has slowed a lot since the turn of the century.
- NSW and Victoria were the most active from 1985, but have been very stable since 2000[2].
- The amount of change diminishes with the size of the jurisdiction.
- Only the ACT (arguably the most consistently left wing government in the country) has not made any changes to common law entitlements, although it has been tried several times. The most recent attempt was in 2010 and we understand they are still considering introducing changes to the workers scheme.
- From a visual perspective, the most sustainable changes have been NT, Comcare and Victoria Motor (the TAC), to be discussed later.
- There have been more changes for workers than CTP. Common law is more accepted in CTP, for the historical reasons outlined in section 1.1.

- All the expansions or increase in entitlements have occurred post 2004[3].

1.4 How can we categorise the common law changes?

The main purpose of this paper is to examine the types of modifications that are made to common law entitlements, and to see what lessons can be learned about sustainability. The modifications have been categorised into:

1. **Abolition (A)** – total replacement by no fault entitlements
2. **Reintroduction (R)** – the reversal of an earlier abolition
3. **Serious injury limitation (S)** – allowing common law access only for 'more serious injuries'; this approach comes down to 'thresholds'
4. **Heads of Damage limitation (H)** – permitting common law damages only in respect of certain heads of damage, with others either abolished or restricted to the no fault part of the scheme
5. **Quantum restrictions (Q)** – includes caps, discount rates and earnings limits
6. **Elections (E)** – requiring an injured person to make choices between no fault and common law entitlements, usually by a particular time
7. **Legal process and costs (L) –** restricting the normal litigation process in some way, including controls on legal costs for claimant's representatives, compulsory settlement conferences, compulsory arbitration/mediation, tribunals prior to court, etc.

The next chart aims to show the various scheme changes in more detail by labelling them with the type of common law modification.

	1985-89	1990-94	1995-99	2000-04	2005-09	2010-14
NSW WC	A RSQE	S		SEH		
NSW CTP	A RQ		Q QS			
VIC WC	H Q	SQ	A RSQ			
VIC CTP	SQ					
QLD WC		E	QL	E		L SLH
QLD CTP				L Q		Q
WA WC		SQL	SQE	SQE		L
WA CTP		Q				
SA WC	H	A				
SA CTP				Q		SQL
TAS WC				S		S
TAS CTP						
ACT WC						
ACT CTP						
NT WC	A					
NT CTP	A					
Comcare	H					

We discuss each of these controls, with examples, in the following section.

2 Controls

2.1 Abolition

The most obvious way to reduce costs associated with common law is to remove access entirely. Different schemes have attempted this with varying degrees of success, although abolition seems to have a degree of permanence in four schemes:

- Comcare since 1988 - while common law is theoretically still available, there was effective abolition for new injuries due to low capped amounts that heavily disincentivise this pathway
- Northern Territory CTP since 1979 (residents only);
- Northern Territory workers' compensation since 1987; and
- South Australian workers' compensation since 1992.

Both NSW schemes and Victoria workers compensation experienced abolition followed soon after by reintroduction.

The learning is that abolition of common law rights has been rare and sometimes not sustainable.

2.2 Reintroduction

There are three examples of abolition followed soon after by reintroduction (albeit with modifications). In each case the reintroduction followed a change of government, but of different political persuasions:

- **NSW CTP and Workers Compensation** – abolished by Labor in 1987 and reintroduced with retrospective application by the Coalition. The CTP scheme is the only scheme that has shifted underwriting from the public to the private sector in the last 30 years.
- **Victoria Workers Compensation** – abolished by Coalition in 1997, reintroduced by Labor in 2000.

We learn that in each case that saw the reintroduction of common law, the government of the day was still very keen to keep premium costs low. As a consequence there was a lot of focus on other control measures at the time.

2.3 "Serious Injury" Limitation

In 1987 Victoria introduced the TAC, a no-fault monopoly CTP scheme with limited common law rights. Awards under common law for economic (earnings) and non-economic (general damages) loss were restricted to serious injury, defined in the act as:

a) A permanent impairment of 30% or greater
b) Serious long-term impairment or loss of a body function
c) Permanent serious disfigurement, such as scarring
d) Severe long-term mental or severe long-term behavioural disturbance or disorder
e) Loss of a foetus.

The most important part of this definition is leg (b), referred to as the narrative test. This (and to some extent (c) and (d)) are where most cases are decided and in each case there is no quantitative test.

It is notable that no changes have been made to theTAC serious injury definition in more than 25 years. It also lasted after its introduction to the workers compensation scheme in 2000. The reasons for this sustainability, when other verbal and monetary thresholds have failed, warrants serious consideration, but is not tackled in this paper. Is it strategic and effective management by the schemes? Did the specific wording in the Act help (there is quite a bit)? Is there something in the state culture and in particular the legal system that 'holds the line'? [4]

WorkSafe Tasmania followed a similar path to Victoria with its 2000 amendments that restricted common law access to those with WPI of 30% or more. These changes were made in response to rising costs (Safe Work Australia, 2013). In 2009, Tasmania revised the common law threshold to WPI of 20% or more, as a result of the Clayton report into fairness and equity of the current benefits, and comparability with other jurisdictions.

The Western Australian WorkCover scheme has had an interesting journey in finding a suitable definition for serious injury. The following table shows the issues that faced the WA government and subsequent reforms to common law access.

	1993	1999	2004
Problem	Rising costs	Low pecuniary loss threshold	Impairment assessments highly variable and difficult for conditions not stabilised within 6 months
Reform	Access based on either: • 30+% impairment • Pecuniary loss threshold Impariment based on WorkCover Guides WA	• Capped damages for 16-29% impairment • No capping for 30+% impairment • Election made within 6 months of first payment Impariment based on WorkCover Guides WA, AMA Guides and Schedule 2 of the Act	• AMA guidelines for WPI assessments • Capped damages for 15-24% WPI • No capping for 25+% WPI • Election made within 12 months of termination, with possible extensions
Impact	Small	Initial claims reductions	Reasonably stable at present

While there have been small refinements to common law access in the 2010 amendments, the serious injury threshold has remained relatively unchanged. The experience in WA illustrates the importance of getting the serious injury definition right and how access via second gateways can affect the desired result.

A summary of the various types of thresholds for serious injury access is as follows:

Type of Threshold	Example	Sustainable?
Narrative	'Serious long term impairment'	No, with the notable exception of Victoria
Monetary	Medical costs over $5,000 General damages, if awarded, would be over $30,000	No
Non-economic loss	More than 10% of a 'most extreme case'	No
Impairment	% loss of function (table of maims approach)	No
Whole person impairment	AMA Guides	Yes

The assessment of sustainability is based on the past experiences in Australia (and to a lesser extent USA). The evidence is not spelt out in the paper.

2.3.1 The Rise and Rise of AMA Guides

The use of AMA Guides to Permanent Impairment has become widespread due to the consistency of assessments between assessors and over time.

It is widely accepted that use of AMA Guides for determining compensation can be 'unfair' in that it is at best a crude representation of the impact of the aftermath of injury on an individual. Nevertheless, as a threshold mechanism, the benefits in objectivity outweigh the disadvantages.

The noteworthy Victorian serious injury threshold is the only one in Australia not currently using AMA Guides as its principal mechanism.

It is usual for the AMA Guides to be varied or supplemented in one way or another, eg for hearing loss, psychological injury, loss of foetus or sexual organs. One crucial issue is the combination of physical and psychological impairments, especially if the latter develops after the injury (secondary psych, functional overlay or compensation syndrome).[5]

2.3.2 Lessons

The definition and implementation of the serious injury threshold is the most important factor in sustainability of modified common law.

Erosion of thresholds has been a major cause of unsustainability, and in many schemes (e.g. NSW CTP, WA workers) has led to multiple reforms.

Experience is showing that a threshold based on permanent impairment using AMA Guides appears to the be most likely to be sustainable.

2.4 Heads of Damage Limitation

Claims costs in a common law scheme can be reduced by abolishing access to different heads of damages. Under the SRC Act 1988, Comcare abolished all the monetary loss heads of damage and capped damages under non-economic loss. This is similar to the restrictions put in place in the South Australian workers compensation scheme in 1987, prior to full abolition in 1992. Victoria workers compensation also had this approach between 1992 and 1997.

Other examples where certain heads of damage are excluded from common law and limited to the no fault scheme are:

- Victorian motor accidents and workers, where only loss of earning capacity and general damages are allowed
- Queensland workers compensation, where no damages for gratuitous care are available

- There are other examples of minor amendments to legislation to remove the effect of unwanted precedents (eg. following the Theiring case in NSW, amendments were made to the CTP legislation to stop LTCS claimants claiming gratuitous care through the CTP scheme).

Another alternative in a 'common law only' scheme is to restrict access to certain heads of damage to those meeting a serious injury test:

- in NSW CTP only claimants who exceed a 10% WPI threshold are able to claim damages for non-economic loss, with other heads available to all
- The 2013 changes to the South Australian CTP scheme introduced a number of 'injury severity points' before the claimant is able to access future economic loss (7 points), non-economic loss (10 points) and gratuitous care (10 points).

It is the author's view that restrictions based on limiting certain heads of damage are relatively ineffective, firstly because the other costs are often met through another mechanism, and secondly because of the common law's adaptability (e.g. the use of medical or care buffers to substitute for general damages).

2.5 Quantum Restrictions

NSW CTP has introduced a variety of caps to reduce common law claims cost. These include:

- A ceiling on weekly earnings for any calculation of past and future benefits
- A cap on damages for non-economic loss
- Limitation on damages under attendant care services, and a minimum requirement (six hours per week for at least six months).

Even with these caps in place, there are still issues surrounding the sustainability of this fault based system (as indicated by the proposed reforms that were subsequently withdrawal).

The Queensland CTP scheme, throught the Civil Liability Act, introduced measures in 2003 to reduce the level of general damages. Queensland introduced an Injury Scale Value (ISV), a number between 0 and 100, reflecting the severity of the injury. The ISV score then translates directly into a general damages amount. These provisions severely curtailed the level of general damages that could be awarded at the lower end of the scale. However, any gains made were eroded over the first few years following the introduction of the CLA, with significant increases in awards for economic loss offsetting the reductions in general damages for low severity claims.

The South Australian CTP scheme changes introduced in 2013 have picked up elements of both the NSW and Queensland schemes –

- A ceiling on pre-injury earnings for any calculation of past and future economic loss benefits
- Introduction of a point scale similar to the Queensland ISV scale, with points determining quantum of non-economis loss
- A minimum requirement (six hours per week for at least six months) to qualify for gratuitous care services.

Another way to limit the entitlements paid under common law is to specify a fixed discount rate for damages paid under pecuniary heads of damage. All things being equal, the higher the discount rate, the lower the benefit paid. For younger claimants with a large proportion of damages paid as economic loss, this decrease can be significant. Most jurisdiction use a fixed 5% discount rate, and following tort reforms in civil liability it is now well entrenched.

It is the author's view that while quantum restrictions may assist in sustainability they will not be sufficient alone to achieve the goal. It is a little bit like the balloon that you squeeze in one part and bulges out somewhere else.

2.6 Elections

In an attempt to discourage smaller or frivolous claims, some schemes require claimants to make an irrevocable election to pursue common law damages. Examples include:

- QLD workers has had a form of irrevocable election since 1990. In the 1996 reforms this election was removed for those workers with a serious injury (i.e. greater than a 20% work-related impairment).
- WA workers introduced an irrevocable election in the 1999 amendments and the worker was required to elect within 6 months of the date of first compensation payment. In 2004 this was adjusted so that:
    - Statutory payments are stepped down in the 6 months after election
    - The worker has 12 months from the date of first weekly payment to elect, with a provision to extend for a further 12 months if the injury has not stabilised.

In the author's view the use of elections is not particularly helpful in sustainability. It entrenches serious legal involvement early in the life of claims and exacerbates the adversarial nature of claim resolution.

2.7 Legal Process and Costs

The QLD workers' compensation scheme has attempted to reduce common law claims costs in many ways, including restrictions on legal proceedings. The WorkCover Queensland Act 1996 introduced a pre-proceedings process for

common law claims. This was done in an attempt to promote early settlement of claims and minimise legal costs (Q-COMP, 2013). The 2009 amendments introduced stricter rules for claiming under common law and in particular -

- Increased obligations on parties to participate meaningfully in pre-court processes, and
- Allowed courts to penalise claimants whose claims are dismissed (Queensland Parliament, 2013).

While it is still early days, WorkCover QLD is predicting a small decline in claims costs as a result of these changes.

Queensland also has a comprehensive structure of legal processes and costs that applies to civil liability and CTP claims – the 'PIPA' (Personal Injuries Proceedings Act 2002). The process requirements involve pre-litigation protocols, full exchange of evidence, compulsory conferences and mandatory final offers. The PIPA restrictions on legal fees are as follows –

- no legal costs can be awarded unless damages exceed $30,000
- a maximum of $2,500 of plaintiff legal costs is recoverable for awards of between $30,000 and $50,000
- full recovery is only possible if damages exceed $50,000.

These thresholds were fixed from when PIPA came in until 1 July 2010 when there was a one-off inflationary catch-up of 17%, and the thresholds have been indexed annually since then.

The effectiveness of these thresholds is debatable – rather than being effective in reducing legal costs, it is argued that the thresholds set a 'target' for plaintiff lawyers, contributing to superimposed inflation.

The 2013 amendments to the SA CTP scheme also include legal cost restrictions –

- no legal costs can be awarded unless damages exceed $25,000
- for awards of between $25,000 and $100,000 the Magistrates Scale of Costs must be used
- full recovery is only possible if damages exceed $100,000.

Of course, these legal cost restrictions in both Queensland and SA impact on amounts that can be reimbursed as part of the claim settlement – there is nothing that stops plaintiff lawyers charging their clients a different amount in solicitor-client costs including no-win-no-fee uplifts.

The NSW CTP scheme also has a schedule of maximum costs recoverable. Even so, the non-judicial dispute system (CARS) has become more legalistic with legal representation (including barristers) now much more frequent.

2.7.1 Alternative dispute resolution

Some of the changes described above could be characterised as alternative dispute resolution (ADR) systems. By its very nature common law is a court-directed process, so ADR only has a place prior to court, and either with specific legislation or as part of court rules.

Both NSW jurisdictions (workers and motor accidents) have gone down this path with specialist tribunals, and Victoria has established protocols for considering the serious injury threshold prior to litigation.

While Australia has used ADR and non-judicial (administrative) tribunals for several decades there is not the same degree of cultural development and understanding of behaviours that exists in our court systems.

It is the author's view that modifications based on legal processes and costs have an important place in making common law sustainable. They are, however, complex in their own right and perhaps outside the core competence of many scheme designers (including actuaries).

3 Other Considerations

3.1 How do no fault and common law interact?

Our first thought tends to be that no fault and common law are alternatives – you have one or the other. As an example, for motor accidents NZ has no fault and QLD has common law.

In reality, life is not so simple. The interaction between common law and no fault, when mixed together in a scheme, is a complex cocktail, and vitally important to sustainability.

For about eighty years, our workers compensation schemes were a combination of no fault and common law, with the common law option being an extra available to an injured worker if negligence could be proven. Motor accidents, on the other hand, were common law only – no negligence meant no compensation.

Given that the basis of workers compensation is a no fault entitlement, every scheme (other than ACT) now has either no common law or restricted to 'serious injury' in one way or another. The sustainability issues have tended to arise when common law is:

- Seen as a 'risk free option' to increase compensation; or
- Blurred with redemptions, permanent impairment lump sums and pain and suffering entitlements.

Workers compensation schemes in QLD and WA are subtly different in that the statutory benefit regime is intended to be time-limited, and the structural design is for common law to be available in cases of negligence for workers who have or will reach the end of the statutory entitlements. This interaction means that restrictions on common law have often been accompanied by extensions to statutory benefits.

In motor accident schemes, there are some more interesting examples:

- The 1970/80s Victorian structure with the Motor Accidents Board (no fault) and the State Insurance Office (common law) suffered badly from the 'free option' problem and from lack of co-ordinated management.
- The Tasmanian MAIB scheme has had no fault benefits since 1973 and unrestricted common law in addition seems to have survived very well – is this because of a different litigation environment and culture in Tasmania? Or is the scheme design and management different?
- In NT, the scheme was essentially split into two. Residents have no fault entitlements without common law. Non-residents have common law only.

- In NSW (and also in SA from 1 July 2014) the 'lifetime care' scheme is no fault for catastrophically injured, while the CTP scheme for others is modified common law. The catastrophic injury schemes with lifetime no fault entitlements are likely to become the norm following NDIS/NIIS.

3.2 The relevance of scheme culture

Culture, simply described as 'the way we do things around here', can be a powerful force in a complex system involving people who work in that system all the time. Very few of these people base their actions on legislation, but rather on what they learned on the job. Changing legislation alone will not change these ingrained behaviours without a range of other forces at work.

For example, when common law was abolished (NSW and SA for example), legal activity switched almost seamlessly to redemptions and impairment lump sums (especially pain and suffering awards which existed then) in a fashion almost indistinguishable from common law, except that a workers compensation tribunal heard the matters rather than a court. In fact, the members and registrars of the tribunals typically came from courts and, not surprisingly, ran things in the way they had learned.

Culture can often be a force of inertia. Even though changes may be made to common law entitlements, outcomes can often move less than expected due to the culture. One example is 'buffers' (we have economic loss, medical and care buffers!) replacing the general damages for less serious claims after a threshold is introduced. To put it simply, lawyers and judges have an expectation about what an injury is 'worth' and follow that expectation. The Queensland CTP experience with economic loss following restrictions on general damages is a case in point.

Sometimes a cultural 'tipping point' seems to be reached – when behaviours do change, they are inclined to change more than expected and rapidly. This might occur when all the participants come to think that 'OK, this is all over and I need to get a different job.' Jeff Kennett's legislation to replace WorkCare by WorkCover in 1992 is a great example. Claims dried up several weeks before the legislation changed, and subsequently, the claims experience for claims that (under the law) continued to enjoy the more generous aspects of the WorkCare laws became very similar to those under the new (more restrictive) laws.

The lessons are:

- Minor changes to rules are unlikely to achieve much if they don't involve change in process.
- Major changes can achieve more than expected if accompanied by forces to change scheme culture.

- Any plan for changes should be accompanied by a careful assessment of how 'the system' (as opposed to the law) works and considering if and how scheme culture may be changed.

3.3 The Honeymoon

It is important to take a medium term (five to seven year) perspective in assessing sustainability following a modification to common law.

There are numerous examples of a 'honeymoon period' after a change when claim numbers and costs fall materially, often below the level anticipated. All seems to be going well, then three, maybe five, maybe seven years later the costs start to grow back towards (sometimes past) the pre-reform levels.

A rather cynical way this is sometimes expressed by the hard-bitten is that 'the lawyers are clever and persistent, and sooner or later they will work out how to fiddle the system'.

The relevance for this paper is the timeframes involved. Scheme reforms usually occur following a period of crisis (or at least high stress). For two or three years all seems well. Those involved 'declare success'. People change, the quality of leadership drops, oversight slackens and a sense of complacency and comfort prevails. As a consequence, trends are missed, corrective actions are delayed, and new reforms become necessary.

The lesson is that the institutions involved must make and stick to a plan for monitoring and management that lasts at least five years, and is itself sustainable.[6]

4 Any Lessons from the US?

The history of compensation schemes in the US has had a different trajectory from that in Australia. Workers' compensation has always had the 'grand bargain' resulting in no common law.

Motor accident insurance, on the other hand, moved from the 'pure common law' model long before it did in Australia. Academic and policy argument for no fault motor insurance ran hot from the 1920s to the 1940s, but it was not until 1970 when the first no fault motor law was introduced in Massachusetts. Approximately 25 states introduced various versions of no fault and hybrid motor bodily injury insurance over the next 10 years.

In the US, no fault motor is currently out of favour because it is more expensive, with premiums higher than in tort systems (Anderson, Heaton, & Carroll, 2010). There are two main factors, apart from the obvious one of covering more injured people:

- Lifetime medical costs cannot be managed; and
- Most schemes are really hybrids with common law and other options that result in 'the worst of both worlds'.

The Rand research concludes that no fault laws do not lead to more accidents or a higher propensity to claim. On the other hand, no fault does give rise to more utilisation of medical services, higher fee rates for medical services and overall a much higher cost of medical treatment.

The cost pressures are worse in the larger, less conservative states such as California and New York.

5 Lessons for Sustainability

The common law system of injury compensation has not been sustainable in Australia over the last 30 years[7]. Almost all workers' compensation and motor accident schemes have moved away from a 'pure common law' structure since the 1980s. In the broader civil liability system of personal injury compensation, tort reforms in 2003 and 2004 also made many modifications to common law.

Nearly all common law modifications have incorporated, in one way or another, modifications that restrict common law entitlements to more seriously injured people. The serious injury modification that has proved to be most sustainable is to use a threshold based on permanent impairment (using AMA Guides, often with some supplementary rules).

Trying to summarise the lessons learned by thinking about the history and analysis in this paper:

1. All but one jurisdiction in Australia has limited common law since 1985, some of them several times.
2. Six schemes have abolished common law access, and three had it reintroduced within three years following a change of government.
3. When scheme costs (hence premiums) are rising there is pressure for reform, and common law is most often the first target.
4. Restricting common law access to those with serious injuries is by far the most common response, and is now the norm.
5. The threshold for defining serious injury becomes the most important decision, and threshold erosion has often led to further need for reform.
6. With one exception, all the thresholds currently in use are based on Whole Person Impairment using AMA Guides – evidence that this is the most sustainable approach.
7. There is one notable exception to lesson 6. In Victoria a narrative threshold has been used since 1989 (motor) and 1999 (workers) without change.
8. Other forms of limitation, such as excluding heads of damage and limiting quantum, are not the most important factors in sustainability.
9. Effective litigation procedures and legal cost rules are very important, and this area can use more work.

6 A recipe for sustainable common law

Many jurisdictions seem committed to keeping common law as part of their scheme design, albeit for more serious injuries only.

In this context, the author's recipe for sustainable common law can be summarised as follows:

1. Take care of the catastrophically injured with lifetime no fault benefits – the NIIS recipe
2. Provide time-limited statutory benefits on a no fault basis
3. Provide common law access for those:
    a) That can demonstrate negligence by an employer or third party, and
    b) That meet a threshold based on AMA Guides, following medical stabilisation with a maximum period of three years
4. A preliminary process for access to common law involving grant by the insurer (or if necessary independent medical assessment) of impairment and/or a court hearing on negligence
5. Case managed litigation in the intermediate court system, with a specialist case management track but without specialist courts
6. Economic loss based on earnings capped at a low multiple of AWE and a 5% discount rate
7. Non-economic loss based on a modest maximum amount with a narrative approach within the maximum
8. Medical, care and the like subject to the same provisions as civil liability
9. Clarity that 'buffers' in medical, care or economic loss are not to form part of damages, with non-economic loss covering the relevant possibilities.
10. Event based legal costs rules until the court hearing stage
11. Statutory restrictions on solicitor-client costs and no-win-no-fee uplifts
12. A scheme regulator responsible for ensuring efficiency and stability of the common law process as well as the no fault part of the scheme.

This recipe should not be taken to mean that the author supports common law over no fault. Having once predicted the gradual demise of common law compensation, and having been proven wrong, it aims to be a constructive contribution to sustainability which is, after all, a goal of all injury compensation schemes.

End Notes

1 There were three States that introduced no fault for motor accidents as far back as 1973 when the previuos cost crisis took place – Victoria, Tasmania and NT, with only NT abolishing common law.

2 Even the major NSW@ reforms of 2012 did not change common law.

3 With one exception – NSW WC 1992

4 At the 8th Accident Compensation seminar Evans and Atkins presented a case study on the workers' compensation part of this reform. Part of that paper is reproduced in Appendix C.

5 One lawyer was heard to remark "Anybody who survives three years in this system would go crazy"

6 It makes one think of the infamous movie…"just when you thought it was safe to go back in the water…"

7 The problems may actually go back 40 years to around 1973, but with most reforms starting in the next cyclical crisis in the mid 1980s.

A Current Scheme Controls

This appendix contains only the briefest of summaries of the various cost control modifications to common law. For accuracy and detail please refer to the excellent Safe Work Australia scheme comparison for workers compensation, or to scheme websites or legislation.

Key
GD General Damages (Pain and Suffering/ Non-Economic Loss)
LOE Loss of Earnings (Economic Loss)
WPI Whole Person Impairment
DPI Degree of Permanent Impairment
NEL Non-Economic Loss
EL Economic Loss

A.1 Table of serious injury thresholds

Workers Compensation

State	Serious Injury Definition	Year of Effect
NSW	At least 15% WPI	2012
VIC	Narrative test (deeming if at least 30% WPI)	1999
QLD	At least 5% DPI	2013
WA	At least 15% WPI	2004
TAS	At least 20% WPI	2010
Comcare	Must have successful permanent impairment claim	1988

Motor Accidents

State	Serious Injury Definition	Year of Effect
NSW	At least WPI of 10% for NEL access	1999
VIC	Narrative test (deeming if at least 30% WPI)	1987
QLD	No threshold	Always
WA	GD threshold of $18k (inflated annually) no threshold for LOE	1994
SA	At least ISV of 7 for EL and at least ISV of 10 for NEL and GvK. Provision for exceptional cases	2013
TAS	No restrictions	Always

A.2 Table of heads of damage exclusions

Workers Compensation

State	Heads of Damage	Year of Effect
NSW	LOE only	2001
VIC	LOE and GD only	1999
QLD	No gratuitous services	2013
WA	No exclusions	Always
TAS	No exclusions	Always
Comcare	GD Only	1988

Motor Accidents

State	Heads of Damage	Year of Effect
NSW	NEL if <10% WPI	1999
VIC	LOE and GD only in CL	1987
QLD	No exclusions	Always
WA	No exclusions	Always
SA	EL if ISV <= 7, NEL and GvK if ISV <= 10	2013
TAS	No exclusions	Always

A.3 Table of Quantum Limitations

Workers Compensation

State	Quantum Limitations	Year of Effect
NSW	Unlimited access to LOE	1989
VIC	Capped for GD and LOE	1999
QLD	Capped GD and LOE earnings limit	2003
WA	Caps when WPI less than 25%, unlimited otherwise	2004
TAS	Unlimited	Always
Comcare	Capped GD (no access to LOE)	1988

Motor Accidents

State	Quantum Limiitations	Year of Effect
NSW	Capped for GD and LOE, attendant care	1999
VIC	Capped for GD and LOE	1987
QLD	Capped for LOE, gratuitous services	2000
WA	Capped for GD	1994
SA	Capped for GD and LOE	2013
TAS	None	Always

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C Serious Injury Common Law A Scheme Reform Case Study

Serious Injury Common Law
A Scheme Reform Case Study

Authors: Julie Evans & Geoff Atkins

For presentation to
the Institute of Actuaries of Australia
8th Accident Compensation Seminar

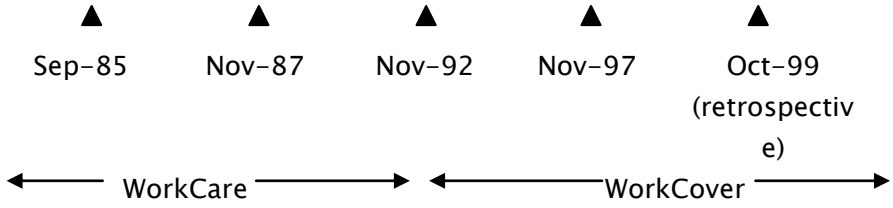
November 2000

2 Background

2.1 Common Law in Victoria Workers' Compensation

Workers' compensation insurance in Victoria was underwritten in the private sector until September of 1985. At that time the private system was replaced by a public sector monopoly insurer, WorkCare. Since 1985 common law access and benefits have undergone a series of changes, as shown in the following diagram.

ACCESS	no restriction	no restriction	serious injury[11]; minimum award threshold	no access	serious injury[1]
ECONOMIC LOSS	nil	nil	capped	nil	capped
NON-ECONOMIC LOSS	unlimited	capped	capped	nil	capped



Between 1985 and 1992 common law damages were available for non-economic loss only (general damages or pain and suffering). Experience showed increasing utilisation of the benefit and high legal costs relative to the damages paid.

2.2 Serious Injury Threshold

In an attempt to reduce the cost of the scheme, a "serious injury" threshold was introduced from 1 December 1992 to restrict access to common law benefits. The definition of serious injury in S135A(19) used a "narrative" test that defined serious injury as:

[1] Definition of serious injury threshold differs between November 1992 – November 1997 and October 1999 onwards.

"(a) serious long-term impairment or loss of a body function; or
(b) permanent serious disfigurement; or
(c) severe long-term mental or severe long-term behavioural disturbance or disorder; or
(d) loss of a foetus".

Under S135A(3), an injury was *deemed* to be serious if it involved 30% or greater whole person impairment (WPI) assessed using the AMA 2nd edition[2] guide.

This definition was taken from the Transport Accident Act 1986. The threshold had proved to be reasonably successful at containing the number of successful common law claims in the transport accident environment.

As part of the Working Party's development and investigation of options for the restoration of access to common law in 2000, the serious injury definition was reviewed.

2.3 Striking a Balance

The deliberations of the Working Party, and ultimately the decision of the Government, involved striking a balance between competing goals:

- adequacy of benefits to the seriously injured
- a competitive premium
- achievement (or maintenance) of full funding of the Scheme.

To this end the Working Party developed a number of different options for the restoration "package" which varied according to, for example:

- restoration date (the degree of retrospectivity)
- access points to common law (the degree of severity)
- other benefit changes.

In this paper we discuss the option selected by Government. Details of all options examined can be found in the report of the Working Party (refer to the Reference Section of this paper for further information).

[2] American Medical Association Guides to the Evaluation of Permanent Impairment (2nd edition).

2.4 Selected Option

The Government decided to restore common law access using a modified serious injury threshold. The changes were made retrospective to the date that the new Labor Government was sworn in - 20 October 1999.

Under the option selected by the Government, eligibility to receive common law benefits is dependent on claimants satisfying a serious injury test. The revised serious injury definition is shown below. The original definition (1992 to 1997) is also shown.

	Access post 20/10/99	Access 1992 - 1997
Narrative	*S134AB(37)*	
	(a) permanent serious impairment or loss of a body function; or	(a) serious long-term impairment or loss of a body function; or
	(b) permanent serious disfigurement; or	(b) permanent serious disfigurement; or
	(c) permanent severe mental or permanent severe behavioural disturbance or disorder; or	(c) severe long-term mental or severe long-term behavioural disturbance or disorder; or
	(d) loss of a foetus	(d) loss of a foetus
Impairment	*S134AB(15)* 30% WPI under AMA 4th edition	30% WPI under AMA 2nd edition

As the comparison above shows, the new narrative definition is similar to that used previously. Changes were made to parts (a) and (c) of the narrative definition, with references to "long-term" replaced by "permanent". With regards the impairment test, the WPI assessment was changed from 2nd edition to 4th edition of the AMA Guides.

In addition, guidance is provided in the legislation to interpretation of the narrative. Broadly this guidance is provided as follows:

- *S134AB(19)(a)* - the Court must be "satisfied on the balance of probabilities that the injury is a serious injury."
- *S134AB(38)(b)* - the terms "serious" and "severe" refer to the consequences to the worker in terms of pain and suffering or loss of earning capacity
- *S134AB(38)(c)* - the consequences must be judged as "being more than significant or marked, and as being at least very considerable"

- *S134AB(38)(e)* - to satisfy the hurdle regarding consequences to the injured worker in terms of loss of earning capacity, the loss must continue permanently and be 40% of gross income or more
- *S134AB(38)(h)* - psychological or psychiatric consequences of the injury are not to be taken into account other than in testing the severity of injury under paragraph (c) of the narrative test
- *S134AB(38)(k)* - the monetary thresholds and statutory maxima which apply to damages are to be disregarded in the assessment of whether an injury satisfies the definition of serious injury.

A number of other Scheme changes were made at the time that access to common law was restored. These changes are not considered significant in terms of the discussion in this paper.

2.5 Implementation of Selected Option

With the restoration of access to common law the Victorian WorkCover Authority (VWA) faces the challenges of risk management including:

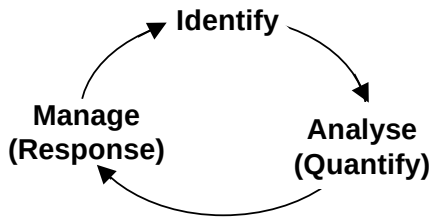
- early identification of claims with common law potential, with a view to early intervention and management
- monitoring experience so as to provide early warning signals of adverse trends and experience
- establishing and implementing controls to ensure application of the legislation in a manner which is consistent with its intent
- management of the scheme so as to ensure stability over time, which is the key to a sustainable scheme.

5 Risk Management

The concept of risk management was introduced when the Government and several stakeholders said they wanted a *sustainable* solution.

To be *sustainable* the common law experience would need to be reasonably stable over time and acceptably close to the allowance in the premium rates.

The simple risk management model can be expressed as follows:



5.1 Risk Identification and Analysis

The single most critical risk identified was the *serious injury gateway* – whether this would be stable over time or subject to erosion.

Analysis of this risk looking historically was controversial. In our view the quantitative and qualitative evidence for gateway erosion was compelling (see for example the graph in 3.2), although not everyone accepted even that. More importantly the drivers of that erosion were unclear – was it:

- the inherent nature of a common law process
- poorly drafted legislation
- poor management by WorkCover and its service providers (claims agents and legal firms)
- some bias or flaw in the County Court/Appeals Court system
- simply more and more claimants becoming aware of their rights, or
- a combination of any or all of the above.

Had there been greater clarity on the factors contributing to this risk, the responses to manage the risk may well have been more focused.

Nevertheless a range of risk management measures were adopted (or recommended for adoption in future), as described in the remainder of this section:

- codify the legal principles
- rely more on medical impairment for the gateway
- a more "objective" test of serious economic loss
- strategic management by the VWA.

5.2 Codify the Case Law

Some lawyers argued that once an adequate body of case law was established, the legal determination of gateway issues would be stable. The history from 1992 to 1999 did not, however, seem to support this proposition. The evolution of case law did seem to have a "ratchet" process – circumstances that would not previously pass the gateway would be tested in a hard-fought case. If that case was won (especially in the appeal court) those circumstances would from then on be accepted as serious injury.

The response tried in the Act was to "codify" the key elements of the case law. The argument is that by writing these critical issues into the legislation the gradual extension of the case law would be stopped.

Examples of this process are listed in Section 2.4 of the paper.

Time will tell, of course, whether this approach is effective.

5.3 Greater Reliance on Medical Impairment

In the first few years after 1992 it was common for claimants to obtain an AMA 2nd edition impairment assessment before deciding whether to pursue common law.

As the narrative test became better established, use of impairment assessments became less common with arguments being built mainly around showing "serious economic detriment". Many of the sample claimants that had impairments appearing to be around or over 30% were still granted serious injury certificates based on the narrative.

In the belief that a medical assessment of impairment would bring greater objectivity and clarity to the process, the new rules require a claimant to have an

impairment assessment before pursuing common law (even if common law is under the narrative).

The impairment assessment will, if there is a dispute, be determined by the Medical Panels.

5.4 More Objective Test for Economic Loss

The main focus of the narrative test of "serious injury" had evolved to be economic detriment. It remained a judgement to be made by the Court as to whether any particular case was "serious". In one of the high profile cases the Court granted serious injury based mainly (it appeared) on the inability to work overtime and lack of flexibility to change jobs.

The approach adopted in the new legislation was to specify that to be "serious", the loss of earnings or earning capacity needs to be at least 40% of pre-injury earnings.

Additional guidance is given to the periods before and after injury to be considered and how to allow for special cases such as apprentices.

5.5 Strategic Management by the VWA

Many observers had been critical of the management of common law by the Victorian WorkCover Authority in the years prior to 1999.

The restoration of common law was accompanied by management recommendations including:

- VWA introduce measures to constrain legal costs, and establish ongoing monitoring systems to allow an evaluation of these emerging costs
- VWA put in place a robust claims management system which could include an increased role for agents
- VWA, together with major stakeholders, establish an education program for the restoration of common law.

These and other recommendations are encapsulated in the phrase "strategic management" by which we mean management with a focus on the outcomes for the whole system. This requires a significant mindshift from the traditional approach to litigation where each case is handled on its own merits.

The VWA needs to exact an active influence on progress of the common law stream and needs to be particularly strong in its monitoring function.

5.6 Gaps in the Risk Management Process

Despite the efforts described above it is easy to identify potential gaps or shortcomings in the management of risk surrounding the reintroduction of common law, including:

- inability to influence legal process – VWA is one party to the various legal proceedings, but it cannot influence the process (e.g. list management rules of evidence, handling of appeals) which is under the control of the County Court and the Appeals Court
- pain and suffering only claims – the legislation opens up the possibility where the pain and suffering is "serious" but economic detriment is not, and the common law claim is for general damages only
- change needs legislative intervention – most corrective action needs legislative intervention, which is slow and is subject to vagaries of the political land legislative process
- depends on Government responding – there is no single entity with the knowledge, authority and capability to take prompt corrective action to manage risk. The VWA must make recommendations to Government, and the response is subject to the will of the Government at the time.

5.7 Conclusion

This reintroduction of common law was done with a clear understanding of the risks and with a range of measures aimed at sustainability.

If in three to five years, it proves to be unsuccessful then the lessons learned may mean that this is the last resurgence of common law in our accident compensation schemes.