Common law in the workers compensation setting

Briefing paper for SISA members

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Introduction

The workers compensation policy paper published by the SA Government on 24th January 2014 contained the following passage:

Access to common law

Currently, there is no access to common law in the South Australian workers compensation scheme. Common law will be re-introduced to the South Australian system. This recognises that a variety of compensation approaches is often useful in a community, in order to suit different needs. A benefit dependency cycle may be avoided where a worker receives a common law settlement, and can then take responsibility for the ongoing management of their injury and control of their life.

Common law will be available to workers with a compensable work-related injury, subject to appropriate thresholds and restrictions. Our common law approach will ensure workers clearly understand the process, likely timeframes and estimated damages and costs. This will put workers in the best possible position to make their decisions. There will be special provisions for seriously injured workers to ensure funds for lifetime care and support are protected.[1]

While there is no certainty that this will actually happen, and there are a great many questions[2] to be answered before a position on this can be formulated, the statement has already generated speculation and concerns about the final result. Much of that is based on a misunderstanding of the form and role of common law in the workers compensation setting. For example, in an opinion piece, the President of the SA Law Society stated the following:

Key to the reforms is the reintroduction of common law. What that means in practice is that an injured worker can sue his or her employer in negligence for having caused an injury. This is welcome news, both from the point of view of injured workers as well as the scheme, which stands to be repaid the sums paid in statutory benefits from the proceeds of the common law claim. It is, in other words, a claw back of benefits paid by the WorkCover Corporation[3]*.*

This statement does not in my opinion reflect how common law is likely to work unless the model for common law being contemplated by the Government is radically different to anything that has existed or does exist in Australian no fault workers compensation law.

The purpose of this briefing note is to clarify these matters to allow informed discussion to proceed in case the prospect of common law takes on more substance. It is not intended to address whether or not common law should be a part of a no-fault scheme – that is a very different set of arguments.

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[1] *A new recovery and return to work system for South Australians: A workers' compensation policy statement,* SA Government 28/1/14 page 5.

[2] These are set out later in this paper.

[3] Morry Bailes, 'Workers comp reform step in right direction', *The Advertiser* 3/2/14 page 18

Background

SA is one of only two workers compensation schemes in Australia that does not currently have common law as part of its entitlement structure. The other is the Northern Territory. A summary of common law provisions among the various schemes is provided at Attachment A. The diversity of arrangements is noteworthy.

A point frequently missed is that the SA scheme allowed for common law claims to be brought against employers in its structure from its inception, until its repeal by the Bannon Government in 1991. Those provisions can be summarised as follows:

- It was limited to non-economic loss (NEL) and solatium (the former being the legal term for 'pain and suffering').
- It was capped at 1.4 times the applicable prescribed sum for section 43 payments.
- Statutory payments made for non-economic loss under section 43 were offset against any common law damages award.
- Actions were dealt with under the SA *Civil Liability Act 1936*, which applied the standard civil burdens and standards of proof to cases seeking to prove negligence against employers, as well as to workers/plaintiffs for contributory negligence.
- Employers were indemnified against common law damages by the scheme.

Common law in the workers compensation context

The most fundamental point to understand about common law in the workers compensation setting (as it is currently understood) is that the workers compensation scheme indemnifies the employer against common law damages (though this is not a consideration for self-insurers). The article quoted earlier infers that employers would have to find a separate means to fund or be indemnified against common law liabilities.

In reality (assuming that the Government is contemplating a model that is broadly consistent with normal practice elsewhere), the scheme indemnifies the employer at common law to the limits specified by the *Workers Rehabilitation & Compensation Act 1986* (WRCA), and no other liability arises outside the Act or beyond the limits specified, by virtue of sections 46, 54 and 55 of the WRCA. In other words, common law is not in normal practice an open-ended exposure to tort under the *Civil Liability Act* - it is just another form of capped, statutory compensation, as ironic as that may sound[4].

Other points to be noted are:

- In normal practice, there is a bar on double compensation. This works in one of two ways. Common law payments can offset by any statutory entitlements paid for the same thing. In the case of NEL in SA pre-1991, if a worker was paid a $30,000 lump sum under section 43 and then won $50,000 at common law from the employer, then the worker would only receive an additional $20,000 in their pocket. In the case of recovery of compensation from common law payments made under the compulsory third party motor accident scheme, or where a worker sues some other third party for damages,

[4] The ACT scheme is a notable exception to these limitations.

then full damages are awarded, including compensation benefits already received, with the latter recovered by the compensating authority under section 54 of the Act.

- It is usual for there to be a threshold on common law access[5] – 15% or 20% WPI. If this is the case in SA, then cases will not be frequent. A sizeable majority of claims have a WPI of 10% or less.
- It is possible that a common law scheme may be introduced that requires workers to make an election regarding their receipt of ongoing compensation benefits or the pursuing of a common law action for damages.
- The concept of the WorkCover scheme clawing back payments from a worker, who successfully sues only their own employer, can only be realised if there is different insurance applying to the employer's common law liability. There is no evidence this is what the government is contemplating.
- Workers can, at their option, sue more than just the employer at common law. Building site accidents are a frequent example. This raises all sorts of issues about apportionment of liability between the various defendants (which in other areas of the law is subject to what's called the principle of proportionate liability), and how much they will each have to ultimately pay if the action is successful against all those sued. This is often in turn affected by contractual arrangements that might apply between defendants who are sued (e.g. between a labour hire employer and a 'host' employer), dictating who should pay what or who should indemnify who, and what insurance if any is available to provide protection in this regard.

Funding questions

The obvious question for self-insurers is whether common law would constitute a net addition to cost and liability. While that cannot be answered for certain until the detail of the proposal is clear, I suggest that the likely answer is no, for one very good reason – the Government's declared aim is to reduce scheme costs and liabilities, not increase them. This will naturally flow through to self-insurers.

The Government has declared that for less seriously injured workers, income maintenance will cease at 2 years and medical entitlements one year after that (without specifying the definition of 'seriously injured'). If this 2 year rule affects current as well as new claims (i.e. all current claims will have 2 years left on the system at the date the laws take effect), then liabilities and payments will swiftly reduce for the scheme and self-insurers alike[6]. This, I expect, will be more than enough to offset the liabilities and cost of the few common law claims that will arise.

[5] Again, the ACT scheme seems to be the exception.

[6] I have taken this as an inferred probability due to Minister Rau's media statement that he expects these proposals to resolve the claims tail in 2 years. Arrangements similar to this were instrumental in the rapid turnaround of the NSW scheme over the last 2 years.

Primary questions about the common law proposal

The following questions have to be answered before any concrete conclusions can be reached about the proposal to re-introduce common law.

- What are the 'appropriate thresholds' mentioned in the paper?
- What are the 'appropriate restrictions' mentioned in the paper?
- What heads of damage would be claimable?
- Will the claimable heads of damage be capped?
- Will there be a bar on double compensation?
- Will claims be dealt with under the *Civil Liability Act 1936*?
- Will the scheme indemnify registered employers against damages?
- How will common law be funded without adding to costs and liabilities?
- Will workers be on risk for costs in unsuccessful actions?
- At what point in time will common law become available to claimants?
- If common law is available while statutory entitlements to weekly payments and lump sums remain current, will the decision to pursue common law affect ongoing statutory entitlements as it does in Queensland?
- What will happen when the injured worker sues other parties as well as the employer? Will the principle of proportionate liability apply?

Conclusions

From the above I hope it is clear that in my view, while the final shape of the Government common law proposal is unknown, it is reasonable to expect that it will not represent a major departure from standard practice, in that:

- The scheme will indemnify employers against common law damages (though this is not a consideration for self-insurers, who will carry this liability for themselves anyway).
- Access to common law will most likely be restricted by an access threshold, restrictions on the heads of damage that can be sought, and capped quanta.
- Common law damages will most probably be offset by statutory payments.
- It will not represent a net addition to costs and liabilities; in fact the reverse must be the case if the scheme's liabilities are to be resolved.

If these suggestions prove to be correct, then the postulated re-introduction of common law may not be the major threat that initial impressions might suggest. However, as mentioned at the outset, whether or not common law ought to be a component of a no fault scheme at all is a different question altogether and a debate to be had when more substance is given to these and other proposals for the future of the scheme.

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Attachment A - Comparison of common law arrangements (Source – Safe Work Australia)

Scheme	Common Law?	Threshold/s	HOD covered	Capped?
NSW	Yes	• 15% WPI • Statutory lump sums to be settled first • Start no sooner than 6 months post-injury	Past & future economic loss only	No
Vic	Yes	• Must be granted a 'serious injury certificate' via: ○ 30% WPI ○ Narrative test • Economic loss claims – permanent loss of 40% of earning capacity	• Pain & suffering • Economic loss	Yes – Act sets minima and maxima
Qld	Yes	• Must have DPI[1] >5% • Under 20% WPI, worker must choose irrevocably between statutory lump sum or common law • Over 20% WPI can pursue both	• Pain & suffering • Economic loss	Yes, maxima only
WA	Yes	• 15% WPI • Secondary psychological, psychiatric and sexual conditions excluded	• Non-economic loss • Economic loss	• < 25% WPI, total award is capped • Unlimited for >25% WPI
SA	No			
Tas	Yes	20% WPI	• Non-economic loss • Economic loss	No
NT	No			
ACT	Yes	None	Unlimited	No
Comcare	Yes	Must have some degree of WPI	Non-economic loss only	Yes

1. DPI = Degree of whole person impairment – essentially the same as WPI