

10.4 The ICF and accident compensation in Australia

John Walsh, Actuarial, PricewaterhouseCoopers

Address for correspondence: john.e.walsh@au.pwcglobal.com

Abstract

This paper briefly describes the Australian accident compensation system, with particular emphasis on its process of impairment classification, assessment, and entitlement to damages. It argues that this process is fundamentally flawed, and suggests that the framework provided by the ICF may provide a starting point for future development.

Accident compensation in Australia

Individuals who sustain an injury in Australia may be eligible for a variety of benefits under Accident Compensation, a set of statutory and common law systems generally under the jurisdiction of states and territories (as distinct from the Commonwealth).

More than \$10 billion per annum (about 1.5% of GDP) is collected in premiums and paid in benefits under the various schemes encompassed by accident compensation:

- Workers Compensation (ten statutory schemes)
- Motor Transport Compensation (eight statutory schemes)
- Public Liability Insurance (generally private insurance)
- Medical Indemnity Cover (medical defence and private insurance)
- a variety of self-insurance and pooled arrangements.

The structure of the schemes has been under constant review during the past 20 years in terms of both benefit entitlement and also underwriting structure. Almost invariably, scheme review has followed either cost escalation, leading to affordability issues for premium payers, or perceived inadequacy of benefits, leading to rights issues for injured parties.

Again, almost invariably, these catalysts for reform have been linked in some way to instability, inappropriateness or lack of confidence in the process or method of assessment of impairment or disability.

Eligibility for compensation

For 'no fault' type schemes, *eligibility* for compensation is broadly linked to the circumstances or place of occurrence, e.g. 'in the workplace', 'out of the use of a motor vehicle'. All of Australia's workers compensation systems have at least some no-fault benefits, as do three of our eight motor transport compensation systems.

For 'common law' type schemes, *eligibility* for compensation is contingent on the ability to establish that the injury for which compensation is claimed was due to the negligence of a third party ('the plaintiff'). All of Australia's public liability insurance (including medical indemnity) is based on common law principles. All of our motor transport compensation systems have at least some common law entitlements (in five out of eight this is the only entitlement). All but three of our ten workers compensation systems have at least some common law entitlements.

In some cases these over-riding eligibility criteria are supplemented by *thresholds* or 'entry points', usually based on an assessment of impairment or disability; i.e. eligibility for damages is contingent on meeting a certain percentage of disability. The determination of whether or not this threshold is reached follows a similar process to the assessment of entitlement to damages, described in the next section.

Assessment of compensation entitlements

The nature of the scheme (common law or no-fault) also generally determines the way in which benefits are determined.

Common law

For common law schemes, compensation is generally available for the following major classes of 'heads of damage':

- *Economic loss (past and future)*, requiring an assessment of the extent to which the injury has resulted in a reduced capacity to engage in employment, and so earn income, and for how long this incapacity will remain
- *Care costs (past and future, medical, hospital, attendant care, therapy, aids and appliances)*, requiring an assessment of the treatment, equipment and personal care which will be required to (as far as possible) overcome the disabling affects of the injury
- *General damages (also termed 'non-economic loss' or 'pain and suffering')*, requiring an overall assessment of the significance of the disability or impairment arising from the injury, normally compared to a 'worst possible case', or some other 100% entitlement.

The method of determination of these measures is left to a judicial process i.e. a judge or magistrate who makes a once-and-for-all award based on evidence from a variety of medical and other experts representing both sides of the argument (plaintiff and defendant). There is generally no specified instrument or benchmark to guide this process, the major argument in favour of this being that the subjective power of the judge allows an appropriate consideration of individual circumstances. Damages are payable by way of a single lump sum.

In a large majority of cases the common law matter does not receive a judicial verdict at all. The settlement for each head of damage (and in total) is agreed between plaintiff and defendant lawyers, based on precedent judgements leading to a decision about the amount they would expect the matter to be awarded. Therefore

the 'assessment' process is even further removed from any rigorous and structured basis.

In my view there are at least four major problems with the subjectivity of the common law assessment process:

- The process has little scientific basis or structure in terms of the concepts of impairment, disability, and incapacity,
- The process is litigious and slow and effectively encourages claimants to prolong their incapacity to maximise financial reward,
- There is only very rough equity between claimants; it is not unusual for very similar claimants to be awarded very different amounts of compensation,
- The process has been found to be unstable at a macro-level. Over time it seems that the balance of judgement gradually moves in favour of the claimant. Hence the convention of what constitutes any 'percentage' incapacity, disability or impairment becomes less and less severe by any objective measure. The result is cost pressure on the scheme, and usually a major review, which typically leads to some short-term restriction on judicial power or some artificial threshold or reduction in entitlements.

Statutory benefits

For no-fault schemes, compensation is generally payable according to statutory benefit rules.

Again the compensation is of three main types:

- *Income replacement benefits (either total or partial)*, which is normally contingent on an assessment of ability to return to usual employment or modified employment ('suitable duties')
- *Medical and care benefits*, usually paid on a 'reasonable and/or necessary' type basis
- *Non-economic loss (or 'permanent impairment', or 'pain and suffering')*, which has a similar meaning to that of the common law equivalent.

Statutory benefits of the first two types (income and medical) are usually payable periodically for as long as entitlement continues. The judgement of when this entitlement begins and ends, and to what extent, is usually made by a medical practitioner based on his or her own experience.

Statutory benefits for non-economic loss are usually paid in lump sum form, with entitlement based on the application of an *impairment guide* or table, of which there are several in use in Australia. There are two main types of such tables:

- *tables of entitlements for specified impairments or 'maims'*—usually in respect of the loss of (or loss of the use of) a body part. These have been developed by individual schemes; and
- *whole Person assessments of impairment*, most commonly using the guidelines of the American Medical Association (4th or 5th Edition).

Disputes over the assessment of entitlement to statutory benefits are heard by a variety of appeal mechanisms, ranging from a judicial process (not unlike the common law) to a binding expert medical panel.

The assessment process in respect of statutory benefits is far superior to that in common law jurisdictions, but still has four major problems:

- For income support benefits, the assessment of incapacity is arbitrary, subjective, and without a well-developed framework to consider the injured person, his or her functional potential, and the mechanical and attitudinal qualifiers required to return to employment
- For medical and care benefits, the process of referral and the assessment of need for ongoing treatment is also arbitrary in most schemes. There are only broad developments in recommended clinical pathways and evidence-based medicine
- For non-economic loss, the process in some schemes has been found to be unstable at a macro-level, for the same reasons as common law is. This problem appears to be assisted by use of the American Medical Association Guides, which place more discipline on the assessment process
- The continued use of 'impairment' as the basis for non-economic loss, however, causes problems for equity reasons. The great benefit of the common law is its desire to differentiate disability from impairment at an individual level (although I would argue it does this imperfectly).

Potential of the ICF in accident compensation

The underlying objective of accident compensation is to provide 'indemnity', i.e. to restore the injured person, as far as possible, to his or her pre-injury condition. In concept, one would imagine that the compensation process should be attempting to define and measure the outcome of the injury in terms of restrictions relative to the pre-injury state and to take steps to modify those restrictions.

However, the process of assessment and compensation described above is arbitrary, unstructured, litigious and focused on monetary compensation rather than facilitated recovery of function. This process has been shown to be unstable and to require constant review. It is also, arguably, detrimental and inequitable to individuals who have sustained an injury.

The ICF potentially provides a basis for clarifying and strengthening the framework for classification, assessment and modifications in the field of accident compensation, leading to a more robust and appropriate compensation system.

Classification

The dimension of body structures and functions provides a more appropriate starting point than the insurance concept of 'impairment' for describing the physical sequelae of an injury or disability.

Assessment

The dimension of activity provides a rigorous framework in which to develop metrics of the insurance concept of 'capacity' in the context of potential for achieving a more positive outcome. This is particularly the case when one combines it with the participation dimension, which can lead directly to the prognosis for future development, such as return to work or social independence.

Modification

The qualifiers to the participation dimension provide a direct parallel with the notion of 'suitable duties' or 'aids and appliances', which are part of the compensation language.

Limitations of ICF

The main limitation of the ICF in providing a framework for assessment and management in accident compensation is the work that will need to be done in moving beyond this framework. The ICF has been developed in a health and disability paradigm, which historically has operated independently of accident compensation in Australia, and vice versa.

For progress to be made in this area, concerted efforts are needed on both sides. This requires a significant commitment by accident compensation authorities to acknowledge the potential of the ICF and its family of classifications. It also requires sponsors and advocates of the ICF to recognise the commercial realities of accident compensation and to assist in developing more targeted classification and assessment instruments.

The other challenge for the use of the ICF is the transition from a 'framework' to the development of assessment instruments suitable for use at an individual claimant level (e.g. for body structure and functions, activity, and participation). Such instruments will be necessary to improve resource allocation for accident compensation and other statutory entitlement systems.