

POLICY OPTIONS

CLAIMANT LEGAL REPRESENTATION IN PERSONAL INJURY CLAIMS: A RAPID REVIEW OF THE EVIDENCE

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Hummell E, Foster M, Grant G, Burns K, Grywacheski N, Shannon N.

Policy context

Injury compensation schemes are vital pathways for rehabilitation and recovery after road trauma or workplace accidents, particularly for injured people with complex needs. Across Australia, personal injury compensation schemes, including for workers' compensation and motor vehicle accident compensation, vary significantly in terms of entitlements and benefits. Furthermore, unfortunately the claims process can also be a health risk factor with current compensation research indicating that involvement in compensation claims processes is associated with poor physical and psychological health outcomes^{1,2,3}. The evidence base pinpointing explanations for this link is sketchy and under-developed. Essentially, it shows associations of multiple factors in claimant outcomes and no clear indication of causal relationships.

In Queensland, the Compulsory Third Party (CTP) insurance scheme provides the ability for individuals injured as the result of another driver's negligence to claim compensation for injuries and access to medical and rehabilitation services. The compulsory insurance premium is paid for by the owner of the vehicle at time of registration, and covers financial liability if they are found to be 'at fault' for the accident⁴.

Policy options

A rapid review of the current evidence on claimant legal representation in personal injury claims indicates some system and operational options to improve claimant experiences and outcomes. There is no conclusive evidence on the mechanisms involved in claimant experiences and outcomes when lawyers are used to negotiate compensation processes. What is clear is that claimant outcomes are systemically based, that is, the contributing mechanisms are linked to: structural issues embedded in scheme design; administrative issues embedded in the procedures, processes and decisions of multiple agents; and claimant related issues in terms of the capabilities, vulnerabilities and motivations of injured people who are involved in compensation.

Policy and operational options for improving the current system relate to:

1. Claimant-centred approaches:

- Focusing on holistic case management delivered by well trained and qualified staff with detailed knowledge of health issues, as well as advanced communication skills and an empathic approach may improve claimants' outcomes
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¹ Collie et al., 2015

² Gabbet al., 2007

³ Grant & Studdert 2009

⁴ Motor Accident Insurance Commission 2018

- Improving the approachability of personnel involved in claims handling to build and sustain close relationships; which would also enable ongoing and timely attention to the emotional needs of claimants
2. Pathways for vulnerable claimants:
 - Improved screening at claim notification for those at risk of delayed recovery and facilitate early intervention.
 - Collecting bio-psychosocial information to predict longer term health profile might be useful to target interventions
 - Once those at higher risk of delayed duration are identified it may be possible to target early interventions to assist these claimants through any perceived complexities in the system, which may address underlying reasons for lawyer engagement
 3. Addressing the needs of claimants with mental health problems:
 - at claim notification and throughout the process strengthen support that is aimed at increasing claimants' resilience, e.g. provide extra assistance in navigating the essential parts of the claims process and minimise exposure to parts of the system known to be particularly stressful
 4. Transparency and trust of processes:
 - strengthen claimant trust of processes by clear and accessible communication and information across the compensation lifespan
 - provide timely information sharing and timely approvals
 - manage perceptions and impacts of medico-legal and other assessments
 5. Future research on the systemic and procedural and process mechanisms that contribute to conflict, disputes and barriers to collaboration.

Key findings

Two issues are clear from the rapid review: 1) recovery for personal injury claimants is complex and contributing factors in compensation experiences and outcomes are multifactorial and multidirectional; and: 2) the study of compensation claimant outcomes is plagued by methodological challenges. Arguably, these factors reinforce both the challenges and importance of understanding the complexity and nuances of associations between legal representation and claimant outcomes.

- **Multiple intersecting systems play a role in injury recovery and how claimants of compensation fair.** Collie and colleagues (2019) highlight these as: societal systems, for example, economic and labour force conditions and attitudes; government systems, such as policy, legal and regulatory frameworks; organisational and management systems, including the decisions and actions taken across multiple levels of the compensation system; and personal systems, including the immediate environment and functional and work status of the injured person.
- **Claimants can become caught in a negative cycle tied to the compensation system, where one event complicates another.** Prolonged exposure to a scheme increases the likelihood of already vulnerable participants encountering stressful system complexities, such as numerous medical assessments and the overall adversarial nature of the compensation process. These circumstances may lead to greater lawyer involvement and/or be exacerbated by lawyer involvement.
- **Methodological challenges hamper development of the evidence base.** Grant & Studdert (2009) have identified these as: 1) problems with measurement of factors between and within different insurance schemes; 2) failure to control selection bias in pre and post reform studies related to multiple legal, administrative and practice changes as part of the reform processes; and 3) a dichotomous binary (yes/no) when measuring lawyer involvement that is likely to conceal the

more nuanced relationships with a combination of factors. Further, the measurement of legal exposure by claimants is often “ambiguous” and “insufficiently differentiated” in research designs making it difficult to pinpoint the nature and strength of relationships between lawyer representation and claimant outcome (Grant & Studdert, 2009, p.878).

- **Claimant experiences and outcomes are systemically linked.** Regardless of scheme design and country differences, claimant experiences and outcomes of both transport and work-related compensation are systemically linked. Transparency and accountability are systemic problems that contribute to claimant experiences and lawyer use. There also exists a market incentive for lawyer engagement in personal injury compensation, and indeed lawyer assessments of claim viability may be a useful predictor of claimant outcomes, both in terms of recovery and compensation.
- **Administrative and communication mechanisms are important in claimant experiences and outcomes.** These include the operating procedures and processes of multiple agencies, insurance personnel and other compensation actors, including lawyers, who have varying purposes when interfacing with claimants and each other, during the compensation process. Importantly, these mechanisms shape how claims are handled, and the likelihood of conflict and disputes being disruptive and an impediment to collaboration. Notably, the interdependencies of various actors and the key ingredients of conflict, disputes and poor collaboration have not been fully accounted for in understanding claimant experiences and outcomes.
- **No single mechanism or factor accounts for claimant experiences and outcomes, or consequently, can be the solution to improving performance of compensation systems for claimants.** There are likely to be multiple tipping points in claimants’ experiences and outcomes and motivation to use lawyers. Moreover, the mechanisms and tipping points exist across multiple dimensions, from scheme design through to local agency-based governance of claims and down to claimant characteristics.

Methods

A rapid review was carried out to synthesise evidence about claimant legal representation in personal injury claims in countries with comparable personal injury compensation schemes, including Australia, the United Kingdom (UK), the United States of America (USA), Canada and the Netherlands. Database searches were conducted in June 2019 in SCOPUS, Web of Science, ProQuest Central and PsychInfo. The database searches yielded 1250 references. Following the removal of duplicates (n=498), books and book chapters (n=8), exclusion based on a title and abstract screen (n=680), and exclusion based on a full text review (n=15), a final count of 49 references were included in this rapid review, including 43 journal articles and six reports.

Of the 49 publications included, 34 were original research, nine were literature reviews, and six were reports. Academic papers came from five different countries: 30 from Australia, one from the United Kingdom, four from the United States, six from the Netherlands, and two from Canada. Compensation claims predominantly related to motor vehicle or transport crashes (n=25), and workers compensation (n=12). In terms of fault and no-fault CTP schemes, 20 papers considered claims within fault-based systems⁵ (15 from NSW, one from the Australian Capital Territory (ACT), one from South Australia (SA), and three from the Netherlands), and eight considered no-fault claims (all from Victoria⁶). This research included a variety of injuries, predominately varied combinations or not specified, while seven focused on whiplash and whiplash associated disorders (WAD).

⁵ This represents the scheme at the time of the study. Both NSW and the ACT have since undergone reforms, with NSW moving to a hybrid system, and ACT becoming a no-fault scheme.

⁶ The Victorian system was largely classified as a no-fault system across the literature, although some papers noted that it is a hybrid scheme which allows both no-fault and common law arrangements after a threshold for serious injury and fault is established.