

ACCIDENT COMPENSATION

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THE PLACE OF REHABILITATION IN ACCIDENT COMPENSATION SCHEMES

I want to mention two areas in which lawyers have traditionally had little interest, and which are often ignored in discussions for the reform of compensation systems.

The first in the area of rehabilitation, which is often limited to vocational rehabilitation. My discussion includes social rehabilitation which would be available to people who cannot return to the work force, but whose situation may be improved by retraining which enables them to live as normally as possible. This could include retraining in order to enable people to carry out household tasks and self-care such as dressing and bathing.

The second area is closely related to the first. In the New South Wales Law Reform Commission Report on A Transport Accident Scheme for New South Wales, it was described as 'support for independent living'. This includes provision for mobility (for example, by provision of a car with controls that can be used by a disabled person), provision enabling a person to live at home rather than in an institution, and provision enabling a person to care for his or her family. Support for independent living may have an important relationship with vocational rehabilitation as, for example, where the disabled person can work, but needs help in getting out of bed, dressing or travelling to the place of work.

As John said in his introduction, rehabilitation has recently taken the place of 'motherhood' in the mouths of politicians. There is a good reason for this. It is, of course, clear that there are deficiencies in rehabilitation at the moment and that few existing compensation systems make proper provision in this area. The other reason, which I am afraid may be more important, is that rehabilitation is seen as a means of reducing accident costs. The most recent South Australian proposals for reforms to the workers' compensation system applauds the goal of rehabilitation but provides little detail as to how this will be accomplished. The Victorian workers' compensation reform proposals contain similar promises, and in Victoria the provision of rehabilitation has been quite explicitly tied to the reduction of accident costs. In Victoria the Government has promised that workers' compensation premiums will be reduced from 4.8% to 2.5% of total wages and salaries and will be held steady for five years. Part of this saving is to be achieved by more effective rehabilitation.

While I fully support the goal of helping injured workers, I believe we need to look at the details of these proposals critically. I have a number of concerns about the implications of the present proposals. Rehabilitation is traditionally provided in the form of services, whereas compensation is generally provided in the form of money. The Government, faced with a period of financial stringency, may find it

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more politically acceptable to cut back on services than to reduce pay-outs. If predicted savings are not realized in either Victoria or South Australia the result may be that cut-backs are made in the area of rehabilitation.

What can be done about this problem? It is clearly impossible to guarantee that proposed provisions for rehabilitation or support for independent living will not be reduced in the future. However, there may be some legislative strategies which make interference with these type of provisions less politically attractive. Lawyers normally scrutinize proposals for benefits carefully, often with the intention of making unfavourable comparisons with the common law. I believe that people involved in the examination of proposals for no-fault schemes should pay more attention to provisions covering rehabilitation or support for independent living.

Three main issues can be identified. First, we need to examine precisely what is to be included within the concept of rehabilitation, and how this is to be recognized by the legislation. Secondly, we need to examine the extent to which the goals of rehabilitation and compensation are reconcilable. In cases where there is a conflict between these two goals, which should have paramountcy? Thirdly, we need to examine the form in which rehabilitation and provision for support services is to be provided.

Dealing first with the definition of rehabilitation, most of the proposals I have seen are long on rhetoric but short on detail. It is characteristic of these proposals that wide powers are conferred on rehabilitation agencies, but no corresponding rights are given to accident victims. The usual form of provision gives a great deal of flexibility and discretion to the provider of rehabilitation services, but little guidance on the philosophy of the scheme. Proposals for reform often fail to make any statement about what is intended to be covered by the notion of rehabilitation and the legislation may take the matter little further. In this area, for example, one of the central questions is whether rehabilitation should include both social and vocational rehabilitation. While the new Victorian workers' compensation legislation makes some provision for social rehabilitation, I think there are doubts about how far this would go. At one meeting I attended I asked the question, 'Would you be prepared to provide a dishwasher for a woman who was unable to carry out her household tasks because of a hand injury?' Many of the people attending the meeting regarded this as an outrageous proposal. They commented that provision of a dishwasher was a house renovation, or improvement of a capital asset. This could not be rehabilitation. While it is impossible for these precise questions to be answered in the legislation, it is at least necessary for us to agree in advance on the broad philosophy of the scheme.

There is a second matter which requires attention in the definition of rehabilitation. I believe the scheme should recognize, to the extent that it is possible in the drafting, some concept of a right to rehabilitation which can be asserted by an injured person and which enables adverse decisions to be challenged. This issue raises difficulties in the practical administration of the scheme. Clearly flexibility is necessary for the decision-makers so that they can respond to the individual situations of injured workers. To some extent this notion of flexibility is difficult to reconcile with a right to rehabilitation. However, I think there should be some attempt in the legislative framework of the scheme to cover typical

situations which give rise to rights. Perhaps this could take the form of recognition of a number of rights, for example, the right to independence and mobility.

Any consideration of the definition of rehabilitation must also pay attention to mechanisms for appeal from decisions made by rehabilitation authorities. When new compensation schemes are designed the tendency is to incorporate an appeal framework that is well suited to challenges of decisions about benefits, and to tack on to this framework some provision for appeal on rehabilitation matters. This may not be the appropriate course. The nature of the review provisions that we might want to establish in the area of monetary compensation may be different from the types of review which would be suitable for challenging rehabilitation decisions.

Finally, when we are considering what is covered by rehabilitation we need to include some examination of structural changes. It is not sufficient to retrain an injured person if social and economic factors still prevent that person from finding employment. It seems to me that some of the promises made about rehabilitation may be empty because they deal largely with the problems of the injured person rather than with the environment to which that person has to return if he or she goes back into the work force. Some attention is now being paid to this area; for example, proposals are being made to provide incentives to employers to employ injured workers, but this needs further examination.

To summarize, the first step in ensuring that compensation schemes make adequate provision for rehabilitation is to clarify what is meant by the concept. So far as possible, the legislation should recognize and protect a right to rehabilitation.

The second problem I want to mention is the difficulty of reconciling compensation and rehabilitation goals. Again, the difficulties in this area seem to have been ignored. John Keeler in his introduction commented that rehabilitation has always been seen as the icing on the cake. If compensation is regarded almost exclusively in terms of money, rehabilitation is something which may be added on at the end. It is axiomatic that this is the approach of the common law, but other proposals for no-fault compensation schemes have been influenced by the common law model in this area. If, however, the primary goal of a no-fault scheme was rehabilitation, and compensation was added on subsequently, I believe we would reach quite different conclusions about the shape and nature of the scheme. The debate we have already had about earnings-related schemes, as opposed to income support schemes which provide for people's basic needs, illustrates the conflict between compensation and rehabilitation goals. Though the new proposals for workers' compensation in South Australia pay lip service to rehabilitation, it is also suggested that injured workers should receive 100% earnings loss replacement for two years, which would be reduced to 85% thereafter. A scheme which is serious about assisting workers to return to the work force and which provides 100% earnings replacement for the first two years may be doomed to failure. I am not suggesting that injured workers are malingerers, or that desire for income is the only motivation for return to work, but I do believe that full earnings replacement may be a substantial disincentive for some injured people. If the earnings related model has to be accepted for political reasons, I would have thought it would have been preferable to provide 85%

earnings replacement for the first two years, perhaps increasing to 100% thereafter.

The schemes supported by Harold Luntz and Michael Chesterman have better implications for rehabilitation than earnings-related models. No matter how much you tinker with an earnings-related scheme, no matter how much you try to build work incentives into such a scheme, I think you have great difficulty in reconciling these two objectives. Disability-based schemes of the kind suggested by Woodhouse for people with permanent partial disabilities have better implications for rehabilitation, although even with such schemes there are some difficulties.

The other problem with any earnings-related model is in the interaction between assessment for compensation and provision of rehabilitation. Should people providing rehabilitation be insulated from claims assessors? It may be argued that this is desirable since injured people may not attempt retraining if this may have adverse effects on their compensation payments. Alternatively, should rehabilitation personnel be required to report on progress of injured people, where this may affect their rights to compensation? In Victoria the unions were suspicious about the role rehabilitation personnel were to play in the compensation system and wanted to achieve a situation in which there was little relationship between the bodies providing compensation and rehabilitation. This indicates a philosophy that compensation is the primary function of the system.

Finally, we need to look at the form in which rehabilitation is provided. Lawyers are accustomed to thinking of compensation as involving monetary payments rather than service provision. I remember the scorn with which some New South Wales lawyers commented on proposals for an extension of home care facilities to cover transport accident victims. In New South Wales there is already a home care scheme that provides help to aging and disabled people in their own home. This includes both housekeeping and, in certain cases, assistance with self-care. The New South Wales Law Reform Commission recommended that the proposed accident corporation should provide funds for this scheme enabling its extension to cover accident victims. The proposal seems to have been regarded as impracticable and falling quite outside the proper scope of any compensation scheme by lawyers in New South Wales, although it has operated successfully for many years. Any new scheme needs to deal with the area of service provision as well as monetary payment as a means of meeting the needs of accident victims.