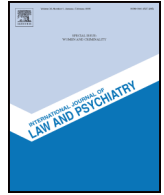




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Administering the cost of death: Organisational perspectives on workers' compensation and common law claims following traumatic death at work in Australia

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ABSTRACT

Quite apart from its devastating human and psychological effects, the death of a worker can have significant, life-changing effects on their families. For many affected families, workers' compensation entitlements represent the primary financial safeguard. Where the worker was self-employed, the family will generally be excluded from this remedy and have to take the more problematic option of claiming damages at common law. Despite the centrality of workers' compensation, little attention has been given to how effectively workers' compensation agencies address the needs of bereaved families or the views of other organisations involved, such as safety inspectors, unions, employers and victim advocates. Based on interviews with forty eight organisational representatives in five Australian states, this study examines how workers' compensation regimes deal with work-related death from the perspective of those organisations involved directly or indirectly in the process. The study highlighted a number of problems, including the exclusion of self-employed workers and dealing with 'mixed families'.

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1. Introduction

In Australia, over 2000 people die from work-related causes each year with significant social, economic, and personal costs (Safe Work Australia, 2013). It is estimated that over five thousand family members and close friends of workers become survivors of traumatic work-related death as a consequence (Matthews, Quinlan, Rawlings-Way, & Bohle, 2012). The death of a worker commonly means loss of a source of income and significant financial loss for their spouse and children or other dependants. Indeed, the consequences can be especially dire as traumatic work-related death is most likely to occur in industries like farming, forestry, fishing, road transport and construction (Ehsani, McNeilly, Ibrahim, & Ozanne-Smith, 2013; Guthrie, Westaway, & Goldacre, 2009; Safe Work Australia, 2013) where average earnings are not especially high and family budgets are often tight at the best of times.

For the families of most of those killed at work a primary source of financial support will be the workers' compensation scheme that operates in Australia and most other countries. While some families will also be able to claim on a life insurance policy held by the worker or superannuation entitlement (private pension schemes are

compulsory for employees in Australia since the mid-1990s), the former are by no means pervasive for workers in occupations where traumatic death is most likely. Further, while superannuation covered 71% of all Australians aged fifteen years or over by 2007 the median account balances were low—A\$31,252 for males and A\$18,489 (Australian Bureau of Statistics, 2008).

Workers' compensation schemes provide for medical expenses and funeral expenses in the case of death (this may extend to capped expenses for non-dependent family members attending the funeral), and a specified level of income support that is paid to dependant family members in the case of death. As well as providing a level of financial support to injured workers and their families and encouraging an early return to work, workers' compensation policy is also aimed at providing fair compensation and reducing the social and economic costs to the community (Safe Work Australia, 2010). The scheme is no-fault, requires employers to take out insurance cover, and is generally restricted to employees that are engaged under a contract of service.

The exclusion of the vast majority of self-employed workers from workers' compensation is important because they constitute between 15% and 17% of the active workforce in Australia and New Zealand (Driscoll et al., 2003; Lilley, Samaranyaka, & Weiss, 2013). Also important are coverage problems or a reluctance to make claims on the part of workers whose employment status is ambiguous, including some telecommuting and home-based workers, or those who are in other forms of precarious employment. The growth of precarious employment and that of vulnerable groups like temporary or undocumented foreign workers often concentrated in such jobs represents a serious

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challenge for worker's compensation coverage (Azaroff, Lax, Levenstein, & Wegman, 2004; Guthrie & Quinlan, 2005; Quinlan & Mayhew, 1999). More flexible work arrangements, including multiple jobholding which has been linked to a higher incidence of fatalities (Bush, McKee, & Bunn, 2013), can also complicate resolution of claims even where coverage is established. Evidence indicates that there is significant under-reporting and the failure to lodge or succeed with workers' compensation claims even in the case of death or serious injuries at work (Sears, Bowman, Adams, & Silverstein, 2013). For example, in 2008–09 the families of 276 (or 26%) of the 400 workers fatally injured at work received workers' compensation while the families of 124 (or 31%) did not (Safe Work Australia, 2012c).

A second option available in terms of securing monetary redress following injury or death at work in Australia and some other countries – and one especially important to those excluded from workers' compensation such as most self-employed workers – is for the family (in the case of traumatic work-related death) to pursue a claim for damages at common law under the tort of negligence or breach of contract against the person or organisation held responsible for the worker's death. Unlike workers' compensation, this is a fault-based remedy where the level of entitlement is not specified but decided on a case by case basis according to general rules.

In addition to workers' compensation or damages claims at common law, families may receive financial support through the social security system or from voluntary donations from workmates of the deceased, the employer, the union, or the community. With regard to the social security available, evidence indicates there is a significant degree of cost-shifting from workers' compensation to the social security system in the case of those experiencing serious injuries (LaDou, 2010; Quinlan, 2004). Whether a similar pattern applies to families of fatally injured workers is unknown, although limited research on the financial impacts on families suggests it does and the burden on social security would be even heavier on those families denied workers' compensation (Matthews, Bohle, Quinlan, & Rawlings-Way, 2012). With some notable exceptions, such as funds established following workplace disasters (see Gregson, 2012), workmate, employer, union and community-based funds – while undoubtedly valuable – are not a significant source of financial support.

Notwithstanding the growth of non-employee work arrangements and the concentration of self-employed workers in a number of especially dangerous industries (forestry, fishing, farming, construction and road transport), workers' compensation remains the most substantial source of financial support for the families of workers who die in Australia. For this reason it will be the main focus of this article although the common law damages option will be examined, especially given its importance in the industries being considered here. It is worth noting that the workers' compensation premiums paid by employers represent a fraction of the total costs of work-related death and illness. For example, in 2008–9 Australian employers paid a total of A\$6.5 billion in workers' compensation premiums which Safe Work Australia (2012c) estimated to be 16% of the total costs associated with work-related injury and disease including fatalities. The community bore 10% of total costs and workers and their families bore 74%—almost three quarters of the costs. In the case of death or full incapacity, the imbalance in the burden in terms of average costs to employers, the community and workers/families actually falls even more heavily on the latter (Safe Work Australia, 2012c).

Despite the significance of work-related death in terms of financial cost, family support and psychological trauma, little research has been undertaken into how effectively workers' compensation schemes or common law damages claims deal with traumatic work-related death. There is an extensive body of research on workers' compensation, part of which focuses on the positive and negative experiences of workers within the compensation system and the impacts of the compensation process on their health. Findings from these studies suggest that the compensation process is often experienced as complex and frustrating

by workers and that it can have adverse health effects (Boden, 2012; Ezy, Walter, & Welch, 2009; Lippel, 1999, 2007, 2012; Parrish & Schofield, 2005; Strunin & Boden, 2004). Stigma, power-imbalances, lack of social support, and payment delays have been cited as primary causes of distress (Lippel, 2007; Strunin & Boden, 2004). Other studies have examined the sense of injustice experienced by workers in relation to the workers' compensation system in Australia (Kennedy & Dunstan, 2013). There is, however, a paucity of research which investigates how surviving family members of workers who die from injuries sustained from workplace incidents experience the workers' compensation process.

Results from a pilot study conducted by the authors found that surviving families also viewed their experiences with the workers' compensation system as predominantly negative, describing it as overly complex, stressful, difficult to negotiate, and in light of the strict criteria governing the determination of eligibility for compensation in some jurisdictions—unjust (Matthews, Quinlan, Rawlings-Way, & Bohle, 2012). These systemic issues resulted in additional burden being placed on those traumatically bereaved by workplace death.

But how do organisations involved in workers' compensation see their role, view their own experiences, or that of other bodies? The aim of this study is to examine how various organisations that are involved to a greater or lesser degree in the compensation process, view the needs of families being met by workers' compensation, and the particular problems or issues that arose in this regard. These organisations include not only workers' compensation authorities, insurance companies, employers and unions but other government agencies (coronial officers and government safety inspectors) and victim advocacy groups.

The remainder of the article is divided into four sections. The first section briefly describes the structure of workers' compensation schemes in Australia with regard to dealing with work-related death. This sets the context for examining responses, including acknowledging significant changes to entitlement made in the past decade. The second section describes the research methods used in this study. The third section presents the findings and discussion, and the fourth and final section is a conclusion.

2. Workers' compensation schemes and work-related death in Australia

Following a workplace death, the worker's spouse or dependants may be entitled to payments through the workers' compensation systems. Reflecting its federal structure (like the USA and Canada), these entitlements, however, vary across the eight different state and territory jurisdictions which each have their own compensation laws. In addition to these systems, there are three other Commonwealth schemes. The first of these schemes is available to Australian Government employees, the employees of licensed self-insurers under the Safety, Rehabilitation and Compensation Act 1988 and Australian Defence Force personnel with service before 1st July 2004; the second is for seafarers under the Seafarers Rehabilitation and Compensation Act 1992; and the final system is for Australian Defence Force personnel with service on or after 1st July 2004 under the Military Rehabilitation and Compensation Act 2004 (Safe Work Australia, 2012b).

Jurisdictional and legislative differences mean that there is considerable variation with regard to workers' compensation arrangements. The type and amount of benefits available, the kinds of workers covered by legislation, and the regulation and administration of claims all point toward important disparities in compensation policy (Purse, 2005). Significant differences can be found with regard to entitlements arising from a work-related death that is captured, in part, in Table 1 with regard to lump sum payments. Other significant differences can be found with regard to the level and duration of periodic payments made to partner/spouses and dependent children as well as the level of funds to meet funeral expenses. The state of Victoria also provides a

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