

CLAIMING JUSTICE IN INJURY LAW

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Contemporary personal injury law lives and breathes in the bureaucratic processing of compensation claims. Little empirical legal scholarship has explored claimant experiences in Australian compensation systems, despite their central role in access to justice for the injured.

This article explores claimant experiences in compensation processes using data from a large longitudinal cohort study of patients admitted to hospital with injuries in three states (Victoria, New South Wales and South Australia). At 6 years after injury, participants (n=332) who had pursued claims in transport accident or workers' compensation claims were interviewed about their experiences. The study highlights the diversity of claimant experiences and key themes in claimant encounters with compensation systems, including the relationship between rights information, advocacy and representation, and the inherent justice-based tensions in claims processing. The findings demonstrate that analysis of claimant experiences of injury law in its primary, bureaucratic form can provide important evidence for the evaluation and development of compensation systems.

I INTRODUCTION

Forget judgments in courts and textbooks on torts.¹ For claimants, the lived experience of personal injury law is about the bureaucratic processing of compensation claims. Transport accident and workers' compensation schemes dominate the Australian injury law landscape. Each year, more than 300 000

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1 Many tort texts seem disconnected from the empirical reality of injury. There are exceptions, the standout being Harold Luntz et al, *Torts: Cases and Commentary* (LexisNexis, 7th ed, 2013) ch 1, as described in Reg Graycar, 'Teaching Torts as if the World Really Existed: Reflections on Harold Luntz's Contribution to Australian Law School Classrooms' (2003) 27 *Melbourne University Law Review* 677, 677–82.

new claims are accepted in these schemes,² where they join the existing ranks of active, unresolved claims.³ Claims managers — those tasked with determining eligibility, assessing injuries, measuring loss and calculating benefits — are the key facilitators of the processes in which claimant rights and insurer liabilities are negotiated.⁴ In the vernacular of insurers and compensation schemes, claimant experiences of these processes are described in terms of client service and satisfaction.⁵ It is in these interactions that the vast majority of claimants access the justice of Australian injury law.

The statutory objectives of compensation schemes typically include promoting claimant rehabilitation and delivering just compensation as effectively and efficiently as possible.⁶ There is, however, remarkably little legal scholarship exploring claimant experiences of scheme performance against these aims. This constitutes a critical knowledge gap about the operation of compensation schemes as legal institutions. Injury is both a significant contributor to the burden

- 2 This estimate was generated by adding up data on annual new case numbers across schemes. The estimated national total of transport accident claims (n = 54 296) was derived by adding the most recent annual new claims figures for complete accident years contained in the annual reports of the state-based transport accident compensation authorities and regulators: Transport Accident Commission (Vic) ('TAC'), *Getting Lives Back on Track: 2013–14 Annual Report* (2014) 4 (n = 22 012 in Victoria in 2013–14); Motor Accidents Authority of NSW, *Annual Report 2013–14: the Facts, the Figures, the Future* (2014) 20 (n = 14 360 in New South Wales in 2013–14); Motor Accident Insurance Commission (Qld), *Statistical Information — 1 July to 31 December 2014* (2015) 5 (n = 6275 in Queensland in 2013–14); Insurance Commission of Western Australia, *Annual Report 2014* (2014) 20 (n = 3561 in Western Australia in 2014); Motor Accident Commission (SA), *Annual Report 2013–14* (2014) 8 (n = 4634 in South Australia in 2013–14); Motor Accidents Insurance Board (Tas), *Annual Report 2013–2014* (2014) 6 (n = 2924 in Tasmania in 2013–14); Territory Insurance Office (NT), *Motor Accidents Compensation Year in Review 2012–13* (2013), 14 (n = 530 in the Northern Territory in 2013). Data was not available for new claims in the Australian Capital Territory so the total estimate for the annual number of claims reported here is an underestimate. In the case of workers' compensation, to enable cross-scheme comparison, Safe Work Australia has long had a practice of only reporting the incidence of 'serious claims', being those involving claims for one or more weeks of work absence, permanent incapacity or death. The total number of new claims (serious and non-serious) appears to have last been reported in 2005–06, when a total of 255 300 claims were lodged with state and territory workers' compensation authorities (Safe Work Australia, *Work-Related Injuries in Australia, 2005–06: Comparison of Compensation Data with all Incurred Work-Related Injuries* (2009) 1).
- 3 Inconsistent reporting practices across schemes make it difficult to establish the number of active claims in any given year. In a rare exception, the Transport Accident Commission in Victoria reported delivering benefits to 47 115 claimants in 2013–14, compared to its new claim tally of 22 012 for the same period: TAC, above n 2, 4. Workers' compensation schemes around Australia tend to report only new claims and claims rates: see, eg, Victorian WorkCover Authority, *Annual Report 2014* (2014) 20.
- 4 As Halliday, Ilan and Scott note, 'it is well established that the vast majority of decisions concerning legal rights are made by bureaucrats in both public and private organisations', rather than courts: Simon Halliday, Jonathan Ilan and Colin Scott, 'Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 *Modern Law Review* 347, 347.
- 5 See, eg, the client service key performance indicators and charters adopted by a number of schemes, such as the customer service charter of the New South Wales Safety, Return to Work and Support division (which encompasses that state's Dust Diseases Board, the Motor Accidents Authority, the Lifetime Care and Support Authority and WorkCover NSW): NSW Safety, Return to Work and Support, *Safety, Return to Work & Support Customer Service Charter* <http://www.maa.nsw.gov.au/_data/assets/pdf_file/0008/26954/SRWS-Customer-service-charter.pdf>.
- 6 See, eg, *Workplace Injury Management and Workers Compensation Act 1988* (NSW) s 3; *Motor Accidents Compensation Act 1999* (NSW) s 5; *Transport Accident Act 1986* (Vic) s 8; *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 10.

of disease⁷ and one of the more common kinds of justiciable problems affecting the community.⁸ Though law has been slow to embrace the value of empirical data and evaluation in the development of justice policy,⁹ analyses of the public's experiences of everyday legal problems have emerged as an important source of insight into the extent to which people are able to access justice.¹⁰ The broader review of compensation systems brought on by the National Disability Insurance Scheme,¹¹ the mooted National Injury Insurance Scheme¹² and other high-profile reform projects¹³ intensify our need to better understand claimant experiences of injury law.

This article argues that the bureaucratic processing of compensation claims is a neglected but significant setting for the delivery of justice. It investigates claimant experiences of claims processing through a large empirical study involving transport accident and workers' compensation claimants in three Australian states, and explores the nature of injury compensation systems as justice-dispensing institutions. The article begins by laying out the neglectful treatment of injury compensation schemes in Australian legal scholarship, and situating the research in the existing (predominantly international and interdisciplinary) evidence based on claimant experiences. It then introduces the empirical study, and presents two sets of findings — first, quantitative evidence of claimants' broad experiences of claims processes, and second, more in-depth qualitative evidence of claimants' reflections and suggestions for change to improve practice.

- 7 Rafael Lozano et al, 'Global and Regional Mortality from 235 Causes of Death for 20 Age Groups in 1990 and 2010: A Systematic Analysis for the Global Burden of Disease Study 2010' (2012) 380 *Lancet* 2095; Christopher J L Murray et al, 'Disability-Adjusted Life Years (DALYs) for 291 Diseases and Injuries in 21 Regions, 1990–2010: A Systematic Analysis for the Global Burden of Disease Study 2010' (2012) 380 *Lancet* 2197; Marisol Concha-Barrientos et al, 'The Global Burden Due to Occupational Injury' (2005) 48 *American Journal of Industrial Medicine* 470.
- 8 Christine Coumarelos et al, Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia* (2012) 60.
- 9 See generally Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, Vol 2, Australian Government, 5 September 2014) ch 25.
- 10 See the comprehensive review of legal need surveys and related literature provided in Coumarelos et al, above n 8, ch 1.
- 11 *National Disability Insurance Scheme Act 2013* (Cth). See also the critique of the patchwork of existing schemes provided in Productivity Commission, 'Disability Care and Support' (Inquiry Report No 54, Vol 2, Australian Government, 31 July 2011) ch 17.
- 12 Productivity Commission, 'Disability Care and Support', above n 11, ch 18. See also The Treasury, Australian Government, *National Injury Insurance Scheme* <<http://www.treasury.gov.au/Policy-Topics/PeopleAndSociety/National-Injury-Insurance-Scheme>>. Part 11 of the NDIS Heads of Agreement — Relationship to National Injury Insurance Scheme — provides for jurisdictions to 'endeavour to agree minimum benchmarks to provide no-fault lifetime care and support for people who are catastrophically injured' in motor vehicle accidents (by the NDIS launch), and for 'workplace accidents, medical accidents, and criminal and general accidents' by the commencement of the NDIS full scheme: *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch*, 18–19 <http://www.ndis.gov.au/sites/default/files/Intergovernmental_Agreement_for_the_National_Disability_Insurance_Scheme_Launch-signed.pdf> ('NDIS Scheme').
- 13 Examples include the reforms of the NSW Workers' Compensation Scheme in 2012 brought about by the *Workers Compensation Legislation Amendment Act 2012* (NSW), the aborted efforts to introduce comprehensive no-fault benefits for transport accident injury in NSW in 2013, and the reformed workers' compensations scheme in South Australia, which commenced on 1 July 2015 with the *Return to Work Act 2014* (SA).

The article concludes by synthesising key themes and policy implications, and making recommendations for future research.

II EXPLORING EXPERIENCES IN INJURY CLAIM PROCESSING

Claims processes are the means by which injury compensation is sought, measured and delivered.¹⁴ They comprise arrangements for assessment and decision-making and mechanisms for communication between stakeholders in the facilitation of a claim. A diverse range of actors may factor in the claims process — the claimant, healthcare providers, employers, return-to-work coordinators, family members, lawyers, and critically, the organisation responsible for the administration and management of the claim (hereafter referred to as the ‘compensation organisation’ (‘CO’)).¹⁵ Depending on the claim type and jurisdiction, the CO with whom a claimant interacts may be a statutory authority, a private insurer or a claims management company.¹⁶ Claimants whose injuries and claims are of low severity, complexity and duration may have a fleeting experience of the claims process, perhaps simply involving submitting receipts and being reimbursed for costs incurred. For many claimants, however, their engagement with the CO will be a defining aspect of their experience of personal injury law in action.¹⁷

Despite this, claimant experiences in compensation systems for work and transport accident injury outside of courts and tribunals have been neglected in

- 14 Rose and Miller have described such tools as governmental technologies: Nikolas Rose and Peter Miller, ‘Political Power Beyond the State: Problematics of Government’ (1992) 43 *British Journal of Sociology* 173, 175. See also Peter Miller and Nikolas Rose, ‘Governing Economic Life’ (1990) 19 *Economy and Society* 1, 7–8.
- 15 One popular means of depicting this complexity is the Sherbrooke ‘arena model’ of stakeholders in injury compensation settings. See Patrick Loisel et al, ‘Prevention of Work Disability Due to Musculoskeletal Disorders: The Challenges of Implementing Evidence’ (2005) 15 *Journal of Occupational Rehabilitation* 507, 509–12. See also Christian Ståhl, Ellen MacEachen and Katherine Lippel, ‘Ethical Perspectives in Work Disability Prevention and Return to Work: Toward a Common Vocabulary for Analyzing Stakeholders’ Actions and Interactions’ (2014) 120 *Journal of Business Ethics* 237.
- 16 In the case of self-insured workplaces, case management may be provided by the employer itself. See the comparison of case management arrangements provided in Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand* (2014) 167, 174.
- 17 For an explanation of law in action as a core concept of socio-legal research, see Robin Stryker, ‘Law and Society Approaches’ in Alexander C Wagenaar and Scott Burris (eds), *Public Health Law Research: Theory and Methods* (Jossey-Bass, 2013) 175; Lauren B Edelman and Robin Stryker, ‘A Sociological Approach to Law and the Economy’ in Neil J Smelser and Richard Swedberg (eds), *The Handbook of Economic Sociology* (Princeton University Press, 2nd ed, 2005) 527, 530.

legal scholarship,¹⁸ especially in the Australian context.¹⁹ Two chief explanations for this come to mind. The first is a visibility barrier. Claims processing occurs out of the public eye, at a ‘lower tier’ of justice than the disputes that attract more scholarly and community interest.²⁰ In Australia, the vast majority of transport accident and workers’ compensation claims do not involve a formal dispute,²¹ much less see the inside of a court or tribunal.²² To develop an evidence-based understanding of justice as delivered and experienced in claims processes, it is therefore necessary to venture beyond formal disputes to the more prevalent experience at the lower tier.²³

A second major barrier to better understanding in this field is a complexity problem. Compensation systems for work and transport accident injury are notoriously varied across state and territory jurisdictions, and they are also technically labyrinthine.²⁴ Around Australia, there are 11 major workers’ compensation schemes and eight sets of arrangements for motor vehicle accident compensation, with substantial differences between schemes in terms of access and benefits.²⁵ Reforms over time have heightened this complexity: modern compensation systems are increasingly ‘hybrid’, incorporating elements of administrative no-fault and statutorily-modified common law compensation.²⁶

- 18 Internationally, exceptions include Canada: Katherine Lippel, ‘Workers Describe the Effect of the Workers’ Compensation Process on their Health: A Québec Study’ (2007) 30 *International Journal of Law and Psychiatry* 427; and the Netherlands: Nieke A Elbers et al, ‘Exploring Lawyer-Client Interaction: A Qualitative Study of Positive Lawyer Characteristics’ (2012) 5 *Psychological Injury and Law* 89.
- 19 Non-empirical contributions include Robert Guthrie ‘Negotiation, Power in Conciliation and Review of Compensation Claims’ (2002) 24 *Law & Policy* 229. There is a significant body of unpublished and non-public grey literature, including in-house research conducted by insurers, compensation systems and private consultants.
- 20 Halliday, Ilan and Scott, above n 4, 349. For evidence from dispute resolution contexts, see, eg, *ibid*; Robert Guthrie, Lisa Goldacre and Warwick Claydon, ‘Workers’ Compensation Dispute Resolution Procedures in Western Australia — The New Regime’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 46; Frances Meredith, ‘South Australian Workers Compensation Disputes: From Conciliation to Adjudication and Back Again’ (2000) 42 *Journal of Industrial Relations* 398.
- 21 For example, in 2012–13 the ‘disputation rate’ (defined as the annual rate of active claims involving new ‘appeal to a formal mechanism, such as a review officer, conciliation or mediation service’, but excluding disputes over common law claims) in Australian workers’ compensation systems was 6.6 per cent (ie in 6.6 per cent of claims there was a new dispute in 2012–13), and 88.6 per cent of disputes were resolved within nine months: Safe Work Australia, ‘Comparative Performance Monitoring Report’ (16th ed, October 2014) 32–4, 42.
- 22 For example, in 2013–14 the TAC provided benefits to 47 115 claimants, and only 624 merit review applications in relation to its administrative decisions were lodged at the Victorian Civil and Administrative Tribunal (TAC, above n 2, 8, 13).
- 23 See generally Tania Sourdin, ‘A Broader View of Justice?’ in Michael Legg (ed), *The Future of Dispute Resolution* (Lexis Nexis, 2013) 155, 155–66.
- 24 Peter Cane, *Atiyah’s Accidents, Compensation and the Law* (Cambridge University Press, 7th ed, 2006) 409.
- 25 Productivity Commission, ‘Disability Care and Support’, above n 11, 789. For a useful comparison of the workers’ compensation schemes, see generally Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand*, above n 16.
- 26 For example, transport accident and workers’ compensation arrangements in New South Wales and Victoria each provide a combination of no-fault and common law benefits. See also the agreement to establish minimum benchmarks for other categories of compensation discussed in NDIS Scheme, above n 12; Productivity Commission, ‘Disability Care and Support’, above n 11, ch 18.

The binary distinctions once used to classify compensation systems to good effect — fault versus no-fault, common law versus statute — fit poorly with the modern legal landscape.²⁷ Taken together, such attributes make these systems an inconvenient research subject: insights from one jurisdiction or scheme may not be generalisable to the same scheme at a later point in time, let alone to other settings. At the same time, however, the fast pace of change and the diversity of arrangements make the need for empirical evidence to inform reform all the more important.

In the absence of sustained attention from legal scholars, other research disciplines have stepped up to examine claimant experiences in compensation systems.²⁸ Contributors to this growing interdisciplinary literature hail from such fields as psychology, health sociology, rehabilitation medicine, health services research and work disability prevention.²⁹ Qualitative studies of the experience of claiming transport accident and workers' compensation have emphasised the impact of process factors on claimant experience, including communication, stigmatisation, and delays in decision-making and benefit delivery.³⁰ This literature tantalisingly draws on law and justice-themed concepts, such as aspects of organisational,³¹ procedural³² and perceived justice,³³ in its investigation of the nature and effects of claimant experiences. It focuses on the relationship between those experiences

- 27 For further discussion of the increasing importance of legislation to tort law concerns see T T Arvind and Jenny Steele, 'Introduction: Legislation and the Shape of Tort Law' in T T Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 1, 1; Joachim Dietrich, 'Teaching Torts in the Age of Statutes and Globalisation' (2010) 18 *Torts Law Journal* 141, 141–3.
- 28 This effort is consistent with Arvind and Steele's suggestion that legal scholars' focus on common law 'risks handing the study of legislation to other disciplines': Arvind and Steele, above n 27, 1.
- 29 Work disability prevention is a transdisciplinary field of inquiry that uses a range of methods and perspectives to expose 'the complex interrelationship between risk factors located within the worker and those located within her or his workplace and social and societal environments': Patrick Loisel and Pierre Côté, 'The Work Disability Paradigm and Its Public Health Implications' in Patrick Loisel and Johannes R Anema (eds), *Handbook of Work Disability: Prevention and Management* (Springer, 2013) 59, 60.
- 30 See, eg, Lee Strunin and Leslie I Boden, 'The Workers' Compensation System: Worker Friend or Foe?' (2004) 45 *American Journal of Industrial Medicine* 338; Ellen MacEachen et al, 'The "Toxic Dose" of System Problems: Why Some Injured Workers Don't Return to Work as Expected' (2010) 20 *Journal of Occupational Rehabilitation* 349; Darnel F Murgatroyd, Ian D Cameron and Ian A Harris, 'Understanding the Effect of Compensation on Recovery from Severe Motor Vehicle Crash Injuries: A Qualitative Study' (2011) 17 *Injury Prevention* 222; Christine Roberts-Yates, 'The Concerns and Issues of Injured Workers in Relation to Claims/Injury Management and Rehabilitation: The Need for New Operational Frameworks' (2003) 25 *Disability and Rehabilitation* 898; Elizabeth Kilgour et al, 'Interactions Between Injured Workers and Insurers in Workers' Compensation Systems: A Systematic Review of Qualitative Research Literature' (2015) 25 *Journal of Occupational Rehabilitation* 160; Belinda J Gabbe et al, 'Patient Perspectives of Care in a Regionalised Trauma System: Lessons from the Victorian State Trauma System' (2013) 198 *Medical Journal of Australia* 149.
- 31 Ståhl, MacEachen and Lippel, above n 15.
- 32 Renée-Louise Franche et al, 'Perceived Justice of Compensation Process for Return-to-Work: Development and Validation of a Scale' (2009) 2 *Psychological Injury and Law* 225.
- 33 Michael J L Sullivan et al, 'Pain, Perceived Injustice and the Persistence of Post-Traumatic Stress Symptoms During the Course of Rehabilitation for Whiplash Injuries' (2009) 145 *Pain* 325; Michael J L Sullivan et al, 'The Role of Perceived Injustice in the Experience of Chronic Pain and Disability: Scale Development and Validation' (2008) 18 *Journal of Occupational Rehabilitation* 249.

and claimant recovery, however, rather than the claims process as a site for the delivery of justice.³⁴

Law and socio-legal scholarship have much to contribute to developing this evidence base, and can do so in ways that add considerable value to the existing research. For example, procedural justice research has identified the importance of how decisions are made and how people are treated in their satisfaction with legal encounters,³⁵ but has been under-utilised for understanding compensation systems.³⁶ Internationally, socio-legal research on tort and insurance practices have long provided a window on the operation of injury law,³⁷ but there has been strangely little of this work conducted in Australian settings. Interdisciplinary and empirical socio-legal analyses have the capacity to produce relevant evidence to inform debates around the optimal design and development of compensation systems, for the benefit of claimants, their families, employers and the broader community. The next part of the article introduces the empirical study that sought to explore this potential.

III STUDY SETTING, DESIGN AND DATA

A Study Setting

The study reported here draws on data collected in interviews with Australian transport accident and workers' compensation claimants. The study participants were drawn from the Injury Vulnerability Study ('IVS'), a long-running prospective cohort study of injury patients in three Australian states (Victoria, South Australia and New South Wales).³⁸ Established in 2002, the IVS has

34 See also Ståhl, MacEachen and Lippel, above n 15, 245 on the different emphases and disciplinary languages employed by health and medical, business and public administration in work disability prevention field.

35 Steven L Blader and Tom R Tyler, 'A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process' (2003) 29 *Personality and Social Psychology Bulletin* 747.

36 The major exceptions are Nieke A Elbers et al, 'Procedural Justice and Quality of Life in Compensation Processes' (2013) 44 *Injury: International Journal of the Care of the Injured* 1431; Franche et al, above n 32; Elizabeth Kilgour et al, 'Procedural Justice and the Use of Independent Medical Evaluations in Workers' Compensation' (2015) 8 *Psychological Injury and Law* 153; Lippel, 'Workers Describe the Effect of the Workers' Compensation Process on their Health', above n 18.

37 See, eg, Tom Baker, 'Insurance in Sociological Research' (2010) 6 *Annual Review of Law and Social Science* 433, 434; H Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Aldine Publishing, 2nd ed, 1980); Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford University Press, 1987); Richard V Ericson and Aaron Doyle, *Uncertain Business: Risk, Insurance and the Limits of Knowledge* (University of Toronto Press, 2004); Nora Freeman Engstrom, 'Run-of-the-Mill Justice' (2009) 22 *Georgetown Journal of Legal Ethics* 1485; Nora Freeman Engstrom, 'Sunlight and Settlement Mills' (2011) 86 *New York University Law Review* 805; Halliday, Ilan and Scott, above n 4.

38 Further detail on the IVS Study and its recruitment strategy is available in Meaghan L O'Donnell et al, 'Prior Trauma and Psychiatric History as Risk Factors for Intentional and Unintentional Injury in Australia' (2009) 66 *Journal of Trauma Injury, Infection, and Critical Care* 470.

provided ground-breaking insight into the relationship between mental and physical health in the wake of injury.³⁹ When the participants were recruited, New South Wales and South Australia had entirely fault-based transport accident compensation schemes.⁴⁰ South Australia had (and still has) a strictly no-fault workers' compensation scheme.⁴¹ The remainder of the compensation schemes in which participants had claims were hybrid schemes (blending elements of fault-based and no-fault compensation).⁴² Key aspects of the recruitment of participants for the IVS and the data collection are summarised below.⁴³

B Data Collection

IVS participants consisted of injury patients admitted to one of four major trauma hospitals in Victoria, New South Wales and South Australia between April 2004 and February 2006.⁴⁴ At those hospitals, a random sample of 1590 patients was selected from among English-speaking patients aged 16–70 years who had injuries severe enough to warrant admission lasting at least 24 hours.⁴⁵ The study was approved by university and hospital human research ethics committees. In total, 1010 patients provided informed consent to participate and completed an intake assessment immediately prior to their discharge from hospital. Follow-up interviews and data collection took place in waves at 3, 12, 24 and 72 months post-injury. Six years after injury, consenting participants were interviewed over the telephone. The interviews took place between January 2011 and May 2012, and 616 members (61 per cent) of the original IVS cohort participated.

- 39 See, eg, Meaghan L O'Donnell et al, 'Psychiatric Morbidity Following Injury' (2004) 161 *American Journal of Psychiatry* 507; Richard A Bryant et al, 'The Psychiatric Sequelae of Traumatic Injury' (2010) 167 *American Journal of Psychiatry* 312; Richard A Bryant et al, 'Trajectory of Post-Traumatic Stress Following Traumatic Injury: 6-Year Follow-Up' (2015) 206 *British Journal of Psychiatry* 417; David Forbes et al, 'An Evaluation of the DSM-5 Factor Structure for Posttraumatic Stress Disorder in Survivors of Traumatic Injury' (2015) 29 *Journal of Anxiety Disorders* 43; Stephanie Schweininger et al, 'The Temporal Relationship Between Mental Health and Disability after Injury' (2015) 32 *Depression and Anxiety* 64.
- 40 See *Motor Accidents Compensation Act 1999* (NSW); *Civil Liability Act 1936* (SA); *Motor Accident Commission Act 1992* (SA). In 2010, reforms to the NSW scheme enabled at-fault claimants to claim up to \$5000 in treatment costs and lost income. See Motor Accidents Authority, *The Scheme History* <<http://www.maa.nsw.gov.au/about-us/about-the-nsw-ctp-scheme/the-scheme-history>>. Both the NSW and SA schemes now provide for lifetime care for people who sustain catastrophic injuries, regardless of fault.
- 41 *Workers Rehabilitation and Compensation Act 1986* (SA), replaced by the *Return to Work Act 2014* (SA) (which) commenced on 1 July 2015).
- 42 *Transport Accident Act 1986* (Vic); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Workplace Injury Management and Workers Compensation Act 1998* (NSW).
- 43 See further O'Donnell et al, 'Psychiatric Morbidity Following Injury', above n 39; Bryant et al, 'The Psychiatric Sequelae of Traumatic Injury', above n 39.
- 44 They were the Royal Melbourne Hospital and Alfred Hospital in Victoria, Westmead Hospital in NSW and the Royal Adelaide Hospital in South Australia.
- 45 Patients with moderate or severe traumatic brain injury were excluded from the sample, as were those who were assessed by medical staff as currently psychotic or actively suicidal.

C Interview Questions and Analytical Method

In their six-year interview, IVS participants were asked whether they had made a claim for compensation in connection with their injuries, and if so, what kind of claim they made. Participants who had made a transport accident or workers' compensation claim (n=339), the population of interest for this study, were then asked about their experiences of the claims process and dealing with the organisation responsible for managing their claim. To do this, a survey with closed and open-ended items was used to get both a broad sense of claimant experiences and to acquire deeper insight into key challenges claimants encountered and their recommendations for improvement.⁴⁶

The survey asked participants a series of Likert-type questions requiring them to rate their agreement with a series of statements about the claims process (see Table 1).⁴⁷ These questions were formulated on the basis of a review of literature on organisational justice,⁴⁸ procedural justice (including validated measures)⁴⁹ and previous research on claimant experiences in compensation processes.⁵⁰ The questions covered elements of the claims process experience including the clarity of communication with, and information received from, the CO; timeliness of CO responses and decisions; fairness; respect and dignity; claimant voice; and the amount of compensation received. The survey was piloted for face validity, comprehension, and feasibility and then administered to participants in the six-year IVS follow-up interview.

46 Analyses involving other items from the claim experience survey have been reported elsewhere: see, eg, Genevieve M Grant et al, 'Relationship Between Stressfulness of Claiming for Injury Compensation and Long-Term Recovery: A Prospective Cohort Study' (2014) 71 *JAMA Psychiatry* 446.

47 See Rensis Likert, 'A Technique for the Measurement of Attitudes' (1932) 22 *Archives of Psychology* 5, 5–55.

48 Jerald Greenberg, 'Organizational Injustice as an Occupational Health Risk' (2010) 4 *Academy of Management Annals* 205; Jason A Colquitt, 'On the Dimensionality of Organizational Justice: A Construct Validation of a Measure' (2001) 86 *Journal of Applied Psychology* 386.

49 E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988); Franche et al, above n 32.

50 See above n 30.

Table 1 Claims process experience: Likert-type items

Claim experience statement	Abbreviation
1. The people I dealt with from [the CO] understood my claim, and were knowledgeable about what I was and wasn't entitled to.	CO understood and had knowledge
2. The letters and instructions I received from [the CO] were clear and easy to understand.	Correspondence was clear
3. It was easy to pull together the information and paperwork [the CO] needed to process my claim.	Easy to provide information
4. [The CO] answered my questions and made decisions about my claim within a reasonable time.	Response time was reasonable
5. The people I dealt with from [the CO] treated me with respect and dignity.	Treated with respect and dignity
6. [The CO] tried to be fair in dealing with my claim.	CO tried to be fair
7. [The CO] gave me a chance to fully explain my situation and took what I said into account in dealing with my claim.	Given chance to explain
8. If something went wrong with my claim — such as a wrong decision being made, or a long delay — I felt like I was able to challenge [the CO] about what was happening with my claim.	Felt able to challenge
9. The number of medical interviews or assessments I had to do for my claim was reasonable.	Reasonable no of medical assessments
10. I am satisfied with the amount of compensation I have got from [the CO].	Satisfied with compensation amount
11. Friends, family or colleagues thought negatively about me because of my compensation claim.	Negative friends, family, colleagues
12. Doctors and other health professionals who treated me thought negatively about me because I was making a compensation claim	Negative health care providers

The response options provided in relation to each claim experience statement were 'strongly agree', 'agree', 'neither agree nor disagree', 'disagree' and 'strongly disagree'. Simple counts and percentages were calculated in relation to participant characteristics and survey responses.

To complement the snapshot of claimant experiences provided by the Likert-type items, participants were also asked the open-ended questions presented in Table 2. Participants' responses to the two open-ended questions were digitally recorded and transcribed verbatim for analysis.

Table 2 Claims process experience: Open-ended questions

Question
1. Reflecting on your whole experience in dealing with [the CO], what was the hardest thing about the process?
2. Based on your personal experience, if you could change one thing about the process of claiming compensation to try and make it better for other people, what would you change?

Analysis of data collected using the open-ended questions was conducted in accordance with principles of qualitative content analysis, consistent with Forman and Damschroder's 'inherently iterative' routine of immersion, reduction, interpretation and verification.⁵¹ Interview data were read through several times, and preliminary themes and codes were identified by two members of the research team using an inductive coding approach and constant comparison of the data.⁵² The preliminary coding framework was applied to a subset of the data by each of the two researchers independently, after which they engaged in in-depth discussions about the evolving framework, the coding categories and connections between categories. Using a consensus approach, a final coding framework was then developed and applied to the data, with particular emergent themes selected for more in-depth analysis.

IV FINDINGS

The findings are presented in three parts. Part A describes the participants and Part B presents the results of the quantitative component of the claim experience survey. Part C presents the findings from the qualitative content analysis of the open-ended questions from the survey. In Part C, the name of any insurer, claims management company or compensation authority referred to by participants has been replaced by the acronym CO. Details have been omitted from participant quotes as necessary in order to preserve participants' anonymity.

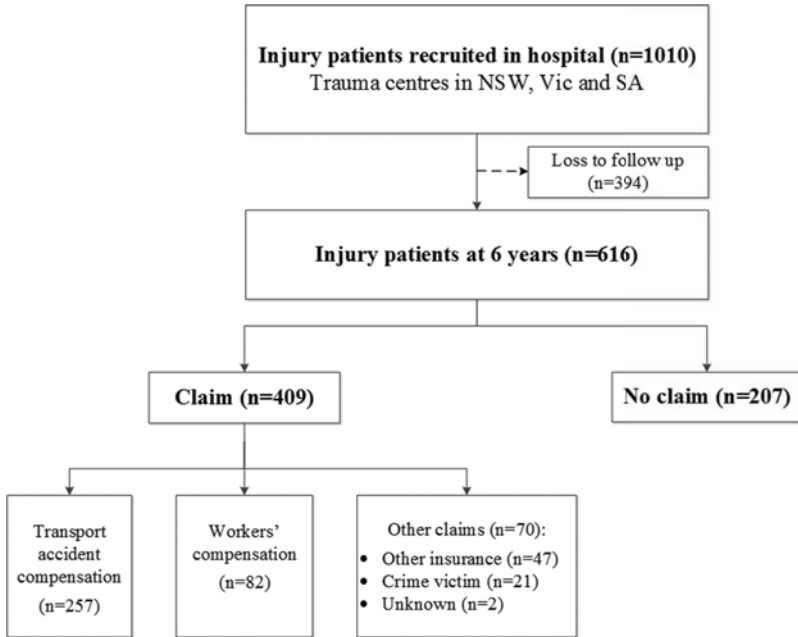
51 Jane Forman and Laura Damschroder, 'Qualitative Content Analysis' in Liva Jacoby and Laura A Siminoff (eds), *Empirical Methods for Bioethics: A Primer* (Elsevier, 2008) 39, 41–46; Hsiu-Fang Hsieh and Sarah E Shannon, 'Three Approaches to Qualitative Content Analysis' (2005) 15 *Qualitative Health Research* 1277, 1281; Catherine Pope, Sue Ziebland and Nicholas Mays, 'Qualitative Research in Health Care: Analysing Qualitative Data' (2000) 320 *British Medical Journal* 114, 114.

52 Barney G Glaser, 'The Constant Comparative Method of Qualitative Analysis' (1965) 12 *Social Problems* 436. See also Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926.

A Participant Characteristics

Survey responses indicated that 409 of the 616 IVS participants retained in the sample at six years (66 per cent) had made some form of claim for compensation or injury insurance in connection with their injury (see Figure 1). Of these, 339 (83 per cent) had made claims for transport accident or workers’ compensation.

Figure 1 Claiming activity among injury patients at six years post-injury



Seven participants did not respond to questions about their claim experiences and were therefore excluded from the analyses. Consequently, the study sample consisted of 332 claimants to transport accident and workers’ compensation schemes in Victoria, New South Wales and South Australia, who were hospitalised with injury in 2004–06 and interviewed six years after injury. This was the study sample — the analyses were confined to this group, and their characteristics are set out in Table 3.

Participants had a mean age on hospital admission of 39 years — 71 per cent were men and 59 per cent had experienced a mental health disorder at some point in their lives before their hospitalisation.⁵³ The median length of hospital stay

53 History of psychiatric disorder was measured using the Mini International Neuropsychiatric Interview (MINI), Version 5.5: David V Sheehan et al, ‘The Mini-International Neuropsychiatric Interview (M.I.N.I.): The Development and Validation of a Structured Diagnostic Psychiatric Interview for DSM-IV and ICD-10’ (1998) 59 *Journal of Clinical Psychiatry* 22. Disorders screened for were major depressive episode, dysthymia, panic disorder, agoraphobia without panic, social phobia, obsessive compulsive disorder, post-traumatic stress disorder, generalised anxiety disorder, alcohol abuse and dependence. For further discussion see O’Donnell et al, ‘Prior Trauma and Psychiatric History’, above n 38.

after injury was 8.5 days (inter-quartile range 5–15 days). Approximately three quarters of participants had made claims in the transport accident scheme (61 per cent) or workers' compensation scheme (11 per cent) in Victoria. Eighty-seven per cent of participants reported that their claim was complete at six years post-injury (excluding any residual claims for health and medical costs, an ongoing benefit in some schemes),⁵⁴ and 48 per cent reported using a lawyer in connection with their claim.

Table 3 Participant characteristics (n=332)

Characteristic	
Male (n, %)	235 (71%)
Mean age on hospital admission, in years	39
Partnered on admission (% married or cohabiting)	53%
Education (completed year 12)	48%
Working prior to injury	94%
Lifetime history of psychiatric disorder	59%
Injury characteristics	
Intensive Care Unit admission	16%
Presence of mild traumatic brain injury	45%
Discharged to rehabilitation facility (versus home)	30%
Compensation system	
Transport accident — Victoria	202 (61%)
Workers' compensation — Victoria	35 (11%)
Transport accident — South Australia	31 (9%)
Workers' compensation — New South Wales	23 (7%)
Transport accident — New South Wales	18 (5%)
Workers' compensation — South Australia	18 (5%)
Another transport accident or workers' compensation system	5 (2%)
Compensation claim complete at six years after injury	87%
Used a lawyer in connection with claim	48%

B Quantitative Findings

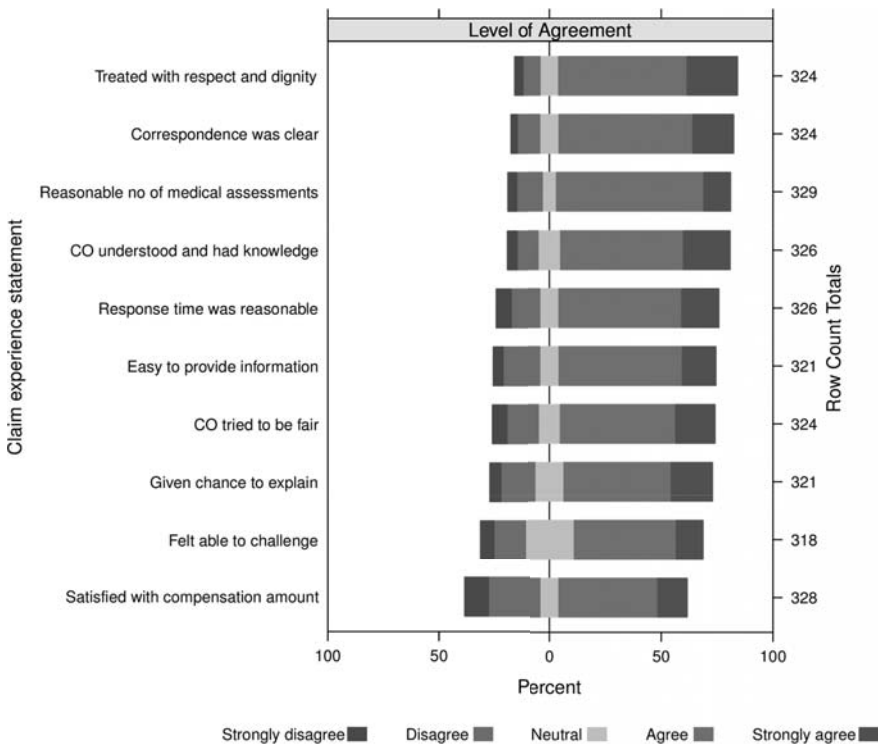
The Likert-type item responses are presented using a diverging stacked bar chart (Figure 2).⁵⁵ In this chart, the neutral responses ('neither agree nor disagree') are divided with half on the left-hand side of the central zero reference point and half on the right-hand side. In reflecting on their experience of dealing with the CO,

54 Schemes included in the study with elements of such benefits were each of the workers' compensation schemes (NSW, SA and Vic), and the Victorian transport accident compensation scheme.

55 See Richard M Heiberger and Naomi B Robbins, 'Design of Diverging Stacked Bar Charts for Likert Scales and Other Applications' (2014) 57(5) *Journal of Statistical Software* 1.

more than three quarters of claimants agreed or strongly agreed that they were treated with respect and dignity (80 per cent), received letters and instructions that were clear and easy to understand (78 per cent), and felt that the CO understood their claim and was knowledgeable about the claimant’s entitlements (76 per cent). Additionally, 78 per cent agreed or strongly agreed that the number of medical assessments they underwent in connection with their claim was reasonable, while 16 per cent disagreed or strongly disagreed with this statement.

Figure 2 Level of agreement with claim experience statements



Around one third of participants (34 per cent) disagreed or strongly disagreed that they were satisfied with the amount of compensation they received. One in five participants disagreed or strongly disagreed that it was easy to pull together the information and paperwork required for their claim (21 per cent), or that the CO answered questions and made decisions about their claim in a reasonable time (20 per cent). Similarly, one in five disagreed or strongly disagreed that they felt able to challenge the CO (20 per cent), were given the opportunity to fully explain themselves (21 per cent) or that the CO tried to be fair in dealing with their claim (21 per cent). Small numbers of participants perceived that as a result of their compensation claim, health professionals (6 per cent) or their friends, family or colleagues (10 per cent) thought negatively about them.

C Qualitative Findings

Turning now to the responses to the open-ended questions, this section presents claimants' experiences on the difficulties they experienced and their recommendations for change. These findings are organised and laid out in four parts. Part 1 sets out overarching findings on claimant experiences of claims processes and management. These range from positive encounters to administrative burdens claimants perceived as justified in the claims context, to criticisms of claims management, including inconsistency, deficiencies in CO staff expertise, challenges in making contact, the absence of care and concern and delays.

The remaining three parts focus on findings relating to specific dimensions of the legal experience rendered in the claims process. Part 2 reports on the interlocking themes of rights information and advocacy, including accessing information about rights and entitlements and the use of legal and non-legal sources of support and advice. Part 3 presents findings on processes of evidence and proof, including claimant experiences of the initial gathering of evidence in support of a claim, building that proof over the course of the claim and the emergence of doubt about the motivations of claimants and COs. Part 4 reports on claimants' lived experiences of the application of the blunt and technical assessment rules of compensation systems.

1 Claims Management

(a) Easy Encounters and Justified Burdens

A substantial proportion of participants reported that they found the process of claiming compensation straightforward and were pleased and impressed with the management of their claim by the CO. Seamless processes ('like clockwork'), responsive and helpful communication with professional CO staff who were pleasant to deal with, and the absence of animosity were hallmarks of these experiences. Such claimants noted being 'just amazed that a bureaucracy could work so well', that they felt supported and regarded the CO as being 'well ahead of the game'. One described claiming itself as:

akin to a lot of processes I've used during my long life and I just hopped in and did it. All I had to do was sort of jot down the consultations and the treatment that I could claim for, send it in, got back the response, Bob's your uncle, that's it. (Female, 70–79)

One claimant reported having anticipated a difficult claims process, but finding that the CO's reputation did not match his actual, far more positive, experience:

One thing that was a little off-putting was everybody else's stories about [the CO]. Other patients and nurses and doctors had stories about how difficult [the CO] was to deal with. I didn't experience that at all but it made me a little bit concerned until I was confident with my case manager.

[The CO] had a reputation which proved to be unfounded ... I think it probably all comes down to really good case managers, so if all [CO] staff were as good as the one I had, I'm sure everyone would be happy. (Male, 40–49)

A sub-set of claimants attributed the ease of the process to the fact that their spouse, parent or lawyer had been principally responsible for dealing with the CO — ‘it made it easy when you had someone else doing it for you’.

Another group of claimants had encountered challenges in the claims process, but were accommodating of those difficulties in the context of their broadly positive experience. For example, one such claimant acknowledged that the CO is ‘dealing with large volumes of people from different walks of life’. Minor communication difficulties, such as bills received in error or other varieties of ‘administrative confusion’ did not significantly tarnish these claimants’ appraisals of the process of dealing with the CO. Such claimants reported that with the benefit of hindsight, delays in claim processing that had been stressful during the acute post-injury phase no longer seemed unreasonable. Others described the necessity of learning how the process functioned and acting accordingly — finding out and recognising ‘the right things to say and do’. In the view of these claimants, ‘going through the hoops’ was understandable and necessary in order for the CO to appropriately verify their claim:

Yeah, going to see different doctors, getting specialist reports, just jumping the hoops. To me it's just a standard thing anyway, you can't just say ‘I want this’ and then ‘Yep, we'll give it to you’; you have to go with the flow. (Male, 50–59)

[I]t's just one of these things. There were times when it surprised you that they got things done for you, and then other times it was like I can't expect too much because [the CO] is a big government thing and you're just a number to them sort of thing ... [L]ike how often you had to go to appointments — sure it was a pain in the arse but at the end of the day you're thinking, well, they're only doing it to check up on you, to make sure you are still sore, and you're thinking, well, at least I get to see a doctor, at least I get to find out how I'm going. (Male, 30–39)

For many claimants then, the claims process comprised a mixture of positive experiences and bureaucratic burdens that they regarded as being justified to facilitate their claim and recovery.

(b) Criticisms and Recommendations for Change

A number of claimants identified negative aspects of the management of their claim that they believed could have been improved. There were five prominent themes in claimants’ discussion of these experiences: inconsistency, staff expertise, mode of contact, care and concern, and delay. Quotes to illustrate these themes are presented in Table 4.

Table 4 Key criticisms of case management

Theme	Illustrative quotes
Inconsistency	<p>I get a new case manager every 2–3 months, and then every 2–3 months I have to go through explaining every single thing, and they all try to do different things. (Male, 30–39)</p> <p>I've had that many different case managers, just crazy, you know. I think I'm up to about number 10 now. It just gets disheartening. (Male, 40–49)</p>
Staff expertise	<p>Until they actually get out there and actually understand and see what the workers have to go through and understand their injuries, man, they haven't got a hope in hell of understanding what goes on. (Male, 50–59)</p> <p>Basically, you know, they're just admin people with no medical degree at all, and when the doctor or the physio says 'she needs this or that', they say 'well, no she doesn't', well, what would they know? (Female, 40–49)</p>
Making contact	<p>I recommend more personal, hands on, one-on-one individual people, not over telephones or through paperwork. There seems to be a paper trail and you don't know anyone personally; it's all over phones or faxes or in the mail. It's a bit hard to deal with people you don't know or see. (Male, 50–59)</p>
Care and concern	<p>Try and make them understand that what we have to go through is not easy. I know at the end of the day, yes, they're doing their job, but I think they take more of an 'it's their job' approach rather than putting themselves in our shoes. (Female, 20–29)</p>
Delay	<p>They should probably be upfront with the timeline so that people know what to expect and how long things would take there and then, just so they're aware of the full process. (Male, 30–39)</p>

(i) Inconsistency

Claimants frequently referred to the challenges of dealing with multiple and changing claims management staff, and the associated difficulty of having to continually repeat the story of their accident and injuries to new personnel:

You get assigned claims assessors at a whim and having to restart the whole process almost every time you get a new claims assessor is exceptionally frustrating. You do build some rapport with the person that you're trying to deal with, and they have more of an idea of what you're trying to achieve

and what you're going through. Then you ring up and go 'Can I speak to X?' and they say 'Oh sorry, Y has been appointed your new case manager'. (Male, 30–39)

I'd ring up one day and there'd be a different case manager. I'd ring up a couple of months later and it'd be a different case manager ... To have one would have been better, because then they know your history and you can talk to them. I did feel comfortable with the first couple I had and they were very helpful, but as time went by ... they were less helpful, I suppose. (Male, 50–59)

With changing personnel came the risk of inconsistency of advice for some claimants — where conflicting messages were received from different personnel, confusion resulted.

Claimants who had sustained head injuries were particularly troubled by the need to repeat details of their condition and claim, especially dates on which claim-related events had occurred. Some claimants noted that where their claims were of long duration, they understood the likelihood that they would need to deal with multiple staff, but that this should be minimised where possible. Better record keeping by claims managers was also recommended as a strategy to avoid claimants having to repeat themselves.

(ii) Staff Expertise

Some claimants questioned the extent to which claims management staff had sufficient skills and insight into the claimant experience, which impacted on the perceived quality of the service and process:

Probably have some of their officers understand what it's like to be either a motorcyclist or a truck driver ... I was asked by my case manager how long it could be before I went back to driving a truck, and I still can't throw rope or chains, or change tyres on trucks or anything like that, which is all part of your job. They didn't really have much perception of that. (Male, 40–49)

When you're dealing with [the CO] you feel like you're dealing with the bookkeepers, and not doctors and counsellors and people who are vaguely in the know. (Male, 30–39)

(iii) Making Contact

For some claimants, getting hold of the appropriate contact person at the CO was a challenge, and this difficulty resulted in frustration. Complaints about the mode of contact also featured in claimants' responses. They expressed a preference for in-person contact with claims management staff, rather than the phone-based and written communication they encountered. Claimants perceived that having the opportunity to meet their case manager face-to-face would make it easier for them to explain their problems, and that 'in an ideal world, you'd have a face to go with the caseworker'.

(iv) Care and Concern

A number of claimants perceived that the CO staff they dealt with demonstrated a lack of care and concern for the claimant's wellbeing. This manifested in the sensation of being treated like a number, and contributed to a sense of dehumanisation in the claims process:

The guy who phoned me, he treated me like I was just a number on a piece of paper; he knew nothing about me except I had a claim. He didn't want to know any more about me, it was just an amount of money, and to me it was more about the injury than it was about money. (Female, 50–59)

The feeling of being 'case managed' — 'being told rather than asked', and 'handing over all of my decision-making to someone else and simply being sent to places' — also engendered a sense of powerlessness and lack of control for some claimants. Judgemental communication from CO staff was perceived by claimants as the antithesis of the care and concern they needed.

(v) Delay

Claimants described their frustration with a range of delays in the claims process. Overwhelmingly, claimants emphasised the overall duration of the claim — 'the length of time it took to be completely clear of it' — as their primary concern in this regard. Many referred to the time it took to get approval for, and access to, specific healthcare services and support — 'trying to get them to approve the services I need when I need them' — and timely payment for those services. For one claimant, realising that the CO's payment of her physiotherapist had been delayed was a source of humiliation:

I was having physiotherapy; everything was fine. One day I got there and he wasn't very pleasant any more and I wondered why because I normally talk to him; just normal things. I insisted to know what's wrong, and he said [the CO] was not paying the treatments. He said 'Don't worry, it's not your fault ... They do that on a regular basis, it's not the first time with you.' It was so embarrassing for me that I never went back to him. I said: 'Listen, if I need to pay for it I'll pay for it and then I'll worry about [the CO].' But I was so embarrassed ... It took me a while to find another person. (Female, 50–59)

Claimants emphasised the need for the CO to communicate about and explain delays in the claims process:

If there's a delay, it needs to be explained why there's a delay, not just there's a delay and that's it ... You need to be treated with respect, given information. (Male, 30–39)

One claimant recommended the use of penalties for COs or their staff where service quality standards such as timeliness were not met, as an accountability mechanism:

They should have to have a checklist and a time limit in which these processes had to be carried out by the insurance company ... I think they should have to meet the criteria within X amount of time after you either put in the claim or put in the actual medical reports ... I think there should be some sort of financial penalty for them if they don't. (Male, 50–59)

2 Information and Advocacy

(a) Accessing Information about Rights

Claimants commonly identified determining what their entitlements were as one of the major sources of difficulty they encountered. Lack of knowledge contributed to a sense of vulnerability for some claimants. Uncertainty surrounding rights and the processes for accessing compensation was particularly acute at the outset of the claims experience. Claimants recommended that more information be provided to facilitate better understanding, whether by information booklet, web resources or in person. Plain English communication was also requested:

They need to put all information into easily understandable sentences. A lot of gobbledegook and a lot of internal talk was used, a lot of acronyms which didn't mean a jolly thing to me; it just was not in plain English. I think also because of at the time an undiagnosed brain injury I found that I wasn't retaining as much information as I should have, and I relied very heavily on my husband. (Female, 60–69)

At the time I didn't think that there was any reason why all of that information couldn't be easily found on the internet. If there was information there at the time, then it didn't seem to me to be easy to access at all, so making that much more easily available I think would be a good start ... I mean, if people are entitled to apply for compensation, then that process should be made easier. (Male, 30–39)

(b) Non-Legal Support

Claimants also described the extent to which they drew on the advice and explanations provided by non-legal actors such as friends, family, and social workers in the early post-injury period to understand their entitlements. Social workers were regarded as valuable sources of neutral advice and explanation during hospital stays and inpatient rehabilitation, and that support was sorely missed by one claimant after discharge:

The hardest thing was dealing with [the CO] after I'd left the rehabilitation facility because at that point in time there were mediators and social workers who could explain parts of the process. So once I got home some of the letters and things became less clear as time went on; I also didn't have the support services to explain what they were actually asking. (Male, 30–39)

Several claimants suggested that it would have been useful to have the services of a non-legal advocate or consultant to manage their claim, arrange transport to appointments and explain entitlements in the early stages:

It would be good if there was somebody who could handle it for you when you come home from hospital and you're really sick. Somebody who could just be a mediator in between, who could just do that, that would be their job, sorting out people's claims for them, because when you're sick and not coping it's just an added stress that you don't need at the time. And you shouldn't have to be paying the lawyers to do it for you. It should be straightforward, fill in the form, put the form in, they say yes or no and then you go to a lawyer. (Female, 60–69)

It's like you've had the accident, you have to manage everything, you have to look after everything, from your insurance, to meet your appointments, to everything. It's like you're the manager of yourself, which is OK, but when you've had a major trauma or accident I think somebody needs to step in and do that for you. You know, someone needs to come in and give you that caring advice. (Male, 50–59)

Some claimants were resentful of the extent to which they felt they had to manage their own claim:

Just having to collate information or even talk about it, any of it, it's all very difficult. Look, I want it done for me, I suppose, because it's all too hard, I didn't do anything, I was just sitting in a car, a parked car, why now do I have to run around and do all this stuff, when I just can't be bothered? I just haven't got the energy. It's all very stressful. (Female, 50–59)

(c) Transparency

Concern about the perceived lack of CO transparency regarding claimants' rights and entitlements was common. One claimant suggested that transparency required more than the provision of written materials — clear and meaningful explanations were required. Others noted the lack of a forthcoming approach by the CO on claimant entitlements — that 'they don't want to put their hand up until they have to':

One that always sticks in my mind the most is that they weren't forthcoming with what I was entitled to earlier, so it took a while to realise what I was entitled to and it was extremely hard at the start until we got some help. (Male, 40–49)

The hardest thing would have been actually getting information out of [the CO] as to what I was entitled to. If I didn't know the right question to ask, there's no information volunteered. (Male, 50–59)

One claimant reported that she adjusted her approach to dealing with the CO after encountering problems, but was concerned about how others less capable than her would manage:

I'm a professional person, so once I realised that this was going to be a bit of a battle, I was able to put a professional spin on it and be absolutely diligent, but my big concern is the people who aren't articulate, don't know what they're entitled to and just go along with, 'oh well, your teeth will just rot, that's not my problem.' (Female, 50–59)

Additionally, lack of transparency in CO communication was interpreted by some claimants as a deliberate strategy to reduce claim activity:

All of the [the CO] processes and everything once they were in train were really efficient, but it was just getting information, particularly about compensation, it was difficult and it was almost like they make sure they don't give you enough information about that because they don't want people to claim. (Male, 30–39)

Some claimants identified a direct link between the perceived lack of transparency from the CO about claimant rights, and their decision to seek a lawyer — one noted, for example, that they contacted a lawyer after panicking about not getting sufficient information from the CO. Claimants noted that where processes and the required steps are not transparent, claimants will then seek and be reliant upon legal advice:

[The CO] should be more transparent and say if you want to make a claim, these are the steps that you can do, alternatively, to seek legal advice. Make it more transparent and cut out all that extra jargon that's in there. There's so much paperwork that you don't understand and you're under so much stress after an accident that it's almost like they're hiding the fact that you can claim ... [the CO] should be more transparent about what your rights are and not to make it such a secret. That's why we think we should have a lawyer, because it doesn't make it easy for you to claim by yourself. (Female, 30–39)

(d) Legal Representation

Claimants who had engaged lawyers in connection with their claims provided diverse assessments of the lawyer's impact on their experience of the process. A number identified their lawyer as a facilitator of positive outcomes they believed they would not have achieved on their own:

Just from my experience and seeing other people who have had injuries, you certainly need the services of a solicitor. I was very fortunate really, but I've seen other people have an injury and really in a way much more affected long-term than me and they've got nothing, so I think it's because they didn't have the services of someone like I had. (Female, 50–59)

Effective lawyers were noted to have enhanced claimants' understanding of the process, 'taking care of things' and reducing the stressfulness of the experience. Legal representatives were seen by some as an effective means to 'get through' to the CO when communication had been problematic. One claimant attributed the

positive outcome of his claim to his lawyer's involvement, but noted that a lawyer should not be required for a claimant to get a good result:

If I hadn't got a lawyer, I would have never gone through the process; [the CO] would have just given me \$11 000 as opposed to this alternative outcome when that should have been built into the system. On an honest level, it's just got to be more transparent rather than having lawyers involved; cheaper too, in some ways. (Male, 40–49)

Others, however, regarded their lawyer as being of marginal benefit, and articulated that with the benefit of hindsight they might not again choose to be legally represented:

The lawyers' firm, they just kept moving and I never even knew 'em, they'd pass my case on down the line, down the line, down the line, not telling me anything. They obviously helped with making appointments, but other than that if I'd have known I could do it without a lawyer ... looking back I would have done that gladly. (Male, 40–49)

Some claimants went further, suggesting that the poor quality and high cost of the legal services they obtained were key negative aspects of their claim experience. They felt claimants needed:

somebody that was outside of it that could just guide you. Somebody that was on my side that could just guide you, listen maybe. I mean that's what your solicitors are meant to be for, but I just chose the wrong ones. (Female, 30–39)

Ensuring that the claimant's lawyer was sufficiently capable and expert in the subject of the claim was important. Getting the 'wrong lawyer' contributed to negative experiences, and left claimants feeling that an alternative, independent support was required to improve the process.

3 Proof and Doubt

(a) Initial Evidence

Processes of gathering evidence to provide to the CO in support of their claim were challenging for some claimants, especially in the immediate post-injury period. These formative experiences of the claims process stood out in claimants' minds, even six years after injury. Assembling initial claim forms and obtaining the necessary supporting materials such as income records often constituted a serious burden:

I was in the hospital and injured and so it was difficult to put them all together while I was undergoing that experience of trying to get myself better again ... The other thing was I had only just started working and so it took quite a lot of work to get the required letters and paperwork from the people who had just employed me. (Female, 20–29)

It's the timing that's the awful thing because you have to sort of pull the information together while you're sitting in hospital, so because you need to do it instantly you don't have access to everything that you may need ... It's really quite hard to do while you're lying in a hospital bed. (Male, 40–49)

Mechanisms suggested to combat this difficulty were an interim payment with later verification of evidence, streamlined forms and paperwork, greater direct transmittal of information from healthcare providers and hospitals to COs, online processes and the use of in-person interviews rather than hard copy forms to elicit information from claimants.

(b) Building the Proof

Beyond the initial phase of the claim, the need to concurrently recover and build the required proof created challenges for many claimants. One such claimant articulated that the process of amassing the required evidence for her claim left her feeling negative about her recovery and the injury's impact on her life:

When you have a claim, to make a case you have to build on all your reports and how it affected you and the things you can't do, where in the meantime you're trying to recover ... In order to build a case you have to focus on the negative things, that's the reality of it. (Female, 50–59)

Another described the difficulty he experienced in getting the CO to acknowledge the existence of his condition:

Trying to get them to see that the injuries I had, I sustained from the accident are there for the rest of my life, the mental scarring as well. It's hard to get them to acknowledge that it happened. (Male, 40–49)

In a setting in which evidence and proof are central, claimants also described proving the presence and legitimacy of non-visible injuries a particular evidentiary challenge:

The hardest thing would be to try and prove the injuries, because some injuries, you can't see 'em. You can't see my injuries, you look at me you don't know what injuries I've sustained, because mine are internal. I've had heaps of examinations on 'em, but you can't see it ... To try and prove it, it's just a heartache, it's absolutely not worth it for me. That's how I see it, it just fails you there. (Male, 30–39)

The number of assessments claimants had to undergo — 'always being sent to more and more and more and more assessments' — was a source of considerable frustration. Key dimensions of this response were the need to relive and repeat the details of the accident and injury, along with the sense of frustration associated with seeing two sets of doctors for assessments (for the CO, and for the claimant's lawyer):

The plastic surgeon I had did such a good job that the scar is barely recognisable, which is good for me. I've already sent photos through to

[the CO] but they want me to go to have more photos done. I rang my solicitor and he said it's a formality; they like their own photos. I said 'but they're not going to be any different to the ones I've already sent', you know, that he's already got, and he said 'but we've just got to do this, so just go'. It's a hassle because I've got to get the day off work ... I mean you've already been sent photos from a reputable plastic surgeon, why do you need me to come in to get more? (Female, 40–49)

Perceived CO insensitivity and inconvenience in the scheduling of medical assessments further contributed to claimant dissatisfaction with this element of the process:

They'd always set them up for first thing in the morning and it's a three hour drive, and at the time I couldn't sit for that long, so you know, you'd have to drive for about an hour or so and then get out of the car ... It was quite nerve-racking to go to the city, and because they were all scheduled at weird times you had to either stay overnight or go at really odd hours. They'd just make the appointment and say you will be there, because a lot of them were specialists and it's really difficult to get appointments with them anyway. (Female, 40–49)

(c) *Doubling Motivation*

Claimants referred to two types of doubt associated with the motivations of actors in the claims process. The first was the sense in which claimants perceived the fraudulent behaviour of others operated as a lens through which their motivations and conduct were evaluated — by the CO, but evidently also in their own minds. One claimant noted the difficulty of 'all the rigmarole you have to go through', but:

by the same token I can understand that there are probably a lot of people out there that are fraudulent, you know, bullshit artists and whatnot. (Male, 50–59)

Others suggested the concern about fraud was the cause of delay in what should have been regarded as 'clear cut' claims:

I don't understand why these things need to drag out. I know some people, they fake it, and they put a neck brace on and they jump up and down and they cry poor, but I nearly lost my leg and I've got the scars to prove it. To me it was pretty obvious that I had something go wrong, I wasn't a fake. (Male, 30–39)

Some claimants perceived the CO's suspicion of wrongdoing as an attack on their personal integrity, that served only to compound stigma they already felt was associated with having a claim:

They treat you with contempt most of the time, as if you were less of a person than any normal person because you weren't back to work. You know they always think you're lying. (Female, 40–49)

I didn't want to milk the system; you get enough people looking at you like as if you're 'one of those people'. (Male, 30–39)

The second type of motivation-related doubt claimants described involved the changing motivations of the CO over the course of a claim, and the perceived impetus for COs to minimise their liability. One such claimant described grappling with the change in the CO role he had observed:

The hardest thing was moving from [the CO] being a support to me in rehabilitation to being the actual entity that I had to deal with to receive compensation, so [the CO] changed from being a support to being the, if you like, the legal opponent. I'd separate those roles out so that [the CO] shouldn't be both the support agency and also the opponent, or potentially the opponent. (Male, 50–59)

Others referred to what they interpreted as an organisational imperative for COs to minimise and close claims as early as possible, rather than facilitating optimal rehabilitation for the claimant:

They want you back at work and not costing them a cent as soon as possible ... Obviously once you're back at work, they're sort of yep, boom, big tick on that, you're out of the system, you're gone sort of thing. (Male, 30–39)

Talking to one of the case managers, who was trying to do the right thing and felt bad because of the stonewalling every step of the way, she said: 'You know, they've got all these graphs and bits and you're just one big blot on their graph that they're simply saying get rid of'. (Male, 40–49)

4 The Bluntness of Legal Tools

A large number of claimants commented on the CO use of rules, formulae, limits, lists, boxes and 'mathematical scenarios in assessing claimants' entitlements. Claimants emphasised the depersonalising impact of the benefit assessment rules, described by one claimant as the result of 'the bluntness of the law ... [I]t's not the people that I deal with, it's just the things they have to do by their principles'. The perceived 'bureaucratically-driven' and formula-orientated nature of the claims process also left some claimants feeling as though their individual circumstances were not adequately recognised:

I think the legislation was such that it's too black and white, too defined; you can't define a few of these injuries, you know what I mean, like bladder problems. It was very difficult and very stressful for me; they didn't consider that a lot when I was claiming. It didn't make any difference. (Female, 60–69)

I was the only person working for my company, so when I had to try and get things organised being a director of the company but also being in hospital it made it very difficult ... I couldn't necessarily pay myself a wage while I was in hospital ... I had no means to actually generate income for the company, yet they were telling me I had to pay myself a wage when I still

had to find \$1000 a week to make recovery payments which obviously I couldn't do with no income, so that side of things is a little bit difficult for [the CO] to get their head around ... It was real black and white, it had to happen; well, if you don't have income, and you've still got two kids and a mortgage and a truck repayment to make, how are you supposed to do it? Things that are written in black and white don't necessarily work in the real world. (Male, 30–39)

Many claimants expressed gratitude and even surprise about the generosity of no-fault benefits they were paid, especially in circumstances where they were at fault. For others, a chief complaint about the application of benefit assessment rules and tools was the perceived mismatch between the losses claimants incurred, and the compensation they received. For some, the focus was on the caps and limits on statutory income benefits. For others, the manner in which their income was assessed and benefits paid did not match well with their specific circumstances or their financial loss:

I had some big jobs coming up in the next month, which were like major jobs, they didn't even want a bar of it, didn't want to know about it even though I had like quotes and stuff from them, they didn't want a bar of it. So it was quite stressful to try to get an amount that I was actually meant to get. (Male, 20–29)

They just seemed like they worked off a list ... If something wasn't on that list, it was just bad luck and they just didn't want to know ... Even when it came down to weekly or fortnightly payments how they used to pay you, they'd insist and you'd have to fight them for every last penny, and they'd say, '[w]ell you're not going to work so your expenses are less', well that's not the case, you're stuck at home, you had the lights on, you had heating going, you had all of these expenses were more because you were in the house all of the time. (Male, 50–59)

A number of claimants expressed surprise, dissatisfaction and confusion about the operation of technical legal rules in the context of their claim. The process of compensation recovery to Centrelink was one such issue:

I had to because I was getting different payments, I then had to backpay. It's hard because they backdate your claim, so when I get my money it goes back to the date of the accident, so therefore I wasn't entitled to my disability pension, so I had to pay all that back, so it gets very, very stressful, and I wouldn't wish it on anybody. (Male, 40–49)

Other claimants described disbelief regarding the legal principle of contributory negligence in the context of the settlement of their claims. One was particularly outraged:

They come up with a figure and then they turn around after we agreed on that figure and they said 'oh, by the way we blame you for 10 per cent of the accident', and I said 'oh, OK, what does that mean?', and they said 'oh that means we're going to take 10 per cent of what we just offered you off.'

And I said, ‘hang on a sec, so you’re saying if you reckon it was 50 per cent my fault, then you’d take 50 per cent off?’ and I said ‘that’s not how it should work’, and that’s just exactly what they did, they took 10 per cent off even though they said it was totally his fault, they said as I was going past him I could have beeped the horn and blah blah blah. And I said ‘oh, so do you beep the horn at everyone that pulls over on the side of the road as you drive past them?’. He said, ‘well no,’ I said ‘so it’s gonna cost me \$40 000 cause I didn’t beep the frickin’ horn at him?’. I said ‘you blokes are unreal, go back to your million dollar salaries and see you later’, you know. (Male, 40–49)

With the elapse of time since their claim was concluded, some claimants developed the view that their claims had been resolved too quickly, before the true extent of their incapacity was apparent:

From where I started I’ve come out pretty well, but I’m sort of thinking back over the whole thing I think we were probably a little hasty in sort of saying OK that’s it, everything’s alright now, when in actual fact it really isn’t. (Male, 60–69)

One such claimant noted the inflexibility and finality of the closure of his claim:

I’ve been told now that it’s all done, that’s it, I can’t make any further claims except for the medical side of things, for the injuries sustained in the accident. You take your chances when you get your payout that if you get better, good on you, and you can go back to work and make more money and all that sort of stuff, and sometimes it doesn’t work. In my case, I haven’t been able to return to work and my payout figure was based on returning to work part-time. When everything goes negative, you should be able to make a further claim ... I mean, I could have gone in the first place and said no, I don’t think I’ll ever return to work, that would’ve been a different story, but at the time there was a hope that I could return to work. Once you make that decision back then, that’s it — you’re stuck with that. I can’t ever go back and make another claim just because I cannot go back to work. (Male, 50–59)

For these claimants, the formal conclusion of the claim process clearly did not mark the end of their experience of the life impacts of their injury.

V THEMES AND POLICY IMPLICATIONS

Through interviews with claimants, this exploratory study provides new insight into claimant perspectives on the front-line justice delivered in Australian transport accident and workers’ compensation systems. This section explores several key aspects of the findings and their implications: the diversity of claimant experiences; the connection between rights information, capability and strategy; and the tensions inherent in the bureaucratic justice of claims processing.

A Diversity in Claimant Experiences

The study found that claimants have highly variable experiences of their engagement with claims processes and COs. In recent years, a growing body of qualitative research evidence has documented the significant challenges some claimants face in negotiating claims processes.⁵⁶ The analysis reported in this article provides further evidence of these challenges: some claimants experienced difficulties with documentation, delay, and contact and communication with CO staff. Importantly, the study also showed that not all claimants encountered such problems; many were broadly positive about their experiences, and acknowledged the necessity of processes to document and verify claims made. The findings also demonstrate the benefit of combining qualitative and quantitative data in investigations of claimant experiences.⁵⁷ One in five respondents disagreed that the CO answered questions and made decisions about their claim within a reasonable time. The deeper insight provided by the open-text responses highlighted the multiple dimensions of delay claimants encountered, from accessing required services as and when they were needed, to the consequences of delayed payment and broader concern about claim duration.⁵⁸

The diversity of experiences documented in the study is predictable. Claims vary in complexity and magnitude, and claimants differ in their injuries, circumstances and expectations.⁵⁹ Exploration of the predictors of negative and positive experiences is needed. These further inquiries are necessary not only because of the statutory obligations of compensation schemes (to promote timely and just resolution of claims),⁶⁰ and the need to promote claimant justice and dignity in claims processes,⁶¹ but also because of the mounting evidence that stressful experiences of claims processes have a negative impact on claimant health.⁶²

One of the candidate factors for further exploration identified by the findings is claimants' differing expectations of claims processes and the support they

56 See, eg, Kilgour et al, above n 30; MacEachen et al, above n 30.

57 See Sheilah Hogg-Johnson and Ellen MacEachen, 'Methodological Issues in Work Disability Prevention Research' in Loisel and Anema, above n 29, 125; Jane H Aiken and Stephen Wizner, 'Measuring Justice' [2013] *Wisconsin Law Review* 79, 94–5, 98.

58 See also Niece A Elbers et al, 'Factors That Challenge Health for People Involved in the Compensation Process Following a Motor Vehicle Crash: A Longitudinal Study' (2015) 15 *BMC Public Health* 339 <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4399435/>>.

59 Despite this, many epidemiological studies continue to reduce having a claim to a binary variable: see Lippel, 'Workers Describe the Effect of the Workers' Compensation Process on their Health', above n 18, 440.

60 See above n 6.

61 Katherine Lippel, 'Preserving Workers' Dignity in Workers' Compensation Systems: An International Perspective' (2012) 55 *American Journal of Industrial Medicine* 519.

62 Grant et al, above n 46; Meaghan L O'Donnell et al, 'Compensation Seeking and Disability after Injury: The Role of Compensation-Related Stress and Mental Health' (2015) 76 *Journal of Clinical Psychiatry* 1000.

will or should receive from the CO.⁶³ Injured persons' expectations regarding return to work and recovery are increasingly recognised as contributing to those outcomes.⁶⁴ Claimant expectations of CO support may play an important role in driving experiences within scheme processes. In light of the study findings about the difference between some claimants' expectations and the support with which they were provided, better understanding of the sources of expectations is also required.⁶⁵ Recent evidence has also highlighted the contribution of the perception of fault in accident circumstances to claimant outcomes and satisfaction.⁶⁶ In light of this, and the different types of benefits available to claimants injured in at-fault and not-at-fault circumstances, the way fault and blame for the occurrence of injury contribute to claimant experiences in claims processes should also be investigated.

B Legal Rights, Capability and Strategy

Another major theme in the findings involves the close connections between access to trustworthy information about claimants' rights and their advice-seeking and problem-resolution strategies, including the use of lawyers. Three quarters of respondents reported that the CO was knowledgeable about their entitlements; one in five, however, reported difficulty with pulling together the information and paperwork needed for their claim and disputed that they felt they were given the chance to explain their situation and had that taken into account by the CO. Nearly half of the respondents used a lawyer in connection with their claim; a number linked their decision to get a lawyer with difficulties they encountered in obtaining clear access to information about entitlements and negative perceptions of the transparency or motivations of the CO. A number of respondents reported positive experiences of lawyer use, describing the support as indispensable in achieving a positive outcome. Others reported challenges — getting in contact,

- 63 Expectations 'serve as standards with which subsequent experiences are compared, resulting in evaluations of satisfaction or quality': Valarie A Zeithaml, Leonard L Berry and A Parasuraman, 'The Nature and Determinants of Customer Expectations of Service' (1993) 21 *Journal of the Academy of Marketing Science* 1, 1.
- 64 See, eg, Michael V Mondloch, Donald C Cole and John W Frank, 'Does How You Do Depend on How You Think You'll Do? A Systematic Review of the Evidence for a Relation Between Patients' Recovery Expectations and Health Outcomes' (2001) 165 *Canadian Medical Association Journal* 174; Joanna Fadyl and Kathryn McPherson, 'Return to Work After Injury: A Review of Evidence Regarding Expectations and Injury Perceptions, and Their Influence on Outcome' (2008) 18 *Journal of Occupational Rehabilitation* 362.
- 65 As Cane suggests, public debates about compensation systems are often characterised by ignorance about the way these systems operate and the history of debates about their development and reform: Cane, above n 24, 409.
- 66 Jason Thompson et al, 'The Association between Attributions of Responsibility for Motor Vehicle Accidents and Patient Satisfaction: A Study within a No-Fault Injury Compensation System' (2015) 29 *Clinical Rehabilitation* 500; Nieké A Elbers, Alex Collie and Arno J Akkermans, 'Does Blame Impede Health Recovery after Transport Accidents?' (2015) 8 *Psychological Injury and Law* 82; S M Littleton et al, 'The Influence of Fault on Health in the Immediate Post-Crash Period Following Road Traffic Crashes' (2012) 43 *Injury* 1586.

timeliness of response, inadequate advice — that are consistent with previous findings⁶⁷ and also with the criticisms made of COs in this study.⁶⁸

These insights are a useful contribution to the literature because understanding how and why claimants seek advice and support about their legal rights is critical to understanding and evaluating compensation systems. There is little evidence from Australian settings about how or why injury compensation claimants go about making the decision to seek legal advice. In the international occupational health literature, the use of lawyers in compensation systems has been dealt with in a relatively unsophisticated way.⁶⁹ For example, the use of a variable representing lawyer engagement in studies predicting health outcomes after injury has led to findings suggesting an association between poor outcome after injury and use of a lawyer.⁷⁰ Such analyses are plagued by a reverse causality problem — though it may be the case that lawyer involvement is associated with poor recovery after injury, poor recovery might also play a role in a claimant's decision to seek legal advice.⁷¹ A small number of studies have explored the relationship between claimant dissatisfaction with claims management and lawyer use,⁷² but there has been little in-depth analysis of the pathways to lawyer engagement.⁷³

Recent evidence suggests that where people who experience legal problems associated with personal injury take action to deal with the problem, that action more frequently includes seeking advice from a professional advisor (whether a healthcare provider or lawyer) than is the case for other kinds of legal problems.⁷⁴ The number and variety of advisors used is closely connected to the perceived severity of the problem (with more severe problems being associated with more advisors).⁷⁵ An emergent strand of research points to other factors that play a role in compensation settings: in a study of transport accident compensation claimants 12 months after injury, Casey et al identified speaking a language other than English at home as being associated with lawyer use at 12 months.⁷⁶ In the same jurisdiction, Murgatroyd et al identified claimant frustration with the complexity of claims processes and poor recovery as likely precursors to legal advice being

67 Coumarelos et al, above n 8, 136; Elbers et al, above n 18.

68 See above Part IV(C)(1).

69 Laura S Welch and Leslie I Boden, 'Letters to the Editor: Attorney Involvement, Claim Duration, and Workers' Compensation Costs' (2009) 51 *Journal of Occupational and Environmental Medicine* 1.

70 See, eg, Ian A Harris et al, 'Predictors of General Health after Major Trauma' (2008) 64 *The Journal of Trauma: Injury, Infection, and Critical Care* 969.

71 Natalie M Spearing et al, 'Research on Injury Compensation and Health Outcomes: Ignoring the Problem of Reverse Causality Led to a Biased Conclusion' (2012) 65 *Journal of Clinical Epidemiology* 1219, 1220.

72 Thomas M Wickizer et al, 'Use of Attorneys and Appeal Filing in the Washington State Workers' Compensation Program: Does Patient Satisfaction Matter?' (2004) 46 *Journal of Occupational and Environmental Medicine* 331; John T Chibnall and Raymond C Tait, 'Legal Representation and Dissatisfaction with Workers' Compensation: Implications for Claimant Adjustment' (2010) 3 *Psychological Injury and Law* 230.

73 Chibnall and Tait, above n 72.

74 Coumarelos et al, above n 8, ch 6.

75 Ibid 110, 135.

76 Petrina P Casey, Anne Marie Feyer and Ian D Cameron, 'Associations with Legal Representation in a Compensation Setting 12 Months after Injury' (2015) 46 *Injury* 918, 922.

sought.⁷⁷ Further research is required to untangle the pathways to legal advice in Australian injury compensation settings, including whether some claimants or claims have characteristics that make legal advice more necessary or desirable in the interests of just outcomes.

Importantly, a number of respondents in the present study reported that non-legal advisors played a critical role providing them with assistance — family, spouses, friends and social workers were all identified as providing support or even taking responsibility for much of the interaction with the CO in relation to the claim.⁷⁸ While discussion with friends and family is well-recognised as a means by which people seek advice to help them to resolve legal problems,⁷⁹ there is a dearth of research on the nature and effectiveness of this kind of support.⁸⁰ Similarly, there is a lack of literature exploring the advice-providing role of health care providers in compensation settings.⁸¹ The role of these actors should also be further explored.

A frustrating range of basic questions remain unanswered about justice in compensation systems, not least about whether claimants know their rights.⁸² More specifically, we do not well understand how people access information about their entitlements, whether the information is the right information, and how being equipped with the right information relates to claiming behaviour, decision-making and problem resolution strategy, and quality of and satisfaction with claim experiences. Some claimants in the study suggested the support of a personalised, non-legal advocate was needed to navigate the claims process; others were aggrieved by the extent to which they perceived that they had to manage their own claim. These findings, along with claimants' identified preference for face-to-face contact with the CO, raise questions about claimant expectations of support and self-management, and how these can be best managed or addressed in claims management within COs. Self-help strategies clearly have a role in enabling people to deal with legal problems themselves, but are widely regarded as being more appropriate for those with some existing level of legal capability

77 Darnel Murgatroyd et al, 'The Perceptions and Experiences of People Injured in Motor Vehicle Crashes in a Compensation Scheme Setting: A Qualitative Study' (2015) 15 *BMC Public Health* 423, 8 <<http://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-015-1739-9>>.

78 Social support has been identified as contributing to recovery after injury: see Ute Bültmann and Sandra Brouwer, 'Individual-Level Psychosocial Factors and Work Disability Prevention' in Loisel and Anema, above n 29, 149, 150, 155. Though recent research suggests the evidence base is inconclusive for musculoskeletal injuries: see Khic-Houy Prang, Sharon Newnam and Janneke Berecki-Gisolf, 'The Impact of Family and Work-Related Social Support on Musculoskeletal Injury Outcomes: A Systematic Review' (2015) 25 *Journal of Occupational Rehabilitation* 207.

79 Coumarelos et al, above n 8, 32.

80 Alexy Buck and Marisol Smith, 'The Importance of Family and Friends in Advice-Seeking for Rights Problems' (2015) 14 *Social Policy and Society* 175.

81 Agnieszka Kosny et al, 'The Role of Health Care Providers in Long Term and Complicated Workers' Compensation Claims' (2011) 21 *Journal of Occupational Rehabilitation* 582.

82 For a detailed examination of the empirical challenge of assessing this, see Catrina Denvir, Nigel J Balmer and Pascoe Pleasence, 'When Legal Rights Are Not a Reality: Do Individuals Know Their Rights and How Can We Tell?' (2013) 35 *Journal of Social Welfare and Family Law* 139.

and in the absence of significant disadvantage and complex problems.⁸³ Traits of self-efficacy, including motivation, engagement, self-belief and confidence have been found to be important to success for self-advocates in civil dispute settings,⁸⁴ and it seems likely that such attributes would be valuable in claims processing contexts too.

C *Doing Justice in Claims Processing*

The third major theme in the findings relates to the way claimants experienced tensions in the values underpinning the bureaucratic processing of their claims. For example, some claimants reported that they regarded the administrative burden associated with making their claim as justified. Others catalogued the difficulties they experienced in putting together the information required by the claims process, especially in the immediate post-injury phase. The lengthy duration of claims was a common complaint, but some claimants acknowledged that it takes time to amass the necessary evidence to enable accurate decisions to be made. Some claimants reported wanting more information about their entitlements, but others found the information they were provided with was overly complex, jargon-laden and confusing. These observations are indicative of the balance claims processing strikes between such values as administrative expeditiousness, accuracy and cost effectiveness; meeting a claimant's individual needs through the application of professional judgment; and providing an opportunity for a claimant to participate meaningfully and be heard in the decision process.⁸⁵

Two strands of findings are particularly illustrative of these tensions: (i) the status of proof as a burden and (ii) claimant experiences of the rules used to calculate compensation. The next section examines these examples, and makes suggestions about the use of socio-legal models of decision-making for understanding the justice of claims processing in compensation systems.

83 Coumarelos et al, above n 8, 44; Productivity Commission, 'Access to Justice Arrangements' (Inquiry Report No 72, Vol 1, Australian Government, 5 September 2014) 510.

84 Michael Robertson and Jeff Giddings, 'Self-Advocates in Civil Legal Disputes: How Personal and Other Factors Influence the Handling of Their Cases' (2014) 38 *Melbourne University Law Review* 119, 143–50.

85 Jerry L Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983), 24–5. See further the discussion of Mashaw's work provided in Simon Halliday and Colin Scott, 'A Cultural Analysis of Administrative Justice' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 183. See also Zuckerman's conceptualisation of truth (rectitude of decision), time and cost as competing procedural qualities in civil justice systems, between which choices and compromises must be made in Adrian A S Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in A A S Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, 1999) 3, 3–12.

1 Proof as a Burden

Claimants articulated a range of ways in which amassing the necessary evidence and proof for their claims caused them to re-live their traumatic experiences.⁸⁶ For example, telling their stories to multiple CO staff and medical assessors required claimants to focus on the nature and consequences of their injuries in unwanted ways. Sixteen per cent of claimants reported that the number of medical assessments they underwent in connection with their claim was unreasonable. From a scheme perspective however, assessing claimants' injuries and their effects is critically important to ensure accurate benefits and support are provided. There is a clear tension between COs' need for accurate, up-to-date information and the adverse effects of these evidence-gathering processes for some claimants. Evidence gathering and medical assessment practices therefore represent domains of claims management where further review and revised practices are required in order to improve claimant experiences.⁸⁷

2 Calculating Compensation

One-third of participants were dissatisfied with the amount of compensation they had received. In a quantitative sense, this was the leading source of dissatisfaction. Closer inspection of the qualitative data sheds light on some potential explanations for this dissatisfaction: a perceived mismatch between benefits and losses, and the mechanistic lists of injuries and impacts that participants felt were used in the assessment of their loss. These findings are consistent with research in workers' compensation settings that demonstrates claimants' evaluations of procedural and distributive (outcomes-based) justice are distinct but behave in closely-connected ways.⁸⁸

Claimants in the study reported feeling confronted by the 'black and white' and technical nature of the legal rules used to measure and assess compensation. The tools used in assessing claimants' injuries and loss, including the *AMA Guides to the Evaluation of Permanent Impairment*⁸⁹ and benefit levels and limits, have a central but often overlooked role in the calculation of compensation.⁹⁰ The use of these tools is intended to foster accuracy, predictability and consistency of decision-making. The study found that many claimants experienced the

86 See also Gary Fulcher, 'Litigation-Induced Trauma Sensitisation (LITS) — A Potential Negative Outcome of the Process of Litigation' (2004) 11 *Psychiatry, Psychology and Law* 79.

87 Examples of such reforms include the introduction of joint medical examinations in the TAC scheme (see *Transport Accident Act 1986* (Vic) sub-ss 60(2F)–(2I)) and the use of medical panels for dispute resolution in workers' compensation contexts (see, eg, *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) div 3).

88 Franche et al, above n 32, 235.

89 The most recent edition is Robert D Rondonelli et al (ed), *Guides to the Evaluation of Permanent Impairment* (American Medical Association, 6th ed, 2008). Australian compensation schemes use a complicated combination of predominantly the 4th and 5th editions of the *Guides* with modifications and additions of their own devising. See, eg, the overview of impairment guides used in Australian workers' compensation schemes provided in Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, above n 16, 71–5.

90 Richard Lewis, 'Insurance and the Tort System' (2005) 25 *Legal Studies* 85, 109.

application of these tools to their particular circumstances as dehumanising and insensitive. It may be that the measurement of injury for compensation — assigning a monetary value to what are often intangible losses — will always be jarring and confronting to some extent. It seems likely, however, that better communication with claimants about benefit assessment rules could play a role in ameliorating some of the distress they experience. This is particularly the case given the study findings about the reported difficulty many claimants experience in getting access to information about their entitlements.

3 *The Bureaucratic Justice of Claim Decision-Making*

An existing but underutilised body of socio-legal scholarship on the justice of decision-making in bureaucratic settings can help us make sense of the inherent tensions of the justice of injury claims processing. Writing about the assessment of social security disability benefits in the United States, Mashaw conceived of bureaucratic justice as the ‘qualities of a decision process that provide arguments for the acceptability of its decisions’.⁹¹ Mashaw distilled three models of justice in decision-making: (1) bureaucratic rationality, which privileges accuracy, efficiency and cost-effectiveness; (2) ‘professional treatment’, which focuses on the service of the client and meeting their individual needs through the application of professional judgment; and (3) moral judgment, involving adjudicating between competing interests and emphasising the need for the claimant to have a meaningful opportunity to participate and be heard in the decision process. Mashaw’s framework has been adopted and further developed by scholars engaged in administrative and bureaucratic justice research, who have identified its value as a framework for normatively assessing the justice of claims processing in a range of contexts.⁹² Most relevantly, Halliday et al applied the framework in evaluating the bureaucratic justice of liability decision-making in tort law,⁹³ and Benish explored its use in privatised welfare decision-making.⁹⁴

There is strong potential for the lens of bureaucratic justice to be used to good effect in assessing the trade-offs in decision processes and resultant justice of injury compensation systems in Australia.⁹⁵ In the examples discussed above, claimants’ experiences of the application of the strict legal rules of benefit assessment reflect a bureaucratic rationality, with its privileging of efficient but inflexible decision processes, at the expense of more discretionary evaluations and claimant participation. We might, however, regard such a trade-off as acceptable if it can be shown to be necessary in the context of a statutory compensation

91 Mashaw, above n 85, 24–5. See further the discussion of Mashaw’s work provided in Halliday and Scott, above n 85, 183.

92 See, eg, Michael Adler, ‘Understanding and Analysing Administrative Justice’ in Adler, *Administrative Justice in Context*, above n 85, 129; Robert A Kagan, ‘The Organisation of Administrative Justice Systems: The Role of Political Mistrust’ in Adler, *Administrative Justice in Context*, above n 85, 161.

93 Halliday, Ilan and Scott, above n 4.

94 Avishai Benish, ‘Outsourcing, Discretion, and Administrative Justice: Exploring the Acceptability of Privatized Decision Making’ (2014) 36 *Law & Policy* 113.

95 Halliday, Ilan and Scott note that ‘the concerns of bureaucratic justice would be applicable’ in no-fault systems as well as tort systems: above n 4, 367.

scheme that achieves timely resolution of a very large number of claims.⁹⁶ Further analysis of the values underpinning decision-making in compensation systems, analysing qualitative evidence of claimant experiences and decision processes with socio-legal theoretical frameworks, is likely to generate valuable insight into the justice of injury claim processing. Critically, this approach is likely to elevate current health-focused research on claims processing in compensation systems to the more sophisticated level of recognising the potential tensions and plurality of values at play in claims processes.⁹⁷

D Study Strengths and Weaknesses

To assess the study's implications, it is important to account for its strengths and weaknesses. The strengths of the study include the systematic way in which the participants were recruited and the range of schemes and settings from which they were drawn. The fact that the participants were enrolled in the study shortly after injury and followed up over six years likely contributed to the diverse range of experiences the study uncovered. The adoption of a socio-legal analytical perspective facilitated the exploration of themes that have been neglected in previous work in this field.

The study also has weaknesses. In keeping with the exploratory nature of the research, it did not focus on the legislative and operational differences between claims processes in the jurisdictions from which the participants were drawn. Attention to a single compensation scheme is more likely to deliver detailed and actionable recommendations for that specific setting. The claims discussed by the study participants are relatively dated, having been made in connection with injuries that occurred in 2004–06. Eighty-seven per cent of study participants' claims were substantially concluded by the time data collection for this study occurred in 2011–12. It is possible, therefore, that the COs and compensation schemes associated with the claims reported in this study have made improvements to their claims processes since the claims were made.⁹⁸

The sample was limited to claimants who had been hospitalised for at least 24 hours after injury; they are likely to be more seriously injured than other claimants. Though non-hospitalised claimants could be expected to have broadly similar experiences of claims processes, there are likely to be differences too (for example, in accessing information about entitlements in hospital settings, and the kinds of benefits obtained). These differences are an important subject for future inquiry. Despite these caveats, the study's findings about the importance of themes related to rights information, representation and evidentiary processes warrant further attention in socio-legal analyses of claimant experiences and claims processing in compensation systems. The study findings are best understood as exploratory,

96 Ibid 353.

97 Michael Adler, 'Fairness in Context' (2006) 33 *Journal of Law and Society* 615, 621.

98 See, eg, reforms to TAC claims processes to make it easier to lodge a claim and access support referred to in TAC, above n 2, 9.

lighting the way to themes for further analysis in more expansive and in-depth qualitative studies.

VI CONCLUSION

This study confirms the value of attention to claimant experiences of claims processes for enhancing understanding of personal injury compensation systems. It makes a timely contribution to the burgeoning research literature by focusing on justice-related themes, identifying the diversity of claimant experiences, and highlighting aspects of claims management, information and advocacy, processes of proof and benefit assessment as key challenges claimants face. Ultimately it argues that close analysis of the conflicting values and tensions inherent in the processing of compensation claims by reference to bureaucratic justice stands the best chance of fully understanding and evaluating the justice of decision-making as experienced by claimants in compensation systems.

Claims processes are the primary facilitators of access to injured persons' legal entitlements to support and benefits. Empirical evidence of claims processing should take a place alongside other socio-legal findings about insurance practices as a window on injury law in action.⁹⁹ As Freeman Engstrom has observed, it is by understanding the frailties of compensation systems that we can best go about effecting their repair.¹⁰⁰ The study identifies a number of promising avenues for pursuit in future analyses of compensation systems as sites for the delivery of justice. Interdisciplinary socio-legal analyses have strong promise for producing relevant evidence to contribute to the ongoing debate around the optimal design and development of claims processes in these important legal institutions.¹⁰¹

99 See also Productivity Commission, 'Access to Justice Arrangements', above n 9, 880, noting that '[d]ata and evaluation have important and mutually-reinforcing roles in analysing and improving the civil justice system'.

100 Nora Freeman Engstrom, 'Exit, Adversarialism, and the Stubborn Persistence of Tort' (2013) 6 *Journal of Tort Law* 75.

101 Genevieve Grant and David M Studdert, 'Poisoned Chalice? A Critical Analysis of the Evidence Linking Personal Injury Compensation Processes with Adverse Health Outcomes' (2009) 33 *Melbourne University Law Review* 865, 885.