give drug and physiotherapy treatment if the child was in distress.

Before starting pre-school: qualified for the allowance

The Tribunal concluded that prior to Melanie attending pre-school, she had required constant care and attention and was a severely handicapped child under s.105J. The Tribunal adopted the definition of the term 'constant' from *Yousef* (1981) 5 *SSR* 55, that is, 'continually recurring'.

After starting pre-school: not qualified for the allowance

The Tribunal pointed out that, even if it was conceded that Melanie needed constant care and attention, under s.105J this must be provided by the person who had the custody care and control of the child and attention must be provided in a private home. Once Melanie commenced pre-school, the Tribunal stated, the constancy of the care was in question; the care was being provided by persons other than the parents; and the care was not being provided in a private home. (The Tribunal decided that s.105KA, dealing with entitlement during temporary absences from home, did not apply. The Tribunal stated that this section envisaged absences for a day or series of days, not absences during some portion of the day.)

The need for reform

Although the applicant had made no claim under s.105JA—where one has to be subject to severe financial hardship in the care of a 'handicapped', as opposed to a 'severely handicapped' child, the Tribunal, as in *Yousef*, called for a rethinking of the legislation.

Formal decision

The Tribunal set aside the decision under review and directed that the applicant was entitled to handicapped child's allowance under s.105J of the *Social Security Act* from September 1980, but only until the date the child commenced pre-school in 1981.

Single parents: 'cohabitation rule'

PETTY and DAVIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/182 and V81/183)

Decided: 23 July 1982 by A. N. Hall, W. B. Tickle and J. G. Billings.

This was an appeal against the DSS' refusal to grant Ms Petty a supporting parent's benefit, and the decision to cancel Mr Davis' supporting parent's benefit. The decisions were made because the DSS argued, the applicants were living together on a *bona fide* domestic basis though not legally married.

Mr Davis had two children by a former *de facto* wife who were living with the applicants, and Ms Petty had a daughter, and all three were living with the applicants.

What constitutes cohabitation?

The applicants argued that they were both entitled to be considered as sole parents even though they lived under one roof and each received some economic support from the association.

The Tribunal adopted the observations from the earlier decision of *Lambe* (1981) 1 *SSR* 5, that 'all facets of the interpersonal relationship of the woman and the man with whom she is allegedly living as his wife need to be taken into consideration'. Some degree of permanence and exclusiveness were essential; the inter-relationship of the parties and any children was relevant; so was the way the parties presented their relationship to the outside world; and financial support was an important, but not crucial, consideration. As the AAT said in *Lambe*:

> [I]t is surely a notorious fact that marriage, in present day society, allows considerable scope to the parties to develop their relationship as they see fit, without damaging the fundamental integrity of that relationship as a marriage.

The Tribunal's assessment of relationship

The Tribunal went on to consider the various elements in the relationship between Petty and Davis. They found that Davis and Petty had a sexual relationship; that each of them probably had sexual relations with others during the time they lived together; that Davis had signed the birth certificate of a child born to Petty as the child's father; that Petty had accepted some responsibility for Davis' children; and that Petty was known by her own name and not as Mrs Davis. On their financial relations the Tribunal said:

> Whilst a system of joint finances has to some extent been forced upon the parties by the refusal of the Department to pay them separate benefits in their own right, the very loosely defined financial arrangements that have subsisted since November 1980 do not suggest that the parties are concerned about maintaining financial independence from each other.

(Reasons for Decision, para. 28)

The Tribunal concluded that, at least since her birth, Petty's daughter had been accepted as a child of Davis and Petty, that Davis had assumed a father role and they jointly constituted a family unit; that Petty was involved in the care of Davis' boys and shared a concern for their welfare; that, if Petty and Davis were involved in other sexual relationships, these were by mutual consent and not seen as destructive of their relationship with each other. 'We therefore find that Mr Davis and Ms Petty are living together in a *bona fide* domestic basis as husband and wife although not legally married': Reasons for Decision, para. 38.

Formal decision

The Tribunal affirmed the decision under review.

TOZER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N81/222)

Decided: 18 October 1982 by W. Prentice.

Coral Tozer (who had four children) was granted a widow's pension in September 1973. In December 1981, the DSS cancelled her pension on the grounds that she was no longer a 'widow' as defined in s.59(1) of the *Social Security Act* 1947. The DSS said that she was living with a man (Young) as his wife on a *bona fide* domestic basis. Tozer applied to the AAT for review of the cancellation. (In June 1982, Tozer moved away from Young and her pension was reinstated. This appeal concerned the non-payment of widow's pension from December 1981 to June 1982.)

De facto relationships: difficult to identify

The Tribunal pointed to the difficulty of applying s.59(1) of the Act to the circumstances of a particular couple. The two phrases, 'living with a man as his wife', and 'on a *bona fide* domestic basis', presented problems 'in these days of widespread rejection of long-established social and ethical ideas, in "western" countries at least, and of experiment in the permutations and combinations of all aspects of social relationships . . .' After mentioning the AAT decisions in *Lambe*, (1981) 1 *SSR* 5, *Ferguson*, (1982) 5 *SSR* 55, *Waterford*, (1981) 1 *SSR* 1, and *Tang*, (1981) 2 *SSR* 15, the Tribunal continued:

> A number of personal relationships have been held not to come within the exclusion from the definition of 'widow', in decisions that would no doubt be regarded as acceptable and understandable by some sections of society, but might appear strange perhaps to others. In a matter such as entitlement to pensions from public monies one imagines that there would be agreement however, that a decision must be made on objective indicia rather than on the subjective notions of the persons concerned as to their relationship (re *Tang* . . .). And a study of the decisions appears to indicate that to date, there has been no instance where a woman living under the same roof as, and enjoying a sexual relationship of a continuing nature with (to the apparent exclusion of others) a man, has been held *not* in the particular circumstances, to be 'living with a man as his wife', within the meaning of the excluding definition of 'widow' in s.59(1) of the Act. Nevertheless the task of interpretation and application must be attempted in each case such as this—on its own special facts, using many well-understood indicia as guides to the nature of the relationship, re *R.C.* (1981) 3 ALD 334, at 349 . . .

(Reasons for Decision, para. 4)

The AAT's assessment: weighing the factors

The Tribunal found that Young had provided the sole support (apart from child endowment) for Tozer and her three children from December 1981 until he became unemployed in May–June 1982. Young had then applied for unemployment benefit at the married rate. Tozer and Young had 'regularly enjoyed sexual intercourse to the apparent exclusion of any other person', and each contributed to the running of the joint household.

The Tribunal found that Young may have exerted only minimal control over Tozer's children but that was not 'in any way abnormal or unusual these days in a *de facto* marital-type relationship when the woman concerned has long held the custody of her children who are well grown'.

The AAT said it was 'beside the point' that Tozer and Young claimed their relationship was not permanent and that Young claimed to be unwilling to share his assets with Tozer:

> Both factors could, I apprehend, commonly be found in a *de facto* marital-type relationship these days, and might well, one would think, in many instances provide some of the reasoning behind a decision of the parties not to transmute a '*de facto*' into a 'legal' marriage situation.

(Reasons for Decision, para. 10)

The Tribunal said that factors, such as the household sharing meals, the 'mutual society in watching television', infrequent outings, and the constant use by Tozer of one of Young's cars, would indicate to neighbours and others that Tozer was in a *de facto* 'marital-type relationship'. Thus, Mrs Tozer was 'living with a man as his wife on a *bona fide* domestic basis although not legally married to him'.

Formal decision

The Tribunal affirmed the decision under review.

Sickness benefit: loss of income

RUCEVIC and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V81/392)

Decided: 30 September 1982 by E. Smith.

Mirko Rucevic had been dismissed from his job in November 1974, following an industrial injury. In December 1974, he was granted unemployment benefit and this was paid until April 1980, at the rate fixed for a person aged over 18 with no dependents: s.112(1)(b) of the *Social Security Act*.

In April 1980, Rucevic was transferred from unemployment benefit to sickness benefit. This benefit was paid at the same rate as his unemployment benefit. The rate of sickness benefit for a person in Rucevic's position would normally have been higher because it was (and is) adjusted every six months in line with CPI movements: ss.112(1)(c) and 112AA of the *Social Security Act*. (On the other hand, unemployment benefit for a person without dependents is not indexed.)

Rucevic applied to the AAT for review of the decision to pay sickness benefits at this lower rate.

Sickness benefit limited to 'loss of income'

The AAT pointed to s.113 of the Act:

> 113. Notwithstanding anything contained in this Part, the rate of sickness benefit (including any supplementary allowance) per week payable to a person shall not exceed the rate of salary, wages or other income per week which, in the opinion of the Director-General, that person has lost by reason of his incapacity.

Section 122 of the Act provides that, for a person transferring from unemployment to sickness benefit, 'the cessation of the unemployment benefit paid to that person shall, for the purposes of this Act, be regarded as a loss of income by that person . . .'

The Tribunal said that s.113 was 'an overriding provision . . . that operates to limit the amount otherwise payable' to a sickness beneficiary. Therefore,

> the applicant could not, leaving aside for the moment the supplementary allowance he was being paid, lawfuly be paid more than the rate applicable to the unemployment benefit plus any other income he lost by reason of his incapacity . . . There was no evidence before the Tribunal that he was in fact earning any other income at the time he transferred to sickness benefit or was prevented by sickness from earning any other income he was about to earn.

(Reasons for Decision, para. 8)

Furthermore, the supplementary rent allowance (then a maximum of $5 a week) payable to a sickness beneficiary after six weeks (s.112A of the Act) was not payable to unemployment beneficiaries. Therefore, the amount of that allowance 'could not . . . be "income" that the applicant lost by reason of his incapacity' and a person transferring from unemployment to sickness benefit could not be paid this allowance: Reasons for Decision, para. 9.

Law reform

The Tribunal observed that this result 'may seem unjust' but that was the effect of the legislation. It was a matter for the DSS and the Parliament to consider changing the Act.

Formal decision

The AAT affirmed the decision under review.

Overpayment: deduction from current benefit

SCHUSS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q81/183)

Decided: 28 September 1982 by J. B. K. Williams.

Robert Schuss (who had a dependent wife) had been paid unemployment benefit from July 1978 to July 1979 and from January 1980 to the time of the AAT hearing. When claiming the benefit, Schuss had stated that neither he nor his wife were receiving any income.

In April 1980, the DSS established that Schuss had received income in connection with his CMF training. The DSS decided that, to the end of April 1980, Schuss had been overpaid $1125 and that this should be recovered by deducting $10 a week from Schuss' unemployment benefit.

Schuss applied to the AAT for review of this decision.

The legislation

The AAT accepted that this matter came within s.140(1) of the *Social Security Act*—an argument put, apparently, by the DSS. (The AAT later recognised that s.140(2) allowed the DSS to recover the overpayment from Schuss' current benefit. However, the AAT mistakenly referred to this provision as 's.142'.)

Section 140(1) provides that an overpayment made 'in consequence of a failure or omission to comply with any provision of this Act' is 'recoverable in a court of competent jurisdiction . . .'

Section 130 requires a beneficiary to notify the DSS of the receipt of extra income.

Section 106(1) defines 'income' in terms which (during the relevant period) clearly included the CMF training payments received by Schuss. (An amendment, which came into operation on 19 September 1980, now excludes those payments from the definition of 'income'.)

The cause of the overpayment

Schuss claimed that he had not disclosed the CMF training payments because he was not aware that they should be notified as in-