period commencing in February 1980 and continuing for the balance of Castronuovo's working life.

The Tribunal then consulted standard mortality tables, and discounted (at the rate of 3%) the present capital value of the award. On that basis, it decided that $2292 should be apportioned to the period between February 1980 and December 1981; and $18 843 should be apportioned to the remainder of Castronuovo's life time. (Castronuovo was 52 years of age.)

It followed that the proper amount to be received by the DSS from the lump sum compensation award was only $2290.

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Director-General with the direction that $2292 should be treated as a payment by way of compensation for the same incapacity and the same period as the payments of sickness benefit to Castronuovo.

## BESGROVE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/125)

**Decided:** 29 June 1984 by R.C. Jennings.

Timothy Besgrove had been injured in motor accidents in March and June 1976. The DSS paid him sickness benefits between March 1976 and November 1976. Following a third accident in May 1977, the DSS paid Besgrove sickness benefits from May 1977 until October 1978 and from June 1979 until August 1980.

Besgrove commenced two common law actions for damages for the injuries suffered in the first and third accidents; and these actions were settled in May 1980 – the first action for $100 000 and the second action for $110 000.

The DSS served a notice on the third party insurer involved in the first action and recovered, out of the settlement of $100 000, the sum of $504 which represented part of the sickness benefits paid following the first accident.

The DSS also served a notice on the insurer involved in the second action (the GIO), informing the insurer that the DSS intended to recover from the insurer the payments of sickness benefit which were being paid to Besgrove following the third accident. (This notice was served on the insurer under s.115(5) of the *Social Security Act*.)

However, the DSS did not follow up that notice to the insurer by informing it of the precise amount of sickness benefit which the DSS regarded as recoverable from the insurer and, when the second action was settled, the insurer did not withhold any money from the settlement of $110 000 to cover the refund of sickness benefits.

In March 1981, the DSS informed Besgrove that, because the damages had been 'released before the payment of sickness benefit could be recovered', the DSS intended to recover from Besgrove the sum of $7417.35, representing sickness benefits paid to him after the third accident.

Besgrove asked the AAT to review that decision.

**The legislation**

The relevant terms of s.115 (which was in force when the decision under review was made) are set out in *Castronuovo*, noted in this issue of the *Reporter*.

**Discretion to waive recovery**

In its review, the AAT focused on the discretion to waive recovery in s.115(4A) of the Act. It decided that, in view of the 'special circumstances' of this case, 'it would be unjust, unreasonable and inappropriate to enforce liability against the applicant 4 years after he has received his award of damages.'

The AAT based that conclusion on a series of factors:

- **First**, the DSS still had a right to recover the sickness benefits from the GIO which had contravened s.115(8) by paying out the settlement moneys.
- **Secondly**, the August 1982 amendments had introduced a new legal protection for sickness beneficiaries. They could only be liable to refund sickness benefit after receiving damages or compensation if they had received a notice from the DSS: ss.115B(3) and 115(F(a). No such notice had been given to Besgrove. Although such a notice was not legally necessary under the old s.115(4), it was 'proper to the exercise of the discretion today under s.115(4A) to have regard to the protection now given to such persons as the applicant, as if the amendments now in force were applicable to him': Reasons, para. 29.
- **Thirdly**, Besgrove did not learn of the DSS claim until April 1981, by which time he had spent much of the settlement moneys – on a motor vehicle and real property. Subsequently, he had further reduced his capital on living expenses.
- **Fourthly**, Besgrove's financial circumstances had been aggravated by the DSS decision to withhold from him (pending the outcome of this review) payment of an invalid pension granted from September 1982.
- **Finally**, while Besgrove might have a claim against his legal advisers for their failure to provide for the DSS recovery when they settled Besgrove's second action, Besgrove should not be forced to take action against those advisers when the DSS was clearly entitled to recover the sickness benefits from another source.

**The amount recoverable**

The AAT said that, in view of the exercise of the s.115(4A) discretion, it was not necessary to deal with the difficult question of the amount of sickness benefit which could be recovered out of the damages settlement. [That complex issue was reviewed in *Castronuovo*, noted in this issue of the *Reporter*.]

The AAT noted that, according to the settlement of Besgrove's second action, its terms were not to be disclosed – a restriction which served 'no real purpose in this type of action'. The GIO and other insurers had an obligation, the AAT said.

> to make settlements which will assist the Director-General to exercise his discretion under s.115(2) or its present equivalent s.115B. Consideration deserves to be given to the adoption of procedures which will facilitate rather than hinder the objects of the legislation.

(Reasons, para. 34)

**Formal decision**

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that special circumstances existed to justify the release of Besgrove from the whole of any liability to refund sickness benefits paid to him prior to 15 August 1980.

# Unemployment benefit: extra benefit for child

## QAZAG and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. A83/42)

**Decided:** 13 May 1984 by E. Smith.

Qazag had married in Jordan in 1975 and his daughter was born in November 1976. He and his wife were divorced in October 1977 and, under Jordanian law, Qazag could not obtain custody of his daughter until she reached the age of 11 years. It was his intention to bring his daughter to Australia when she reached that age, that is, in November 1987.

In December 1981, Qazag migrated to Australia. He was paying maintenance for his daughter in Jordan at the rate of $50 a month. He applied to the DSS for family allowance in respect of his daughter and, when he was granted unemployment benefits, for additional benefit in respect of his daughter. The DSS rejected both these applications.

Qazag asked the AAT to review that refusal.

**Family allowance**

Section 95(1) of the *Social Security Act* provides that a family allowance is payable to 'a person who has the custody, care and control of a child'.

The AAT said that Qazag was not qualified for family allowance in respect of his daughter because, although Australian law might treat him as having joint custody of his daughter, he could not be regarded as having the care and control of his daughter.

**Unemployment benefit**

Section 1 112(5) provides that additional unemployment benefit is payable where a person has the custody, care and control of a child or 'is making regular contributions towards the maintenance of a child'.

Section 106A of the Act provides that a person cannot be treated as a child for the purposes of unemployment benefit, unless the person is living in Australia or unless 'the Director-General is satisfied that the claimant or beneficiary intends to bring the person to live in Australia as soon as it is reasonably practicable to do so.'

The Tribunal decided that Qazag was making regular contributions towards the maintenance of his daughter in Jordan and, therefore, he was qualified to receive extra unemployment benefit under s.112(5) of the Act.

Section 105A did not defeat his claim for that extra benefit because, although his daughter was living outside Australia, he intended to bring his daughter to live in Australia as soon as Jordanian law would permit him – that is as soon as it was 'reasonably practicable to do so':

> The fact that such a lengthy period [that is, some 4½ years after Qazag applied for the extra unemployment benefit] is necessarily involved must, of course, be taken into account in considering the genuineness of the intention to bring the child to Australia and the reality of the intention ever being able to be carried out. A mere genuine wish on the claimant's part is insufficient. But, in the special circumstances of this case – and I stress that each case must be decided on its own particular facts – I am satisfied that the intention is both genuine and realistic, and will be carried out as soon as possible.

(Reasons, para. 20)

The AAT rejected an argument based on s.131(2) (now s.112(6B)), to the effect that a limit of 4 years should be imposed on the time within which a claimant or beneficiary could intend to bring his child to live in Australia. Section 131(2) provided that the rate of benefit payable to a beneficiary should be calculated without regard to a child, where the child was a person to whom s.106A(b) applied and –

> (a) the child has not been brought to live in Australia within a period of 4 years commencing on the first day in respect of which the supplementary rate was so taken into account; or
>
> (b) at any time within that period of 4 years, the Director-General is satisfied that the person does not intend to bring the child to live in Australia as soon as it is reasonably practicable to do so

The AAT said that although the section set a limit of 4 years on the time during which additional benefit would be paid for a child covered by s.105A(b) if the child had not been brought to Australia within that period of 4 years, the section did not control s.106B:

> The requirement that the applicant intends to bring the child to Australia as soon as it is reasonably practicable to do so is not a requirement to bring the child to Australia within 4 years and I do not think that there is any clear intention evidenced by the legislation that such a requirement is to be implied. In the absence of a clear intention to the contrary . . . welfare legislation should be given a beneficial construction.

(Reasons, para. 20)

**Formal decision**

The AAT affirmed the decision not to pay family allowance to Qazag; and set aside that the decision not to pay additional unemployment benefit to Qazag.

# Age pension: portability

**ENGLISH and DIRECTOR-GENERAL OF SOCIAL SECURITY**
**(No. V83/142)**

**Decided:** 20 June 1984 by R. Balmford, H.E. Hallowes and H.W. Garlick.

Leo English was born in Australia in 1907. After training as a priest, he left Australia in 1936 and, since that time, he had lived and worked in the Philippines, where he had permanent residence status. He retained his Australian citizenship and an Australian passport and returned to Melbourne (where his brother and sisters lived) on several occasions, spending a total of 4 years (in broken periods) in Australia since 1936.

He returned to Australia in December 1981, lodged his claim for age pension and returned to the Philippines in January 1982. When he left Australia, the DSS suspended payment of his pension, claiming to act under s.83AD(1). English then applied to the AAT for review of that decision.

**The legislation**

Section 21(1) of the *Social Security Act* provides that a man is qualified to receive an age pension if –

- he has reached the age of 65;
- he is residing in and physically present in Australia when he claims the pension;
  and
- he has at any time being continuously resident in Australia for at least 10 years. Section 20(2) provides a claimant shall be deemed resident in Australia during any absence from Australia if he was a resident of Australia within the *Income Tax Assessment Act*.

  Section 6 of the *Income Tax Assessment Act* provides that 'resident of Australia' means a person whose domicile is in Australia, unless the Commissioner of Taxation is satisfied that the person's permanent place of abode is outside Australia.

Section 83AD(1) of the Act provides that where a former resident of Australia has returned to Australia, claimed a pension and left Australia 'before the expiration of the period of 12 months that commenced on the date of his return to, or his arrival in Australia', any pension granted as a result of the claim is not payable while the pensioner is outside Australia.

**Residence and domicile**

Evidence was given to the Tribunal that the religious order of which English was a member directed its members as to the place in which they should work; each member was obliged to go where he was sent and to remain there until recalled. English had been working for many years on the preparation of an English-Tagalog dictionary, a complex and urgent task; and, according to the religious order, English (the man) was to remain in the Philippines until this work was finished and then return to Australia.

The AAT pointed out that English had a domicile of origin in Australia:

> The abandonment of a domicile of origin and acquisition of a new domicile of choice in another jurisdiction is effected by *residing* in a country other than that of the domicile of origin with the *intention* of continuing to reside there indefinitely (*Udney* v *Udney* (1869) LR 1 Sc. & Div. 441).

(Reasons, para. 14)

Although English had left Australia and resided in the Philippines since 1936, thus satisfying the first requirement for a change of domicile, he could not be said, the AAT said, to have formed a voluntary intention to remain indefinitely in the Philippines. Indeed, it would be difficult for a person living under the rule of the religious order to which English belonged to establish the necessary intention to acquire a domicile of choice in a country to which he had been sent.

Because English had maintained his domicile in Australia, and because the Commissioner of Taxation had not indicated that he was satisfied that English's 'permanent place of abode [was] outside Australia', it followed that English was a 'resident of Australia' within the meaning of the *Income Tax Assessment Act*. Therefore, he should 'be deemed to have been resident in Australia during the period of his absence from Australia' – that is, between 1936 and 1981.

The AAT then decided that the extended meaning of 'resident in Australia' applied not only to qualification of age pension in s.21(1) of the Act, but also to the portability provisions, in particular s.83AD of the Act. It followed, therefore, that English's entitlement to be paid his pension while he was outside Australia was not affected by s.83AD: this was because, at the time when English returned to Australia, he was 'resident in Australia' and 'not a person who formerly resided in Australia'.