

Wrongful recovery: interest payment?

DANIEL and SECRETARY TO DSS
(No. N86/104)

Decided: 29 September 1986 by
R.A.Hayes, M.S.McLelland and
M.T.Lewis

The facts

The applicant had been injured at school in December 1978. In December 1979 she left school and applied for, and was granted, sickness benefit. She received \$3,395.34 in sickness benefit until March 1981 when she was granted unemployment benefit. In May 1981 the DSS advised the New South Wales Government Insurance Office under s.115 of the *Social Security Act* that the amount paid in sickness benefit was the Department's charge on any subsequent compensation payment.

In August 1981 the applicant received \$10,000 general damages in the New South Wales District Court. Her solicitors objected to the charge claimed by the DSS as there was no

provision in the award of damages for economic loss as the applicant was a student at the time of the accident.

In 1983 the DSS refunded the amount claimed on legal advice as the necessary opinion required by the then s.115(2) had not been evidenced.[That section then required the Secretary to form the opinion that the damages payment could reasonably be regarded as a payment by way of compensation for the same incapacity for which sickness benefit was paid.]

The applicant then claimed interest on the amount but the DSS refused to pay interest. An SSAT upheld her claim but a delegate of the Secretary dismissed her appeal. The applicant applied to the AAT.

DSS' liability for interest on refunds

The Act, said the Tribunal, is silent on the question of interest. Turning to the common law, two questions must be asked.

First, is there a legal obligation to pay interest? The AAT referred to *Walker v. Constable* (1798) 1 *Bos & Pul* which still stated the law that in any action against a party holding money received without proper legal entitlement only the net sum could be recovered without interest.

Second, is there any power in a government department to make such a payment where there is no specific authority? The Tribunal said it was clear that no funds can be released from consolidated revenue without statutory authorisation: *Board v. The King* [1924] A.C. 318 at 326-327. The Department thus had no authority to pay interest.

Formal decision

The AAT affirmed the decision under review.

Invalid pension: psychiatric disorder

ABRAMOVIC and SECRETARY TO DSS

(No. N85/295)

Decided: 18 September 1986 by
A.P.Renouf, H.D.Browne and
C.J.Stevens

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 49 year old former construction worker who had suffered injuries at work which left him with a minor physical disability. Evidence was also presented to the Tribunal that the applicant suffered from paranoid thinking.

Commenting on the conflict of evidence provided by two specialists the Tribunal said:

This direct conflict in evidence has put us in a very invidious position made more difficult

by the fact that Dr Giuffrida and Dr Robbie each impressed us very favourably. Our dilemma would not have been so acute had we had the views of a third distinguished psychiatrist and we commend this course as one which might be followed should a similar instance occur in the future. In the absence of this in the present case, we have simply to find what we can from balancing the evidence.

It is our finding that short of having a psychiatric illness, the applicant is given to paranoid thinking in the sense that society has so conspired against him that he would be

incapable, were he to try, of obtaining employment. He has therefore, abstracted himself from the workforce.

We do not believe that such thinking by an individual is sufficient, by itself, to create an entitlement to the invalid pension. To create such an entitlement there must, in our view, also be some substantiation of the validity of the belief by unsuccessful attempts to obtain employment. In this case, no evidence was offered to prove such attempts.

(Reasons, paras. 45-47)

Background

CARERS OF PERSONS WITH AIDS - APPROPRIATE GUARDIANS?

The Carer's Pension is available to persons who provide constant care and attention for a relative in a home that they share provided that the relative is a severely handicapped person in receipt of an age pension, invalid pension or rehabilitation allowance (where they were eligible to receive an invalid pension immediately prior to the receipt of the allowance).[see *Social Security Act*, section 33]

Clearly a person with AIDS may qualify for invalid pension (or age pension in the appropriate case). They would also seem to meet the criteria of being a 'severely handicapped person' which is defined in section 33(3) as a person who:

- (a) has a physical or mental disability;
- (b) by reason of that disability, needs constant care and attention; and

(c) is likely to need constant care and attention permanently or for an extended period.

The problem for many persons who care for persons with AIDS will be the definition of 'relative'. This is defined in section 33(4) as:

- (a) the spouse of the person;
- (b) a grandparent, parent, step-parent, parent-in-law, brother, sister, half-brother, half-sister,