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 frm 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;
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> (b) by reason of that disability, needs constant care and attention; and
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> (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,

step-brother, step-sister, child, adopted child, step-child, son-in-law, daughter-in-law, or grandchild of the person;
(c) a person who is or has been a guardian of the first-mentioned person or a person to whom the first-mentioned person is or has been a guardian;
(d) a person who, by virtue of paragraph (a) or (b), has at any time been taken into account as a relative of the first-mentioned person for the purpose of the first-mentioned person becoming qualified to receive a carer's pension.

Paragraph (d) replaced a previous paragraph (d) in May 1986. The previous paragraph (d) gave the Secretary of the Department the power to grant carer's pension by deeming non-relatives to be relatives 'in the special circumstances of the case'.

Thus, a person who was caring for a person with AIDS who did not fall within any of the definitions of 'relative' may nevertheless qualify under this deeming provision.

The amendment to the legislation removing this deeming power prompted the DSS to evolve the policy of granting special benefit to persons who were caring for people with AIDS. But special benefit does not carry the fringe benefits which carer's pension possesses, nor would it usually be paid at the same rate as carer's pension.

Guardians?

A recent Social Security Appeals Tribunal decision has highlighted a possible avenue through which a person caring for an AIDS sufferer may still qualify for carer's pension. In that case the applicant argued that he fell within the definition of relative contained in s.33(4)(c) as he was a 'guardian' of the person with AIDS.

[The applicant was in receipt of special benefit at a rate $7 below the rate of carer's pension.]

The applicant relied on the fact that the person with AIDS for whom he was caring had given him a general power of attorney to handle all his affairs and had made a will leaving all his estate to the applicant. This supported his argument that he was a 'guardian' of the person.

The SSAT was faced with the absence of a definition of 'guardian' in the Act. Giving the word its ordinary legal meaning the SSAT concluded that it referred to persons who manage the affairs of those who are legally incapable of doing so for themselves. The problem in the present context was that a person who is of full age and of sound mind is not generally regarded as in need of a guardian.

But, said the SSAT, the law on this point may have developed too slowly. It said:

> A person who is terminally ill and in the diagnosed final stages of his/her illness is, as a matter of clear empirical observation, quite often, although certainly not always, unwilling to bother his/her self with the day to day management of his/her person let alone his/her affairs, notwithstanding that he/she may be of perfectly sound mind. That mind may well be and/or wish to be, devoted to other matters which do not need to be spelled out here.

In the usual case, said the SSAT such a person would not be regarded as in need of a 'guardian'. No particular significance could be generally attached to the making of the will or the granting of the power of attorney. Both such documents could be revoked by the person taking control of his/her life.

> But while he/she remains in the state of wishing someone else to assume all care and legal responsibility for him/her...should not the person to whom that power is given be regarded as the giver's 'guardian'?

Every case needed to be dealt with on its own facts said the SSAT. In a case where the applicant could not point to a power of attorney or a will as in the present situation it may be necessary to come to a decision on 'guardianship' on whatever other facts were available.

The SSAT then recommended that the appeal be allowed on the basis that the applicant fell within the category of 'guardian' in section 33(3)(c) of the Act (having fulfilled the other criteria for carer's pension). Alternatively, the SSAT recommended that the applicant should be paid special benefit at a rate equivalent to carer's pension. The DSS did not accept either recommendation.

Need for reform?

The Welfare Rights Centre has proposed that the discretion previously contained in the Act giving the Secretary power to deem carers relatives for the purposes of the carer's pension should be restored. Alternatively, the rate of special benefit could be increased to the rate of carer's pension along with the fringe benefits available with the pension for persons caring for AIDS sufferers.

A more contentious proposal is to argue that the definition of 'spouse' in section 33 may include homosexual spouses. However, it is recognised that this would not assist carers who are not the partners of the person with AIDS.

In principle, it would appear sensible to expand the category of 'relative' to include those carers of AIDS sufferers. If part of the policy of carer's pension is to encourage home-based care then certainly those suffering from AIDS who may be for one reason or another cut off from traditional sources of 'relatives' should have access to the same care as those in different circumstances. Otherwise carer's pension may be seen to be allocated on the basis of the appropriateness of the guardianship.

[This discussion was prepared from material supplied by the Legal Working Group of the AIDS Council of New South Wales]