tasks which required fine motor skills — such as doing up buttons, cutting certain food and opening bottles. He supervised various exercises and ensured that she took her medication (to which she particularly objected).

T attended primary school under an integration program in which her participation in classroom and other activities was structured and supervised by an integration teacher.

'Substantially more' care and attention

The AAT said that it was satisfied that T had a physical disability and that she needed care and attention on a daily basis which was more than the care and attention required by a child of the same age without a disability. The question was whether that care and attention was 'substantially more'. The AAT referred to a decision in *Whiteford and Commissioner for Superannuation* (1987) 6 AAR 70, where the AAT had said:

> 'The meaning of "substantially" must, therefore, be considerably higher up the scale of substantiality than "not trivial, minimal, or nominal".'

The AAT said that T's physical disability meant that she required supervision in many of her tasks, including exercises, preparation of food, dressing, washing her hair and taking medication. The AAT explained its approach to the issue presented in this case:

> 'The care and attention a child needs must be more than a minimal amount of care and attention over and above the care and attention a child without a disability needs, but it need not be care and attention such that the child is supervised at all times and assisted with all tasks. The term is here used in a comparative sense.'

(Reasons, para. 14)

The AAT said that it was satisfied that T placed demands on those who cared for her which were substantially more than the demands made by other children of the same age. There was, the AAT said, 'no escape for her father from the daily reminder that T cannot do those things expected of other 11-year-old girls who do not have a disability': Reasons, para. 15.

The evidence indicated that T was likely to need the present level of care and attention for an extended period, a period which was 'something less than the period covered by the term "permanently" used in the qualifications for invalid pension': Reasons, para. 16.

Finally, the AAT concluded that Kymantis was providing care and attention to T in their home on a daily basis. It did not matter that Kymantis had arranged for another person to supervise T after school, because of Kymantis' work commitments:

> '[T]he absence of a care giver and the delegation to another of the responsibility for care and attention does not mean that the person ceases to be qualified for the allowance.'

(Reasons, para. 17)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that Kymantis was entitled to child disability allowance from April 1988, the date when he lodged his claim.

[P.H.]

Supporting parent's benefit: loan or income?

FOOTE and SECRETARY TO DSS (No. 5600)
Decided: 13 December 1989 by S.A. Forgie.

The Tribunal *affirmed* a decision of the DSS in finding that money received by Foote was income and that Foote had been overpaid $7235 supporting parent's benefit. Consideration of the discretion to waive recovery under the former s.186 [now numbered s.251] of the *Social Security Act* was adjourned.

The facts

At issue was whether or not money paid on behalf of Foote by her fiance (B) was a loan or a gift. Foote was a mother of 2 dependent children, and receiving supporting parent's benefit. In 1983 she bought a car. B gave her money for the car payments, as she was having trouble meeting them herself. She said it was agreed that, if the car was subsequently sold, she was to pay B back from the proceeds.

The car was sold but Foote did not repay B. Instead she bought another car. She required a further loan and B also paid the instalments on that loan. The car had many things wrong with it and the dealer 'was made to take it back' and to refund the money. B stopped making the payments in May or June 1987 at the time their engagement broke up. Evidence was given in the form of letters and a statutory declaration from B that he had loaned the money to Foote.

The decision

The Tribunal accepted Foote's evidence of her serious financial difficulties once her pension was cancelled. This and the difficulties she encountered in obtaining an interview with the DSS affected her state of mind when she signed a statement on 30 November 1987. The Tribunal thus took her state of mind into account in considering the contents of the statement (in which she had admitted receiving income from B).

However, the Tribunal said:

> 'Her actions [in buying the second car] do not accord with the then terms of the alleged loan agreements, and consequently I am unable to accept there was such a loan agreement.'

It was only after the engagement ended that B began to consider the money had been a loan which he wanted repaid.

The AAT concluded that the money had been provided by B as a gift, not a loan, and was therefore 'income' of Foote. The applicant was thus overpaid supporting parent's benefit as s.48 of the *Social Security Act* imposes an income test on that payment.

[B.W.]

Supporting parent's benefit: overpayment; de facto relationship

CLAY and SECRETARY TO DSS (No. 5554)
Decided: 19 December 1989 by D.W. Muller, D. Horrigan and W.A. De Maria.

Diane Clay asked the AAT to review a DSS decision to raise and recover an overpayment of $22 652 paid in supporting parent's benefit during a period when the DSS determined that she was living with C as his wife on a *bona fide* domestic basis.

The facts

Clay had one child and was receiving supporting parent's benefit when she met C in 1982. C was 22 when they met; Clay was 36. They had a sexual relationship which resulted in the birth of a son J in June 1983. Clay never informed the DSS of the existence of either C or her son for whom she did not claim additional benefit.

C moved into her rented house in Orange after J's birth and they lived there together until she went to Sydney in October 1983. During her absence until February 1984, Clay continued to pay the rent on the house while C remained living there.

C was on unemployment benefit from time to time, but also did seasonal work. During the period when he had a job from April 1984 to November 1984, Clay told the AAT that he gave her a small amount of assistance for rent and clothes for the children. At this time, he was relatively stable and came home to the house every evening. However, after he lost his job in November 1984, he went to Cowra to look for work and from this time, he gave no money to Clay.

C was an Aborigine and he and his younger brother had been taken from their mother as children and raised by white foster parents. He subsequently experienced a severe identity crisis which led him to disappear for a few weeks at a time when he would go away to discover 'what he called his "aboriginality"' (Reasons, para. 7). In January 1985, he located his brother in Alice Springs and after the reunion, the brother and his girlfriend came to live in the house at Orange.

Over the next year, Clay supported all of them at various times; and, after she became unhappy about this, the household split up and C went to live with his brother and his girlfriend while Clay took her 2 children to Sydney to stay with her mother.

Shortly afterwards, Clay agreed to join C in Queensland and lived there in a caravan adjacent to C's brother and his girlfriend. C lived alternately between the two caravans. When they moved to a house in June 1985, the same pattern continued, with C spending alternate fortnights with Clay and with his brother and the brother's girlfriend.

In February 1986, the brother and his girlfriend moved to Victoria and after this, C lived with Clay on a permanent basis again. C did not contribute to household expenses and spent what he had on alcohol, the TAB and socialising.

In July of that year, C had a serious car accident and in November he contacted DSS with a view to obtaining sickness benefit. The DSS then discovered C's relationship with Clay and cancelled her supporting parent's benefit, paying him unemployment benefit at married rate with additional payment for two children. In February 1988, C was killed when his car ran off the road.

Perceptions of the relationship

Clay told the AAT that, because of C's insecurity about the loss of his Aboriginal heritage, he found it difficult to develop a sense of belonging and security. In some respects, she described her relationship with C as like a mother. She never knew when he was going to take off and disappear and he was too unreliable to consider asking him to claim benefit on a family basis. The AAT found that

> 'C had an identity problem which probably accounted for his instability and his lack of a sense of worth and responsibility. Ms Clay struggled as best she could with those problems plus the burden of raising two children.'

(Reasons, para. 14)

The relevance of a conviction

The DSS argued that the issue of whether or not Clay had lived in a *de facto* relationship with C had been disposed of through her conviction by a Magistrate's Court on a charge under s.174(1)(b) [previously s.138(1)(b)] of the *Social Security Act* for having knowingly obtained a benefit which was not payable. She had pleaded guilty and been placed on a 3-year good behaviour bond.

However, the majority of the AAT were not prepared to treat the conviction as deciding that she had lived in a *de facto* relationship. They decided that the conviction was the result of a plea bargain and the Tribunal noted that —

> 'it has long been the experience of the courts that any confession or admission which has been obtained by duress, inducement or a promise of some advantage is of doubtful probative value.'

(Reasons, para. 17)

Accordingly, the AAT had to determine the issue for itself.

The majority decision

The majority members (Muller and Horrigan) decided that Clay had lived with C in a *de facto* relationship from June 1983 to his death in February 1988 and that therefore she had been overpaid. This was despite a considerable amount of instability in their relationship and his failure to provide financial support for her or her children. Clay had failed to comply with the provisions of the Act by not informing the DSS of the true situation.

However, C had also foregone a considerable amount of benefit which would have been payable for Clay and her children as his dependants, which, when offset, left the overpayment at approximately $10 000.

The majority then noted that the DSS had conceded that Clay was virtually destitute with no means of support other than her benefit, from which $36 per fortnight was being withheld.

After considerable discussion of the Federal Court's decision in *Hales* (1983) 13 *SSR* 136, the majority decided that even though she had received money to which she was not entitled, had the true position been known, she would have been entitled to a substantial proportion of the benefit paid, through C's unemployment benefit.

As the majority considered Clay 'as close to destitution as one can get in Australia' (Reasons, para.25), with no prospects of her situation improving, and as it was considered that the worst impact of continuing to have repayments withheld would be on her children, the majority decided to waive the right of the Commonwealth to recover any money from her after 1 December 1989.

The minority decision

After providing his own detailed account of the facts, De Maria stated that he found Clay 'to be an honest witness, who gave direct and informative answers to questions, many of which brought back painful memories' (Reasons, para. 3). On the matter of the conviction, he pointed out that a number of cases were 'authorities for the view that account of relevant matters in a Magistrate's or District Court should be taken, while not regarding the Court results as conclusive, one way or the other to the appeal at hand' (see *Re Rimmer* (1984) 20 *SSR* 225; *Re Letts* (1985) 23 *SSR* 269; *Re Byrne* (1988) 43 *SSR* 551).

Adding together a number of incriminating admissions made by Clay, by C, the evidence of witnesses, an unfavourable SSAT recommendation and a Magistrate's court conviction, 'any reasonable person would conclude that the applicant had been overpaid' (Reasons, para. 18). However, with the exception of two periods (July–November 1984;and July–November 1986), he believed she

should succeed. This was because even though she herself might have believed that she was living with C in a genuine domestic relationship, 'her assessment does not make it so': Reasons, para. 19. He continued:

> 'I believe we are dealing here with two people separated by two of the greatest segregators of our society — race and age. She was white, he was black. When they met, she was 36 and he was 22.'

Clay had mentioned the age difference between her and C time after time in her oral evidence and had suggested that 'he just came and went' because he did not want to be tied down, whereas 'she had 14 years more of living than he had'. De Maria also mentioned C's frequent disappearances, his drinking and his identity crisis, which made him feel awkward in white company.

De Maria considered the relationship by reference to the indicia established by a number of cases. First, the relationship did not have an element of permanence, because he came and went frequently.

> 'If we judge the relationship within a white frame of reference . . . it is hardly a relationship at all. Within the white frame of reference, unannounced departures for lengths of time measured in weeks, would be anathema.'

On the next issue, exclusiveness, he decided that any expectation of exclusiveness was not shared by C, who never viewed Clay as his exclusive partner. He then decided that there was little or no pooling of resources. Clay had said that the money situation became particularly acute when C's brother and his girlfriend had moved in.

> 'This matter is of some significance because it indicates the different racially derived conceptions of relationships that were at large in the Clay household. She wanted a small nuclear arrangement; . . . [h]e, like many Aborigines was very comfortable with an expanded kinship network of relatives and visitors.'

(Reasons, para. 35).

As to the parties' subjective belief, 'while important, [it] is insufficient for our purposes', particularly as it is not clear that they understood the case law definition of a *de facto* relationship: Reasons, para. 36.

On their joint parenthood of J, while the minority accepted that C loved his child, 'he often threatened to take the child away to the Kimberleys to live an Aboriginal existence as he believed that the child should not be raised by his mother (a white woman).'

He noted that there was little or no social life for them as a couple: 'the pull to be with his own people appeared stronger than any interest in joint socialising', and concluded that 'there are convincing cultural reasons, on both sides, why there was little mutuality of positive emotions'. Further, if any weight was to be given to the subjective views of the relationship, both parties must share that view. Here, there was no evidence to suggest that C considered himself to be Clay's spouse (except for the two periods mentioned).

De Maria concluded that aside from during those two periods, Clay was not living in a *de facto* relationship with C. Further, given that she was at the time of the hearing 'near destitute', De Maria would have waived the overpayment in respect of those periods.

Formal decision

The AAT set aside the decision under review and waived the right of the Commonwealth to recover any part of the overpayment after 1 December 1989.

[R.G.]

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