'where a child is a dependent child of 2 persons, that child shall, for the purposes of this Part, . . . be taken to be a dependent child of one of those persons only'.

If the Secretary is satisfied that a child is a dependent child of two people, the Secretary is to specify which of them is the relevant parent for the purpose of entitlement to supporting parent's benefit.

From March 1989, supporting parent's benefit was replaced by sole parent's pension. Under the new Part V, s.52 is in terms similar to the old s.58. The effect of this is that, even if a child is a qualifying child of both parents, only one of them can receive sole parent's pension in respect of that child. This is to be contrasted with the situation governing family allowance where, under s.86 of the Act, payment can be split between the parents (as it was in this case).

The AAT's findings

The AAT found that both parents could properly be characterised as joint custodians and that Luke was a 'dependent' child of both Minassian and Beales within the meaning of s.3(1) and (2) as it stood before 1 March 1989.

Further, the AAT was satisfied that Luke continued to be a dependent child and a qualifying child of both parties from 1 March 1989.

The AAT then had to consider which of them should be specified as the relevant parent for the purpose of s.52.

Operating on the basis that there is no presumption that the decision under review is correct, the AAT noted that s.52 does not provide any guidance to the decision-maker as to what factors are relevant in making such a determination.

The AAT also commented that, because of the pending custody proceedings, the parents refrained from putting before the AAT evidence matter which might have assisted the Tribunal.

Having found that there was not a great deal of difference between the capacity of the parents as carers or their financial needs for the maintenance of Luke, the tribunal concluded that the only evident difference was that Luke spent 14 hours more per week with Minassian, and continued:

'Reluctantly the Tribunal is now in a position of having to decide that, there being no other significant distinguishing factor, the quantum of care provided by each parent becomes the deciding factor.'

Formal decision

The AAT set aside the decision under review and determined that, throughout the period under review, Luke was the dependent child of both his parents; but, that for the purposes of Part V, 'Gerry Minassian is to be taken to be the person in relation to whom the said child is a dependent and a qualifying child'.

[J.M.]

Child disability allowance; family allowance; additional invalid pension:

A. PERECZ and SECRETARY TO DSS
(No. 5750)
Decided: 9 March 1990 by H.E. Hallowes.

This was an application to review a decision of an SSAT to reduce the applicant's rate of invalid pension and to cancel child disability allowance and family allowance paid to the applicant in respect of her son, Leslie, on the basis that he did not require constant care and supervision and that he was in receipt of an Austudy payment.

The facts

This case follows the case of *L. Perecz*, also reported in this issue of the *Reporter*. The facts relating to the condition of the applicant's son can be found in that report. The applicant had some expectation that her son would receive invalid pension on his 16th birthday and did not understand why it was decided that he was no longer regarded as disabled at that age. In 1988 her son began to receive a $50 per week Austudy payment and this caused the reduction in the applicant's rate of invalid pension.

Eligibility for child disability allowance

Section 102 of the *Social Security Act* provides that a child disability allowance is payable to a person in receipt of family allowance for a child who is a 'disabled child' where the person provides, in the private home of the person and the child, care and attention on a daily basis.

A 'disabled child' is defined in s.101 to mean a child who has a physical, intellectual or psychiatric disability, who needs substantially more care and attention on a daily basis than a child of the same age without that disability and who is likely to require that care and attention permanently or for an extended period.

The AAT accepted that the applicant's son had a physical disability. As to whether the child needed substantially more care and attention than a child of the same age with no disability the Tribunal commented that the test of need was an objective test. The subjective view of the applicant as to the needs of the child was not the test according to the AAT. In determining whether the child needs 'substantially' more care the AAT said:

'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, p.10)

The applicant's son had a constant fear that he would hit his head. This caused some restrictions being placed on family activities but the weight of the evidence, both in terms of his medical condition and in terms of his attendance at school, led the Tribunal to conclude that the care and attention applicant's son needed had diminished since the applicant was first granted child disability allowance. The AAT decided that the son was not a 'disabled child' and the applicant was thus not entitled to receive child disability allowance.

Eligibility for family allowance

Section 80(1) of the Act provides that a person is qualified to receive family allowance where that person has a 'dependent child'. However, according to s.81, where payments under Austudy are being made to that child, family allowance is not payable. These were the facts here and the Tribunal found that it had no discretion in the matter. The AAT did note that if the applicant's son stopped receiving Austudy payments then the applicant would qualify for family allowance.

The rate of invalid pension

Section 33(4) of the Act provides for additional pension to be paid where the person has a dependent child. Section 33(4)(b) provides for an increase of $260 per annum for a dependent child who is a prescribed student child (that is, receiving Austudy payments) and who was receiving such payments immediately before 1 January 1988.

The applicant's son was granted Austudy payments from 30 May 1988.

Accordingly the AAT decided that no additional pension could be paid to Perecz for her son; and rejected the appeal against the decision to reduce the rate of invalid pension paid to her.

Formal decision

The AAT affirmed the decision under review.

[B.S.]

MONAGHAN and SECRETARY TO DSS
(No. 5732)
Decided: 28 February 1990 by J.A. Kiosoglous, J.T.B. Linn and D.B. Williams.

Marion Monaghan asked the AAT to review a decision to cancel the payment of child disability allowance to her in respect of her son and also to review a decision to recover from her an overpayment of $456 in unemployment benefit. The relevant legislative criteria can be found in *A. Perecz*, reported in this issue of the *Reporter*.

Cancellation of child disability allowance

Monaghan's 16-year-old son suffered from a hole in the heart. According to the applicant this caused him to become extremely tired and as a consequence he did not wake for 'calls of nature'. The applicant then had to change his bed linen up to 3 times a night. Extra water and electricity were required to clean the linen and it was contended by Monaghan that the linen wore out more quickly than would normally be the case. The son also suffered from allergies and asthma and required a special diet. This diet apparently avoided the need for him to undergo open heart surgery. Monaghan's son was in year 11 at school. He usually walked or rode a bicycle to school. He ran errands and scored for his favourite football team.

The medical evidence indicated that Monaghan's son needed some additional care compared with the level of care required by a child without a disability, but it was not satisfied that the child needed 'substantially more' care as required by the Act. The Tribunal referred to *Re Whiteford and Commissioner for Superannuation* (1987) 6 AAR 70, where the AAT had said that the word 'substantially' (albeit in a different context) meant 'higher up the scale of substantiality than "not trivial, minimal or nominal"'.

The AAT, citing *Sachs* (1984) 21 *SSR* 232, said that the test as to whether the child, compared to other children without a disability, 'needed' substantially more care and attention was an objective test. The Tribunal commented with respect to Monaghan's claim:

> 'It may be that in her commendable efforts to ensure [her son] is not disadvantaged by his heart-condition, the applicant provides more care and attention than is, or may be, strictly needed. There is no evidence before the Tribunal which establishes that [the son] needs an amount of care and attention substantially more than that needed by any 15-year-old . . .'

(Reasons, p.8)

The medical evidence suggested a steady improvement in the child's condition and that he was capable of changing his own bed linen. The AAT also referred to an unemployment benefit claim form completed by Monaghan which stated that she had not been prevented from looking for work by the need to care for her children as they were 'sufficiently capable of caring for themselves' while she worked. All of this evidence taken together led to the conclusion that the cancellation was proper.

Overpayment of unemployment benefit

An overpayment of unemployment benefit had been raised on the basis that The applicant's husband had earned $2230 during the period when she had received unemployment benefit. The applicant gave evidence that this amount was not declared as it was not actually received by her husband because the work had been done to repay a debt owed to his employer. She also said that a DSS officer had told her that in those circumstances it was not necessary to declare it. The DSS did not accept that such advice would have been given.

It was decided by the Tribunal that the overpayment occurred as the result of the omission by the applicant to inform the DSS of the amount earned by her husband. This satisfied the requirements of s.246 of the Act which provides that an amount paid in consequence of such an omission is a debt due to the Commonwealth. The AAT also found that the amount earned was 'income' for the purposes of the Act and that the overpayment was thus properly raised.

Discretion to waive recovery

The Tribunal then considered whether recovery should be waived pursuant to s.251 of the Act. The AAT gave the benefit of the doubt to the applicant on the point that she had been advised that it was not necessary to declare the amount. There was no evidence to disprove this claim. The fact that her husband had declared the income in his tax return and had received a group certificate with the amount included did not mean that the applicant would have understood the need to declare the amount in relation to her unemployment benefit application.

The AAT also acknowledged the financial hardship that the applicant's family was suffering. Out of an income of $570 per fortnight, $350 was going towards the repayment of debts. The Tribunal referred to *Hales* (1983) 13 *SSR* 136 and the need to balance the competing considerations of recovering public money paid where there was no entitlement and the need to consider the reason for the payment and the circumstances of the applicant. In this case the amount was small and the AAT considered that the compassionate circumstances outweighed other considerations. Thus the conclusion was that there should be an exercise of the discretion to waive recovery in favour of the applicant.

Formal decision

The AAT affirmed the decision under review with respect to the cancellation of child disability allowance, but with respect to the overpayment of unemployment benefit the AAT decided that the debt should be written off pursuant to s.251 of the Act.

[B.S.]

Reciprocal agreement with New Zealand

THOMPSON and SECRETARY TO DSS
(No. 5819)
Decided: 11 April 1990 by J.A. Kiosoglous.

David Thompson, a New Zealand citizen, arrived in Australia in September 1979. In January 1986 he went to Botswana as a member of the Australian Volunteers Abroad program. He returned to Australia in February 1988 then visited New Zealand for 2 weeks before finally returning to Australia in March 1988. He then applied for unemployment benefit and special benefit.

The DSS rejected his claims apparently on the basis that he had been