that it is not unusual in today's society for the mothers of young children to participate in the labour force. The fact that a woman has a young child does not of itself give rise to an inability to earn a livelihood': Reasons, p.9.

The DSS referred to the decision in *Butt* (V81/13) where a similar fact situation arose. The AAT had there concluded that the applicant's desire to be available to breastfeed her son was not related to her inability to earn a sufficient livelihood. Based on this decision, the DSS submission was that Barnett had control over the circumstances which led to her being unable to go to work and that it was therefore inappropriate for her to be granted special benefit. It was argued that the appropriate payment to Barnett was family allowance supplement in these circumstances.

The DSS submission concluded:

> '. . . where a person's only reason for not joining the work force is a desire to remain at home and care for children then it is only in those situations specifically catered for under the *Social Security Act* that support is provided under that Act.
>
> The Department acknowledges with regret that Mrs Barnett's initial enquiries with the Department led to confusion and misunderstanding as to her entitlement. However this does not provide grounds for the exercise of the discretion to grant special benefit. The remedy which the Department undertakes should the SSAT's decision be set aside is to pay an amount equivalent to the family allowance supplement which could have been paid (such amount if any has yet to be calculated) from the date of Mr Barnett's first application for special benefit.'

(Reasons, p.10)

The discretion

It was also argued by the DSS that, even if it could be said that Mrs Barnett was unable to earn a sufficient livelihood, the degree of control which she had over her circumstances would affect the manner of the exercise of the discretion contained in s.129. The DSS relied on the decision in *Te Velde* (1981) 3 *SSR* 23 for this proposition. The DSS submitted that she could have influenced her husband's decision to leave the workforce and equally her decision not to join the workforce was within her control.

The DSS said:

> 'When considering the scope and object of the *Social Security Act* one has to consider that it provides income support and income supplement payments to persons in defined categories i.e. the aged, invalid, widowed, sole parents, unemployed, disabled. Assistance for families and children is provided for by way of family allowance and family allowance supplement. In the context of this legislation need alone does not create an entitlement to a benefit.'

(Reasons, p.8)

The AAT's view

Barnett submitted that the DSS could not maintain their proposition that the discretion in s.129 should be exercised against her because of the control she had over the circumstances which gave rise to her inability to earn a sufficient livelihood. She said that the misleading and erroneous advice given by the DSS had influenced the family to make the decisions it did and the family had relied on the expectations that the advice gave them about the family's short term financial security.

With respect to the argument based on her being in a position to control her circumstances which made her 'unable' to earn a sufficient livelihood, the AAT said:

> '. . . it did not occur to her that she should make herself available to join the workforce, leaving her young child at home in the care of her husband, again because of this advice. She did not think through to the point of making a conscious choice against being available to join the workforce in order to stay at home and care herself for the baby. Consideration of the proposition on her part to such an extent did not seem necessary.'

(Reasons, p.11)

The AAT noted that these points raised by Barnett impacted considerably on the DSS submission. The AAT referred to *Te Velde*, where it was said that the word 'unable' in the relevant section 'connotes an act which, in all of the circumstances, the person cannot reasonably be expected to do'.

The Tribunal reviewed the circumstances in the case including the climatic conditions which caused Barnett's husband to leave his work, the problems associated with finding alternative employment and of moving elsewhere, the advice given by the DSS at various points, the 10-month-old baby being breastfed and the difficulties in feeding the baby an alternative formula and the need to pay for child care if required. The conclusion reached was that in these circumstances Barnett was 'unable' to earn a sufficient livelihood.

On the question of how the discretion should be exercised, the AAT found that the DSS argument could not be upheld. The Tribunal commented:

> 'The circumstances which lead to Mrs Barnett's inability in June 1990 to qualify for unemployment benefit have been recorded. There were many features of these circumstances over which she had no control and there were features in respect of which her perception of a need for her to control them was altered, indeed, diminished, by the inappropriate advice which it is common ground she was given.
>
> So far as the further submission by the Department "that where a person's only reason for not joining the workforce is a desire to remain at home and care for children" is concerned, in my view, on the face of this case, the reasoning in *Butt's* case is distinguishable. Mrs Barnett was not giving vent to a desire but rather as she saw it a very real responsibility, a responsibility she was able to discharge (as opposed to making herself available to rejoining the workforce upon reliance upon the husband's presence at home to care for the baby) by dint of the raised expectation of the receipt of the benefit, the subject of her application.'

(Reasons, p.14)

Formal decision

The AAT affirmed the SSAT decision.

[B.S.]

Young homeless allowance

SECRETARY TO DSS and TU-NGUYEN TRAN
(No. 6392A)

Decided: 17 May 1991 by J. Handley.

Tu-Nguyen Tran applied for special benefit after leaving school and his father's home on 21 May 1990. He also applied for the additional allowance, payable to a young person receiving benefit who is homeless. The DSS refused both applications.

On review, the SSAT decided that Tran qualified for special benefit and the young homeless allowance.

The DSS appealed to the AAT, where it conceded that Tran qualified for special benefit during the relevant period — 22 May to 21 August 1990. But the DSS maintained that Tran did not qualify for young homeless allowance.

The legislation

Section 115 of the *Social Security Act* defines a 'homeless person' for the purpose of payment of additional allowance to a young person in receipt of a benefit. The issue in the present case was whether Tran was covered by para. (a)(ii) of that definition, as a person who did not live with his parent 'because domestic violence, incestuous harassment or other such exceptional circumstances make it unreasonable to expect the person to live at such a home'.

The evidence

In May 1990, Tran was 17 years of age and attending secondary school full-time, undertaking year 11. He realised

that he would not pass that year, largely because of difficulty with the English course. He decided to leave school, find employment and continue his secondary studies on a part-time basis.

Tran's father then told Tran that, if he left school, he would have to leave the father's home.

Tran told the AAT, and the AAT accepted, that he would be subjected to physical violence if he left school but attempted to remain in his father's home.

Tran's former teacher told the AAT that Tran had set himself a very high standard, but had accurately assessed his poor prospects of passing year 11. The teacher said that, in her opinion, a failure would produce more problems for Tran than leaving school.

A psychiatrist with whom Tran consulted told the AAT that Tran's decision to leave school had been a mature choice between options; and that, if he had remained at school, he would have been exposed to intolerable pressure from his father.

A youth welfare worker expressed the opinion that Tran had left school because, as with many migrants with interrupted schooling, 'school had become a trauma rather than a positive learning experience'. She also told the AAT that she had found Tran, after leaving his father's home, living with his cousin without food and in obvious poverty.

'Other such exceptional circumstances'

The AAT agreed with the DSS that the phrase used in para. (a)(ii) of the definition of 'homeless person', 'other such exceptional circumstances', had to be read as a reference to circumstances of the same kind (*ejusdem generis*) as domestic violence or incestuous harassment.

That is, such exceptional circumstances would need to involve 'behaviour which is intrusive or invasive or threatening': Reasons, p.11. The DSS Benefits Policy Manual recorded examples which, the AAT said, were well within the class covered by the phrase.

These examples included criminal activity within the home, drug abuse, alcoholism, prostitution by the parents or other persons living in the home and extended irrational parental behaviour.

The AAT's decision

On the basis of this evidence, the AAT found that there were 'exceptional circumstances' within the definition of 'homeless person' in s.115 which made it unreasonable to expect Tran to live at his father's home.

His father's insistence that Tran remain at school was not an exceptional circumstance which would justify his leaving his father's home; but the threat of violence to Tran did amount to such an exceptional circumstance:

> 'In my view, no person should be subjected to the threat or the risk of violence whether it be in domestic circumstances or otherwise. I am satisfied that [Tran] genuinely believed that in the event that he refused to leave the family home he would have been assaulted by his father, in the circumstances that he has earlier described.
>
> In those circumstances it would be unreasonable to expect a person to live at a home where that risk or threat is apparent.'

(Reasons, p.12)

Formal decision

The AAT affirmed the SSAT's decision that Tran was eligible to receive benefit as a homeless person.

[P.H.]

Sickness benefit, late lodgment: sole or dominant cause

WESTON and SECRETARY TO DSS

(No. W90/160)

Decided: on 13 March 1991 by Deputy President P.W. Johnston.

Ms Weston applied for review of a decision of the SSAT affirming a DSS decision to reject a claim for sickness benefit on the ground that the claim had not been lodged within five weeks of the date on which the incapacity occurred. She also sought a recommendation from the Tribunal that a payment of an amount equivalent to sickness benefit be made in accordance with Finance Direction 21/3.

The facts

Ms Weston became incapacitated on 7 December 1989 when she injured her knee seriously while in Victoria. After being taken to hospital and informed that surgery would be required, Ms Weston telephoned the Department's Melbourne office on 12 December 1989 and enquired about making a claim for sickness benefit. When she mentioned that she was probably returning to Perth in the near future she was told that it would be better if she lodged her claim in Perth. There was no mention of time limits.

Upon returning to Perth on 24 December 1989, she tried to ring the Department to enquire further about making a claim. A recorded message led her to believe that the office was closed between Christmas and New Year.

On 4 January 1990 she rang the Department's Hotline. She was told that she would have to attend at a departmental office to fill in a form. Again she received no advice about the time limits for lodging a claim.

Since she was still troubled by her knee injury and finding it difficult to drive, she did not attend a DSS office until 23 January 1990. It was then that she realised that she was out of time to make a claim. She lodged a claim on 30 January 1990 and was advised that the claim was only payable from the date of lodgment and as she had been working since 12 January 1990 there was no benefit payable.

The legislation

Section 125(3) of the *Social Security Act* provides that sickness benefit is payable to a person from and including the 7th day after the day on which the person became incapacitated where their claim for benefit is lodged within 5 weeks after the date on which the person suffered incapacity.

Section 125(4) provides that whenever a claim for sickness benefit is not lodged within a period of 5 weeks as required by s.125(3), the benefit is payable from and including the day on which the claim was lodged unless the Secretary is satisfied that the sole or dominant cause of the failure to lodge the claim within the 5 week period was the said incapacity. Where the Secretary is so satisfied, benefit is payable from and including such date as the Secretary considers reasonable under the circumstances, not being a date earlier than 4 weeks before the date on which the claim was lodged.

Whether incapacity is sole or dominant cause

The SSAT had found that it was Ms Weston's lack of awareness of the time limit rather than her incapacity that was the 'sole and dominant cause' [sic]. The AAT said that the SSAT erred in treating the effects of the incapacitating injury and the applicant's unawareness of the time limit as mutually exclusive causes. The question of whether the incapacity was the sole or dominant cause of the failure to apply in time should not be