automotive companies. He had been continuously unemployed and in receipt of benefits since September 1990.

After unsuccessfully seeking work in Australia, he travelled to England in June 1990 to pursue his work-seeking activities overseas. He did not notify the DSS of his absence. While in England he continued to lodge benefit continuation forms each fortnight. His wife and child remained in Australia and he continued to support them. His wife did not claim benefits in her own right.

The legislation

Turner did not dispute the existence of the debt but sought that it be waived in full. Section 1237 of the *Social Security Act* 1991 empowers the Secretary to waive the Commonwealth's right to recover the whole or part of a debt. That power must be exercised in accordance with any directions issued by the Minister under s.1237(3) and in force from time to time (s.1237(2)).

The AAT was bound to exercise its discretion in accordance with the ministerial directions of 5 May 1992 which revoked those of July 1991. The directions limit the circumstances in which a debt may be waived. Clause (d) authorises waiver where, in the opinion of the Secretary, special circumstances apply such that the circumstances are 'extremely unusual, uncommon or exceptional'.

Clause 3 requires waiver of an amount equivalent to the amount that a debtor would have been entitled to receive by way of family allowance during the overpayment period had the person lodged a claim for family allowance.

Section 1236 empowers the Secretary to write off a debt.

Special circumstances

The AAT found that Turner was actively seeking work during his absence. In view of his specialised experience the AAT found that it was appropriate for him, after unsuccessfully seeking work in Australia for nearly 2 years, to travel to England in search of employment. That was an extremely unusual and uncommon circumstance for a recipient of job search allowance, but the whole of the circumstances had to be weighed to determine whether the conditions in clause (d) of the ministerial directions were satisfied.

The AAT then directed itself to the 7 matters set out in *Ward* (1985) 24 *SSR* 289 as being relevant to the existence of special circumstances indicating waiver of a debt. The first and paramount consideration was that Turner had received public money to which he was not entitled. In determining what weight should be placed on that consideration, it would be unbalanced to ignore the notional entitlement of Turner's wife and child to some form of social security payment, since this represented a saving to the public purse.

Although Turner's wife had not been registered with the CES and was therefore not qualified for unemployment benefit or job search allowance in her own right during Turner's absence, the AAT was satisfied that she would have claimed benefits and complied with the requirements had Turner not continued to receive payments for the family.

The Secretary submitted that the requirement in cl.3 of the directions for waiver of an amount equivalent to notional entitlement to family allowance impliedly excluded power to consider notional entitlement to another benefit. The AAT rejected this submission:

> ' . . . Clause 3 does not exclude the power to consider another notional entitlement as part of the relevant circumstances which may be special and give rise to a decision to waive in a particular case.'

(Reasons, para. 44)

One of the relevant matters listed in *Ward* was the way that the overpayment arose. The AAT found that Turner had knowingly deceived the DSS about his absence from Australia, but that he did not know that he was disqualified for unemployment benefit and job search allowance while absent. He saw the deception as a necessary means of allowing him to engage in his search for employment. The AAT was troubled by the deception practised on the DSS by Turner in concealing his absence from Australia, but concluded that this matter did not in all the circumstances preclude waiver.

Formal decision

The AAT varied the decision under review. Like the SSAT, it waived an amount equivalent to the notional entitlement of Mrs Turner and her son to unemployment benefit during the period 14 June to 5 August 1991. Instead of writing off the balance, as the SSAT had done, the AAT determined that the balance should be recovered 'by such instalments as appear appropriate, commencing on the day 12 months from the date of this decision'.

[P.O'C.]

Child disability allowance: review of cancellation

SECRETARY TO DSS and FORBES

(No. 8407)

Decided: 4 December 1992 by R.C. Jennings.

The DSS asked the AAT to review an SSAT decision which had set aside a DSS decision to cancel the child disability allowance paid to the applicant.

The facts

Megan Forbes was born in March 1979. In November 1983 she began to receive treatment for acute lymphatic leukemia involving induction therapy, cranial irradiation and maintenance chemotherapy. This latter treatment continued for over three years. In November 1988 she was considered to be cured, although it was advised that as a result of her treatment she might have significant learning disabilities.

In 1991 Megan was assessed by a special education consultant, who observed that Megan was having difficulty in the classroom as a result of a border-line intellectual disability, and a poor short term memory. It was noted that Megan required special programs and support. She was given special homework which was supervised by her mother for an average of one to two hours each day. This compared with 5 to 20 minutes per week by other parents.

The legislation

Section 952 of the *Social Security Act* 1991 provides that a young person is a disabled child if:

> '(a) the young person has a physical, intellectual or psychiatric disability; and
>
> (b) because of that disability, the young person:
>
> (i) needs care and attention from another person on a daily basis; and
>
> (ii) the care and attention needed by the young person is substantially more than that needed by a young person of the same age who does not have a physical, intellectual or psychiatric disability; and
>
> (c) the young person is likely to need that care and attention permanently or for an extended period.'

Section 954 provides that a person is qualified to receive child disability allowance in respect of a child if the

young person is a child of the person, receives care and attention on a daily basis from the person in a private home that is the residence of the person and the young person.

The care and attention needed

The AAT accepted that Megan suffered an intellectual disability and that she received care and attention on a daily basis from her mother at home because of this disability. The AAT also found that the care and attention provided by the mother was substantially more than that needed by a child of the same age without the same kind of disability.

In determining whether the care and attention was needed the Tribunal commented:

> 'The care and attention must of course be needed *because* of the disability. Dr Waters says a decision as to the need for extra assistance is an educational one. Just as the extent of care and attention required to overcome a physical or psychiatric disability will usually be a matter for medical opinion, thus the nature and extent required in relation to an intellectual disability may well be resolved by an educationalist.'

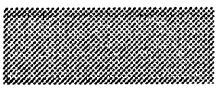
(Reasons, paras.6-7)

Thus reliance was placed on the opinions of Megan's teachers as well as the mother. It concluded that the amount of care and attention needed by Megan to develop her potential approximated the amount she was receiving from her mother, and that it would be needed for an extended period.

Formal decision

The AAT affirmed the decision of the SSAT which had decided that Forbes was entitled to child disability allowance from the date of cancellation.

[B.S.]



SECRETARY TO DSS and MACLEAN

(No. 8476)

Decided: 14 January 1993 by P.W. Johnston, P. Staer and S.D. Hotop.

The DSS applied to the AAT for review of an SSAT decision that MacLean was entitled to child disability allowance. The relevant legislation is set out in *Forbes* (reported in this issue).

The facts

MacLean and her husband suffer from congenital deafness and can only say 'short' words. Their 4-year-old daughter, Jasmine, is not hearing impaired. She attended a child care centre five days a week from the age of nine months, but this was reduced when her father lost his job.

On 24 July 1991 MacLean claimed child disability allowance. It was claimed that Jasmine needed extra therapy to develop her language skills as well as speech pathology. A social worker reported that Jasmine had poor language skills compared to children her age due to her parents' limited spoken language skills.

The claim for CDA was rejected on the basis that MacLean was not caring for her daughter in her own home as she was attending the child care centre during most of the week. A review officer relied on a medical assessment which described Jasmine's condition as requiring 'some' extra care and attention but not substantially more. The report concluded that the need for this care and attention 'could be regarded as due to the parents' disabilities and not the child's': Reasons, para. 7.

By the time the matter came before the AAT, it was conceded by the DSS that Jasmine's speech development delay as an intellectual disability under the Act. The AAT noted two issues to be determined. The first was whether Jasmine, because of her intellectual disability, needed care and attention from another person on a daily basis that is substantially more than that needed by a young person of the same age who does not have a disability. The second was whether she received care and attention on a daily basis from her mother or father in her residence.

The DSS submission

The DSS contended that Jasmine did not need substantially more care and attention than a child of the same age without a disability. The attendance at the child care centre was not solely due to her disability, but was also related to the disability of her parents and their disabilities. In addition, the learning aids provided by MacLean did not constitute substantially more care and attention than that provided to other children.

It must be the parents who provide substantially more care and attention. This was not the case in this instance. Reference was made to *Kymantas* (1990) 19 *ALD* 128 in which the AAT concluded that temporary absences from home will not cause payments of the allowance to cease, but if the applicant failed to provide the necessary care and attention, then eligibility for the payments would end.

MacLean's submission

MacLean submitted that pursuant to s.954 of the Act, she was required to provide 'care and attention on a daily basis' in the family residence, and that the extra care and attention does not have to be provided by the child's parents.

Given the evidence that Jasmine should attend the child care centre to develop her language skills, the Act should be interpreted so as to benefit the child. That is, the requirement that care and attention be provided should include situations where the provision is delegated to others.

The result

The AAT had some reservations about the agreement between the parties that Jasmine had an intellectual disability. While it was not bound to accept the agreement, it nevertheless was reluctant to reject it without clear grounds and the benefit of the testing of the evidence on this point.

On the question of whether Jasmine needed care and attention from another person on a daily basis because of her disability, the AAT concluded that she did. It relied on the evidence which indicated that she required special attention on a daily basis to set goals for her development. The evidence also indicated that she required a language-hearing environment and intensive therapy to improve her language skills. The further issue to be decided was who must provide the care and attention:

> 'It is evident that not all the care and attention Jasmine needs to overcome her disability can be provided by a single person. She requires assistance from several different persons, including her parents, Ms [B], Ms [G] and her aunt, Ms [L]. Each of them could be said to be "another person" for the purposes of s.952(b)(i). The question then presents itself whether the expression "another person" should be read restrictively as applying only to the case where one single individual is able to provide all the relevant care and attention to the exclusion of all others, or whether it may be construed distributively in the sense that whilst the need for care and attention may be constant, it may have to be provided by a number of persons, each of whom individually qualifies as "another person". Having regard to the beneficial nature of the particular provisions, the Tribunal accepts the latter meaning.'

(Reasons para. 33)

The AAT rejected any notion that Jasmine's attendance at the child care centre for other reasons, discounted the attention she received there for her speech. Although the parents' disability may have some connection with Jasmine's need for care and attention, it was still her disability which gave rise to that need. Jasmine had an entitlement 'to receive the care and attention necessary to bring her up to the same average level as other children of her age': Reasons, para. 34.

Adopting the view in *Bosworth* (1989) 51 *SSR* 678 that 'substantial' means 'considerably' or 'significantly more than' the AAT concluded that Jasmine did need that level of care.

Is s.954(b)(i) satisfied?

Once it was established that Jasmine was a child with a disability who required substantially more care and attention than a child without a disability, the AAT had to consider whether s.954(b)(i) was satisfied. That section provides that 'the young person receives care and attention on a daily basis from [the mother or father] in a private home that is the residence of the [parents] and the young person'.

The DSS submitted that the reference to 'care and attention' in this section should be read as meaning the extra care and attention referred to in s.952(b)(ii). Thus it was contended that it must be the parents who provide the extra care and attention on a daily basis. MacLean submitted that as s.954(b) only refers to 'care and attention', no further requirement need be satisfied in order to qualify for the payment once s.952 has been satisfied.

The Tribunal traced the history of the allowance. Although earlier provisions had required that the claimant had to provide constant, continually or frequently occurring care and attention, the present provisions only specified a degree of care and attention in relation to the needs of the child, and not in relation to what the child receives. This was a 'curious' structure, although in the normal case it would be the claimant who would be providing the extra care and attention needed and no issue would arise.

> '[t]he differences between the present circumstances and the normal cases are highlighted, however, where there is a discrepancy between the degree of care needed by a child and the care actually provided by a claimant parent.
>
> The difference between the standard or degree of care and attention needed by a child and that received may seem anomalous in the present case where it is the respondent's own disability that gives rise in part to that of the child whilst at the same time limiting the respondent in her capacity to provide remedial assistance. Nevertheless, the Tribunal considers that the interpretation of the legislative scheme of CDA within the Act advanced by the respondent (MacLean) is logically open and tenable. Although the view for which the applicant (the DSS) contends is also arguable, the Tribunal is of the view that, having regard to the beneficial nature of the legislation, and supported by the history of statutory amendments to the scheme, it should prefer the former interpretation.'

(Reasons, paras 42 and 43)

Thus it was only necessary for the parents to show that they provided care and attention on a daily basis in their home to qualify for the payment. The AAT found this care and attention to be an important part of Jasmine's development as it complemented the special care she received elsewhere. The Tribunal concluded that this requirement was met.

> 'In coming to this conclusion, the Tribunal rejects the notion that *relatively* minor efforts by a parent do not satisfy the requirements of s.954 of the Act. Such a view would discriminate against parents who might, for one good reason or another, be less able to provide for a disabled child's needs.
>
> Whilst on a sensible reading of s.954 the provision of ordinary, everyday care and attention due to any child should not attract CDA, in the Tribunal's opinion a significant and substantial effort by a parent directed specifically towards providing the daily care and attention needed by a CDA child because of disability satisfies the requirements of s.954 of the Act.'

(Reasons, para. 46)

Formal decision

The AAT affirmed the decision under review.

[B.S.]

Child disability allowance: date of commencement

MACDONALD and SECRETARY TO DSS

(No. 8418)

Decided: 2 December 1992 by I.R. Thompson, R.C. Gillham and W.G. McLean.

MacDonald applied to the AAT for review of a DSS decision not to grant him child disability allowance from the date of birth of his child on 25 December 1989. He had applied for the allowance on 5 November 1990 and it was paid from 20 September 1990.

The facts

The applicant was in a *de facto* relationship with the mother of the child, who had spina bifida and was confined to a wheelchair. The child was premature and suffered a cerebral haemorrhage leading to hydrocephaly. He was in intensive care for two weeks and in hospital until 1 July 1990.

The applicant visited the child regularly in hospital while the mother took little interest. The Victorian Department of Community services obtained a supervision order over the child when it was discharged from hospital, because of concerns about the care of the child.

The child lived with the mother and MacDonald after its discharge from