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

hospital. The mother provided little care, so MacDonald left his work in March 1990 to look after the child. In September 1990 the mother and MacDonald separated, but the child continued to live with Macdonald. He claimed the CDA in November 1990.

The legislation

The relevant legislation was the *Social Security Act* 1947. Section 102 provided that child disability allowance was payable to a person if the person is eligible to receive family allowance for the child, the child is a disabled child and the person 'provides, in a private home that is the residence of the person and the child, care and attention for the child on a daily basis'.

It was not in issue that the child was a disabled child, and that he needed care and attention on a daily basis of a kind substantially more than that needed by a child without a disability, and that such care would be required on a permanent basis. But the child was in hospital until July 1990 and so did not receive that care in a private home as required by the Act.

Care in a 'private home'

The applicant referred to s.103(2) and (3) of the Act. Section 103(2) provides that, where a person is qualified to receive the allowance, and the child is temporarily absent from home for more than 28 days, then the Secretary may decide that the person is still qualified to receive the allowance. Section 103(3) provides that where a person is qualified to receive the allowance, and the child is absent from home to receive education, training or treatment, such absence does not disqualify the person from receiving the allowance.

The Tribunal noted that each of the sub-sections does not deem the child to be receiving care in a private home but provides that the person does not cease to be eligible. That is, the Act required that the person must first qualify for the allowance before the sub-sections come into operation.

> 'The effect of [section 102] is that a person becomes qualified only when he or she provides, in a private home that is his or her residence and also the residence of the child, care and attention for the child on a daily basis. As in the present case the child was in hospital without a break from the time of his birth until 11 July 1990, the applicant was not qualified before that date to receive a child disability allowance irrespective of whether he met the requirements of paragraph (a) of section 102'.

(Reasons, para.6)

Eligibility for family allowance

To be eligible for receipt of child disability allowance, the person must be eligible for family allowance. Section 79(5) provided that where a child was a dependent child of the husband and wife, the child was to be treated as the dependent child of the wife for the purpose of qualification for family allowance. The DSS argued that as the mother had been in receipt of family allowance from the birth of the child it could not be now found that the applicant was qualified to receive it. The Tribunal did not agree. The Act required that family allowance be 'payable' not 'paid' to MacDonald. Nor did s.102 require that a claim be made for it to be 'payable'.

MacDonald also argued that the child was not a 'dependent child' of the mother, as the mother did not have custody, care and control of the child as required by the Act. Thus s.79(5) did not prevent the child being considered the dependent child of MacDonald. It was submitted that the mother's failure to look after the child meant that she did not have the custody, care and control of the child.

The Tribunal confirmed the approach in *Hung Manh Ta* (1984) 22 *SSR* 247 which had decided that 'custody, care and control' was an expression 'referring essentially to the overall responsibility for the day to day maintenance, training and advancement of the child'.

The Tribunal questioned the applicant's counsel as to the legal competence of the mother to look after the child. Counsel told the AAT that the mother had such competence, but had chosen not to exercise it with respect to feeding and clothing the child. She also had the physical capacity to look after the child, except for bathing the child because of the restrictions of being in a wheelchair.

The AAT noted the 'family situation' which existed prior to the mother leaving the home in September 1990 and concluded:

> 'where neither parent is legally incompetent or, possibly, physically incapable of having the care and control of a child, both the parents have the custody, care and control of the child and the child is in the custody, care and control of them both. At least in the absence of any order of a Court depriving one or other or both of them does not in fact exercise as he, she or they should the care and control which they have does not affect the fact that they have care and control of the child. In the present case the mother did not exercise her responsibility to provide care for her child but the child was in her care as well as being in her custody and control. That being so, section 79(5) did have the effect that, while the mother was living with the applicant [MacDonald] and the child in the family situation, the child was the dependent child of the mother and not the applicant.'

(Reasons, para.10)

As a result, MacDonald could not meet the first of the eligibility criteria for child disability allowance, viz. that family allowance was payable to him in respect of the child.

The Tribunal stated its sympathy for MacDonald. Accepting the view the mother had squandered the allowance paid to her, it agreed that:

> 'from the time when the child was discharged from hospital on 11 July 1990 it would have been in the child's best interests if the applicant had been qualified for the family allowance and the child disability allowance and if both allowances had been paid to him'.

(Reasons, para.11)

But there was no discretion to make the payment in this way and this situation could only be remedied by the legislature.

Formal decision

The AAT affirmed the decision under review.

[B.S.]