cumstance. It is an allowance paid in respect of children regardless of the existence of any disability. It is not similarly grounded to CDA, in that the basis for payment of family allowance is simply the support of a child, whereas the basis for payment of CDA is the provision of care and attention to a disabled child on a daily basis in the home of the person and the child. I am satisfied that the distinction between the two allowances is more significant than the fact that they both provide regular financial support to a person who has the care of a child.'

(Reasons, para.13; original emphasis)

But even if they were regarded as similar in character and the claim for family allowance could be treated as a claim for CDA, the applicant would not be qualified for CDA. This would occur because qualification for CDA requires that family allowance be payable to the person. The treatment of the claim for family allowance as a claim for CDA would mean that there would then be no claim for family allowance to enable the applicant to qualify for CDA.

The AAT also dismissed the possibility of treating a claim under a State Act for a mobility allowance as a relevant claim for the purposes of s.159(5).

The AAT expressed sympathy with the applicant who had not found out about the availability of CDA for 13 years. The AAT noted:

'The fact that it took thirteen years before she learnt, from another parent at a school John attended, that she should claim CDA shows that the system has somehow failed to make known to those whom it is designed to help, the availability of CDA. Whether further action could or should have been taken by the Department or by the Royal Children's Hospital, the medical profession or the other professionals and supporting services to whom Mrs Harris has taken J, is not for the Tribunal to determine.'

**Formal decision**

The AAT affirmed the decision under review.

[B.S.]

# *Child disability allowance: review of cancellation*

**SECRETARY TO DSS and BRADY**

**(No. 8307)**

**Decided:** 13 October 1992 by D.W. Muller.

In March 1991 the DSS decided that Brady was no longer entitled to receive child disability allowance in respect of her 19-year-old son. The SSAT set aside this decision and the DSS asked the AAT to review that decision.

**The facts**

Brady's son had been deaf from birth. The medical evidence was that her son had to attend university away from home in order to access the support services he required to reach his potential. He required extra care and attention in relation to his studies as he missed a significant proportion of what was said in lectures, tutorials, etc.

The evidence presented to the Tribunal also stressed the significant burden cast on the family by the disability. Because deafness was not a visible impairment, it was often regarded as a lesser disability than others.

**The legislation**

The AAT decided that the *Social Security Act* 1947 was the applicable legislation. Section 101 of that Act provided that a 'disabled child' was a child who had a physical, intellectual or psychiatric disability, as a result of that disability needed care and attention on a daily basis that is substantially more than that required by a child of the same age without such a disability, and is likely to need that care and attention permanently or for an extended period.

Section 102 provided that where a family allowance was payable to a person in respect of a child who was a disabled child, and the person provided in a private home that is the residence of the person and the child, care and attention on a daily basis, then the person was qualified to receive child disability allowance in respect of the child.

Section 103(1) provided that the allowance was still payable where the child was temporarily absent from home provided the absence was for a period not exceeding 28 days. But s.103(2) gave a discretion to the Secretary to determine that the allowance was still payable even though the child was temporarily absent from the home for more than this period. Section 103(3) also provided that the child's absence from home on normal school days for the purpose of receiving education, training or treatment, does not disqualify the person from receipt of the allowance in respect of the child.

**The DSS argument**

The DSS submitted that the purpose of the allowance was to enable children with not terribly severe handicaps to stay at home instead of being institutionalised. The payment offset some of the financial burdens imposed on parents as a result. In this case Brady's son was attending university and coping well. He did not require substantially more care and attention on a daily basis, and, in any event, that care and attention must be in a private home, not at the university. The discretion to allow for a temporary absence from home in excess of 28 days could not cover this situation as the son was absent from home for up to 32 weeks each year. This could not be considered temporary.

The DSS also submitted that as the Bradys were well off financially, the discretion should not be exercised in their case. Finally, it was submitted that a university is not a school within the meaning of the Act.

**The Tribunal's findings**

The AAT found that Brady's son was a dependent child and a disabled child because he suffered from profound sensory neural deafness. He needed care and attention on a daily basis as a result of that disability. This care and attention was substantially more than that needed by a child of the same age who did not have such a disability. This continued until the end of his first year at university. Since then he has been self-sufficient.

The Tribunal found that the son's absence from home to attend university was a temporary absence. The word temporary is not defined in the Act and the AAT referred to the Shorter Oxford English Dictionary which defined 'temporary' as 'lasting for a limited time; existing or valid for a time (only); made to supply a passing need'. The AAT noted that this definition did not necessarily suggest a short time or a brief moment.

The Tribunal also found that the university attended by the applicant's son was a 'school' for the purpose of

s.103(3). The Shorter Oxford English Dictionary defined 'school' to include 'universities in general'. As a consequence Brady was still eligible for the allowance during the absence of her son to attend university.

**Formal decision**

The AAT affirmed the decision of the SSAT. The AAT also found that Brady was qualified to receive the child disability allowance under the 1947 Act and then under the *Social Security Act* 1991 until 19 March 1992.

**[B.S.]**

# Disability support pension: first qualified overseas

**CHRISTIAN and SECRETARY TO DSS**

**(No. 8552)**

**Decided:** 18 February 1993 by P.W. Johnston.

Allen Christian came to Australia from New Zealand in June 1985. He worked in Australia until November 1988, although he suffered an injury to his lumbar spine in February 1986.

In November 1988, Christian travelled to the United Kingdom, taking his 2 children and his personal effects. Christian worked in the United Kingdom in a number of advisory or supervisory jobs until January 1992, when he injured his neck in a motor accident. In March 1992, Christian was granted a disability living allowance by the United Kingdom DSS.

In April 1992, Christian returned to Australia and lodged a claim for disability support pension (DSP). The DSS rejected his claim. The SSAT affirmed the DSS decision. Christian appealed to the AAT.

**The legislation**

Section 94(1) of the *Social Security Act* 1991 sets out the qualifications for DSP:

- A person must have a physical, intellectual or psychiatric impairment of 20% or more under the impairment tables: s.94(1)(a) and (b).
- The person must have continuing inability to work: s.94(1)(c).
- The person must have turned 16: s.94(1)(d).
- The person must either be an Australian resident at the time when he or she first met the impairment and continuing inability to work requirements or have 10 years qualifying Australian residence: s.94(1)(e).

**Overseas resident's inability to work in Australia**

The DSS conceded that Christian had a sufficient level of impairment and had a continuing inability to work within s.94(1)(a), (b) and (c).

However the DSS submitted that Christian had first met the impairment and continuing inability to work requirements while he was resident in the United Kingdom. Christian argued that he had met those requirements during his earlier period of Australian residence, between 1986 and 1988.

The AAT accepted the DSS submission and decided that Cgristian did not qualify for DSP. In the course of doing so, the AAT made the following points.

1. In applying s.94(1)(e)(i) and deciding when a person first met the impairment and continuing inability to work requirements, it was necessary to form:

> 'a contemporary opinion based on events that have occurred in the past, including situations (such as whether someone incurred a continuing inability to work) that have prevailed prior to [the introduction of DSP]'

(Reasons, para. 17)

2. A person's continuing inability to work was to be judged by reference to 'work that exists in Australia': s.94(5)(b). When considering the time when a person, who had been resident outside Australia, first developed a continuing inability to work within s.94(1)(c), it was necessary to ask a hypothetical question: when would the person:

> 'have been prevented from engaging in the person's usual kind of work for the requisite hours had that person been resident in Australia, for a period of at least two years following the point in time at which the inability to work reached that degree of incapacity'?

(Reasons, para. 21)

3. A person would be 'prevented' from engaging in work where the person was hindered from undertaking work and the hindrance was 'substantial in the sense of confining a person to no more than 30 hours a week': Reasons, para. 26.

4. The term "usual work" in s. 94(2)(a)(i) 'should be approached in a broad manner in terms of the kind of work one normally performs': Reasons, para. 29.

5. A person's continuing inability to work was to be determined as a matter of fact: if the person did continue to work for a substantial number of hours each week, despite his impairment, he could not be said to have a continuing inability to work. The fact that this was made possible by a sympathetic employer did not prevent this conclusion: 'his fortune in having an accommodating employer does not affect the position': Reasons, para. 31.

The AAT concluded that Christian had first developed a continuing inability to work while resident in the United Kingdom. He was not, at that time, an Australian resident. As he did not have 10 years' qualifying Australian residence, he could not satisfy s.94(1)(e) and did not qualify for DSP.

**Formal decision**

The AAT affirmed the decision under review.

**[P.H.]**

# Compensation: judgment verdict

**SECRETARY TO DSS and MESSENGER**

**(No. 8544)**

**Decided:** 19 February 1993 by B.A. Barbour.

The Department of Social Security (DSS) asked the AAT to review a decision of the SSAT which had set aside a DSS decision on the appropriate preclusion period to be imposed on Messenger.

Messenger had been injured in a motor cycle accident on 3 November 1988. On 16 September 1991, a judgment was made in his favour for the sum of $168,422 which was reduced by 15% for contributory negligence, making a total of $137,565. Of this amount, $116,930.25 was agreed to be in respect of economic loss, both past and future. The DSS had treated this sum as