The facts

Cunneen was employed at the Canterbury District Hospital as a rehabilitation counsellor. She was injured on 16 August 1988 and had not worked since 18 August 1988. She was paid sickness benefits from 13 September 1988. Her claim for compensation pursuant to the *Workers' Compensation Act (NSW)* was settled on 24 March 1994. Prior to that, she had not received weekly payments of compensation under the NSW scheme. She received the following amounts:

- $2500 for weekly payments from 18 August 1988 to 24 March 1994
- $12,510 for a permanent impairment to the back
- $9,382.50 for a permanent impairment to the right leg
- $9,382.50 for a permanent impairment to the left leg
- $15,000 for pain and suffering
- $2275 interest on the lump sum for pain and suffering
- $10,000 for expenses, and
- payment of her legal costs.

The law

The definition of compensation in s.17(2)(e) of the *Social Security Act* provided that it was a payment made 'wholly or partly in respect of lost earnings or lost capacity to earn'. Section 17(3) determines the compensation component of a lump sum compensation payment, and s.17(4A) provides that arrears of periodic payments is not a lump sum compensation payment. Section 1165 precludes the payment of a pension or benefit to a person who receives a lump sum payment of compensation for a period to be calculated according to s.1165(4). Sections 1165(3), 1165(3A), 1165(3B) and 1165(3C) provide for the commencement of the lump sum preclusion period.

The issue

The AAT had to determine whether Cuneen had received compensation as defined by s.17(2) of the *Social Security Act.* If so, s.1165 operated to fix a lump sum preclusion period.

The AAT considered whether elements of the settlement amount were to be deemed compensation and included in the calculation of a lump sum preclusion period.

The DSS sought to resile from their previous arguments about the lump sum preclusion period. The DSS argued that it was entitled to recover sickness benefits paid between 16 August 1988 and mid-November 1989 as this was the correct lump sum preclusion period. The DSS sought to have the matter remitted to it on the basis that Cunneen was entitled to DSP for 52 weeks from March 1994.

Findings

The AAT did not accept the arguments of the DSS about the entitlement to recover sickness benefits. The DSS had not made any determination pursuant to s.1166 about the payment of sickness benefits.

The AAT was satisfied that the payment of $2500 of weekly compensation was not compensation as defined by s.17(3) of the Act. The effect of s.17(4) was to treat arrears of weekly payments as being received during the relevant period rather than as a lump sum compensation payment. As there was no relevant lump sum compensation payment for the period to 24 March 1994, the lump sum preclusion period could only commence on 25 March 1994. Accordingly, there was no lump sum preclusion period between August 1988 and November 1989.

Was the balance of compensation paid, $56,275 made wholly or partly in respect of lost earnings or lost capacity to earn as provided in the definition of compensation? The balance was paid for permanent impairments to the back and legs, pain and suffering and medical expenses. The AAT found that the lump sum payment did not include any amount for lost earnings or lost earning capacity.

Formal decision

The AAT made an interim decision that the amount received was not compensation under the *Social Security Act 1991.*

[H.B.]

Compensation: preclusion and special circumstances

SECRETARY TO DSS and HILL

(No. 10566)

Decided: 4 December 1995 by W. Eyre.

On 3 November of 1994, Hill received compensation of $18,223, including an amount of $5000 for future loss of earning capacity, by way of settlement, from the State Government Insurance Office for injuries resulting from a motor vehicle accident on 15 May 1992. At the time of the accident Hill was in receipt of job search allowance and remained so until 10 July 1992.

As a result of Hill's receipt of compensation, the DSS decided to apply a lump sum preclusion period of 17 weeks from 15 May 1992 to 10 September 1992 based on 50% of the settlement figure of $18,223, and that job search allowance paid to Hill during that period, in the sum of $1588.02, was a recoverable debt. The SSAT set aside that decision and substituted a decision that the compensation component of the settlement amount should be disregarded and no preclusion period should be applied. The DSS appealed to the AAT.

The issue

The issue in this case was whether, in Hill's case, there were special circumstances, enabling the Secretary to treat the whole or part of the compensation payment as not having been made, in accordance with s.1184(1) of the *Social Security Act 1991.*

Special circumstances

Hill argued that in a situation where social security payments are received for only a short period, and the compensation for future economic loss does not overlap that period either by nature or time, it is harsh and unreasonable to try and reclaim the amounts of social security payment.

The AAT noted the decision of *Commonwealth of Australia v Daniels* (1994) 33 ALD 111, in which the AAT found special circumstances to exist where there was a complete lack of causative connection between the compensation payment for incapacity to work and the applicant's unemployment status arising from retrenchment, and there was an undue delay between the accidents in 1980 and 1982 and the payment of the lump sum in 1989, emphasised by the fact that the applicant became unemployed in 1990. The DSS argued that *Daniels* was distinguishable because of amendments effected by the *Social Security (Budget and Other Measures) Legislation Amendment Act 1993*, which inserted a new subsection 1184(2). That subsection provides that, where a person is qualified for a compensation-affected payment and their partner receives compensation, the fact that there is no connection between eligibility for benefit and the circumstances giving rise to the compensation payment, does not of itself constitute special circumstances.The AAT, however, confirmed that the discretion given by s.1184(1) is not affected by s.1184(2) which only applies where compensation is received by the partner of a social security recipient.

The AAT agreed that Hill had not been compensated for loss of earnings or lost

earning capacity while he was in receipt of job search allowance, but for economic loss to 3 November 1994, the date of settlement of his road accident claim, which was 27 months after his job search allowance stopped and 29 months after the accident. The accident occurred at a time when Hill was already receiving job search allowance payments. There was no element in the case suggesting compensation for past loss or that Hill should be retrospectively living on the compensation received rather than the job search benefits paid. As a result there was no element of double dipping, and the Tribunal was satisfied that special circumstances existed to make it appropriate to disregard the whole of the compensation payment. This was so despite the fact that Hill did not appear to be in current financial difficulty.

The AAT noted that where factors are present suggestive of manipulation of heads of loss, or manipulation of the timing of the prosecution or settlement of a claim, those factors would weigh heavily against there being special circumstances.

Formal decision

The AAT affirmed the decision under review.

[A.T.]

Federal Court decisions

Compensation payments: special circumstances

GROTH v SECRETARY TO DSS (Federal Court of Australia)

Decided: 1 December 1995 by Kiefel J.

Groth appealed against the AAT decision which had affirmed the DSS decision that weekly compensation payments received by Groth were to be treated as direct deductions when calculating the rate of disability support pension (DSP) payable to Groth.

Groth was injured in 1986. He last worked in 1992 on a part-time basis. He is now unable to work because of injuries to his knees and neck. He received compensation payments of $145 a week under the *Workers' Compensation Act 1926* (NSW). *The Workers' Compensation Act 1987* (NSW) came into force in 1987 and would have provided for more generous payments. By the time Groth became eligible for DSP the *Social Security Act* had been amended so that compensation income was treated as a direct deduction rather than as ordinary income. The AAT had found that Groth's family circumstances were difficult and that they were just able to make ends meet. The family's income comprised of compensation payments, part disability support pension and AUSTUDY payments of $60 a fortnight.

The issue

The only issue raised before the Court was whether the AAT had correctly applied s.1184 of the *Social Security Act 1991*, dealing with special circumstances. Where special circumstances exist the total or part of compensation payments may be treated as not having been made.

What are special circumstances?

Groth placed particular reliance on s.1184 being a remedial section. The AAT considered a number of the cases which had considered special circumstances, and concluded that the purpose of the direct deduction section (s.1168) was to ensure that a person is not paid twice for the same period. Therefore the direct deduction of compensation from the rate of DSP paid, cannot be a special circumstance. The AAT then considered Groth's financial situation and the family's ill-health. Neither of these was sufficient to constitute special circumstances. The AAT stated that special circumstances existed where the operation of s.1168 would produce an unjust or unreasonable result, when the purpose of this section was taken into account.

Kiefel J agreed with this approach stating:

> 'The submission with respect to the remedial nature or operation of s.1184 did tend to suggest this as a proper exercise to be undertaken by the decision-maker. It clearly is not. Before determining to ignore all or part of the compensation payments the decision-maker must have come to a conclusion that the circumstances pertaining to the person otherwise qualified for the receipt of pension payments were special.'

(Reasons, p.7)

The AAT was also correct in only having regard to any law applying at the time the decision about the pension was made. Whether special circumstances applied depended upon the effect of s.1168 in Groth's case.

> 'Since an unintended consequence may amount to a special circumstance, it is necessary to understand the results it was intended to have.'

(Reasons, p.7)

For special circumstances to apply in Groth's case it must be distinguished from the usual situation so that the situation is extraordinary. The AAT had considered Groth's circumstances and concluded that his situation was not extraordinary, even though his circumstances were difficult.

Formal decision

The Federal Court dismissed the appeal.

[C.H.]

Family payment: split payments

ELLIOTT v SECRETARY TO DSS (Federal Court of Australia)

Decided: 14 December 1995 by Lehane J.

The AAT affirmed the SSAT decision that family payments be paid at the rate of 74% to Mr Elliott and 26% to Mrs Elliott. The SSAT had set aside the DSS decision to pay Mr Elliott 100% of the family payment. Mr Elliott appealed to the Federal Court because he believed he was entitled to the whole payment.

Background

The Elliotts are divorced. They have 3 school age children under 16, and the Family Court made an order on 16 June 1992 concerning guardianship, custody and access. The order gave the Elliotts joint guardianship of the children, custody to Mr Elliot and access to Mrs Elliott during successive periods of 6 weeks. Mrs Elliott has the children for 3 successive weekends from after school Friday until 6.00pm Sunday, and then from 6.00pm on the Sunday following the last of those weekends until the following Friday (5 days). For the rest of the 6-week period Mr Elliott has the children. Mr Elliott has the children for 74% of the period and Mrs Elliott for 26%.

The law

Section 838(1) of the *Social Security Act 1991* provides that qualification for family payment depends on the person having a 'FP child'. Each dependent child of a person is a 'FP child'.