

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 compen-

sation 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 tim-

ing 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 Elliots 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 Elliots 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'.