nephews who he visited regularly or who visited him, and he considered his cousin to be like a brother. He had been a member of the Lebanese Moslems Association since 1970, and this contact provided him with social activity and support, as well as meeting his spiritual requirements. He believed that in Australia his health, financial situation and emotional support would be better provided for, and his future was more secure. With the death of his mother his connection with Lebanon through family responsibility had ceased, and he intended to stay and die in Australia. That was not to say that he would not visit his family in Lebanon for a holiday.

The findings

The AAT noted the statement of 16 November 1998 was clearly incorrect, as Raad's mother had died two years earlier. Afterwards he had consistently denied its correctness, and he had described the circumstances in which he had signed it. The AAT could not see any possible benefit Raad might have derived from making the statement, and concluded that it would never know the precise reasons for the statement being written. The AAT did not consider this early statement to be indicative of a man with little credit, but rather of some confusion about the matters in hand.

From the cases cited on behalf of the parties the AAT considered that while it must apply the criteria in s.7(3) of the Act, the factors therein were not exhaustive. A determination of residency involved a consideration of why Raad was absent from Australia and the purpose for such lengthy absences against a backdrop of his other connections with Australia or Lebanon, both in a physical and emotional sense.

Raad had adopted a practice of living with relatives and friends in Australia because he liked living with people, and because he was not able to afford rental accommodation. In Lebanon he had always stayed in his mother's home and he had no accommodation there.

In Australia Raad had lived with his brother and later with the family of his cousin with whom he had a particularly close relationship. He had other friends and connections with the Moslem community. His siblings in Lebanon had their own families. The main factors causing him to return were his family responsibilities, particularly as the eldest son. After his parents died and his sister agreed to look after his brother, the reasons for his frequent trips to Lebanon had receded. Raad then returned to Australia, as was his pattern, although he need not have done so. At the time he claimed pension the more meaningful family relationships were in Australia and Raad intended to reside here. That was not inconsistent with returning to Lebanon for holidays.

Raad no longer had employment, financial or business ties, and no assets, in Australia in November 1998, nor did he have any in Lebanon. The AAT accepted that he had had no option but to sell his furniture and household items when he left Australia in 1986. His mother's property in Lebanon had still not been divided.

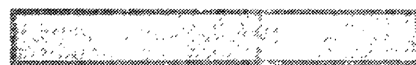
The AAT did not consider Raad's lack of knowledge of events in Australia while he was in Lebanon indicated he had a lack of interest in Australian affairs and did not have an intention to reside in Australia. It could not make any finding in relation to Raad's intention to reside in Australia from the inconsistent evidence about his tax returns.

Also taking into account the facts that Raad was an Australian citizen who had been resident in Australia for over 10 years, had an Australian passport and a Medicare card, the AAT considered that he was residing in Australia on 9 November 1998.

Formal decision

The decision to reject the claim was set aside and substituted with a decision that Raad qualified for age pension from the date of claim.

[K.deH.]



Lump sum payment: compensation part of a lump sum; special circumstances

WOLFE and SECRETARY TO THE DFaCS (No. 2000/367)

Decided: 12 May 2000 by K.L. Beddoe.

The issue

The issue in contention here was whether any portion of a lump sum settlement amount should be treated as compensation in respect of economic loss where the recipient was in fact unemployed at the time of accident which gave rise to the settlement.

Background

Ms Wolfe in April 1992 suffered an accident at a council car park. At the time she was not employed and the accident did not occur in relation to any employment. Owing to the accident she was unable to work for 8-9 weeks while her leg was in plaster. She also gave evidence that prior to the accident she had been unable to work from February 1991 (owing to, she alleged, harassment — an issue which the Tribunal accepted but found to be irrelevant to the issues presented to it) and did not resume work until March 1996. She sued the local council for $40,000 which was said to be the limit of the Magistrates' Court jurisdiction, although her claim quantified expenses and economic losses totalling $82,1232 (including $74,400 for post accident and future economic loss). She settled the action for an amount of $25,000 by way of general and special damages, plus legal costs.

The Department in determining Ms Wolfe's eligibility for disability support pension payments determined that 50% of the $25,000 should be treated as compensation in respect of lost earnings, and calculated a non-payment period on this basis. Ms Wolfe contended that there was no element of economic loss in the settlement figure (and that therefore the whole of the settlement amount should be disregarded). In the alternative, she argued that the portion of the settlement that was in respect of economic loss was so small that it would be harsh to treat 50% of the settlement amount as being the compensation portion.

The law

The *Social Security Act 1991* (the Act) provides by s.17(3) that the compensation part of a lump sum compensation payment is to be 50% of the payment. The compensation part of a lump sum, in turn, is used to determine any lump sum preclusion period — that is, a period during which Department payments cannot be paid to the recipient of the lump sum (s.1165). Under s.1184(1) of the Act the whole or part of a compensation payment may be treated as having not been made if it is considered appropriate to do so in the special circumstances of the case.

Discussion

The Tribunal accepted that Ms Wolfe was effectively unemployed at the time of her accident, and remained so for at least two years after the accident. The Tribunal noted that the formal claim for damages included claims for post acci-

dent economic loss and future economic loss. Applying *DSS v a'Beckett* 21 ALD 90 wherein it was held that claimant statements (especially the formal statements of claim) asserting a loss should be given substantial weight in determining how the settlement sum was arrived at, the Tribunal concluded that in this matter it was 'not satisfied that economic loss statements played no part in the eventual settlement of the matter ...'

The Tribunal concluded that the compensation payment was made partly in respect of lost earnings or lost capacity to earn, notwithstanding the difficulties Ms Wolfe was at that time having in obtaining employment.

The Tribunal noted the criteria set out in *Beadle v DSS* (1985) 7 ALD 670 that, to be 'special', circumstances must be unusual, uncommon or exceptional such that the normal application of the law would result in an unfair or inappropriate result. Applying these criteria, the Tribunal found in this matter that there were no circumstances sufficient to justify exercise of the discretion contained in s.1184 of the Act.

Formal decision

The Tribunal affirmed the decision under review.

[P.A.S.]

Background

Family allowance estimate debts explained

A recent decision made by the Administrative Appeals Tribunal (AAT) *Secretary, Department of Family and Community Services and Julianna Butt* (AAT, D.F. O'Connor J, President, H.E. Hallowes, Senior Member and Dr J.D. Campbell, Member, decided Sydney, 28 July 2000) has resolved a number of issues on which previously conflicting decisions had been delivered by the Tribunal regarding family allowance[1] estimate debts.

The family allowance program has enabled a person's entitlement to be assessed upon either their base year income (the income earned in the financial year previous to the calendar year in which payments are made) or their current year income where Submodule 2 of Module H of the Family Allowance Rate Calculator set out in the *Social Security Act 1991*, permits. Where Submodule 2 is used, it usually has involved a recipient making an estimate of the income to be earned in the remainder of the relevant financial year.

For many people, estimating their income is a difficult task and events such as retrenchment, back pay, changes in accounting systems, promotions, overtime, increased hours of casual employment, variations in returns from self-employment — all make estimating income harder. Further, these matters are usually entirely unknown at the time the estimate is given.

Where a person's estimate was found to have varied from their actual income by more than the accepted margin of error, the Department has used s.885 to recalculate the person's entitlement. Where such a re-calculation has occurred the difference between the rate paid and rate payable is a debt under s.1223(3) of the Act.

From 1 January 1996 the margin of error for estimates was reduced from 25% to 10%. As a result, large numbers of recipients were asked to repay debts for payments made after this date.

Limit of section 885

In Ms Butt's case, the Tribunal determined, that s.885 could only be used to recalculate a person's entitlement where the estimate had been lawfully used to calculate the person's rate under the rate calculator in the first place. If the rate calculator did not provide that the estimate should be used, either no debt existed where the pre 1 October 1997 debt recovery provisions applied, or the debt arose from administrative error and might be waived under s.1237A.

When can the current year estimate be used?

Essentially, Submodule 2 states at sections 1069-H13 and H14 that a person's rate should be assessed with reference to the base year income, unless one of two situations arise.

The first is where a person is required to provide an estimate of the income they expect to earn in the current year. This can be due to the occurrence of an 'assumed notifiable' or 'notifiable event'. These are events listed on forms and letters.[2] Where one of these events occurs and it does, or is likely to, increase the person's income to more than 110% of the base year income, the estimate can be used.

The second is where a person requests in writing that an estimate of their current year income be used under s.1069-H21.

In both of these cases, where the actual income earned was more than 110% of the estimated amount, the rate payable has to be re-assessed in accordance with s.885(1). However, the impact of both types of estimate debts can be restricted to the end of the calender year under s.1069-H15 in respect of requests, and under s.1069-H17 or s.1069-H19 in respect of 'assumed notifiable' and 'notifiable events', depending on the circumstances.

Ms Butt's case

Ms Butt's case concerned two alleged overpayments. The first from 1 August 1996 to 28 August 1997 and the second from 11 September 1997 to 10 September 1998. Throughout these periods she completed a number of review forms which required her to update her estimates. As her estimates were always lower than the base year income, the Department assessed Ms Butt's rate on the basis of the estimate (thus affording her a higher rate of payment). However, the standard review forms did not contain a question which asked whether Ms Butt wanted her family payments assessed on the estimated income rather than the base year. Use of the estimated income exposed her to the risk of overpayment, whereas the base year, while paying at a lower rate, did not expose her to that risk. In addition, Ms Butt's circumstances changed in early 1997. The parties agreed that the change was a notifiable event, but it did not, nor was it likely to, lead to an increase in Ms Butt's income beyond 110% of the base year.

When does a person request that an estimate be used?

The Department argued that Ms Butt had made a 'request' by filling out the estimate sections of the forms and responding to letters by providing more information about her income. The Tribunal did not accept this and adopted the