

a determination needs to be made as to whether the circumstances are different from 'the usual run of cases'.

(Reasons, para. 25)

The Tribunal considered that Males must be regarded as an extremely vulnerable person. He was and remained a single young man with a serious back injury, who had not worked for many years and was unlikely to do so in the immediate future. He had probably become addicted to poker machine gambling by the time he received the compensation lump sum, although winning was not the most important thing. He also attended the venues because he was bored, wanted to get out of the house and was depressed.

*Secretary, DFaCS & Rankin* [1999] AATA 496 was distinguished on the basis that Rankin still owned real estate after dissipating \$35,000 in a casino over a short period of time, and there was no evidence that he was addicted to gambling.

The Tribunal acknowledged that it might be said that Male's circumstances were the result of his own folly and failure to recognise his addiction to gambling or to seek any help or relief from it.

An attitude of that type would in my view be harsh, uncaring and heartless. Mr Males now endures perilous economic circumstances by reason of the dissipation of funds due to gambling and payment of other debts. Yet this cannot be looked at in isolation from his personal circumstances being his age, domicile, incapacity, injury, limited education, limited job opportunities and social status. He has virtually no assets capable of realisation and would not qualify for borrowed funds. At the age of 30 he presently lives on handouts from his mother who is also a workers compensation recipient. Despite having repaid ... \$16,863 from the proceeds of his common law settlement, he has — for practical purposes — been precluded from receiving a benefit since August 1996, some 165 weeks. At the time of the hearing there remained 77 weeks of his preclusion period to run before he becomes eligible for a social security benefit.

(Reasons, para. 29)

For those reasons the Tribunal was satisfied that part of the compensation moneys should be treated as not having been made, to the extent that the preclusion period should end on the date of the delivery of the reasons for the decision. The discretion in s.1184 is sufficiently broad to permit a finding of this type without any 'formula' (refer *Secretary, DSS v Smith* (1994) 53 FCR 58).

#### Formal decision

The AAT varied the decision so that the period of preclusion ended on the date of delivery of the decision.

[K.deH.]

## Lump sum compensation: whether in respect of lost earning or lost earnings capacity

LAWLOR AND SECRETARY TO THE DFaCS  
(No. 19990910)

Decided: 2 December 1999 by  
J.A. Kiosoglous.

#### Background

Lawlor was involved in a motorcycle accident in a motorcross event. His injuries were significant and he started to receive a disability support pension soon after.

His claim for compensation was settled for \$90,000 and a preclusion period was worked out under the provisions of the *Social Security Act 1991* (the Act). As he had been paid a social security pension during the time of the preclusion period, the DFaCS recovered from him the amount that he had been paid in social security payments. Lawlor was unsuccessful in having that decision changed when he sought review by the ARO and the SSAT.

#### The issues

The issue identified by the AAT was whether or not there was a component for lost earnings or lost capacity to earn in the lump sum compensation payment. The significance of this issue was that it determined whether the lump sum fell within the definition of 'compensation' in the Act. If it did not then no preclusion period would apply and no moneys would be recoverable under the Act as having been paid within that time.

#### The legislation

Under the Act, the provisions that govern the setting of preclusion periods or those that govern recovery of payments after an award of damages or compensation is made, rest upon an initial determination that an amount is 'compensation' within the meaning of the Act. This is defined in s.17(2):

17.(2) For the purposes of, means:

- (a) a payment of damages; or
- (b) a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or
- (c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme; or
- (d) any other compensation or damages payment;  
(whether the payment is in the form of a

lump sum or in the form of a series of periodic payments) that is:

- (e) made wholly or partly in respect of lost earnings or lost capacity to earn; and
- (f) made either within or outside.

#### The settlement

Lawlor's evidence was that he did not claim compensation for past or future economic loss. His argument was that the case was settled on a commercial risk basis as legal advice was that his claim had little chance of success. Whilst the particulars of claim did state that Lawlor 'has suffered economic loss as a result of the injuries and will have substantial loss of future earning capacity', Lawlor submitted that it is standard to make such claims. The DFaCS, however, relied on these words in the claim and on correspondence between Lawlor's solicitors and the insurance company, to show that the issue of a component of economic loss was in the forefront of the parties' minds.

In deciding the matter the AAT looked at several authorities dealing with the issue of whether a sum is 'compensation' at all. The Tribunal referred to *Cocks and Secretary to the DSS* (1989) 48 SSR 602 and cited from that decision:

... In many cases the task of obtaining sufficient evidence to enable the delegate to form the necessary opinion is at the least a very difficult one. In the case of a judgement of the Industrial Court after a contested hearing it would be unlikely that the delegate in forming an opinion one way or the other would depart from the decision of that Court in the absence of other evidence. Where, however, there is a consent order like the type in question then the task of the delegate is, to the extent that it is possible having regard to all the circumstances, to identify the basis upon which the compensation was paid in order to identify what incapacity the payment was to effect compensation ... In the absence of the delegate having sufficient information to form the requisite opinion then the Department cannot recover under s.115B.

(Reasons, para.14)

In *Cunneen and Secretary to the DSS* (1995) 2(2) SSR 8 the AAT, in deciding that a sum was not 'compensation' within the meaning of the Act, had stated:

28. ... I find that the balance was made up of:

- (a) \$31,275 — s.66 — compensation for permanent injuries paid in accordance with the percentage loss determined under a table of maims
  - (b) \$15,000 — s.67 — pain and suffering
  - (c) \$10,000 — medical expenses
- \$56,275

29. It follows, in my view, that I cannot be satisfied that the lump sum payment included any amount for lost earnings or lost

earning capacity. As the Full Court made clear in *Blunn v Cleaver* (supra) the statutory provisions here in question are to be interpreted taking into account that the perceived legislative intention is such as to require that all the provisions of Pt 3.14 operate according to the nature of the entitlement to the compensation payment rather than to the manner in which payment is, in fact, made (119 ALR 65 at 81).

(Reasons, para. 15)

In Lawlor's case the AAT decided that it must look to more than merely the settlement itself and stated that it did not consider the words used in the statement of claim to be particularly helpful. The AAT considered that the reference in the words of the claim to 'economic loss' indicated no more than that the applicant hoped to be able to receive moneys for those things:

In order for a compensation payment to be considered to include loss of earnings or earning capacity, there must be more solid evidence of this intention than merely the fact that these were in the heads of claim. A plaintiff may claim damages because the sun wasn't shining and receive money in an out of court settlement to stop him taking such an action to court and thereby costing a defendant more money. This does not mean that he was paid because the sun didn't shine.

(Reasons, para. 22)

The AAT decided that in Lawlor's case the insurance company paid the amount to avoid the risk of going to trial, and this did not constitute actual payment in respect of loss of earnings or lost capacity to earn.

The Tribunal found that s.17(2) was not satisfied and the lump sum was not 'compensation'.

#### Formal decision

The AAT set aside the decision under review and substituted the decision that there was no 'compensation' paid to Lawlor in respect of lost earnings or capacity to earn and that as a result no social security payment was recoverable from him.

[M.C.]

[Contributor's note: It is curious that the AAT relied on the AAT case *Cunneen* without any reference to the fact that the decision was set aside by the Federal Court in *Secretary to the DSS v Cunneen* 3(3) SSR 36.]

## Sole parent pension: joint custody; determining eligibility

HOLMES and SECRETARY TO  
THE DFaCS  
(No. 19990844)

Decided: 19 October 1999 by  
M.D Allen.

#### Background

This was an application for review by Holmes against an SSAT decision that affirmed a decision by an authorised DSS delegate to reject his claim for sole parent pension (SPP).

#### The facts

After the breakdown of their marriage, Holmes and Passmore decided that Passmore would have custody of their four children, whilst Holmes would have access. In practice this meant Passmore had care and control of the children for 60% of the time, as against Holmes' 40%. The children would usually spend eight or so consecutive days with Holmes before returning to Passmore. These arrangements were made mutually without recourse to the Family Court for a residency determination. Subsequent to the initial SSAT decision, Passmore had a child by another man.

#### The issues

The specific issue before the AAT was to determine factors relevant to the exercise of the Secretarial discretion under s.250 (2) of the *Social Security Act 1991* (the Act) to designate which party was to receive SPP where a child may be considered an SPP child of more than one person because of joint custody arrangements.

The AAT was concerned that the Act offered no guidance as to how the Secretary should exercise his or her discretionary authority, but found that it was necessarily 'left as a discretion to take into account the various permutations and combinations which may exist in the case of dealings between adults' (Reasons, para. 7) and noted, further, that the discretion had been previously exercised on the basis of the preponderance of care and control of the children.

#### Preponderance of care and control

The AAT found that in circumstances of shared custody where these arrangements alternated between parents regularly over a period of time and which involved joint decision-making on major issues, reliance on the preponderance of the care and control test was alone insufficient. Following Secretary, Department of Social Security v Lowe [1999] FCA 707 (28 May 1999)

the AAT found that it was unrealistic to view such joint custody arrangements as neatly divisible for the purposes of a 'preponderance of care and control' test and that resort to further factors was necessary to guide the exercise of the discretion conferred by the Act.

#### The financial needs of the parties

The AAT found, following Guyder and Secretary, Department of Social Security (AAT 10967, 29 May 1996) that recourse to the gravity of financial need was determinative where all other criteria were equal. The AAT found further, having noted the beneficial nature of the legislation, that the criterion of financial need reflected the purpose of the Act, namely to assist disadvantaged members of the community, quoting Guyder with approval on this point.

The AAT stated that 'in this matter also one must consider the relative financial positions of the parties, and found that, although Holmes had a profession, his current unemployed status placed him in 'more necessitous financial circumstances' than Passmore who had a business and had taken over the mortgage of the former matrimonial home. The AAT accepted that Passmore's most recent child was being supported by its father, and further found that Passmore's circumstances were thus considerably changed. The AAT stated 'More importantly ... she [Passmore] is entitled to payment of a Parenting Pension Single in respect of that child' (Reasons, para. 14), and suggested Passmore make application for such payment on behalf of her most recent child.

#### Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that Holmes be paid parenting payment single from the next payment day.

[L.B.]