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.]