

**Formal decision**

The Federal Court dismissed the appeal and ordered Meschino to pay the Department's costs.

[C.H.]

**Compensation preclusion period: special circumstances**

**KIRKBRIGHT v SECRETARY TO THE DFaCS**  
(Federal Court of Australia)

**Decided:** 21 December 2000 by Mansfield J.

**Background**

Kirkbright was in receipt of a sole parent pension during the period 28 January 1993 to 4 September 1997. On 27 July 1993 he was injured in a motor vehicle accident. He commenced a claim for compensation and was awarded \$121,463 plus costs and interest. The award included \$70,000 for past economic loss and \$5000 for future loss of earning capacity.

Centrelink applied a preclusion period in respect of Kirkbright's entitlement to a social security payment based on a figure of \$75,000 for economic loss. The preclusion period extended for 181 weeks, from 27 July 1993 to 13 January 1997.

**The AAT's decision**

It was argued that there were special circumstances in Kirkbright's case such that all or part of the compensation payment should be treated as not having been made, thus reducing the preclusion period. The special circumstances put forward included ill health, financial difficulties and the unfairness in Kirkbright's situation of strictly applying the legislative scheme. In considering the latter issue, the AAT looked to the Explanatory Memorandum of the *Social Security Legislation Amendment (Budget and other Measures) Bill 1996* and determined that the intent of the legislation was that compensation recipients must exhaust available funds before claiming social security benefits.

**The decision of the Court**

The Court held that the AAT had erred in law when interpreting the intent of the legislation. Mansfield J stated that the rationale behind the legislation was to circumvent any concurrent entitlement to compensation income and social security benefits:

In my view, that misapprehension of the legislative policy has influenced the Tribunal into excluding from consideration unfairness in the strict application of the legislation as possibly demonstrating that special circumstances exist in the applicant's case. Indeed in my view, s.1184 is designed specifically to enable the respondent, and on review the Tribunal, to ameliorate such unfairness or injustice when it appears by virtue of the strict application of the Act.

(Reasons, para. 22)

The Court held that the Tribunal had erred by failing to examine the particular circumstances in Kirkbright's case:

... one would expect the Tribunal to have expressly referred to the amount of the claimed refund, the amount of the implicit weekly earnings or income contained in the award for damages, and to have determined the extent to which the independently arising benefit by way of pension under the Act would still have been payable in the face of that deemed income or implicit income and other considerations. In other words, it would have looked at the extent to which there may have been an injustice or unfairness to the applicant in the particular circumstances. It did not do any of these things. It is clear, in my view, that the Tribunal instructed itself, as a matter of law, that unfairness by virtue of the operation of s.1165(1A) and the other provisions to which I have referred cannot constitute special circumstances.

(Reasons, para. 25)

As a result Mansfield J concluded that the AAT had deprived itself of the opportunity, in the light of the injustice it had found to exist, to apply s.1184.

The Court also rejected the Department's submission that the unfairness or injustice caused by the strict application of the Act could not qualify as a special circumstance, unless it in some way arose out of some other special circumstance. The Court noted that this submission failed to have regard to the clear words of s.1184, and was contrary to authority.

**Formal decision**

The matter was remitted to the AAT for further consideration according to the law.

[A.T.]

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