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Disregarding compensation payments by reason of special circumstances

This is the second instalment in a two-part special on compensation recovery. The first article appeared in the April edition of *Plaintiff*.

Section 1184K of the *Social Security Act* 1991 (Cth) allows the secretary to disregard, in whole or in part, the receipt of compensation, and thus avoid or reduce the social security preclusion period. The test is beguilingly simple. Does the secretary think it is appropriate to do so in the special circumstances of the case? There have been many tribunal and Federal Court decisions on these provisions. There are no hard and fast guidelines for determining special circumstances. It is a question of fact in each case.[1] This article considers the most common factors in special circumstances arguments.

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UNFAIRNESS OR RELATIVE HARDSHIP ARISING BY REASON OF THE 50% DEEMING RULE

The secretary's position has consistently been that any unfairness arising from the application of the 50% rule was envisaged by parliament when it enacted the provision, and so cannot alone amount to special circumstances. However, in *SDSS v Smith*[2] it was held that the blunt nature of the 50% deeming rule could itself be the basis for the finding of special circumstances.

In some cases, applicants have sought to make out special circumstances because of the different manner in which the 50% deeming rule treats lump sum compensation compared to the more lenient treatment of periodic compensation and the even more lenient treatment of ordinary income.

The essence of the argument is that two people should not be treated differently under the Act if they are in otherwise identical situations, except that one is injured and receiving income from workers compensation, while the other is uninjured and receiving income as wages. They each have the same rent, food and childcare costs.

Notwithstanding some criticism of the discriminatory nature of the policy underlying this differential treatment, the tribunal has held that this difference does not, of itself, amount to special circumstances.[3]

This was affirmed in *Groth v SDSS*,[4] although Justice Kiefel did not preclude the possibility of special circumstances arising from hardship or unfairness because of the application of the blunt (or arbitrary) deeming rule.

In *Kirkbright v SDFaCS*,[5] Justice Mansfield held that it was an error of law for the tribunal to hold that unfairness in the application of the deeming rule, in the particular circumstances of the applicant's case, could not comprise special circumstances. The injury that gave rise to compensation had no connection to the applicant's entitlement to a sole parent pension, and the yearly earnings implicitly accepted by the trial judge when awarding compensation would not have precluded him from receiving a part sole parent pension.

When the case was remitted to the tribunal,[6] it was held that $5,000, identified by the District Court as payment for future economic loss, should be disregarded. The tribunal considered, in hindsight, that this amount was inadequate compensation for lost earning capacity, when considered in conjunction with his lost entitlement to the sole parent pension.

Applicants often argue special circumstances on the basis that the true amount of economic loss in the settlement is either *de minimis*[7] or such a small percentage of the total lump sum that they would lose more from lost social security payments than if they were awarded in economic loss.

In *Re SDSS and Brain*,[8] for example, the applicant was in her mid-fifties and in ill-health. She received $30,000 in her settlement. Because of her age and the fact that economic loss is only paid to retirement age (60), the tribunal found it

harsh to treat 50% of her settlement as economic loss, and therefore disregarded a proportion of the settlement.

But in *Re Fowles and SDSS*,[9] the tribunal refused to find special circumstances where the applicant received in a consent settlement a significantly lower economic loss component than the amount that would have accrued under the 50% formula.

Counsel argued that this lower component occurred because of the desirability of reaching settlement before the trial. This stemmed from difficulties in proving economic loss and the fact that liability was very much in issue, with some contributory negligence likely to be proved.

In *Re SDSS and Beel*,[10] the tribunal disregarded a substantial part of a lump-sum payment of $60,000 because only $10,300 related to incapacity for work. The other parts of the payment were $29,809 for permanent impairments and $19,691 for non-economic loss and various out of pocket expenses.

The tribunal noted that no inference could be drawn that 'the quantum of each component of the consent order was in any way manipulated to achieve a specific result with implications for social security benefits'[11] because the quanta were taken from the Compensation for Permanent Injuries table, which forms part of the *Workers Compensation Act* 1987 (NSW). The tribunal considered it would be 'unfair, unjust and quite inappropriate under these circumstances'[12] to leave in place the 50% formula figure of $30,000.

In *Re SDFaCS and Guettler*,[13] the tribunal found special circumstances for two reasons. Firstly, the respondent never had any earning capacity before the accident (because of disability). Secondly, his actual legal and medical charges accounted for almost 50% of a relatively small lump sum.

RELATIONSHIP BETWEEN COMPENSATION AND WELFARE PAYMENTS

The lack of relationship between the compensation payment and the social security payment from which the person is precluded is often argued as special circumstances. Section 1184K(2) provides that this fact alone does not constitute special circumstances.

However, in *SDFaCS v Edwards*,[14] Justice Drummond held that section 1184K(2) does not prevent this and other factors in the case from being considered when determining special circumstances.

INCORRECT ADVICE

Before *Re SDSS and* VYS[15] it was thought that incorrect legal advice on the effect of a settlement on social security entitlements was irrelevant for special circumstances purposes. However, in *VYS* the tribunal said:

'If delay on the part of a solicitor is not necessarily "to be visited upon a client" whose only remedy would be action against the solicitor, but may constitute "an acceptable explanation for delay", it would seem that incorrect advice from a solicitor may, in an appropriate matter, constitute an acceptable special circumstance within the meaning of that term in section 1184 of the Act. That is a more realistic response than one which requires an impecunious client to commence action against a solicitor or else suffer the consequences.'[16]

Special circumstances have been regarded in cases where the relevant government body has either failed to advise on the preclusion period prior to the settlement or has advised an incorrect preclusion period upon which the applicant has acted to his or her detriment.

For example, in *Re Bell and SDSS*,[17] the applicant, before agreeing to a lump-sum settlement, telephoned the department to inquire about his entitlement under a disability insurance policy. He was wrongly advised that a compensation preclusion period would not apply. The tribunal shortened the preclusion period by one year, commenting on the department's obligation to give correct advice.[18]

FINANCIAL HARDSHIP

Although financial hardship may be grounds for finding special circumstances, it is not a prerequisite for special circumstances.[19] The departmental guidelines[20] purport to concur with this, but go on to provide that special circumstances cannot be found where the applicant has sufficient liquid resources to survive the preclusion period.

These two propositions are plainly inconsistent. In the writer's view, a person is not necessarily barred from making a special circumstances claim by reason of the existence of some liquid assets.

In *Re Brodley and SDSS*,[21] the tribunal considered that the circumstances must be exceptional, and noted: 'In situations where persons have a substantial unencumbered asset the tribunal has been reluctant to find special circumstances. It has also been reluctant in circumstances where the financial situation of the applicant is no more than "straitened".'[22]

In *Re Napolitano and SDSS*,[23] special circumstances were refused because the applicant's workers compensation receipts exceeded the invalid pension rate.

In *Re SDSS and VYS*, the tribunal pointed to the undesirability of denying special circumstances to applicants who, while not in immediate financial hardship, are likely to face long-term financial difficulty if special circumstances are not found. The tribunal considered it was 'inappropriate for a system of social security to require people to take "a one-way ticket to poverty" to qualify for social security payments'.

The departmental guidelines[24] provide that hardship may not suffice where there are other persons who could reasonably be called upon to support the applicant.

EXISTING ASSETS

Cases before the tribunal often involve situations where the person has used part or all of their lump-sum compensation to buy a home or discharge a mortgage on an existing home. The tribunal's approach to these cases has varied. In part, it seems dependent on the modesty of the house. Where a person purchases an expensive house, ▶

the tribunal has shown reluctance to find special circumstances because it is possible to sell or mortgage the house or to trade down to a more modest one.

In *Re SDSS and Turner*,[25] the tribunal found there were special circumstances because the current home was 'towards the bottom end of the market' and the move to rental accommodation would be 'disastrous for the family which is currently at the end of its tether emotionally'. It would 'inevitably mean that the family would end up in public housing at government expense'.

In *Re SDSS and Hickman*,[26] the tribunal considered that Mr Hickman should not be required to divest himself of two houses, one occupied by his estranged wife and their children, and the other on a bush block, which provided the isolation he required (as a result of his severe injuries) to give him some emotional stability.

Where a house or land purchased with the lump sum is not the person's principal residence, the tribunal is more likely to require it to be liquidated before finding special circumstances.[27] The same goes for expensive cars and other assets.[28]

However, in *Re Duca and SDSS*,[29] the tribunal did not force a sale of a truck, purchased by the applicant for $39,809 from his lump sum for use in a sand-carrying business. The tribunal was not satisfied the truck would secure a reasonable price. 'It may well be that the sale will dispose of the applicant's only possible income earning asset and still not get them out of financial trouble.'

EXPENDITURE OF THE MONEY

Many cases emphasise that reckless or imprudent expenditure of compensation funds on holidays, cars, gifts, entertainment and so on is a negative factor in the exercise of the discretion. However, exceptions are sometimes made for cases where the reckless expenditure is itself the result of a sick mind.

For example, in *Re SDSS and Thompson*,[30] the respondent spent a large proportion of a $575,000 lump sum on friends, alcohol, cars, gambling and drugs. More was lost through poorly handled investments. The tribunal reduced the preclusion period after considering the investment losses, 'money lost due to psychological imbalance and social and intellectual disadvantage at the date of the receipt of the lump sum payment'[31] and 'the respondent's background, psychological state and poor management skills'.[32]

The preclusion period was not reduced to zero because the respondent still had substantial assets, including a house which could be rented or sold. A Federal Court appeal was dismissed.[33]

In *Re Anderson and SDFaCS*,[34] the preclusion period was shortened because the applicant had spent his lump-sum compensation on gambling and had no means of support. However, he was refused lump-sum arrears payments because he was likely to gamble them away.

In *SDFaCS and Edwards*,[35] the applicant spent part of a settlement establishing a business, which later failed. The tribunal declined to exclude the money spent establishing the business, saying that the applicant had failed to set aside provisions to support himself and that his impoverished state was a result of his voluntary actions.

ILL HEALTH

Physical and mental ill health is regularly taken into account in special circumstances. The ill health may go to the fact that the applicant has no capacity to earn an income to support him- or herself, or it might go to the circumstances under which the compensation was spent.[36]

In *Re SDSS and Galea*,[37] the applicant was a long-term heroin user who had recently stabilised his life, married, and had children. His health was poor, as was that of one of his children. The tribunal found that the family house would have to be sold if the preclusion period was enforced. This was likely to cause stress and a return to heroin use, with adverse health consequences for the applicant and his children. The tribunal was prepared to find special circumstances.

In *Re SDSS and Moshref*,[38] the tribunal found special circumstances, after considering the respondent's financial circumstances, his deteriorating back condition, the unexpected pregnancy of his wife, her inability to return to work immediately, and the impetus for her leaving work (a misunderstanding of government advice about the possibility of a preclusion period).

The tribunal accepted that while pregnancy in itself could not be regarded as unusual, uncommon or exceptional, her unexpected pregnancy after 10 years of trying and several miscarriages was significant. Due to the nature of her pregnancy and her medical history, the family did not have available to them a source of income which they anticipated having when they spent the compensation funds.

SOCIAL CONDITIONING

A person's perception of their social obligation can be a relevant consideration in a special circumstance application.[39] In *Re Cvetanoska and* SDFaCS,[40] the tribunal accepted a concession by the department that $10,000 spent by the applicant on her husband's funeral should be disregarded in a compensation lump sum because of her cultural obligations within the Macedonian community.

However, further expenditure of $8,000 on a headstone and other expenses was not disregarded because 'any expenditure undertaken as a result of the pressures must be taken in the context of what can be afforded'.[41]

Once special circumstances are found, there is discretion as to the extent to which compensation will be disregarded. This is an exercise in 'intuitive fairness', rather than mathematic precision.[42]

CONCLUSION

Failure to consider the effect of compensation recovery can lead to significant financial disadvantage for a client. To achieve the best possible result for the plaintiff, the legal representative should consider the amount of economic loss relative to the whole claim, the plaintiff's age and any special circumstances.

Practitioners should seriously consider whether it is in the client's interest before making and pressing small economic loss claims as part of larger non-economic loss claims. This can result in a net loss to the client, with little prospect of attracting the operation of special circumstances provisions. PL

Endnotes:

1 See *SDSS v Smith* 23 ALD 277.
2 30 FCR 61.
3 *Zaccardi v SDSS* 40 ALD 760.
4 40 ALD 451.
5 32 AAR 120, para 25-29.
6 (2001) AATA 480.
7 eg *SDFaCS v Hall* (2001) AATA 664 - $7000 in a $185,000 lump-sum settlement, where the plaintiff's injuries had deteriorated.
8 Unreported, 24 June 1993.
9 38 ALD 152, at 38.
10 38 ALD 736.
11 at 738.
12 at 739.
13 Unreported, 20 April 1999.
14 32 AAR 370.
15 40 ALD 745.
16 at 38.
17 Unreported, 24 April 1998.
18 para 18-19.
19 See *Re SDSS and Hill.*
20 at 4.13.4.10.
21 Unreported, 14 August 1991.
22 at 17.
23 Unreported, 23 December 1992.
24 at 4.13.4.20.
25 Unreported, 26 May 1993.
26 43 ALD 75.
27 See *Re SDSS v Bolton* 18 ALD 464.
28 See *Re Smith v SDFaCS* (2001) AATA 541; *Re SRL v SDSS*, unreported 14 October 1997.
29 Unreported, 20 October 1995.
30 Unreported, 17 September 1993.
31 at 10.
32 at 12.
33 *SDSS v Thompson* 20 AAR 435.
34 (2000)
35 [2002] AATA 187.
36 See *SDSS v Thompson* 53 FCR 580.
37 35 ALD 739.
38 Unreported, 16 December 1994.
39 See *SDSS v Thompson.*
40 Unreported, 9 June 2000.
41 at 29.
42 *SDSS v Thompson.*

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Similar fact evidence in civil trial: *A review of the law*

In *Morris v Warrian & Suncorp Metway Insurance Limited,*[1] where both liability and quantum were in issue, Justice McGill considered the role of similar fact evidence in civil trials. He also greatly stressed the importance of the level of pain the plaintiff suffered, compared to the level of impairment at which he was assessed, when awarding his general damages.

The facts

The plaintiff was riding a motorcycle, which collided with the rear of the defendant's vehicle. The plaintiff said the accident happened because the defendant's vehicle moved to the left and slowed down as if it was going to park at the kerb. The plaintiff began to overtake the defendant's vehicle when it suddenly, without warning, swung to the right and into the path of the plaintiff, as if executing a u-turn.

The defendant said he had moved a little to the left to avoid a fire hydrant plug, which he could see above the surface of the bitumen. He had then moved back to the normal line of traffic when his vehicle was struck from behind by the plaintiff's motorcycle.

Similar fact evidence

The plaintiff called a witness who said he had seen the defendant on two other occasions, shortly before the accident, execute a u-turn at about the same place on the road without giving prior warning to other traffic. The question was whether the evidence about the earlier incidents was admissible.

One reason why similar fact evidence is inadmissible is that if admitted it would be given undue weight by a jury, making it more prejudicial than probative. This applies in criminal, not civil proceedings. In civil cases, such evidence cannot be prejudicial because there is no accused person.

It was stated that matters of habit, trade custom and business practices could be proved by evidence of what has been done on other occasions. Justice McGill examined a number of civil cases dealing with similar fact evidence. ▶

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