

the obligation to repay the allowance where 'special circumstances' exist.

Did 'special circumstances' exist?

The applicant argued that special circumstances existed that should release her from the liability. The principles which governed the exercise of the discretion to waive recovery of sickness benefit under s.115(4A) were held in *Izard* (1984) 22 SSR 255 to be relevant to the exercise of the discretion contained in s.135R(1B).

Referring then to the discussion of those principles in *Ivovic* (1981) 3 SSR 25 the Tribunal asked whether imposition of the liability would be 'unjust, unreasonable or otherwise inappropriate'.

It was argued by the applicant that it should be taken into account that the rehabilitation she underwent did not prepare her for work but was directed to enabling her to cope with everyday life. She had little chance of ever obtaining employment and at only 18 years of age her only asset was the compensation payment she had received.

The AAT noted that the applicant and her legal advisers were aware of the demand the DSS had made with respect to the cost of training prior to the settlement of her common law claim. The Tribunal was also aware that her settlement was much lower than the assessment of her damages by her legal advisers but was accepted because of the concern that her contributory negligence might have on any award.

The AAT in rejecting the claim that special circumstances existed which would justify her release from the liability commented:

'...Although the sum received by the applicant may not adequately compensate her for her injuries and loss of enjoyment of life, it is nonetheless a considerable sum and was accepted following sound legal advice. The applicant cannot be said to be suffering from severe financial hardship. She lives with her parents and has to date few financial needs. Were the applicant to choose to live independently

from her parents sufficient funds are available in court for her to establish herself alone or with a friend in suitable accommodation.'

(Reasons, para 13)

The Tribunal also remarked on the effect of the reduction in the settlement for her contributory negligence. Such an occurrence was not of itself 'special circumstances' although it assists in deciding whether it would be unjust, unreasonable or inappropriate in enforcing the liability.

The applicant had received a substantial amount of compensation. Public moneys had been expended. This was a paramount consideration in determining whether recovery should be waived. To make the applicant pay for her own rehabilitation would not be unreasonable nor impose financial hardship.

Formal decision

The AAT affirmed the decision under review.

Assets test: valuation

BENNETT and SECRETARY TO DSS
(No. N86/520)

Decided: 11 December 1986 by B. J. McMahon, M. S. McLelland and J. H. McClintock

Robert Bennett had his age pension cancelled on 7 March 1986 because of the value of his assets. He applied to the AAT for review of that decision.

The assets in question were two blocks of land which flanked both sides of the block of land on which the house in which he resided was situated.

The legislation

Section 6AA(1) of the *Social Security Act* provides that in calculating the property of a person their interest in their principal home shall be disregarded. Sub-section (3)(a) defines principal home to include the private land adjacent to the house up to a total area of 2 hectares. Sub-section (4) then reads:

'Where the area of private land adjacent to a dwelling-house exceeds substantially the average area of private land adjacent to other dwelling-houses in the same

locality, so much only of the first-mentioned area as the Secretary determines in writing not to be in excess of the average area shall be taken into account for the purposes of paragraph (3)(a).'

That sub-section was subsequently repealed. As a result the applicant again qualified for the full pension having satisfied the other sub-sections. The issue for the Tribunal was whether his pension was properly cancelled pursuant to sub-s.(4) prior to its restoration.

Did the two blocks exceed the average?

The total area of land did not exceed 2 hectares. The only issue was whether the land adjacent to the applicant's house exceeded the average for other houses in the same locality.

The Tribunal required the DSS to demonstrate that the determination under sub-s.(4) was based upon adequate evidence [*McDonald* (1984) 18 SSR 188]. The DSS called no evidence at the hearing and relied on two valuations supplied by the Taxation Office. Those valuations

deduced a value for the applicant's land based upon sale prices of comparable land in the area. The valuations contained no description of the area in general and no statement that the land adjacent to the applicant's land substantially exceeds the average area of land adjacent to other houses in the area. There was no evidence to support the case for cancellation.

The applicant on the other hand made a statement at the hearing that there were several houses near his which stood on large blocks of land. The AAT accepted the truth of his statement which the DSS had no means of contradicting.

Formal decision

The AAT set aside the decision and remitted the decision to the DSS with the direction that payment of the applicant's pension be made on the basis that at all relevant times the private land adjacent to his dwelling did not exceed substantially the average area of private land adjacent to other dwelling houses in the same locality.

Assets test: date of deprivation

WOLFGANG and SECRETARY TO DSS
(No. N85/352)

Decided: 7 July 1986 by C. J. Bannon

Mr Wolfgang had applied for a pension but apparently was refused

after the application of the assets test. In particular it had been decided that he had deprived himself of property in order to qualify for the pension and so s.6AC operated which allowed the DSS to include that property for the purposes of the assets test. [The

legislation is set out in *Gibbons*, this issue.] He applied to the AAT for review of that decision.

The facts

The applicant decided to sell his dairy farming, cattle and wheat growing