However, the AAT decided that the failure of the DCSH to advise Sharman of the cost of his rehabilitation was a 'special circumstance', even though this was a common practice of the Department. The AAT said that everyone was 'entitled to know the costs that they are incurring for provision of a service'. Avoiding disclosure of costs so as not to discourage some people taking a rehabilitation program 'would have to be regarded as unduly paternalistic', the AAT said: Reasons, para. 16.

The AAT also rejected an argument on behalf of the DCSH that its common practice could not be described as 'special'. The Tribunal rejected the view that repetition of 'some default of a department or instrumentality... among a sufficiently large group of persons ... changes the character of the circumstances to being normal'; and preferred 'to view the situation from the individual's point of view': Reasons, para. 13.

Some information should have been provided to persons undergoing rehabilitation and the failure to do so was a 'special circumstance', particularly where that failure had an adverse effect, as it had on Sharman. The AAT exercised the discretion in s.23(3) to release Sharman from $450, representing the approximate cost of the additional 6 days treatment provided above the original estimate.

Formal decision

The AAT set aside the decision under review and substituted a decision that the DCSH pay Sharman $450.

[P.H.]

Dependent child: shared custody

SECRETARY to DSS and WETTER

Decided: 8 October 1991 by T E Barnett

W91/36

The DSS asked the AAT to review a decision of the SSAT which had set aside the DSS cancellation of Wetter's sole parent pension and rejection of her claim for family allowance.

Wetter and her husband had separated and the husband had sole guardianship and custody of their only child under a Family Court order made in April 1990.

Wetter was awarded access by the court but she and her husband had come to an informal arrangement under which the child lived with each of them on a week on, week off basis. Wetter's sole parent pension was cancelled by the DSS from 23 July 1990 and a claim she lodged for family allowance was rejected on 10 August 1988.

The SSAT set aside the cancellation of sole parent pension and determined that Wetter and her husband were entitled to split the payment of family allowance.

The legislation

Payment of both family allowance and sole parent pension requires the recipient to have a dependent child, within the meaning of s.3(1) of the *Social Security Act* 1947; that is, a child under 16 who is in the custody, care and control of the person.

Section 3(2) provides that a person shall not be taken to have the custody of a child unless the person, whether alone or jointly with another person, has the right to have, and to make decisions concerning, the daily care and control of the child.

For sole parent pension, a person must have a qualifying child (s.44).

Under s.43, a dependent child includes a child who is being wholly or substantially maintained by the person.

Dependent child

The AAT noted that the only issue in relation to both sole parent pension and family allowance was whether Wetter's child, B, was her dependent child.

The DSS had argued that the guardianship and custody order determined the issue: since Wetter's husband had sole guardianship and custody, she was precluded from claiming that B was in her custody.

The evidence indicated that during the times B was in her care, Wetter met all the routine daily expenses for such things as food, medical expenses etc and that she and her husband shared the costs of his school fees, clothing and tennis lessons (though her husband paid the greater proportion).

The AAT, relying on the authority of the Federal Court decisions in *Ho* (1988) 40 *SSR* 510 and *Huynh* (1988) 44 *SSR* 569, decided that Wetter had effective custody, care and control of B every second week and during half of each school holidays.

While she was in daily control of B during the access periods ordered by the Family Court (as varied by consent), she did have, not only the right, but also the duty, to make decisions concerning the daily care and control of the child: Reasons for decision, p 7.

Applying this to the issue of family allowance, the AAT decided, relying on *Mrs B* (1984) 22 *SSR* 246, that, since the income of Mr Wetter was substantially more than that of his ex-wife, the family allowance should be shared on a two thirds, one third basis and that Mr Wetter receive the one third.

The AAT also decided that Wetter was entitled to receive the sole parent pension but only for the periods during which her son is actually under her daily care and control.

Formal decision

The AAT set aside the SSAT decision and substituted for it a decision that Wetter was entitled to a two thirds share of the family allowance and that she was entitled to sole parent pension for the periods when she exercises actual care and control over her son.

[**Note**: the AAT, while noting that s.86 permits the sharing of family allowance, did not refer to the fact that sole parent pension cannot be shared (see s.52), nor is there any provision authorising partial payment of pension, other than for means testing purposes.

Further, as sole parent pension is paid on the basis of full fortnightly periods (see now the distinction between payday-based and period-based payments in s.42 of the 1991 Act), there are real difficulties in payment for broken periods. This difficulty was discussed by the Federal Court in *Secretary to DSS v Field* (1989) 52 *SSR* 694].

[R.G..]

Discretion to grant special benefit: a humanist approach

SECRETARY TO DSS and SCHOFIELD

(No. 7378)

Decided: 11 October 1991 by P.W. Johnston.

The DSS sought review by the AAT of an SSAT decision that special benefit was payable to Lynelle Schofield from the date of her application for that benefit, 13 May 1991.

History

Ms Schofield was 19 years old and lived with her parents.

In January 1990 she suffered severe ankle injuries in a motor vehicle accident. She experienced difficulties with her recovery, requiring ongoing medical attention. On 8 January 1991 she had a further ankle operation.

Ms Schofield claimed sickness benefit on 23 January 1991. DSS granted this claim on 6 February 1991. She received 3 payments dating from 15 January 1991.

Ms Schofield ceased her employment and, on 25 February 1991, commenced full-time university studies. She advised DSS of this and her sickness benefit was terminated.

On 11 April 1991 Ms Schofield withdrew from her university course because of family turmoil and because she suffered from anorexia nervosa which had been getting worse throughout 1990. She claimed sickness benefit on 16 April 1991. A medical report tendered to the AAT stated that Ms Schofield was suffering from bulimia nervosa which can be precipitated or exacerbated by undue stress and that she suffered from stress as a result of emotional and family issues as well as her financial situation.

This claim for sickness benefit was granted but a 13 week full-time education leaver deferment period was imposed so that Ms Schofield was not entitled to sickness benefit payments until 15 July 1991. DSS delayed in advising Ms Schofield of this decision.

Accordingly, it was not until 13 May 1991 that she claimed special benefit. On 17 May 1991 DSS rejected this claim because Ms Schofield had available liquid funds of around $4000. On 19 June the SSAT affirmed the deferment of sickness benefit but decided to grant special benefit from 13 May 1991.

The legislation

Under s.129(1) of the *Social Security Act* 1947 there was a discretion to pay special benefit to a person who the Secretary was satisfied was 'unable to earn a sufficient livelihood' (para. (c)).

The AAT noted that the amendment to s.127(1) of the 1947 Act making the full-time education leaver deferment applicable to sickness benefit commenced on 20 September 1990.

Discretion the only issue

The DSS conceded before the AAT that Ms Schofield met the eligibility criteria for special benefit set out in s.129(1) but argued that the discretion to grant the benefit should not be exercised in her favour.

The AAT noted that:

> 'satisfying the preconditions merely opens the gateway to the field in which the Secretary's discretion lies. Having crossed the threshold to that field the claimant is not automatically assured of a grant of special benefit'. (see *Te Velde* (1981) 3 *SSR* 23)

(Reasons, para. 16)

The DSS decision was based on guidelines in its Manual which stated that applicants undergoing the education leavers deferment period should not be paid special benefit where their available funds were equivalent to more than twice the appropriate maximum rate of benefit. The AAT commented that:

> 'Reference to guidelines set forth in the Manual is in many instances a proper starting point for the exercise of a discretion such as that contained in s.129(1).'

(Reasons, para. 19)

The AAT considered this particular guideline not to be unreasonable because special benefit was:

> 'a "safety net" (*Guven* (1983) 17 *SSR* 173), directed to ensuring "very fundamental levels of support" (*Beames* (1981) 2 *SSR* 16) though at a standard something more than mere survival (*Spooner* (1985) 26 *SSR* 320).'

(Reasons, para. 21)

Financial considerations

Ms Schofield had savings of $3000 in one bank account and a 'nest egg', variously put at $1000 or $1500 in another bank account. The 'nest egg' was a gift from her grandmother which she intended not to be used until Ms Schofield turned 21.

Against this the AAT took into consideration that Ms schofield had incurred almost $4000 in medical expenses not paid by health insurance since the motor vehicle accident. She had borrowed from her parents to pay these debts and owed them between $3000 and $3500 as at 16 April 1991.

She had ongoing weekly expenses of $12.85 for health insurance and $39 medical fees. Whilst employed she paid her parents board of $50 per week and regarded herself as incurring an ongoing liability to her parents of $50 per week whilst not employed. Her mother gave evidence that neither she nor her husband had superannuation and needed the money. However, they were not pressing their daughter for payment.

The AAT said that:

> 'where claimants have available to them resources by way of family support or readily realisable assets, it is not reasonable in the absence of some greater justification to expect that the government should simply intervene and subsidise the claimant's standard of living and thereby, at the expense of public revenue, allow claimants to retain the benefit of their savings or assets.'

(Reasons, para. 24)

The AAT was of the view that, 'if the considerations governing the exercise of . . . [the special benefit] discretion were confined solely to matters of financial hardship', Ms Schofield might well have been expected to use up all her available assets and 'draw upon the full measure of family support' before being granted special benefit: Reasons, para. 35.

The liability to pay her parents board was taken into account because, if not living at home, she would have incurred an equivalent debt elsewhere. However, there was 'no immediate financial necessity' to pay that debt and her parents' readiness to support her meant that there was no reason for the government to intervene 'so far as that specific factor is concerned': Reasons, para. 37.

The AAT also considered that 'in ordinary circumstances' it would be hard to see why public funds should be expended to enable Ms Schofield to keep her 'nest egg' intact until she turned 21.

However, the AAT noted that in the light of 'the degree to which her excess medical expenses were accumulating it is doubtful if resort to the nest egg would afford her much relief. It would, on the other hand, probably have exacerbated her psychological stress'. (Reasons, para. 38).

Not limited to financial considerations

The AAT said that factors other than Schofield's finances were relevant:

> 'The Tribunal does not regard itself as restricted only to take into account financial and economic considerations when contemplating an exercise of the discretion available under s.129. Even in the past, when considering matters of what constitutes a "sufficient livelihood" for the purposes of s.129, the Tribunal has seen as relevant the physical and mental integrity and well being of the claimant for special benefit. It is in fact part and parcel of human existence. It would be entirely meaningless if the purpose of providing special benefit were to do no more than to keep the body alive, no matter what the circumstances of stress, anxiety and misery the recipient may be in. As the Tribunal pointed out in *Ezekiel and the Director-General of Social Services* (1984) 21 *SSR* 237, it is not necessary that the claimant should have to prove extreme hardship before becom-

ing entitled to special benefit. Sufficient livelihood means being maintained in a state of social and psychological security which, as a community, we have committed to bestow on those in need of it and those receptive to it.'

(Reasons, para. 40)

There were 3 main considerations relied upon by the AAT in deciding in the 'special circumstances' of this case that the discretion to pay special benefit should be exercised. First, there was the inter-relationship of medical factors and financial aspects.

Secondly, the AAT formed the view that paying special benefit would accelerate Ms Schofield's cessation of sickness benefit:

'In seeking special benefit she has sought to relieve some of the continuing build-up of expenses that psychologically have affected her health. Provision of special benefits in her case can be seen to be contributing to relieving her of burdens which are only likely to prolong her continuance on sickness benefit.'

(Reasons, para. 41)

Thirdly, there was a 'quirk of her situation' that she was receiving sickness benefits before commencing studies but could not then pursue her studies because of her health, and was then caught by the 13 week full-time education leaver deferment period upon reclaiming sickness benefit.

Backdating payment

The AAT decided that payment of special benefit should commence from 16 April 1991, the date of Ms Schofield's sickness benefit claim, payment of which was deferred for 13 weeks.

Backdating was regarded as a 'procedural' issue to which the *Social Security Act* 1991 applied rather than a 'substantive' issue to which the 1947 Act applied. (It will be recalled that all decisions up to and including that of the SSAT were made prior to 1 July 1991, when the 1991 Act commenced.)

Accordingly, s.731(2) of the 1991 Act was applied, with the AAT regarding the sickness benefit claim as a claim for a benefit 'similar in character to special benefit'. That provision enables special benefit to be paid from the date of such an earlier claim where the claimant would have qualified for special benefit on that date, she subsequently makes a special benefit claim and the Secretary is satisfied that it is reasonable to apply the provision to the claimant.

Formal decision

The AAT varied the decision of the SSAT by making special benefit payable from 16 April 1991, the date Ms Schofield claimed sickness benefit.

[D.M.]

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