THE SOCIAL SECURITY COMMISSIONERS

SOCIAL SECURITY ADMINISTRATION ACT 1992
SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992
SOCIAL SECURITY ACT 1998

Commissioner's Case Nos CSDLA/133/2005

APPEAL FROM A DECISION OF AN APPEAL TRIBUNAL
ON QUESTIONS OF LAW

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

HIS HONOUR JUDGE HICKINBOTTOM, CHIEF COMMISSIONER
MR COMMISSIONER ANGUS
MR DEPUTY COMMISSIONER BURNS QC

Appellant:	
Respondent:	**The Secretary of State for Work & Pensions**
Tribunal:	**Glasgow**
Tribunal Date:	**27 July 2004**
Tribunal Register No:	**U/05/098/2003/00366**

DECISION OF A TRIBUNAL OF SOCIAL SECURITY COMMISSIONERS

Decision

1. We find that the tribunal sitting at Glasgow on 27 July 2004 erred in law, and we allow the appeal. We set aside that decision and refer this matter to a freshly constituted tribunal for a rehearing under the directions given below.

Facts

2. The claimant is a girl who was born on 19 July 1994. On 7 November 2002 a claim for Disability Living Allowance ("DLA") was made on her behalf by her mother who is her appointee. In the claim form her mother described the claimant as having "behavioural difficulties, memory loss, difficulty concentrating and other problems", and as being hyperactive. She was unable to take in information and retain it. Some of the difficulties that the claimant encountered when out of doors were also set out. She sometimes wandered off. She suffered memory loss so that she was unaware of dangers. Her mother said, "I always have to be with her". The claimant had help through therapy and attended a speech therapist, paediatric psychologists, behaviour therapists and a consultant in paediatric neurology.

3. A report from the claimant's head teacher was also advanced. She described the claimant as at times having difficulty in socialising with her peers, and reported that a class room assistant helped the class teacher to motivate the claimant's learning and keep her on track. The claimant also got help to integrate with her peers on a social level. However, the claimant was said to be "making average progress for her age".

4. On 30 January 2003 a decision-maker decided that the claimant was not entitled to either component of DLA. The claimant appealed to the tribunal against that decision. Before the tribunal considered her case, a report from a paediatric neuropsychologist from a specialist neurosciences unit dated 29 April 2003 was produced. The claimant had been referred to that unit in May 2001. No formal diagnosis was made of the claimant's condition. An educational psychologist had previously considered that she suffered from a "pathological demand avoidance syndrome"; but that was not a description that the neuropsychologist who authored the new report found useful. However, he found the claimant to have significant problems in many areas of her ability to use language to solve problems. He considered that she had "difficulty in keeping instructions in mind, and in considering how new information relates to what she already knows and using this to produce meaningful responses". No neurological cause for her learning and behavioural difficulty had been found by the consultant paediatric neurologist who had been involved, and investigations such as MRI and chromosomal review were normal. It was not thought that the claimant fitted into any one category of diagnosis. The author of the report considered that the best way of describing the claimant was "as having significant learning difficulties with prominent language processing disorder and associated behavioural problems".

5. On 4 November 2003, an Appeals Service tribunal refused the claimant's appeal. The claimant appealed to a Commissioner against that decision. The Secretary of State conceded that the tribunal had erred in law. In CSDLA/190/2004,

Mrs Commissioner Parker allowed the appeal and remitted the matter to a freshly constituted tribunal. At paragraph 14 of that decision, the Commissioner examined the area of "prompting and encouragement to carry out bodily functions". She referred to two apparently conflicting decisions of Commissioners, namely CSDLA/309/1998 and CDLA/1148/1997. She followed the latter saying at paragraph 15:

> "At issue are the claimant's reasonable requirements for assistance with bodily functions which are necessitated by the disablement. It is not determinative that the claimant is physically unable to carry them out unaided. If her disablement prevents her from doing so because it induces lack of motivation which exhortation from another is able to overcome, then this is capable of constituting attention with independent bodily functions which a claimant is thereby enabled to carry out. It must of course be the claimant's mental disablement which causes the lack of motivation and not, for example, a character defect."

We return to the question of whether prompting or motivating are capable of constituting attention in connection with an impaired bodily function within the meaning of the relevant statutory provisions below (paragraphs 18-27).

6. The claimant's appeal was duly heard before a newly constituted tribunal in Glasgow on 27 July 2004. It was submitted on behalf of the claimant that she was entitled to the lowest rate of the mobility component and the middle rate of the care component for daytime needs. In respect of the care component, the tribunal found that the claimant was able to perform many day to day functions herself. It noted that she received help to keep her motivated in respect of her lessons and to integrate socially with her classmates, but found that this did not constitute attention in connection with a bodily function - not accepting that "communication" and "social integration" were "bodily functions". The tribunal considered this determinative. It said:

> "In our view, the proposition by [the claimant's representative] that encouragement to do something which involves moving the limbs or some other body part constitutes attention in connection with a bodily function fails to take account of the distinction between an activity and a bodily function. We have followed R(DLA) 3/03 among others."

The tribunal found that the claimant was not entitled to either component at any rate.

7. The claimant appealed to the Commissioners against that decision in relation to the care component. No appeal was made in relation to the refusal of the mobility component, and we do not consider that component further. However, in view of the fact that this appeal raised questions of special legal difficulty as to whether prompting and motivation are capable of constituting attention in connection with an impaired bodily function and the proper scope of the decision by a Tribunal of Commissioners in R(DLA) 3/06, on 12 August 2005 the Chief Commissioner directed that the matter be dealt with by a Tribunal of Commissioners. The hearing was held in Edinburgh on 30 and 31 March 2006. The claimant was represented by Mr Simon

Collins, Advocate, and the Secretary of State by Mr David Bartos, Advocate. We are grateful to them for their submissions in both written and oral form, which have helped considerably to focus the issues with which this tribunal has had to deal.

The Law

8. The relevant statutory provisions giving entitlement to DLA are found in sections 72 and 73 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act"). The approach to "disablement" in these provisions has been considered by Tribunals of Commissioners in three recent decisions: R(DLA) 3/06 (particularly at paragraphs 33 and following), R(DLA) 4/06 and R(DLA) 6/06. The propositions derived from and applied in these cases were set out in R(DLA) 6/06 at paragraph 13 and 14, as follows:

> "13. ...
>
> (i) DLA is a benefit for people who are so disabled that they need help to cope with their disability. The purpose of the benefit is to assist with the reasonable care and mobility requirements that result from disability.
>
> (ii) "Disability" is distinct from "medical condition", "disability" being entirely concerned with a deficiency in functional ability, i.e. a physical or mental ability to do things. Whilst a medical condition may give rise to a disability (e.g. a condition that involves the loss of a limb would give rise to an obvious diminution in functional capacity), it may not do so (e.g. a life threatening but asymptomatic heart condition may not have any adverse impact on one's ability to care for oneself or be mobile without assistance). Sections 72 and 73 are entirely focused on disability.
>
> (iii) However, the statutory provisions impose a number of limitations. First, the claimant must be disabled, i.e. have some functional incapacity or impairment. He must lack the physical or mental power to perform or control the relevant function. Second, even where there is a functional incapacity, that alone is insufficient for entitlement to benefit - for the purposes of sections 72 and 73(1)(d), the disability must be *severe* i.e. the disability must be such that it results in the claimant requiring the degree of assistance identified in the legislation (e.g., under section 72(1)(a)(i), the claimant must require attention for a significant part of the day).
>
> (iv) ... [Consequently,] sections 72(1) and 73(1)(d) give rise to two issues. (i) Does the claimant have a disability, i.e. does he have a functional deficiency? (ii) If so, do the care or mobility needs to which that functional deficiency give rise satisfy any of paragraphs (i) or (ii) of section 72(1)(a) to (c) (and, if so, which) or (for the lower rate of the mobility component) section 73(1)(d)?
>
> 14. [S]ection 73(1)(a) [which governs higher rate mobility component] gives rise to some different issues. To satisfy the requirements for higher rate mobility component, it is necessary for a claimant to show that his symptoms or manifestations (even if physical themselves) have an identifiable *physical* cause. This is the only exception to the principle that the focus of the relevant statutory

provisions is upon the *consequences* of a condition, not its *cause*, this exception resulting from the binding effect of the Court of Appeal decision in *Harrison v Secretary of State for Social Services* (reported as an Appendix to R(M) 1/88)."

9. As the Commissioners indicated in R(DLA) 6/06 (at paragraph 15), these principles are the starting point for a consideration of issues concerning disablement within sections 72 and 73, and we will return to them. However, for the purposes of this appeal, we highlight the importance of the principle set out in paragraph 13(iii) of the extract, i.e. that the severity of the functional disablement is defined in terms of the degrees of assistance identified in the legislation. In the statutory scheme there is an important and close relationship between functional disablement and the assistance reasonably required to cope with that disablement.

10. The appeal before us concerned the requirements of Section 72(1)(a)(i). That subsection provides:

> "Subject to the provisions of this Act, a person shall be entitled to the care component of a disability living allowance for any period throughout which -
> (a) he is so severely disabled physically or mentally that -
>
> (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day....."

11. The debate before us concentrated on the degree and circumstances of assistance required under this provision before there is entitlement to the benefit where the disablement upon which the claimant relies involves loss of cognitive and perceptive function, and in particular the nature and scope of the term "bodily functions" in this context. We consider this below (paragraphs 28 and following).

12. However, before we do, we will deal with two important propositions in relation to these statutory provisions that were common ground between the parties, and ones with which we agree.

Functions of the Brain

13. First, the functions of the brain are included within the term "bodily functions".

14. We consider that this proposition is reflected to an extent in the oft-cited and approved approach of Dunn LJ in *R v National Insurance Commissioner ex parte Secretary of State for Social Services* [1981] 1 WLR 1017 (also reported as an Appendix to R(A) 2/80) ("*Packer's Case*") when (at page 1023F) he said:

> "To my mind the word 'functions' in its physiological sense connotes the normal actions of any organs *or sets of organs* of the body and so the attention must be in connection with such normal actions." (emphasis added).

It is also implicit in cases such as *Mallinson v Secretary of State for Social Services* [1994] 1 WLR 630 (also reported as R(A) 3/94), in which Lord Woolf (giving the majority opinion) not only commended the approach of Dunn LJ in *Packer's* Case but

also (at page 641C) expressly referred to mental disabilities as falling within the provisions.

15. The matter was put beyond doubt by *Cockburn v Chief Adjudication Officer* [1997] 1 WLR 799 (also reported as an Appendix to R(A) 2/98 ("*Cockburn*"), in which the House of Lords gave judgment in two consolidated appeals, *Cockburn* itself and *Fairey v Secretary of State for Social Security*. In respect of Miss Fairey's case, Lord Slynn of Hadley said (at page 813B):

> "Although movement of the limbs (including their use for walking and running) is a bodily function, so also in my view is the operation of the senses. The reception of sound, its communication to the brain and the brain's instructions to the limbs or other parts of the body to act or refrain from acting are all as much bodily functions as the movement of the limbs and the actions of the digestive or excretory organs."

In respect of Miss Fairey's case, all their Lordships agreed with Lord Slynn. This unanimous view of the House of Lords is of course binding on us.

16. In any event, with respect to those who have taken a different view, even without the benefit of precedent we would consider this construction of the statutory provisions to be clearly correct. The language of the section has to be considered as a coherent whole (*Woodling v Secretary of State for Social Services* [1984] 1 WLR 348 at page 352E per Lord Bridge of Harwich). As indicated above (paragraphs 8-9), a person's disablement is defined in terms of deficiency in his functional ability, i.e. the physical *and mental* power to do things (R(DLA) 3/06, paragraphs 34-35). In section 72, the words "physically *or mentally*" are words of inclusion, not exclusion. Therefore entitlement to the care component of DLA is not limited to some types of disability alone; there is no exclusion of some types because they are related to the brain or mind (R(DLA) 3/06, paragraph 38). The attention that has to be required is - it must be - related to the disablement (the functional deficiency) found. As Lord Woolf pointed out in *Mallinson* at pages 639H-640E), the question to be considered is the attention that is required "in connection with" the bodily function with which there is a deficiency. And in *Cockburn*, Lord Slynn said (at page 813E-F):

> "If the bodily function is not working properly that produces the disability which makes it necessary to provide attention. The attention is provided by removing or reducing the disability to enable the bodily function to operate or in some cases provide a substitute for it."

Looking at the statutory provision as a whole, the only reasonable construction is that the "bodily functions" for which attention is required include functions of the brain.

17. Therefore, on the basis of this statutory interpretation (backed as it is by binding authority), we consider the proposition agreed between the parties - that the functions of the brain are included within the term "bodily functions" - to be a correct proposition of law. We disapprove those cases (such as CSDLA/867/1997, CSDLA/832/1999 and CSDLA/860/2000) to the contrary.

Prompting and Motivation

18. Before us, the Secretary of State conceded that, as submitted on behalf of the claimant, prompting and motivating are capable of constituting attention in connection with an impaired bodily function within the meaning of section 72(a)(i) (and also section 72(c)(i), which is in substantively the same terms). We consider that concession properly made.

19. "Attention" has in this context been the subject of substantial consideration by the higher courts. In *Mallinson* (at page 637B), Lord Woolf approved and strongly commended the following from the judgment of Dunn LJ in *Packer's Case*:

> "The word "attention" itself indicates something more than personal service, something involving care, consideration and vigilance for the person attended. The very word suggests a service of a close and intimate nature. And the phrase "attention... in connection with... bodily functions" involves to my mind some service involving personal contact carried out in the presence of the disabled person."

Some comment on this passage might be helpful.

20. First, in addition to this passage from Dunn LJ's judgment in *Packer's Case*, Lord Woolf also referred to *Moran v Secretary of State for Social Services* (reported as an Appendix to R(A) 1/88), in which Nicholls LJ characterised "attention" as denoting "a concept of some personal service of an active nature", as opposed to supervision which is "a state of passivity coupled with a readiness to intervene". This characteristic - activeness - therefore has to be added to "care, consideration and vigilance".

21. Second, Lord Woolf (at page 637B) added one important caveat to the comments of Dunn LJ, namely that the "contact" need not be physical contact; and he held, on the facts of the case before him, that contact by spoken word can amount to "attention in connection with bodily functions". However, this was no more than a marker that simply talking to someone is *capable* of amounting to such attention. Whether it has the requisite proximity (in terms of "care, consideration and vigilance", and activeness) will depend upon the facts of the specific case.

22. Third, in *Mallinson* Lord Woolf gave the majority judgment. In *Cockburn*, Lord Slynn approved and followed Lord Woolf's approach. In respect of both of the individual cases before him, Lord Slynn said that the relevant test was whether what was done had "the active, close, caring, personal qualities referred to by Lord Woolf" (at pages 814C-D and 818E). This test - does the service provided have sufficient active, close, caring and personal characteristics to constitute "attention" - has consequently had the further endorsement of the House of Lords.

23. Fourth, when Dunn LJ referred to attention conveying "more than personal service", he appears not to have been setting a specifically high level for the "personal" nature of the relevant service. We agree with Mr Collins, that in the context of that case he appears to have been saying simply that it means more than personal domestic service such as cooking and cleaning. It is noteworthy that,

towards the end of his judgment (at page 1026H), O'Connor LJ found that "cooking is too remote from the proximity that 'attention... in connection with [a] bodily function' necessarily requires".

24. Indeed, we do not consider it helpful to describe the hurdle to be overcome by a claimant in this regard in terms of being "high" or indeed "low". Lord Bridge in *Woodling* said that "a high degree of physical intimacy between the person giving and the person receiving the attention" is required; but this has not been endorsed subsequently as setting a peculiarly high hurdle, and we do not consider it to be anymore than an indication that a real degree of proximity will be required. We do not consider that Dunn LJ in *Packer's Case* suggested more.

25. Where the line should be drawn is a matter of fact and degree for decision-makers and tribunals to decide, on the approach advocated by *Mallinson* and *Cockburn*. However, the cases give some guidance as to the proximity that will be sufficient. In *Mallinson* itself, Lord Woolf found that guiding a blind person has the requisite "active and close, caring, personal qualities" to amount to attention for the purposes of section 72(1)(a) (at page 639C). In *Cockburn*, in relation to Mrs Fairey's case, Lord Slynn considered that "providing interpretation by sign language (which involves personal communication between two people even if the message is at the same time by the making the signs communicated to others) has sufficiently "the active and close, caring, personal qualities referred to in the authorities (per Lord Woolf in the *Mallinson* case [at page 639]) as to constitute attention for the purposes of the Act. The provision of an interpreter to use sign language is therefore capable of providing 'attention' within the meaning of the section." The same has been held to apply to the use of an interpreter for a prelingually deaf claimant in comprehending and responding to written documents (R(A) 1/03).

26. On the basis of the approach advocated in *Mallinson* and *Cockburn* (and the illustrations of application of that approach in the cases to which we have referred), and the proposition that "bodily functions" includes the functions of the brain (see paragraphs 13-17 above), as was common ground before us we consider that prompting and motivating are capable of constituting attention in connection with an impaired bodily function.

27. Simple apathy of course will not entitle a claimant to DLA. Although we would not have phrased it in the same terms, we believe that this is what Mrs Commissioner Parker meant when she said in an earlier appeal relating to this same claimant, CSDLA/190/2004: "It must of course be the claimant's mental disablement which causes the lack of motivation and not, for example, a character defect" (see paragraph 5 above). But where a claimant suffers from a condition which has as a component a lack of motivation which exhortation from another is able to overcome, then we agree with Mrs Commissioner Parker (at paragraph 15 of that decision) that this is capable of constituting attention with bodily functions. Although any case will depend upon its own facts - and, where a child is the claimant, the provisions of section 72(6)(ii) will apply, so that only if the child's requirements are substantially in excess of the normal requirements of a child of his or her age will the conditions of section 72(1)(a)(ii) be satisfied - we are firmly of the view that such services are at least capable as a matter of law of having the requisite active, close, caring and personal characteristics to amount to attention within the meaning of section 72.

The Scope of "Bodily Functions"

28. The main controversy before us concerned the scope and nature of "bodily functions" for the purposes of section 72(1)(a)(i). Relying on R(DLA) 3/03, the tribunal found that "communication" and "social integration" were not "bodily functions" for these purposes, but were rather "activities". That finding determined the appeal against the claimant.

29. Before us, the tribunal's finding was supported by the Secretary of State through Mr Bartos. He submitted that "communication as such" was not a bodily function, although he readily accepted that speaking and gesticulation were such functions. He submitted that communication and (as a stronger case) social integration are activities consequential on bodily functions. Mr Collins for the claimant submitted that the tribunal had erred in law in concluding that communication and social integration as a matter of law could not be bodily functions. Relying on a number of authorities in support, he submitted that the phrase should not be construed narrowly, the phrase properly including both bodily functions which he referred to as "microfunctions" (e.g. movement of a limb, or the tongue; or the brain instructing such movement by sending impulses through the nervous system), and those which he referred to as "macrofunctions" (e.g. walking, communication and social integration, which involve a combination of "microfunctions").

30. The distinction suggested by Mr Collins - although he rendered it more sophisticated - appears to derive from the respective judgments of Dunn LJ and Lord Denning MR in *Packer's Case*. In a passage already cited above (paragraph 14), Dunn LJ said (at page 1023F):

> "To my mind the word 'functions' in its physiological sense connotes the normal actions of any organs or sets of organs of the body and so the attention must be in connection with such normal actions."

This approach - of looking at the particular actions of organs of the body - has been regularly approved by the higher courts, including the House of Lords. For example, this passage has been expressly approved by Lord Bridge in *Woodling* (at page 352H), Lord Woolf in *Mallinson* (at page 637B) and Lord Slynn in *Cockburn* (at page 807), all majority if not unanimous opinions.

31. However, rather than identifying the hallmark of "bodily functions", Lord Denning in his judgment in *Packer's Case* preferred to give examples, both inclusive and exclusive, as follows (at page 1022C):

> "Bodily functions include breathing, hearing, sleeping, eating, drinking, walking, sitting, sleeping, getting in and out of bed, dressing, undressing, eliminating waste products - and the like - all of which an ordinary person - who is not suffering from any disability - does for himself. But they do not include cooking, shopping, and any of the other things which a wife and daughter does as part of her domestic duties: or generally which one of the household normally does for the rest of the family."

This general approach to the concept of "bodily functions" by way of example finds some support in *Mallinson*. It was referred to with approval by Lord Woolf (at page 636E-F) (although in Lord Woolf's view, perhaps understandably, Lord Denning's references to "the role of different members of the family, as he perceived them to be, are not, in contemporary circumstances, of any real assistance"). In the same case, Lord Templeman (agreeing with Lord Woolf) referred to the bodily functions of "bathing, eating and walking". Lord Lloyd of Berwick (at page 64, dissenting, but with whom Lord Mustill agreed) cited the passage from Lord Denning without criticism, and indeed gave further similar examples of bodily functions such as "rising from a chair" as well as other examples used by Lord Denning such as getting out of bed. There is also some apparent support in *Cockburn*. Lord Hope (with whom Lord Clyde agreed), whilst earlier (at page 822C) talking of the bodily function of "movement of limbs" required to dress and undress, at page 823D-E referred to the bodily functions of walking, dressing and undressing. Lord Goff (at page 802D-F) referred to the bodily function of eating. However, in that case Lord Slynn indicated that he did not consider walking, sitting, getting in and out of bed, dressing and undressing and the like as bodily functions in themselves - although of course bodily functions were used in such exercises. For example, the bodily function of movement of the legs would be used in walking and running (page 807D-E, and 813A).

32. For ourselves, we do not see a dichotomy between "microfunctions" and "macrofunctions" as those terms were used by Mr Collins; and we consider that, to a large extent, the apparently disparate opinions expressed in the higher courts identified above are reconcilable.

33. As identified by Dunn LJ in *Packer's Case*, a "bodily function" primarily refers to the normal action of any organ of the body. For example, the function or a function of the lower jaw is to move up and down, i.e. its normal action. By way of extension, we consider it quite appropriate to extend this reference to the organ's immediate purpose: in our example, the purpose of the lower jaw moving up and down is to masticate food, and we do not consider it would not be incorrect to refer to such mastication as a "bodily function", i.e. a function of the lower jaw. It appears to us that the term is sufficiently wide to cover this extension.

34. Such functions might be voluntarily controlled (e.g. the lower jaw, as in our example), or involuntary (e.g. it is the function of the kidneys to filter waste products from the blood, which it does without any voluntary instigating action).

35. Furthermore, as Dunn LJ indicated in *Packer's Case* (see paragraph 30 above), "bodily functions" includes not only the action of one organ of the body, but also those of any set of such organs in concert. Therefore, when the lower jaw is looked at with the mouth and various internal organs including the stomach and alimentary tract, it can properly be said of that set of organs of which the jaw is a part that the bodily function (in the sense of purpose as described above) is eating. We see no inconsistency between the proposition that it is a function of the lower jaw to move up and down and masticate food, and, as part of a set of organs, its function is also eating. Indeed, far from there being a strict dichotomy between "microfunctions" and "macrofunctions" - and to be fair to Mr Collins he did not submit that there was such a clear and absolute dichotomy - in terms of the organs of the body, there is complex web of functionality that requires acknowledgment.

36. However, of course, there are limits. Not every activity performed by the body is a "bodily function", because it cannot properly be said that that activity is either a normal action or purpose of that organ or set of organs. Shopping is one example which falls clearly on the wrong side of the line: whilst no doubt involving various functions of the body, shopping could not properly be said itself to be a function (in terms of either simple actions or purpose) of any organ or set of organs of the body. Similarly, it was not suggested by any of the judges in *Packer's Case* that cooking could itself be a "bodily function". There may be difficult, borderline cases; but, like Lord Slynn (and with respect to Lord Denning's obiter dicta in *Packer's Case* and those of subsequent judges, to which we have referred: see paragraph 31 above), we do not consider that getting in and out of bed, or dressing and undressing, are "bodily functions", because (in our respectful view) it cannot properly be said that it is the normal action or purpose of any organ or sets of organs to perform these exercises. These are not functions of organs of the body, but merely things which a body can do if the relevant bodily functions (e.g. movement of the limbs) are working normally.

37. However, given that activities such as shopping, dressing and undressing, getting in and out of bed necessarily involve bodily functions of one sort or another (which can be specifically identified, if necessary), why does the relevant "bodily function" matter in any specific case? The answer to this lies in looking at the wording of the statutory provisions as a whole, as has been urged by the House of Lords (see paragraph 16 above) and in the approach to those provisions of Lord Woolf in *Mallinson* and the tribunal of Commissioners in R(DLA) 3/06. As already indicated (paragraphs 8-11), the focus of these provisions is on the disablement (i.e. functional deficiency) of the claimant. Even where such a disablement is shown, the relevant attention is that *reasonably required* by virtue of that functional deficiency. On the issue of relevant attention, it may therefore be necessary to focus upon the functional deficiency with some particularity. It may not be crucial whether the bodily function impaired in someone who cannot move his legs and consequently walk is looked at as (i) movement of the legs, or (ii) walking. We consider both have equal validity for the reasons we give above. However the function is viewed, the necessary attention to address the claimant's reasonable care requirements will be the same. But in other cases it may be of importance, because it will be necessary to identify the bodily function that is impaired with some precision so that the attention reasonably required to address the impairment can be properly identified and assessed.

38. For example, Mr Mallinson was blind, and was consequently unable to walk in unfamiliar surroundings because (as Lord Woolf put it, at page 639H) he did not know where to walk or (e.g. when crossing the road) when to walk. As Lord Woolf pointed out (at page 639G), to say whether the attention he received in the form of being guided was "in connection with his bodily functions" (i.e. reasonably necessary as the result of an impairment to those functions), it was necessary to identify the bodily function or functions to which the attention relates. We consider that in substance this is no more than ensuring that the relevant attention is reasonably necessary - because, as indicated above (paragraphs 8-9), the severity of the functional disablement is in fact defined by that attention. Therefore, although in one sense it could be said that Mr Mallinson's ability to walk was impaired (in the ways

identified by Lord Woolf), in considering this question, as Mr Mallinson's legs were working normally - but his eyesight was not - of the interwoven bodily functions involved, "it is preferable to focus on that function [i.e. his deficient ability to see]" (per Lord Woolf at page 641A). The relevant "bodily function" that is impaired (i.e. the disablement) must therefore be identified with sufficient particularity so that the assistance reasonably required can be identified and assessed; and this is why "bodily function" cannot be given a definition so wide as to include all human activity or indeed any particularly complex activity. This is therefore another reflection of the close relationship between functional disablement and the assistance reasonably required to cope with that disablement referred to in paragraph 9 above.

39. However, even where an activity is such that it cannot itself properly be described as a bodily function, that will not be the end of the matter - because recourse will then have to be had to the discrete bodily functions which are involved in the activity and the extent to which they are impaired, and particularly as to whether the functions or any of them are so impaired that assistance to the level of any of the provisions of section 72 is required in respect of the disablement. In these circumstances, the relevant discrete bodily functions will have to be identified and "unbundled", considered and assessed. Indeed, given the purpose of identifying the relevant bodily functions given above (paragraphs 36-37), in functionally complex activities which may be borderline, we regard this "unbundling" exercise as the correct approach in any event, and warn against the temptation of considering in very fine detail whether the complex activity can truly be described as a single bodily function or not. We consider the potential dangers of such an arid exercise are well illustrated in this very case. As the various House of Lords opinions referred to above (but notably that of Lord Slynn in *Cockburn*) make clear, in borderline cases it cannot be incorrect to unbundle functions in this way, and it is likely to be helpful in approaching the issue of assistance reasonably required.

40. This restriction on the ambit of "bodily functions" is not the only limitation in the statutory provisions. For entitlement to benefit, a claimant must show that the disability results in him or her requiring the degree of assistance identified in the legislation. Under section 72(1)(a)(i), the claimant must show that, in connection with the identified "bodily functions", he or she requires "attention for a significant part of the day". Cooking and shopping plainly involve the use of a wide range of bodily functions such as movement of the limbs, sight and smell. But assistance with those activities does not qualify because it lacks the requisite degree of intimacy that "attention in connection with" a bodily function necessarily requires (see paragraphs 18 and following). Even where the attention is sufficiently proximate, then it must be reasonably required for a significant part of the day. Only if the provisions of Section 72(1)(a)(i) are satisfied in their entirety, will there be entitlement to benefit.

Application of the Principles to the facts of this Case

41. How should these principles be applied to this case?

42. The tribunal found that neither communication nor social integration is a bodily function for the purposes of section 72, and consequently found the claimant not to be entitled to any level of care component. We will deal with "communication" first.

43. The issue of whether communication is capable of being a bodily function for the purposes of section 72 has been considered in a number of Commissioners' decisions. In finding that communication was not so capable, the tribunal in this case purported to follow the case of R(DLA) 3/03 "among others". The claimant in that case had Asperger's Syndrome which (it was submitted on his behalf) meant that he was "optimistic, he needed to develop skills such as not talking too loudly, too close or overtalking, he needed help to learn to read people" (paragraph 12). In looking at the question of communication, the Commissioner (Mr Commissioner Howell QC) at paragraph 13 considered it preferable to approach the application of the section by construing it as a whole and "by reference to its practical application" rather than drawing "semantic" lines between what might be a bodily function and an activity. He determined the case by examining closely the claimant's claimed loss of function. He found that the claimant was able to communicate without assistance. His manner of communicating was merely different from other people. The claimant therefore had no relevant disablement. The Commissioner did not hold that communication could not be a bodily function for the purposes of the statutory provisions. We consider that, on the facts of that case, such an approach was entirely proper. But, with respect to the tribunal in this case, it does not support their finding that communication is incapable of being a bodily function.

44 The tribunal did not cite any of the other cases it relied upon. But there are a number of Commissioners' decisions holding that "communication" is not a bodily function for these purposes. In CSDLA/840/1997, CSDLA/867/1997 and CSDLA/860/2000, Mr Commissioner May QC held that it was not. Having cited Dunn LJ in *Packer's Case* and Lord Slynn in *Cockburn*, the Commissioner said (in the consolidated decision in the first two mentioned cases - which both involved claimants with prelingual deafness who could not speak - at paragraph 22):

> "I thus reach the conclusion that communication is an activity along the lines of walking, sitting, getting out of bed, dressing and undressing. It is something which is achieved by bodily functions such as hearing, seeing, speaking and movement."

He did so on the basis that to find "communication" - and presumably the other "activities" to which he referred, such as walking - to be a bodily function would be contrary to approach required by Lord Slynn in *Cockburn*.

45. However, with respect to the Commissioner, this is to misunderstand that approach. "Communication" is a functionally complex activity involving many organs of the body, including the mouth and vocal chords, but also the face and limbs. In *Cockburn*, Lord Slynn expressly referred to communication as being capable of being a "bodily function" within the terms of section 72, a point that was said not to be in issue after *Mallinson* (see page 811A). Even if it is unhelpful to consider communication as a single "bodily function" for the purposes of section 72 (for the reasons given above; see paragraphs 36-38), it is possible to breakdown or "unbundle" the specific functions of individual organs or smaller sets of organs and, where there is a functional deficiency, to focus on the particular function that is (or, where more than one, functions that are) deficient. As Mr Commissioner May accepted - and as Lord Slynn in *Cockburn* made clear - hearing, seeing, speaking and movement of parts of the body are all "bodily functions". In a case where the

claimant's claim for benefit is based upon difficulties with communicating, it will be possible to look at the particular functional aspects that are deficient in his or her case, in order properly to assess the attention that will be reasonably required in respect of those deficiencies. As conceded by the Secretary of State before us, we consider the failure of the tribunal to do so in the case before us to have been in error of law. We disapprove the cases to which we have referred to an alternative effect, and other cases following that similar line (e.g. CSDLA/832/1999).

46. A similar approach must be taken to "social integration". For our own part, when put that widely, we would have doubts as to whether "social integration" is a discrete bodily function within the meaning of section 72. However, in *Cockburn*, in considering the concept of "attention" (which, for the reasons we give above, we consider to be a related concept), Lord Slynn said (at page 814H):

> "On the question of principle, I reject the contention that the relevant attention must be essential or necessary for life and that attention must not be taken into account if it is merely desirable. The test in my view is whether the attention is reasonably required to enable the severely disabled person as far as reasonably possible to live a normal life."

Later he added (at page 815B-C):

> "Social life, in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life."

This suggests that he considered some form of social interaction may amount to a complex bodily function, as he apparently did "communication". But, again, even if that be the case, in the context of section 72 the functions may need "unbundling" so that the nature and degree of attention reasonably required to address the relevant functional deficit can be assessed. Again, in our view, it was insufficient for the tribunal merely to find that "social integration" was not a bodily function. They erred in law in failing to identify the specific bodily functions that were deficient in the claimant's case, and in failing to assess the attention reasonably required in respect of that deficiency.

47. When decision-makers or tribunals come to consider the attention that is reasonably required in connection with the relevant bodily functions, then of course they must have in mind that the attention must have the active, close, caring, and personal characteristics referred to above and the guidance with regard to that requirement given by the higher courts and in this decision (see paragraphs 18-27 and 39 above). Whether the attention is sufficiently proximate in a case will depend upon the circumstances of that particular case, and will be a judgment for the decision-maker or tribunal to make taking account of the guidance given in by the Commissioners and higher courts. They will have a significant amount of discretion in making that judgment (see *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 1 WLR 1929 also reported as R(DLA) 7/03; and R(DLA) 5/05); and a tribunal will only err in law (and consequently be open to appeal) if its judgment falls outside the spectrum of possible decisions. Given the issues in the appeal before us, it is unnecessary for us to comment further upon the nature and width of this discretion, upon which we did not hear full oral argument.

Conclusion

48. For these reasons, we find that the tribunal in this case erred in law, and we allow the appeal. We set aside that decision and refer this matter to a freshly constituted tribunal for a rehearing on the basis of the principles of law set out above.

(Signed)
His Honour Judge Gary Hickinbottom
Chief Commissioner

(Signed)
R J C Angus
Commissioner

(Signed)
David Burns QC
Deputy Commissioner

28 July 2006