

## The House of Lords ruling in Mallinson and what it means for Visually Impaired People

On 21st April 1994 the House of Lords ruled in favour of an appeal by Eric Mallinson, a blind man who had been refused Attendance Allowance. As a result of the *Mallinson* judgment visually impaired people stand a much better chance of qualifying for Attendance Allowance and the middle rate care component of Disability Living Allowance (DLA).

### **What did the Lords decide?**

Under the daytime condition for Attendance Allowance and the middle care rate of DLA you must require *“frequent attention throughout the day in connection with your bodily functions”*. Lord Denning defined ‘bodily functions’ as:

*“breathing, hearing, seeing, eating, drinking, walking, sitting, sleeping, getting out of bed, dressing, undressing, eliminating waste products. But they do not include cooking, shopping or other domestic duties”*

However, before *Mallinson* the help with *seeing* that visually impaired people need was not counted as ‘attention’ by the Department for Work and Pensions (DWP). Therefore if visual impairment was your only disability you were unlikely to pass the ‘frequent attention’ test. The *Mallinson* judgment changed all that. The Lords ruled that:

*“The only attention which can be given to a person ‘in connection with’ a sight handicap is to provide the assistance to enable that person to do what he could physically do for himself if he had sight”*

Obviously nobody can enable you to see but someone can *act as your eyes* by guiding you. This is the sense in which it is possible for visually impaired people to receive help with *seeing*. Lord Woolf held that:

*“The attention is in connection with the bodily function if it provides a substitute method of providing what the bodily function would provide if it were not totally or partially impaired”*

He also said that the Court of Appeal in *Packer* gave a useful definition of attention. It said attention is:

*“. . . more than a personal service, something involving care, consideration and vigilance for the person being attended. The very word suggests a service of a close and intimate nature. And the phrase ‘attention . . . in connection with his bodily functions’*

*involves some service involving personal contact carried out in the presence of the disabled person.”*

However, Lord Woolf pointed out that

*“contact need not be physical contact: it can be contact established by the spoken word”*

In *Mallinson* Lord Woolf held that only guiding outdoors and reading correspondence constitute attention of this sort. However, ‘attention’ could include many other occasions when you need someone to *act as your eyes* by guiding, describing something, reading aloud or providing spoken instructions.

### **When will I require help with seeing?**

In order for *help with seeing* to count as *attention* it must be ‘*reasonably required*’ as opposed to ‘*medically required*’. Whether something is ‘*reasonable*’ is a subjective question which relates to the *quality of life*. We think it is unreasonable for visually impaired people to be cut off from social or cultural life and to be excluded from recreational activities. Initially the DWP produced guidance advising that:

*“attention for recreational, leisure, cultural or social purposes is unlikely to be reasonably required”*

As a result of this interpretation most people who applied for extra benefit were refused. This guidance has subsequently been overturned as a result of the *Halliday* (or *Fairey*) case [CA/780/91]. On 14.10.94 Commissioner Sanders ruled that:

*“It is right to include in the aggregate of attention that is reasonably required such attention as may enable the claimant to carry out a reasonable level of social activity”*

The Secretary of State unsuccessfully appealed against *Halliday*. On 21.5.97 the House of Lords upheld the *Halliday* decision. Lord Slynn ruled that:

*“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”*

He added that:

*“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”*

Therefore help with social or leisure activities can be treated as attention. We think that many visually impaired people ‘*reasonably require*’ help with seeing in all the following situations:

- personal attention: checking your clothes are clean and matching; checking that your face, hands and nails are clean; checking make-up, checking hair is correctly groomed; administering medicines.

- mealtimes: checking food is fresh; identifying where food is on a plate; cutting up food and de-boning chicken or fish; dealing with food or drink spilt on clothes.
- household activities: locating household objects, reading the labels (on containers, tins, cassette boxes, record covers, etc.) reading magazines and newspapers; describing television pictures.
- outside the home: avoiding everyday obstacles and crossing roads; identifying bank notes and checking change; reading shop receipts labels and price tags; guiding in shops, pubs and restaurants; guiding when exercising.

You should be able to identify other times, such as at work or study, when you need someone to assist you with *seeing*. Be warned that the DSS may object that a particular need may be met by an aid or adaptation, e.g. a low vision aid or Braille marking. You need to anticipate these objections and explain why it may not be reasonable or practical for you to use specific aids or adaptations. For example, it may be impractical to use a particular aid like a magnifier where print is too small, or text is too lengthy. Equally, you may not be able to use a long cane to anticipate common outdoor hazards like overhanging branches or loose paving stones.

## **Domestic duties**

The DSS guidance suggests that help in relation to domestic tasks doesn't normally count as attention because "*they could be carried out without the disabled person being present*". We think this is the wrong approach. It is right to say that attention must involve '*personal contact*'. Therefore if someone cooks for a disabled person, without them having to be present, then this would not count. However, what if you do your own cooking or shopping, but need a sighted guide or reader to help you accomplish these tasks adequately and safely? We think this constitutes attention. A number of Commissioners' decisions support our approach. For example, in CDLA/267/94 Commissioner Rowland held that:

*"if a claimant reasonably requires to be able himself to cook and can do so if he has assistance with, for example, seeing or lifting, that seems to me to show a requirement for attention in connection with his bodily functions"*

Two other cases where Commissioners give a similar opinion are CDLA/12381/96 and CDLA/3711/95.

DWP decision makers are, however, still very reluctant to accept the help you get to do domestic duties is attention. Some Appeal Tribunals are also reluctant to include this help in your pattern of care needs. Therefore, we suggest that you don't rely too heavily on help relating to domestic tasks. If possible ensure that the help you need adds up to '*frequent attention*' without counting domestic tasks.

## **Childcare**

Looking after a young child is another area of dispute. We believe that if a parent needs sighted help to wash, dress, feed and play with his/her child that is attention with the bodily function of seeing which is reasonably required. In CDLA/16996/1996 the Commissioner agreed saying:

*“In my view, attention in connection with the bodily function of seeing to enable a sight impaired person to deal with (to use a neutral expression) her very young children is properly capable of counting as qualifying attention.”*

CDLA/16129/1996 takes the same view. However, the Commissioner in CSDLA/314/97 disagrees saying such help is *“too remote”* to be attention. So, if possible try to show you qualify regardless of such help.

## **Passing the frequency test**

Remember that the help you need must be both *‘frequent’* and spread *‘throughout the day’*. The help should not just be needed at the beginning, middle and end of the day but also in the periods in between. You therefore must ensure that you don’t focus on the help you get at a certain time of the day.

Rather than concentrating on activities you do infrequently (e.g. visiting the doctor), you should dwell on routine, daily activities such as reading newspapers and following TV programmes.

## **Will I automatically qualify?**

Even though *Mallinson* makes it easier for visually impaired people to satisfy the daytime attention condition, it does not mean you will automatically qualify. In CDLA 8167/95 (\*94/97) the Commissioner stressed that the attention you need had to be a close or intimate service. As an example he said:

*“. . .if you have to tell another person they have gravy on their chin this is not an act of close personal contact or intimacy, whether they are sighted and have forgotten to look in the mirror or are blind and unable to do so.”*

If you have these problems we think you should include them in your claim. But, you may have to explain why the help you need is special to your individual needs. For example you may have someone you trust to help you select matching clean clothes to wear. This might be necessary for your work, socialising or because it is important for your self-esteem.

## **What do I do next?**

If you are not getting DLA or Attendance Allowance you need to make a new claim. You should claim DLA if you are under 65, and Attendance Allowance if you are over 65. You can ring the Benefits Enquiry Line on 0800 882200 and

ask for a claim pack. You should also obtain a copy of our '*Disability Living Allowance*' or '*Attendance Allowance*' fact sheet and our '*help with seeing*' checklist to assist you with filling in the claim form. If you have other physical disabilities as well as sight loss you should use our '*visual impairment and additional disabilities*' checklist. If you are claiming for a child under 16 you should read our '*DLA for children*' fact sheet.

If you are already getting DLA, but are not getting the middle care component you should ask for a revision or supersession. You may not have an automatic right to a revision or supersession if it is more than one month since your DLA was awarded.

- If your DLA was awarded before the *Mallinson* judgment (21.4.94) and your claim has not been looked at after that date you can ask for a supersession on '*error of law*' grounds. Decisions before *Mallinson* were erroneous in law because the DWP did not count guiding or reading to blind people as attention.
- If your DLA was awarded before the original Commissioner's ruling in *Halliday* (14.10.94) and your claim has not been looked at after that date you can ask for a supersession on '*error of law*' grounds. All decisions made prior to *Halliday* were erroneous in law because the DWP did not count social activities.
- If you have had a DLA claim, review, revision or supersession decision since 14.10.94 your decision can only be superseded if:
  - a. there has been a "*relevant change of circumstances*", e.g. your sight has deteriorated, or
  - b. the previous decision was made "*in ignorance of some material fact*", e.g. you can provide new information.

If you are not sure what type of revision or supersession to ask for give us a ring and we will advise you.

### **Can I get my money backdated?**

The backdating rules for DLA and AA are quite complicated.

- If you are making a new claim for DLA or Attendance Allowance you will only be paid from the date of claim.
- If you are awarded the middle rate of DLA care following a '*change of circumstances*' or '*ignorance of material fact*' supersession, then backdating is restricted to one month prior to your application.
- If you are awarded the middle rate of DLA care following an '*error of law*' supersession (i.e. where there has been a reinterpretation of the law

following a court decision) then your award should be backdated to the date of the relevant court decision.

### **What if I am still refused?**

If you have exhausted the supersession and revision procedure you can still appeal to an independent tribunal. You shouldn't be put off by a refusal because the DWP decision is not necessarily correct. If you are prepared to go to an appeal hearing you may stand a better chance. This is because you have the chance to explain your difficulties verbally to a tribunal. If you want to appeal you should ask your local advice agency or law centre to represent you. You should also read our briefing paper on '*Taking Mallinson cases to tribunal*'.

This is only a guide and is not a complete or exhaustive statement of law.

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