'permanent incapacity' (such as *McDonald* (1984) 18 *SSR* 188 and *Panke* (1981) 2 *SSR* 9), the Tribunal asked whether it was more likely than not that Evan's brother would, at the time of the claim, remain here indefinitely.

The AAT said that it had to decide this question in the light of the material before it (not the material before the DSS) and 'make its own decision in place of the administrator's': Reasons, para. 18.

However, the AAT said, it could not 'use subsequent events to construe the situation existing at the time the decision has to be made – in this case at, or soon after, the time when the person concerned first arrived in Australia': Reasons, para. 19.

At that time, Evans' brother was enrolled in a matriculation course. There was no 'convincing evidence of "ability to matriculate" [nor] as to his prospects of acceptance for tertiary studies' and, therefore, no basis on which it could be said that he was likely to stay in Australia indefinitely.

The fact that, in 1984, Evans' brother enrolled in a four year degree course at a tertiary institution was not relevant, the AAT said, to the question which had to be answered in the light of information available in early 1983.

Even if account was taken of his enrolment in the degree course, the AAT said, Evans' brother would not be a person 'likely to remain permanently [i.e. indefinitely] in Australia' because he was:

> in Australia for a definite time, that is to say a time 'which is predictable and capable of being quantified', though not necessarily with precision, to use Woodward J's words [in *McDonald*]. The definite time was the period of his course and at that stage he would not, on present indications, be eligible for permanent status.

(Reasons, para. 26.)

Formal decision

The AAT affirmed the decision under review.

Sickness benefit: graduate student

NELSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/315)

Decided: 2 April 1984 by J.O. Ballard, R.G. Downes and L.J. Cohn.

Anitra Nelson had been enrolled as a graduate student at La Trobe University, where she was researching the Mexican foreign debt for a master's degree. She held a Commonwealth Postgraduate Research Award which provided a living allowance of $4620 a year and several other allowances.

In February 1983, Nelson suspended her studies on medical advice: she was diagnosed as suffering from severe 'reactions to many foods and several common chemical exposures'. (Her studies and payment of the Award remained suspended at the time of the AAT's decision.)

Nelson applied for sickness benefit but the DSS rejected this claim, in accordance with a departmental instruction:

> 22.A student who intends to resume his studies as soon as he recovers from his incapacity does not qualify for Sickness Benefit under the new provision. In other words, the student must have abandoned his course for the year and intend to obtain employment when he is well enough. Evidence such as a copy of agreement by the Institution to withdraw from the course should be obtained.

Nelson applied to the AAT for review of this decision.

The legislation

Section 108(1) provides that a person is qualified for sickness benefit if he or she passes age and residence requirements and if

> (c) the person –
> (i) satisfies the Director-General that throughout the relevant period, he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he has thereby suffered a loss of salary, wages or other income; or
> (ii) not being a person who is qualified to receive sickness benefit by virtue of the operation of sub-section (1AA), satisfies the Director-General that, throughout the relevant period, he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he would, but for the incapacity, be qualified to receive an unemployment benefit in respect of the relevant period."

Can research be 'work'?

The Tribunal referred to the decision in *Wood* (1984) 18 *SSR* 1985, where the AAT had decided that a former student who had lost a NEAT allowance had not 'suffered a loss of . . . income' within s.108(1)(c)(i). This was because 'income' referred to money paid in return for services performed or work done.

But, the Tribunal said, the present case was different: Nelson was not engaged in a structured course to obtain a qualification but was undertaking research which might lead to a higher degree. That research could be regarded as work and the Award payments as income: this depended on an assessment of the nature of the research; it did not depend 'on the broad brush approach relating to "students" contained in the departmental policy instruction; which is without legal authority': Reasons, para. 14.

On the Tribunal's assessment, '[Nelson's] research project could not properly be described as work for the purposes of section 108 of the Act'; she had not, therefore, become incapacitated for work; and she was not, the Tribunal said, qualified for sickness benefit: Reasons, para. 12.

Special benefit

However, the AAT said, that did not conclude Nelson's entitlement. The Director-General or his delegate should have considered whether or not to pay her a special benefit under s.124 of the Act.

That section gives the Director-General a discretion to pay a special benefit to a person when the Director-General is satisfied that, 'by reason of . . . physical . . . disability . . . that person is unable to earn a sufficient livelihood'. Nelson's right to be considered for special benefit under section 124 was, the AAT said, 'unquestionable'. The failure to consider her eligibility for special benefit should now be rectified: Reasons, para. 15.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General for reconsideration in accordance with its Reasons.

[**Comment**: The Tribunal's review of Nelson's claim for sickness benefit is rather frustrating. It is difficult to see why a person's 'incapacity for work' should be assessed solely by looking at that person's activities *before* she became incapacitated. That is certainly not the approach taken by the Tribunal or the Federal Court in the context of invalid pension decisions.

Even if Nelson could not meet the requirements of s.108(1)(c)(i) – because, for example, the Award which she had lost, was not 'income' – she might have qualified under s.108(1)(c)(ii). But the Tribunal said nothing on that issue (although the DSS had expressly based its rejection of her claim on both sub-paragraphs (i) and (ii) of s.108(1)(c)).

It might be objected that, if the DSS reacted to the AAT's suggestion that Nelson be granted a special benefit, then any inadequacy in the Tribunal's review of the sickness benefit question would be of academic interest only. There are two responses to that: first, that special benefit is of less value than sickness benefit; and, second, claimants are entitled to insist that their welfare rights be treated seriously and thoroughly. **PH**]