penses. However, at no stage did they share a surname and they had regular independent social activities.

On the basis of this evidence, the AAT decided that, although Smith had been living with R on a *bona fide* domestic basis during the period in question (which was from July 1984 to March 1985), she had not lived with R 'as his wife'. The AAT said that several aspects of the relationship between Smith and R had to be examined, including the following:

(1) the fact that Smith and R had lived apart since March 1985 suggested that any relationship which they had had was not a permanent one;
(2) during the period when they shared the house, there was no suggestion that their relationship was an exclusive one;
(3) Smith and R had pooled only part of their resources (namely the cost of purchasing food);
(4) Smith had gone out of her way to explain to other people that she was not married to R;
(5) Smith and R had not regarded their relationship as being like one of man and wife (this, the AAT said, was 'the most important test': Reasons, p.13);
(6) there had been no sexual relationship between Smith and R during the period in question; and
(7) Smith and R had enjoyed largely separate lives.

The AAT summarised its assessment as follows:

> Perhaps it is some emotional element that must exist in the relationship between a man and woman before she can be regarded in anyway as his wife. Whatever spark is required to ignite the tinder of cohabitation into the fire of a quasi marriage relationship, we are clear that it did not exist in the present circumstances. An arrangement of mutual convenience for the housing and the material welfare of the parties and their children is the highest level at which it could be put.

(Reasons, p.16)

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with the direction that Smith be granted the widow's pension.

Income test: damages settlement

PAYNE and SECRETARY TO DSS (No. W85/47)

Decided: 14 June 1985 by G. D. Clarkson.

Graeme Payne was granted unemployment benefit in January 1984 and payment of that benefit continued for some time. However, the DSS decided that, because his wife received a payment of $14 000 in the week ending 11 May 1984, unemployment benefit could not be paid to Payne for that week.

The payment to Payne's wife was a settlement of her damages claim for injuries suffered in a car accident. According to evidence given to the Tribunal, the damages related to disfigurement and pain and suffering but did not include any economic loss suffered by her. Payne asked the AAT to review the DSS decision.

The legislation

Section 114(1) of the *Social Security Act* provides for unemployment benefit to be reduced by taking account of the beneficiary's weekly income. According to s.114(3), the income of a married person includes the income of that person's spouse.

Section 106(1) defines 'income' as meaning—

> any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . .

The s.106(1) definition goes on to exclude certain payments from the definition of income, including a payment of compensation for loss or damage to buildings, plant or personal effects (para. (cd)).

'Income' does not include capital receipts

The AAT said that the 'two terms, "moneys" and "valuable consideration", are equivocal and could refer . . . to what is commonly described as capital': Reasons p.5.

However, the AAT said, the meaning of those terms should be influenced by the other phrases in the s.106(1) definition, 'personal earnings' and 'profits'; so that the definition of 'income' should be taken as referring to income as distinct from capital receipts.

It might be argued, the AAT said, that the specific exclusion of compensation payments for loss of property in para. (cd) suggested that all compensation for personal injury should be treated as income; but the Tribunal said that it was wrong to read too much into that specific exclusion, 'because Acts of Parliament are not always drafted as precisely as might be desirable': Reasons p.8. The AAT concluded that the definition of 'income' did not apply to capital receipts and that—

> the general policy of the Act [is] that bare capital assets, in no way derived from or related to the loss of past or future earnings, do not affect the amount of periodic payments made under Part VII of the Act.

As the general damages received by Payne's wife had not covered loss of earning capacity, past or future, there could be no question that those damages amounted to 'income' within s.106(1).

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that the sum of $14 000 general damages received by Payne's wife was not income for the purposes of ss.106 and 114.

Income test: war restitution pension

KOLODZIEJ and SECRETARY TO DSS (No. S84/44)

Decided: 6 June 1985 by J. A. Kiosoglous.

Stanislaw Kolodziej had been granted an invalid pension in March 1980. At the time of this grant, the DSS reduced his pension on the ground that payments received by Kolodziej and his wife under the West German *Federal Restitution Act* were 'income' for the purposes of the social security income tests.

Kolodziej had spent 5 years as a prisoner of war in Germany and had been subjected to severe physical maltreatment over this period. In 1949, he married his wife, who had also been imprisoned and ill-treated by German authorities during the war. They had migrated to Australia in 1950 and, in 1964, had been recognized by the West German Government as victims of Nazi persecution. As a consequence they had been granted compensation under the West German *Federal Restitution Act* and that compensation had been converted to periodic pension. In 1980, Kolodziej's restitution pension was $4800 a year and his wife's pension was $3600 a year.

Following the decision of the DSS to reduce his invalid pension by reference to these restitution pensions, Kolodziej sought review by the AAT.

The legislation

Section 6 of the *Social Security Act* now defines 'income' as—

> personal earnings, moneys, valuable consideration or profits earned, derived or received by [a] person for that person's own use or benefit by any means from any source whatsoever, within or outside Australia and includes a periodical payment or benefit by way of gift or allowance . . .

The West German *Federal Restitution Act* provides for the payment of compensation or a pension to a victim of Nazi persecution who 'suffered damage to life, body, health, freedom, property, wealth, his employment or economic livelihood . . .'

'Income'

The AAT said that the definition of 'income' in s.6 of the *Social Security Act* was broad but it was not unlimited. That definition differed markedly from the notion of 'income' under the *Income Tax Assessment Act* 1936, as the AAT had pointed out in *Paula* (1985) 24 *SSR* 288 and *Schafer* (1983) 16 *SSR* 159.

Because the *Social Security Act* and the *Income Tax Assessment Act* used quite different concepts of 'income', statements made in Parliament when the *Income Tax Assessment Act* was being amended to exclude restitution pensions from 'assessable income' for income tax purposes, were not relevant to the meaning of 'income' in the *Social Security Act*. On this point, the

Tribunal refused to follow the approach taken in *Teller* (1985) 25 *SSR* 298.

'Moneys' or 'allowance'

The AAT said that the restitution pensions received by Kolodziej and his wife could only be described as 'income' if they were 'moneys . . . received . . . by any means' or 'a periodic payment or benefit by way of . . . allowance'.

The word 'moneys' in the definition could have a very wide application, the AAT said. But that word was 'flanked by the words "personal earnings . . . valuable consideration or profits"'. It had to be read in its context. That context indicated that it referred to 'moneys, payable by way of reward or for some personal exertion or as consideration for some services rendered' as the AAT had decided in *Flanagan* (1984) 22 *SSR* 256 and *Artwinska* (1985) 24 *SSR* 287.

The word 'allowance' also took its meaning from the context in which it appeared and, as the AAT had said in *Artwinska* (above), it should be taken as referring to a payment to an employee for additional services rendered. It did not refer to a restitution or compensation payment, such as that received by Kolodziej and his wife under the West German *Federal Restitution Act*. The contrary decision of the AAT in *Teller* (above) was, this Tribunal said, incorrect.

Accordingly, the level of Kolodziej's invalid pension should be determined without regard to the restitution pensions being paid to him and his wife.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that none of the restitution pension paid to Kolodziej should be taken into account in determining his income for the purposes of his invalid pension entitlement.

Sickness benefit: tertiary student

O'CONNOR and SECRETARY TO DSS
(No. Q84/143)

Decided: 14 June 1985 by J. R. Dwyer, W. A. Maria and H. M. Pavlin.

Bernard O'Connor was enrolled as a full-time tertiary student in 1983 and receiving a TEAS allowance of $40.75 a week and wages from part-time employment of $39.76 a week.

At the end of February 1983 he was obliged to give up his course and his employment because of illness and he was granted sickness benefit on 1 March 1983. Payment of this benefit continued until 29 April 1983, when O'Connor was granted unemployment benefit. Although O'Connor's TEAS allowance was cancelled from 1 April 1983, the DSS decided that the maximum amount of sickness benefit which could be paid was $39.76 a week.

O'Connor asked the AAT to review that decision.

The legislation

Section 108(1) of the *Social Security Act* provides that a person is qualified to receive sickness benefit if the person meets age and residence requirements and the requirements of para. (c), that is if the person—

> (i) satisfies the Secretary 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 loss of salary, wages or other income . . .

(An alternative qualification is provided in sub-para. (ii), which was not relevant to the matter, the AAT concluded.)

Section 112 fixes the rate of sickness benefit to be paid to a beneficiary; and the maximum rate payable to O'Connor would have been $77.25 a week.

Section 113(a) provides that the rate of sickness benefit payable to a person who has qualified under s.108(1)(c)(i)—

> shall not exceed the rate of salary, wages or other income per week that, in the opinion of the Secretary, that person has lost by reason of his incapacity . . .

'Income' is defined in s.106(1) as meaning, unless the contrary intention appears—

> any personal earnings, moneys, valuable consideration or profits earned, derived or received by that person for his own use or benefit by any means from any source whatsoever . . .

'Income . . . lost'

The AAT said that the TEAS allowance lost by O'Connor from 1 April 1983 should be included in the 'salary, wages or other income . . . lost by reason of his incapacity'. The argument put by the DSS, that 'income' in s.113(a) should be read as referring to a payment analogous to wages, should be rejected. The word 'income' should carry the meaning given to it by the definition section, s.106(1).

There was, in s.113, the AAT said, no indication of a contrary intention sufficient to displace the meaning given to 'income' in s.106(1). In coming to this conclusion, the AAT cast considerable doubt on the earlier Tribunal decision in *Wood* (1984) 18 *SSR* 185, where 'income' in s.108(1) and s.113(a) had been read as not including a training allowance paid under the NEAT scheme. The AAT suggested that there was an alternative basis for the decision in *Wood* and that that decision should not be regarded as establishing that the word 'income' in the various sickness benefit provisions had a narrower meaning than the statutory definition in s.106(1). The AAT supported its view as follows:

> 22. We are of the opinion that the interpretation of 'income' in sub-section 106(1) is that which should be used in sections 108 and 113. We note that if this was not so the very strange situation would be reached where the application of the definition of 'income' in s.106 which is the definition section for Part VII would be as follows:
>
> s.106 — definition section
> s.106A — not relevant
> s.107 — not relevant
> s.108 — narrower definition preferred
> s.109 — not relevant
> s.110 — repealed
> s.111 — r e p e a l e d
> s.112 — not relevant
> s.112A — definition relevant for the purpose of reducing rate of supplementary allowance payable to a person
> s.113 — narrower definition preferred
> s.114 — definition relevant for purpose of applying income test
>
> Thus the statutory definition of 'income' in s.106(1) would apply only to two sections and only for the purpose of calculating the income of a beneficiary so as to reduce the rate at which benefit should be paid. In other cases where the wide statutory definition would have the effect of operating in favour of a beneficiary to show entitlement to the maximum rate of sickness benefit, a narrower definition would be preferred. We cannot believe that this is a correct interpretation of the Act.

'Incapacity for work'

Moreover, the AAT said, O'Connor should be treated as having lost his TEAS allowance 'by reason of his incapacity' within s.113(a). The incapacity referred to in that provision was the 'incapacity for work' referred to s.108(1)(c). And the reason why O'Connor had lost his TEAS allowance was that he was unable to continue in his enrolled course of study, that is, unable to undertake the work of that approved course.

The regulations dealing with payment of TEAS allowances provided that a student was qualified for the allowance while he undertook 'such work of his approved course' as amounted to the prescribed 'rate of work' for that course. The AAT noted that an earlier Tribunal decision, *Nelson* (1984) 19 *SSR* 203 had assumed that neither undergraduate study nor postgraduate research could be described as 'work' within s.108(1)(c). The AAT observed:

> The Tribunal there did not clearly explain why it decided that the applicant's research project could not be regarded as work. In fact the Tribunal adverted to the paucity of material before it on which it had to decide the issue. We regard the facts in the case before us as very different from those in *re Nelson*.

(Reasons, para. 30)

Law reform

The AAT then discussed the general question of the eligibility of tertiary students for sickness benefit once they had been forced to withdraw from a course because of illness. The AAT said that there were significant difficulties in applying the several provisions of the Act to these students; and these difficulties, combined with the fact that the various provisions had received different interpretations in several decisions of the AAT, indicated that there was a need for amendment of the *Social Security Act* to clarify the provisions.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Secretary with a direction that O'Connor was entitled to sickness benefit during the period under review at a rate which took account of his loss of wages and his loss of TEAS allowance.