could only be identified after the outgoings related to those activities had been set off against receipts— a point that had been recognised in *Haldane-Stevenson* (1985) 26 *SSR* 323.

However, the decision in *Haldane-Stevenson* did not, the judges said, support the proposition that the losses incurred by Garvey in his business of letting properties should be deducted from the income which he and his wife derived from dividends, interest and employment.

The judges said that the *Social Security Act* was not concerned with supporting the losses incurred on a pensioner's unprofitable business activities:

> 'There would have been an expectation underlying the Act that any applicant for income assistance in the form of a pension would have corrected or relinquished any such activities which occasioned loss. The purpose of the relevant part of the Act was very clear, namely to maintain a basic level of income for those who were unable to receive sufficient income to provide for themselves. It was not the purpose of the Act to provide a further source of income for a person who had applied his or her income to maintain a business conducted at a loss or upon outgoings incurred in acquiring or maintaining assets.'

(Reasons, pp.9-10)

The judges concluded that the definition of 'income' in the *Social Security Act* did not permit the 'negative yield' of one source of income to be off-set against the positive yield from other sources of income.

Formal decision

The Federal Court allowed the appeal, set aside the orders made by Spender J and remitted the matter to the AAT for further enquiry and determination as appropriate.

[P.H.]

Recovery of sickness benefit: looking behind compensation award

SECRETARY TO DSS v LITTLEJOHN
(Federal Court of Australia)
Decided: 21 December 1989 by Ryan J.

This was an appeal, under s.44 of the *AAT Act*, from a decision of the Tribunal that Littlejohn was not obliged to refund to the DSS sickness benefit paid to him between July 1984 and February 1985, amounting to $5347: *Littlejohn* (1989) 49 *SSR* 637.

The DSS had attempted to recover this sickness benefit following Littlejohn's receipt of a worker's compensation award, which had been expressed as compensation for past medical expenses and future incapacity. The AAT had decided that, because the compensation award appeared to be one which could be made under the relevant compensation legislation (the *Workers' Compensation Act* (Vic.)) it should not look behind the compensation award. It followed that the compensation was not provided for the same incapacity as the sickness benefit payments, and, accordingly, there could be no recovery under the former s.115B(3) of the *Social Security Act* — under that provision, recovery of sickness benefit was only possible where the sickness benefit and compensation award had been made for the same incapacity.

Ryan J referred to the decision of the Full Federal Court in *Secretary to DSS v Siviero* (1986) 68 ALR 147, which held that, in order to recover sickness benefit following a compensation award under the former s.115B, the incapacity for which the sickness benefit and compensation award were paid must be the same: 'Incapacity in this context has both a causal and a temporal aspect'. (Reasons, p.8)

Ryan J pointed out that the incapacity for which Littlejohn had received sickness benefit was for a specific period, from July 1984 to February 1985. But the compensation award (made by consent) was expressed as in respect of incapacity for an indeterminate period beginning in December 1985:

> '*Prima facie*, therefore, the temporal aspect of the incapacity in respect of which the sickness benefit had been received was not the same as, or even partly co-extensive with, the temporal aspect of the incapacity for which the payment of compensation was to be made.'

(Reasons, p.9)

Ryan J then referred to the AAT decision in Cox (1989) 48 SSR 662. In that case, the Tribunal had said that the Secretary and the AAT could go behind the terms of a compensation award and conclude that some part of the award was compensation for the same incapacity as sickness benefit payments, particularly where there was evidence which indicated that the basis of the compensation expressed in the award was incorrect.

Ryan J noted that, in the present case, the AAT had considered whether there was any evidence which could indicate that the terms of the compensation award did not reflect the real situation and had concluded that there was no evidence to suggest that the compensation award related to past, rather than future, incapacity. Ryan J said that on the evidence available to the AAT, this finding was clearly open to the Tribunal. That evidence showed that, unlike the applicant in Cox, Littlejohn had clearly suffered a permanent incapacity:

> 'Therefore, the consent award which, on its face, compensated him for the effects of that incapacity arising only after the date of the award cannot be said to reflect "an incorrect view of the factual basis relating to that incapacity".
>
> ...
>
> For the reasons which I have already indicated, it was open to the AAT to find that there was no identity between the incapacity for which Mr Littlejohn received compensation and that for which he received sickness benefits. As the Full Bench of the AAT noted in Cox, an inability to point to such identity operates to defeat the Department's ability to recover.'

(Reasons, pp.14, 15)

Formal decision

The Federal Court dismissed the appeal.

[P.H.]