incapacity for which sickness benefits were paid'. The $100 paid in respect of Manatakis' future medical expenses was justified, and was not a sum paid 'in respect of the same incapacity for which sickness benefits were paid'.

The AAT concluded that the $7400 paid in consideration of Manatakis not bringing common law proceedings was also not a payment in respect of the same incapacity for which sickness benefits were paid. To conclude that this speculative common law claim could include a claim for economic loss did not allow any realistic assessment of its success or the amount for which a claim could be made. (This was contrary to the SSAT decision which had decided that some portion of the claim would be for economic loss).

Formal decision

The Tribunal set aside the SSAT decision and subsitituted for it a decision that no part of the $47 500 lump sum was in whole or in part a payment by way of compensation in respect of the same incapacity for which sickness benefit was paid.

[J.M.]

Compensation award: looking behind award

SECRETARY TO DSS and CAVALERI (No.5573)

Decided: 21 December 1989 by B.H. Burns, D.B. Williams and D.J. Trowse.

The Secretary appealed against an SSAT decision setting aside a DSS decision to preclude Cavaleri from receiving invalid pension for 26 weeks from the date Cavaleri had received a lump sum compensation payment from his employer.

The South Australian Industrial Court had ordered by consent that Cavaleri's employer pay him $25 000 for an injury received in a car accident. The DSS had taken 50% of this amount to reach the 26-week preclusion period.

The legislation

Sections 152 and 153 of the *Social Security Act* govern pension payments that commence after 1 May 1987 and payments by way of compensation that are wholly or partly in respect of an incapacity for work received after 1 May 1987 (s.152(1) & (2)(a)).

Section 152(2)(e) provides that where a lump sum payment was made 'in settlement of a claim' on or after 9 February 1988, 50% of that amount is to be considered as the 'compensation part of a lump sum payment'. Otherwise, the 'compensation part' is to be determined by the Secretary.

Section 152(2)(c) provides for the calculation of a lump sum payment period by dividing the compensation part of a lump sum by average male weekly earnings.

Section 153 provides that a person will be precluded from receiving pension during a period calculated on the basis of the 'compensation part' of any lump sum compensation payment, whether before or after becoming qualified for pension.

A 'payment by way of compensation'?

The AAT found that Cavaleri was entitled to receive an invalid pension at all relevant times; that he received a lump sum compensation payment prior to his application for invalid pension and that the money he received was a 'payment by way of compensation' given that it was a payment under a scheme of compensation provided by South Australia (see s.152(2)(a)(ii) and (iii)).

A 'lump sum'?

The AAT then went on to consider whether Cavaleri had received a 'lump sum' by way of compensation. It noted that 'lump sum' was not defined in the Act but after checking the definition (which defined lump sum as a number of items taken together or in the lump), found that Cavaleri had recieved such a lump sum because the $25 000 had included components paid for different purposes under ss.69, 70 and 72 of the South Australian *Workers' Compensation Act*.

A payment for 'incapacity for work'?

The crucial question was whether the payment was in whole or in part 'in respect of an incapacity for work'.

The AAT relied on the Federal Court decision in *Siviero* (1986) 68 ALR 147, which had considered ss.69 and 70 of the *Workers' Compensation Act*. The Court had decided that payments under these sections were in respect of injury, not in respect of incapacity for work; 'injury' and 'incapacity for work' were separate concepts.

The AAT said that the *Social Security Act* required that the payments would be 'in respect of an incapacity for work' if —

> 'the incapacity for work has directly resulted in some form of financial loss either actual or potential which in turn has been compensated.'

(Reasons, p. 8)

The AAT said that, on its face, the award did not evince this connection. However, it noted with approval the decision in *Cocks* (1989) 48 *SSR* 622 which, according to the Tribunal, allowed it to go behind the award and look at all the evidence (regardless of whether either party asked it to do so).

In examining the medical evidence the AAT found that Cavaleri had suffered extensive injuries in a car accident and had some permanent residual disabilities. Given these injuries, the amounts said to be awarded under ss.69 and 70 of the *Workers' Compensation Act* were not excessive. It concluded therefore, that the amount awarded by consent by the South Australian Industrial Court was in respect of injury rather than in respect of incapacity for work.

Formal decision

The Tribunal affirmed the decision of the SSAT.

[J.M.]

Residence in Australia: time limit for appeal to AAT

SECRETARY TO DSS and PESU (No. 5614)

Decided: 21 December 1989 by S.A. Forgie, J.D. Horrigan and W.A. De Maria.

The Secretary asked the AAT to review an SSAT decision to pay Martta Pesu age pension from the date of her claim in June 1984.

As well as challenging the substantive issue of whether Mrs Pesu was residentially qualified for payment of age pension, the Secretary also sought review of the SSAT decision to pay arrears, on the ground that she had not lodged her application for review to