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

that tribunal within 3 months of the adverse decision. The AAT dealt with the arrears question before considering her eligibility for age pension.

The facts

Mrs Pesu and her husband moved to Australia from their native Finland in 1967. Both were missionaries. After moving to Australia in 1967 with their 6 children, bringing all their personal possessions, they settled in Mt Isa where they bought a house. They first applied for citizenship in 1969 but were told their application was too early.

They then sold the house and spent 4 years in Papua New Guinea (PNG) from December 1969. During their absence there, they left some personal property in Australia and also left their 2 eldest children here with friends.

They returned to Australia and became Australian citizens in 1974 but were again posted to PNG, where they stayed until 1977. They then returned to Australia, and lived in Canberra with their children until 1980 when they travelled overseas for a 12-month holiday.

At the end of 1981, they were recalled to PNG, where they stayed until May 1983. After returning to Australia, they left again for PNG in July 1984 and remained there until May 1987. During all this time, they maintained property in Australia and lodged Australian tax returns each year.

On 19 June 1984, Mrs Pesu lodged her claim for age pension. By an undated letter, she was informed that her claim had been unsuccessful and that she could seek reasons for the decision, have her case reviewed by a review officer or seek a review by the SSAT.

Mrs Pesu wrote from PNG in May 1985 that she was unable to come to discuss her case personally but wished the decision to be reviewed. No action was taken on this letter and Mrs Pesu assumed that nothing further could be done about it.

Mrs Pesu lodged a further claim for pension on 21 July 1987 which was granted from 23 July 1987. With the assistance of a solicitor, she then sought arrears of payment to the date of her original claim. When this was refused, by letter dated 5 October 1988, she lodged an application to the SSAT on 20 January 1989. The SSAT set aside the decision and granted her age pension from the date of her original 1984 claim.

Payment of arrears

The DSS argued at the AAT that, even if the SSAT decision were affirmed, payment should commence only from 20 January 1989 as Mrs Pesu had lodged her application for review outside the 3 months (from 5 October 1988) specified in s.183(5) of the *Social Security Act*. This matter had not been addressed by the SSAT.

The AAT noted that s.183(5) imposes a 3-month time limit for appeals to the SSAT from the giving of written notice of a DSS decision. It considered the provisions of the *Acts Interpretation Act* 1901 (Cth) dealing with the giving of notice.

The AAT rejected the DSS argument that s.29 of the *Acts Interpretation Act* deems notice to be given at the time at which a letter would be delivered in the ordinary course of post. If that argument were accepted, Mrs Pesu had notice by 8 October of the adverse decision and her appeal would have been lodged outside the time limit for payment of full arrears.

The AAT held that s.29 applied only where other legislation expressly authorized or required a document to be served by post and s.183(5) of the *Social Security Act* was not such a section: Reasons, para. 19.

The AAT also decided that, at the time the decision of 5 October 1988 was made, s.174(2) of the *Social Security Act*, which requires the DSS to provide written notice of an adverse decision after review by the Secretary, was not in force. Therefore, ss.28A and 29 of the *Acts Interpretation Act*, both of which deal with the serving of written notices, did not then apply.

In the event, the only issue was whether Mrs Pesu had in fact been given written notice. The AAT found on the evidence that Mrs Pesu did not receive notice of the decision till shortly before 16 November 1988, when she sought review. This is because she and her husband had moved to Canberra (and had notified the DSS of their new address). Therefore her application to the SSAT was made within 3 months of that date and she was entitled to full arrears in the event of a favourable decision.

Although the AAT did not consider it necessary to determine whether the notice was properly addressed, within the meaning of s.28A of the *Acts Interpretation Act* (this is discussed in *Todd* (1989) 52 *SSR* 691), it did suggest that a letter sent to an address which DSS knew was not current could not be 'properly addressed'.

The residence issue

The AAT went on to consider whether, at the time of her June 1984 application, Mrs Pesu satisfied the then s.20 of the *Social Security Act*, which provided that a person should be deemed to be a resident of Australia during a period of absence during which she was a resident within the meaning of the *Income Tax Assessment Act*.

That Act in turn defined resident as, *inter alia*, a person whose domicile is in Australia (unless the Commissioner is satisfied that her/his permanent place of abode is outside Australia).

Applying a number of AAT and Federal Court decisions (see, eg, *Hafza* (1985) 23 SSR 227; *Re Perkins Shipping Pty Ltd and Australian Customs Service* (1988) 9 AAR 36) to the facts of this case, the AAT held that Mr and Mrs Pesu were resident in Australia during the relevant period. The AAT took into account the following factors:

- their various absences from Australia were all for settled periods;
- it was in the nature of their work as missionaries that these absences occurred;
- throughout this period they maintained a home base in Australia, evidenced by their retention of property here and their leaving their children here for their schooling; and
- they became Australian citizens as soon as it was possible for them to do so.

The AAT also held that throughout this period they were domiciled in Australia: Mr Pesu had abandoned his domicile of origin in Finland and he and his wife intended to make Australia their permanent home. The AAT did not accept the DSS contention that they had formed an intention to reside permanently in PNG and thereby abandoned their domicile of choice in Australia.

On this basis, the AAT determined that Mrs Pesu was domiciled in Australia at the time she applied for pension and that she had not established a permanent place of abode outside Australia. Accordingly, she remained a resident of Australia during her absences.

Formal decision

The AAT affirmed the SSAT decision that Pesu was eligible for age pension at the time of claim and should be paid arrears to June 1984.

[R.G.]