weeks and that payments totalling $6941 made between August 1988 and March 1989 were recoverable from him.

On review, the SSAT decided that, before calculating the period during which Beaumont was precluded from receiving sickness benefit and invalid pension, Beaumont's legal costs of $5384 should be deducted from the settlement figure.

The DSS asked the AAT to review the SSAT decision.

The legislation

Section 153(1) of the *Social Security Act* provides that, where a person, qualified to receive a pension, receives or has received a lump sum payment by way of compensation, then pension is not payable to that person during the 'lump sum payment period'.

Section 152(1) defines 'pension' to mean an invalid pension, unemployment benefit, sickness benefit, special benefit or sheltered employment allowance.

Section 152(2)(a) provides that a reference to a payment by way of compensation includes a payment in settlement of a claim for damages 'that is, in whole or in part, in respect of an incapacity for work'.

According to s.152(2)(e) 'the lump sum payment period' is to be calculated by dividing 'the compensation part' of a lump sum payment by average male weekly earnings.

Section 152(2)(c)(i) provides that a reference to the 'compensation part of a lump sum payment by way of compensation' where the lump sum payment was made in settlement of a claim and the settlement was made after 9 February 1988, is a reference to 50% of the lump sum payment.

The AAT's decision

The AAT decided that the consent award was a payment by way of compensation because part of it amounted to compensation for loss of income arising from Beaumont's injury.

Because the award was made in settlement of a claim which in part related to injury and was made by consent after 9 February 1988, s.152(2)(i) required that the 'compensation part' of the payment be calculated as 50% of the award, namely $58 000.

The AAT said that the relevant provisions of the Act did not authorise any legal costs being excluded from the lump sum before calculating the compensation part of the lump sum:

> 'It is clear, in my opinion, because of the inherent difficulties associated with ascertaining in lump sum settlements with any degree of certainty, what portion is in fact compensation in respect of incapacity for work that Parliament has fixed a certain percentage, i.e. 50%. It follows that Parliament has intended the remaining 50% to be for compensation, costs, and other sums which are not in respect of incapacity for work. The lump sum in this particular case did not include a sum for costs... Even if the lump sum had included legal costs, then there is no warrant to excise them from the lump sum before making the necessary calculations.'

(Reasons, para. 12)

Formal decision

The AAT set aside the decision of the SSAT and decided that Beaumont was precluded from receiving a benefit or pension for 119 weeks from 3 August 1988 to 13 November 1990; and that benefit or pension already paid to him, $6941, should be recovered.

[P.H.]

a'BECKETT and SECRETARY TO DSS (No. 5882)

Decided: 10 May 1990 by D.H. Byrnes, D.B. Williams and B.C. Locke.

Edward a'Beckett, a self-employed legal practitioner, was injured in a motor vehicle accident in November 1983. He received a maximum payment of $20 800 for loss of earning capacity from the Victorian Transport Accident Commission.

a'Beckett was paid invalid pension by the DSS from February to August 1988. On 22 July 1988, a'Beckett settled his common law proceedings for damages relating to his injuries for $60 000; and the DSS then decided that a'Beckett was precluded from receiving invalid pension for 63 weeks from 8 December 1987 (the last date covered by the compensation from the Transport Accident Commission) to 20 February 1989.

a'Beckett asked the AAT to review that decision.

The evidence

In this appeal, a'Beckett argued that the settlement of his common law claim had not included any payment in respect of his incapacity for work. The statement of claim lodged in those proceedings in February 1986 had, however, specified loss of earning capacity as one of the items in a'Beckett's claim for damages. In particular, it had been claimed that 'his capacity to earn income has been severely affected'.

The terms of settlement signed in July 1988 had recorded that a'Beckett, in consideration of receiving $60 000, released and discharged the defendant in the common law proceedings 'from all actions, suits, causes of action, demands, costs and expenses of every description which I now have or at any time hereafter may have... by reason of or in respect of the said accident'.

a'Beckett told the AAT that he had instructed his own solicitor to ensure that the settlement figure should not include any component for loss of income.

a'Beckett's solicitor gave evidence to the AAT but, apart from his observation that it would have been difficult to vary the standard form used for terms of settlement in these matters, the details of his evidence to the Tribunal were not set out in the Reasons of the AAT.

The majority decision

Two members of the AAT, **Byrnes** and **Williams**, accepted a'Beckett's argument that the settlement of his common law action for damages was not a payment by way of compensation within s.152(2)(a) so as to be caught by s.153(1) of the *Social Security Act.*

The majority said that the evidence of a'Beckett and his solicitor was 'both frank and credible' and indicated that the settlement 'may well have not included in it any component in respect of an incapacity for work': Reasons, para. 13. The majority expressed their decision in rather inconclusive terms as follows:

> 'The uncertainty of the likely components comprising the settlement sum in this particular case lead us to acknowledge that whilst it is possible that loss of income may have formed part of the lump sum in question we are unable to say that this was more probable than not.'

(Reasons, para. 14)

The minority view

The third member of the AAT, **Locke**, decided that the settlement of a'Beckett's common law action had included some component for incapacity for work. He said that the evidence in the case indicated that a'Beckett had not worked to full capacity between the date of the accident and the date of the settlement. The dissenting member noted that a'Beckett had received $20 800 from the Transport Accident Commission to cover his loss of earnings over some 4 years. It was, he said, -

> 'difficult to accept that a solicitor would only earn $20 800 in three and a half years. In my view there must have been a balance for past

> loss of income remaining under the common law damages claim.'

(Reasons, para. 8)

The dissenting member also said that the AAT 'must act judicially' so that it should 'expect that persons read what they sign and know what they are signing, and, they therefore must accept whatever consequence a closer examination of a document reveals'. The terms of settlement in the present matter had been prepared and vetted by solicitors for both parties. Although a'Beckett had instructed his solicitor that there should be no component for incapacity for work in the settlement, the condition had not appeared in the settlement and he had signed it knowing the clause was missing because he did not want to hold up the settlement:

> 'He is not a frail, aged person; he is a 50-year-old man in complete control of his faculties and he was in control of them when he signed the document. In addition, but more importantly, he is a barrister and solicitor who has practised in Melbourne for 20-25 years.'

(Reasons, para. 10)

Formal decision

By a majority, the AAT set aside the decision under review and decided that the lump sum payment of $60 000 was not a lump sum payment by way of compensation for the purposes of s.153 of the *Social Security Act.*

[P.H.]

SECRETARY TO DSS and MURPHY (No. 5883)

Decided: 10 May 1990 by D.H. Burns.

Victor Murphy suffered an industrial injury in August 1984, for which he received weekly worker's compensation payments until May 1988.

Murphy was paid sickness benefits from June to November 1988. When he settled a common law claim for damages against his former employer for $95 000 on 27 October 1988, the DSS decided that the sickness benefits paid to Murphy ($5474) were recoverable from him and that Murphy was precluded from receiving benefits until 21 March 1990.

On review, the Social Security Appeals Tribunal decided that, before calculating the period for which Murphy was precluded from receiving benefits, the sum of $2000, which represented his legal costs, should be deducted from the $95 000 settlement figure.

The DSS asked the AAT to review the SSAT decision.

The legislation

Section 153(1) of the *Social Security Act* provides that where a person, qualified to receive a pension, receives or has received a lump sum payment by way of compensation, then pension is not payable to that person during the 'lump sum payment period'.

Section 152(1) defines 'pension' to mean an invalid pension, unemployment benefit, sickness benefit, special benefit or sheltered employment allowance.

Section 152(2)(a) provides that a reference to a payment by way of compensation includes a payment in settlement of a claim for damages 'that is, in whole or in part, in respect of an incapacity for work'.

According to s.152(2)(e) 'the lump sum payment period' is to be calculated by dividing 'the compensation part' of a lump sum payment by average male weekly earnings.

Section 152(2)(c)(i) provides that a reference to the 'compensation part of a lump sum payment by way of compensation', where the lump sum payment was made in settlement of a claim and the settlement was made after 9 February 1988, is a reference to 50% of the lump sum payment.

The AAT's decision

The AAT first decided that Murphy had been qualified to receive a pension at the time when he received the $95 000 settlement. The $95 000 was a settlement of a claim for damages; and there was a sufficient link between the lump sum payment and Murphy's incapacity for work so that it could be described as being a payment 'in whole or in part in respect of an incapacity for work'. Accordingly, the payment was 'a lump sum payment by way of compensation' within s.152(2)(a). Accordingly, Murphy's receipt of that payment of compensation brought s.153(1) into operation.

The AAT then considered the question whether legal costs could be excluded from the lump sum payment for the purpose of calculating 'the compensation part' of that payment. The Tribunal said that, where a lump sum payment was described in the terms of settlement as being 'inclusive of costs' and part of the settlement related to an incapacity for work, s.152(2)(c)(i) required 50% of the lump sum to be treated as the compensation part for the purposes of calculating the lump sum payment period:

> 'Costs are not to be excluded from the lump sum before calculating the compensation part of the lump sum payment by way of compensation in accordance with s.152(2)(c)(i)(A) or (B). In the Tribunal's view it is clear that Parliament intended to allow the remaining 50% to be for costs and other sums which are not in respect of an incapacity for work. . . . In this particular case party/party costs did not form part of the lump sum settlement but even had they then they should not be excised from the lump sum payment before applying the provisions of s.152(2)(c)(i). The Tribunal holds the same view with respect to solicitor-client costs.'

(Reasons, para. 9)

The Tribunal also observed that, if the lump sum payment fell for consideration under s.152(2)(c)(ii), which required the Secretary to form an opinion as to how much of the lump sum payment was 'in respect of an incapacity for work' where the payment did not fall within s.152(2)(c)(i), then 'costs must be excluded as not being in respect of an incapacity for work': Reasons, para. 9.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that Murphy had received a lump sum payment by way of compensation in the sum of $95 000; that he was precluded from receiving benefit for pension from 5 May 1988 to 21 March 1990; and that sickness benefit paid between June and November 1988, totalling $5740, was recoverable.

[P.H.]

DIMOVSKY and SECRETARY TO DSS (No. 5730)

Decided: 23 February 1990 by H.E. Hallowes.

Mendo Dimovsky was injured while driving to work in 1984. He was paid sickness benefit in 1986 and again in 1987.

In January 1988, Dimovsky settled a worker's compensation claim for $5500. The DSS then decided that sickness benefits paid to Dimovsky during 1986 and 1987, totalling $2552, were recoverable from the compensation settlement.

The Social Security Appeals Tribunal set aside that decision and the DSS applied to the AAT for review of the SSAT's decision.

The legislation

The relevant provisions, in force at the time that Dimovsky was paid sickness benefits, appeared in the former Division 3A of the *Social Security Act.*

Section 115B(2A) provided that, where a person receiving sickness benefit also received a lump sum payment that was, in the opinion of the Secretary, in whole or in part a payment by way of compensation in respect of the same incapacity as the sickness benefit payments, the sickness benefit payments should be reduced by an amount calculated under s.115B(2B).

Section 115B(2B) set out a formula for converting a lump sum payment of compensation into the equivalent of weekly payments. The formula required the lump sum payment to be divided by average male weekly earnings, so that the lump sum payment could be attributed to a number of weeks. According to s.115B(2B), the number of weeks calculated in this way was to be taken to have begun on the date on which the person's incapacity began.

The Tribunal's decision

The AAT first considered the sickness benefits paid to Dimovsky in 1986, totalling $681. The Tribunal noted that, at the time Dimovsky received those sickness benefits, he was also paid periodical compensation. The amount of this compensation, because of s.115B(2A), reduced Dimovsky's entitlement to sickness benefit during that period to nil. Accordingly, the sum of $681 which he received in sickness benefit in 1986 was recoverable.

However, by the time of the 1987 payments of sickness benefit, Dimovsky was not receiving periodical compensation payments. Accordingly, those sickness benefit payments were only recoverable if Dimovsky could be said to have received a lump sum payment of compensation in respect of the same incapacity, notionally converted into weekly payments of compensation in accordance with s.115B(2B).

The AAT noted that, in *Piatkowski* (1987) 12 ALD 291, the Tribunal had said that the identity of incapacity referred to in s.115B(2A) was an identity in terms of 'cause and time'.

The same point had been made by the Federal Court in *Littlejohn* (1989) 53 *SSR* 712, where the court had said that 'incapacity in this context has both a causal and a temporal aspect'.

The AAT noted that, of the compensation settlement in the present case, $3000 expressly related to the same cause as the incapacity for which Dimovsky had received sickness benefit, namely, the injuries suffered in 1984. However, the compensation award made in January 1988 had described this part of the settlement as 'future compensation', whereas the sickness benefit payments which the DSS was seeking to recover related to a period in 1987. Unless the AAT was justified in going behind the terms of the award, the temporal identity required, before it could be said that the compensation and sickness benefits were received in respect of the 'same incapacity', was not present.

The AAT noted that Dimovsky had remained unable to work for some 2 months after the compensation settlement. A compensation payment of $3000 for 2 months inability to work was not such an amount which would justify going behind the award, the AAT said: Reasons, para. 15.

However, the AAT noted that Dimovsky had received sickness benefit payments from the DSS between January and March 1988. By virtue of s.115B(2B), the lump sum payment of compensation which he received in January 1988 (described in the award as being paid as future compensation) was to be divided by the average male weekly earnings, so that it covered six and a half weeks running from the date of the settlement (29 January 1988). Those notional weekly payments should then be set off against any sickness benefit payments received by Dimovsky in that period.

Formal decision

The AAT set aside the decision of the SSAT and remitted the matter to the Secretary with the direction that the worker's compensation insurer was liable to pay to the Commonwealth an amount to be calculated in accordance with the AAT's reasons for decision.

[P.H.]

Compensation award: recovery of sickness benefits

HOGG and SECRETARY TO DSS (No. 5778)
Decided: 15 March 1990 by W.J.F. Purcell.

Robert Hogg suffered an industrial injury in March 1985. He received sickness benefit payments from 1985 to 1987.

In June 1987, Hogg settled his claim for worker's compensation for $68 000, of which $38 000 was identified as a payment for incapacity for work.

Despite that identification, the DSS decided that $50 000 of the compensation settlement represented compensation for the same incapacity for which Hogg had received sickness benefit; and that, accordingly, that sum of $50 000 was available for recovery of those sickness benefits under the former s.115B of the *Social Security Act*.

Hogg asked the AAT to review that decision.

Interpreting the settlement

The DSS decision, to treat $50 000 of the compensation settlement as being available for recovery of sickness benefits, was made under s.115B(3A) of the *Social Security Act*, on the basis that this amount represented the compensation payment for the same incapacity as the payments of sickness benefit.

In going behind the terms of the award, the DSS was applying its own Unemployment and Sickness Benefit Manual, para. 9.1321 of which calls for a careful interpretation of the award 'where it appears that the award or settlement may have been expressed in such a way as to attempt to avoid the effect of the legislation'.

In the present case, the DSS had relied on information supplied by the worker's compensation insurer about the background to the settlement. The insurer said that Hogg could have expected to recover $170 000 in compensation if his claim had proceeded to a hearing and he had been successful at that hearing.

The insurer said that, of the expected $170 000, the sum of $125 000 would have represented Hogg's past and future economic loss.

The DSS had then calculated that, as the total settlement figure ($68 000) was 40% of the potential maximum, the economic loss component of the final settlement should also be taken to be 40% of the potential economic loss claim: 40% of $125 000 was $50 000. The DSS then treated that $50 000 as a payment in respect of the incapacity for work for which Hogg had been paid sickness benefits.

However, there was other evidence from Hogg's solicitors to the effect that Hogg had settled the compensation claim because there would be some difficulty in proving the extent of his incapacity and because he was in such