approached as a matter of any precise apportionment of causation. Accepting the sense of 'dominant' given in the *Shorter Oxford Dictionary* as 'governing' or 'most influential', the AAT found that the incapacity was the most influential factor in causing Ms Weston to delay submitting her claim.

Her unawareness of the time limit was a contributory cause to her failure, but that was due in part to departmental default in misinforming her and failing to alert her to the time limit. The relevance of administrative default in assessing whether the incapacity was the sole or dominant cause of late lodgment was explained as follows:

> 'Thus if someone in the applicant's situation had been informed of the need to lodge within time, an injury which made it difficult but not impossible to travel could not be said to be the sole or dominant cause. But where the claimant is left in ignorance of the need to lodge promptly, either in person or through an alternative means such as the post or by a friend, an incapacitating injury, if of sufficient magnitude, may be so regarded because its effect should be measured relatively to the perceived urgency or lack of it.'

Formal decision

The AAT set aside the decision under review and substituted a decision that sickness benefit should be payable from the earliest allowable date. Since under s.125(4)(a) this could not be earlier than 27 December 1989, the AAT considered the question of whether to recommend an *ex gratia* payment in accordance with Finance Direction 21/3.

***Ex gratia* payment under Finance Direction 21/3**

A delegate of the DSS had considered the SSAT's recommendation for an *ex gratia* payment and decided that there was no case for such a payment because Ms Weston had failed to act promptly upon the advice given by the Hotline that she should go to a departmental office and make a claim.

The AAT approved of the guidelines relating to such payments set out in Chapter 35 of the Department's Benefits Manual, but found that they had been misapplied.

The advice given on the Hotline was not the only instance of incomplete or misleading advice by the Department to the applicant. Furthermore, the question of whether the applicant contributed by her slowness to act to the situation did not exclude negligence on the part of the Department, but should lead to an apportionment when assessing the amount of the *ex gratia* payment.

The AAT recommended that the Department reconsider its decision not to make an *ex gratia* payment of the whole or a substantial part of an amount equivalent to sickness benefit for the period prior to 26 December 1989.

[P.O'C.]

Australian resident

OPITZ and REPATRIATION COMMISSION

(No. N89/753)

Decided: 27 July 1990 by C.J. Bannon.

Mr Opitz sought review by the AAT of decisions by the Repatriation Commission cancelling his service pension and demanding repayment of $13 540.84, the entire amount of service pension paid to him over the 2 years since he lodged his claim. These decisions were apparently based on a finding that Mr Opitz was not and had not been an Australian resident.

The legislation

Under s.43(4) of the *Veterans' Entitlements Act* 1986:

> 'A veteran is not eligible to lodge a claim for service pension unless the veteran is an Australian resident and is in Australia.'

'Australian resident' is defined in s.35(1) (which is identical to the definition in s.3(1) of the *Social Security Act*) to mean:

> 'A person who resides in Australia and who is (a) an Australian citizen . . .'

The evidence

Mr Opitz was an Australian citizen and had family, including grandchildren, in Australia. He was divorced from his first wife. In 1983 he entered into a *de facto* relationship with a Philippino woman, whom he married in 1985; and he then lived in the Philippines with her and her son for some years.

On 26 July 1986, Mr Opitz returned to Australia. He was arrested at the airport, subsequently charged with offences committed between 1979 and 1981, and was kept in custody for 2 to 3 weeks until bail was arranged.

On 19 August 1986, Mr Opitz lodged a claim for service pension. In a statement lodged with the claim he said:

'I will be residing permanently in Australia. My wife and child are still living in the Philippines and will be joining me in the not too distant future approximately 6-12 months . . . '

Service pension was granted.

Mr Opitz pleaded guilty to the 1979-81 charges and on 29 October 1986 was sentenced to 15 months gaol with a 6 months non-parole period. Before sentencing he gave evidence that his primary reason for returning to Australia was for medical attention and that he intended staying 4 to 6 weeks.

On 17 February 1987, Mr Opitz was released from prison and returned to the Philippines in March 1987. His service pension was cancelled from 11 August 1986 by a decision made on 27 July 1988. In addition, repayment of pension paid for the period 19 August 1986 to 10 August 1988 was demanded.

At the hearing before the AAT, a written statement was tendered in which Mr Opitz asserted that he intended to return to Australia, but lacked the necessary funds.

Two unsuccessful attempts were made by the AAT to obtain telephone evidence from Mr Opitz from Manila, the first attempt being thwarted by an earthquake. The AAT refused to adjourn to make further attempts to contact him. In so refusing, the Tribunal commented that:

> 'Oral statements by telephone are of extremely limited value when the demeanour of the witness cannot be observed, and there is an issue as to his credit.'

(Reasons, p.5)

Not residing in Australia

The AAT applied the Federal Court decision in *Hafza* (1985) 26 *SSR* 321, in which Wilcox J said:

> 'As a general concept residence includes two elements: physical presence in a particular place and the intention to treat the place as home, at least for the time being, not necessarily forever.'

(Reasons, p.6)

The AAT also commented that:

> 'A person may, of course, have more than one residence, and may even be a resident against his will when he prefers some other place as his permanent residence.'

(Reasons, p.6)

Relying on Mr Opitz's sworn evidence to the criminal court, which the AAT had no doubt should be preferred to his contrary assertions in unsworn documents and statements, it was concluded that:

> 'He was not in Australia as a resident, but simply as a visitor when he lodged his claim.'

(Reasons, pp.6-7)

Backdating the decision

Section 58(2) of the *Veterans' Entitlements Act* (which is practically identical to s.168(2) of the *Social Security Act*) permitted backdating of a decision where payment would not have been

made but for a misrepresentation and provided the power for the backdating by the Commission in this case.

The AAT also said:

'I do not consider that an ineligible claim achieves eligibility because of an incorrect determination.'

(Reasons, p.7)

However, in this case s.58(1), which includes a power to cancel (and is identical to s.168(1) of the *Social Security Act*), provided 'express power to reverse wrongful determinations'.

Formal decision

The AAT affirmed the decision under review.

[D.M.]

Compensation recovery: 'lump sum'

SECRETARY TO DSS and VAN DER MOLEN

(No. 6618)

Decided: 4 February 1991 by H.E. Hallowes.

The DSS decided that Mr Van Der Molen had been paid $2193.86 in sickness benefits over the period 1 January 1989 to 1 March 1989 which was recoverable by the Department because he had received a series of periodical payments by way of compensation in respect of that period.

This decision was set aside by the SSAT which substituted a decision that only sickness benefit paid during the 2 weeks beginning 8 September 1988 (the day after periodical payments ceased) was recoverable. The DSS sought review by the AAT of this SSAT decision.

The legislation

The principal issue in this case was whether s.153(2) or s.153(3) of the *Social Security Act* should be applied. This in turn depended on whether Mr Van Der Molen had received a lump sum compensation payment or a series of periodical compensation payments.

Under s.153(2) —

'Where (a) a person has received a lump sum payment by way of compensation . . . the Secretary may . . . determine that the person is liable to pay . . . the amount of pension paid to the person during the lump sum payment period . . .'

The 'lump sum payment period' is determined under s.152(2) and (3). Where the lump sum was paid pursuant to a settlement made on or after 9 February 1989, 50% of the sum is divided by average weekly earnings to determine the duration of the period. That period runs from the day on which the last periodical compensation payment was made, if such payments have been made in respect of the incapacity.

Under s.153(3) —

'Where (a) a person has received a series of periodical payments by way of compensation . . . the Secretary may . . . determine that the person is liable to pay . . . (d) the amount of pension paid to the person during [the period during which payments in the series of periodical payments were made] . . .'

For the purposes of all these provisions a 'pension' is defined in s.152(1) to include a sickness benefit.

A subsidiary issue involved the application of s.156 of the *Social Security Act* which permits the Secretary to treat whole or part of a compensation payment as not having been made 'if the Secretary considers it appropriate to do so in the special circumstances of the case'.

The facts

Mr Van Der Molen injured his back at work in May 1988. On legal and medical advice he resigned on 9 September 1988 after unsuccessfully attempting to return to work in June. Weekly compensation payments ceased on 7 September 1988.

A claim for sickness benefit was lodged on 13 September 1988 and granted from 12 September 1988.

In January 1989 Mr Van Der Molen lodged a claim for weekly payments of compensation under the *Accident Compensation Act* 1985 (Vic.). This claim was opposed on the basis that his injury was not caused by work. The hearing of this claim was listed before the Accident Compensation Tribunal on 18 September 1989.

Settlement negotiations resulted in the making of a consent award for 'weekly payments of compensation from 5 January 1989 until 1 March 1989 inclusive', which amounted to $2777.80. Mr Van Der Molen gave evidence to the AAT that he was advised to settle this claim to avoid jeopardising a potential lump sum claim for permanent impairment under s.98 of the *Accident Compensation Act*. He was not consulted as to the dates in the award and merely understood that he was to receive a 2-month period of compensation.

When Mr Van Der Molen went to collect his settlement moneys, he found that his employers had already paid $2039.06 to DSS. It was conceded by the Department that it had failed to comply with the correct notice procedures as required by Part XVII of the Act. DSS found itself in a position where the money turned up before it had a chance to issue the notices.

At the time of the AAT hearing, the Van Der Molens' only income was from social security payments. They experienced financial hardship in September 1989 but were back on an even keel after Mr Van Der Molen received $8546 pursuant to s.98 of the *Accident Compensation Act* in July 1990 in respect of his back injury.

Looking behind the award

The AAT first decided whether it could look behind the award in this case. It considered the AAT's decisions in *Cocks* (1989) 48 *SSR* 622 and *Littlejohn* (1989) 49 *SSR* 637 and the Federal Court's decision in *Littlejohn* (1989) 53 *SSR* 712, commenting in relation to the latter case that —

'It was noted in the Federal Court judgment . . . that although the Secretary and, on application for review, the Administrative Appeals Tribunal, could look behind the terms of a compensation award in order to determine whether there was in truth an identity of the incapacity for which the sickness benefit and compensation had been paid, the refusal of the tribunal in *Littlejohn* to undertake that course had not involved an error of law, the Tribunal's finding that there was no evidence to suggest that the compensation award was anything other than what it purported to be having been open to the Tribunal.'

(Reasons, para. 16)

In relation to the case before it, the AAT decided that —

'Despite the wording of the award, the evidence as to the circumstances surrounding this application satisfy me that this is an application in which the Tribunal should look behind the award.'

(Reasons, para. 27)

Lump sum or periodical payments?

The AAT quoted the following passage from the Federal Court's decision in *Banks* (1990) 56 *SSR* 762:

'A "lump sum" payment is simply one which includes a number of items. Where a payment by way of compensation consists of the aggregate of several amounts which could have been paid separately or at different times the payment is one of a lump sum.'

(Reasons, para. 22)

Reliance was also placed on the Federal Court's decision in *a' Beckett* (1990) 57 *SSR* 779.