The issue

Smith and her husband had purchased a farm which was operating at a loss. They were attempting to sell it and, in the meantime, Smith obtained paid outside employment to supplement their income. The DSS treated her income from employment as the relevant income for the purpose of the calculation.

Smith, on the other hand, argued that the farm losses should be offset against her income from employment in determining whether her income fell within the 'allowable income'.

Therefore, the sole issue was the legal question of whether the losses from the farming business should have been taken into account in calculating the amount of her income for the purposes of section 5B(2).

The case law

The AAT noted that the question of offsetting losses against income had been considered by the Federal Court in a number of previous cases. In *Haldane-Stevenson* (1985) 24 *SSR* 296, the Full Federal Court held that, while income as defined in the 1947 Act meant net rather than gross income, where a person's income was derived from several sources, the net income from each of those sources had to be ascertained by offsetting against the gross income from that source only expenditure associated with it. In that case, expenditure on research for the writing of a book could not be offset against any other source of income, such as a UK pension.

In *Garvey* (1989) 53 *SSR* 711, Garvey and his wife had income from the wife's wages, from interest and from 4 rental properties. They had borrowed money to buy the properties and estimated their expenses in generating the rental income of $16 396 as $43 000. Garvey argued that those expenses should be offset against the total income in order to calculate his income. Although he succeeded before a single judge of the Federal Court, the Full Court allowed the DSS appeal, stating that they were 'of the view that the definition of "income" in the Act does not permit the "negative yield" of one source of income to be offset against the yield from other sources'.

The AAT's reasoning

The AAT decided that, following the decision of the Full Federal Court in *Garvey*, there can be no room for argument that expenditure which is associated with one source of income can be set off against income from another source.

Applying that decision to this case, expenditure incurred in carrying on the dairy farming business can be offset only against income derived from carrying on that business. The AAT disagreed with the SSAT which had decided that *Garvey* could be distinguished on the basis that Smith and her husband were making all reasonable efforts to sell the farm and thus to relinquish activities which were occasioning loss (para.14).

It was also argued in the AAT that, since Smith had obtained employment only because money had to be put into the farming business to enable it to continue, her income from employment was associated with the farming business.

The AAT rejected both submissions, relying on *Garvey*, and on an AAT decision cited with approval by the Full Federal Court in *Garvey*, *VXB* (1989) 49 *SSR* 633, where the facts, though different, were analogous.

Nor did the AAT consider it relevant that what was at issue here was a decision under the *Health Insurance Act*, while *Garvey* and *Haldane-Stevenson* both concerned claims for pensions or benefits under the *Social Security Act*. The Tribunal was satisfied that, since the definition of income is essentially the same in the two Acts, the principles in those cases were applicable to this case.

Formal decision

The AAT set aside the decision of the SSAT and substituted a decision that the original decision not to declare Smith a disadvantaged person with effect from 22 September 1990 was correct.

[R.G.]

Assurance of support debt

SECRETARY TO DSS and AQUINO-MONTGOMERY

(No. 7203)

Decided: 26 July 1991 by B.G. Gibbs, C.G. Woodard, and P.J.B. Burns.

The DSS asked the AAT to review an SSAT decision that set aside a DSS decision to recover an assurance of support debt from Mrs Aquino-Montgomery.

The facts

Mrs Aquino-Montgomery was born in the Philippines in 1958. She came to Australia in 1982. She became an Australian citizen, married and had a daughter and a son now aged 13 and 7. In 1987 her sister and niece came to live with her in Australia. Her mother came to Australia in December 1985 on a visitor's visa and departed in June 1986. She returned to Australia on a visitor's visa in December 1986.

In June 1987 Mrs Aquino-Montgomery made a statutory declaration giving an assurance of support for her mother for a period of 10 years. The declaration acknowledged that it was given for the purpose of the *Migration Regulations* and that in the event of any special benefit being paid to her mother during the period of her assurance she would repay the payment to the Commonwealth.

Mrs Aquino-Montgomery's mother was granted permanent residence in November 1987 and Australian citizenship in November 1990. In January 1989 she claimed special benefit and this payment was granted to her in March 1989. On 24 January 1990 the DSS wrote to Mrs Aquino-Montgomery advising her that, as her mother was in receipt of special benefit and she had given an assurance of support, she was accruing a debt, but that the debt would only accrue from the date of the letter. There was no response to this letter and on 19 June another letter from the DSS stated the debt to be $2344.75 and increasing at the rate of $279.50 per fortnight.

On 26 June 1990 Mrs Aquino-Montgomery wrote to the DSS saying that she disputed the debt claimed on the basis that she had not been advised of her mother's claim, that she had not been informed or invited for an interview concerning this claim, and that she had not been informed that the claim for special benefit had been granted. This letter was treated as an appeal to the SSAT.

The legislation

It was not disputed that there was a debt of $2344.75. The only issue was whether the amount should be recovered. Section 251(1) of the Social Security Act 1947 provided that the Secretary could write off debts owed under the Act in certain circumstances, waive recovery of debts or allow the debts to be paid in instalments.

The Tribunal referred to the principles which governed the operation of the discretion contained in s.251. In

Taylor (1987) 40 *SSR* 506, the Tribunal had said that all the circumstances, including the circumstances in which the overpayment arose should be taken into account, whether it occurred as the result of an innocent mistake or fraud, whether administrative delay or error contributed and all relevant compassionate circumstances. The impact of the recovery action on the social welfare recipient was not relevant here, as Mrs Aquino-Montgomery was not such a recipient. The Tribunal referred to a number of other decisions, including *Hales* (1983) 13 *SSR* 136 and *Gee* (1982) 5 *SSR* 49 which set down similar principles for the exercise of the discretion to recover the debt to those outlined above.

Should the debt be recovered?

Mrs Aquino-Montgomery gave evidence that she provided her mother with all of her needs but that some friction developed between her mother and herself over her mother smoking, which caused Mrs Aquino-Montgomery and her husband to be concerned about the mother's health. This led to her mother leaving home on three occasions. On the last occasion she did not return and Mrs Aquino-Montgomery, concerned that her mother might claim special benefit, contacted the DSS at this time to inform them that she was providing her mother with all her needs and that she should not be paid special benefit. She also gave evidence that she did not receive the letter dated 24 January 1990. The only letter she received was that of 19 June 1990 informing her of the debt. This letter was sent after her mother had made a second claim for special benefit when she turned 60 because she was not residentially qualified for age pension.

Mrs Aquino-Montgomery was employed as a secretary earning $31 000 per annum. She was paying off, with her husband, a $280 000 house mortgage. Her husband was running a small business from home which grossed about $50 000 per year, but he was also repaying debts from an earlier failed business.

Her sister and her niece lived with her. She had sent money to her brother and his family in the Philippines in the past, but could no longer afford to do so.

The Tribunal concluded that the marriage relationship between Mrs Aquino-Montgomery and her husband had been difficult for some years, and that the mother had been introduced into this situation and had chosen to leave the home and not return. The Tribunal also concluded that Mrs Aquino-Montgomery was at all times willing and capable of supporting her mother.

The Tribunal accepted that the DSS had omitted to inform Mrs Aquino-Montgomery of her mother's claim for special benefit until January 1990, but it was also accepted that the DSS had been correct in only seeking to recover the debt from the date of the letter. It was also accepted that she did receive the letter dated 24 January 1990. However, no contact was made after the mother made a second claim in May 1990 and there was no evidence that Mrs Aquino-Montgomery deliberately avoided contacting the Department.

The AAT concluded that there were insufficient grounds for the writing off or waiving of the debt under s.251(1), for the period 24 January 1990 to 2 May 1990. For that period Mrs Aquino-Montgomery owed an assurance of support debt and must repay it to the Commonwealth. However, the Tribunal felt that there were sufficient grounds for the exercise of the discretion to waive recovery of the debt owed in relation to the period from 3 May 1990 to 18 May 1990 which related to the period after the second claim for special benefit was made by the mother. (18 May 1990 was the end of the debt period referred to in the DSS letter of 19 June 1990.)

Formal decision

The AAT set aside the decision under review and substituted a decision that the respondent owed to the Commonwealth an assurance support debt of $2344.75 for the period 24 January 1990 to 18 May 1990; that the amount incurred between 24 January 1990 and 2 May 1990 be recovered; that the amount incurred between 3 May 1990 and 18 May 1990 be waived; and that the matter be remitted to the DSS with the direction that waiver and recovery action be taken in accordance with the terms of this decision.

[B.S.]

Invalid pension: permanent incapacity for work

BOURKE and SECRETARY TO DSS

(No. 7063)

Decided: 21 June 1991 by B.G. Gibbs, D.B. Travers and E. Stephenson.

Julia Bourke lodged a claim for invalid pension on 5 December 1988 and this was rejected by the DSS on 27 January 1989. An appeal was lodged with the SSAT and the decision was affirmed. Bourke requested that the AAT review this decision.

The facts

Bourke was 48 years old and separated. Two of her children had been killed in tragic circumstances. Approximately 7 years ago Bourke developed pain in her upper limbs whilst working as a process worker. She had time off work and returned on light duties. She ceased work in August 1988 and had not received Workers' Compensation benefits since November 1988. The SSAT found that Bourke was fit for rehabilitation and retraining in light work.

Bourke's symptoms were extensively investigated and no evidence of stenosing tenosynovitis or carpal tunnel syndrome was found. A number of specialists could find no evidence of any ongoing organic disability.

Bourke told the AAT that she was attending a stress management course, had trouble sleeping and suffered from frequent headaches.

The AAT also received evidence from 2 psychiatrists. Dr Veness diagnosed Bourke as suffering from chronic anxiety and depression which manifested itself as chronic pain syndrome. Dr Merrifield could find no evidence that Bourke had pain or depression. The Commonwealth Rehabilitation Service assessed Bourke and decided not to offer her rehabilitation.

The legislation

After referring to s.27 of the *Social Security Act* 1947, the AAT stated that the first question it must decide was whether Bourke was permanently incapacitated for work. The second question was whether at least 50% of that permanent incapacity was directly caused by a physical or mental impairment.