s.103(3). The Shorter Oxford English Dictionary defined 'school' to include 'universities in general'. As a consequence Brady was still eligible for the allowance during the absence of her son to attend university.

Formal decision

The AAT affirmed the decision of the SSAT. The AAT also found that Brady was qualified to receive the child disability allowance under the 1947 Act and then under the *Social Security Act* 1991 until 19 March 1992.

[B.S.]

Disability support pension: first qualified overseas

CHRISTIAN and SECRETARY TO DSS

(No. 8552)

Decided: 18 February 1993 by P.W. Johnston.

Allen Christian came to Australia from New Zealand in June 1985. He worked in Australia until November 1988, although he suffered an injury to his lumbar spine in February 1986.

In November 1988, Christian travelled to the United Kingdom, taking his 2 children and his personal effects. Christian worked in the United Kingdom in a number of advisory or supervisory jobs until January 1992, when he injured his neck in a motor accident. In March 1992, Christian was granted a disability living allowance by the United Kingdom DSS.

In April 1992, Christian returned to Australia and lodged a claim for disability support pension (DSP). The DSS rejected his claim. The SSAT affirmed the DSS decision. Christian appealed to the AAT.

The legislation

Section 94(1) of the *Social Security Act* 1991 sets out the qualifications for DSP:

- A person must have a physical, intellectual or psychiatric impairment of 20% or more under the impairment tables: s.94(1)(a) and (b).
- The person must have continuing inability to work: s.94(1)(c).
- The person must have turned 16: s.94(1)(d).
- The person must either be an Australian resident at the time when he or she first met the impairment and continuing inability to work requirements or have 10 years qualifying Australian residence: s.94(1)(e).

Overseas resident's inability to work in Australia

The DSS conceded that Christian had a sufficient level of impairment and had a continuing inability to work within s.94(1)(a), (b) and (c).

However the DSS submitted that Christian had first met the impairment and continuing inability to work requirements while he was resident in the United Kingdom. Christian argued that he had met those requirements during his earlier period of Australian residence, between 1986 and 1988.

The AAT accepted the DSS submission and decided that Cgristian did not qualify for DSP. In the course of doing so, the AAT made the following points.

1. In applying s.94(1)(e)(i) and deciding when a person first met the impairment and continuing inability to work requirements, it was necessary to form:

> 'a contemporary opinion based on events that have occurred in the past, including situations (such as whether someone incurred a continuing inability to work) that have prevailed prior to [the introduction of DSP]'

(Reasons, para. 17)

2. A person's continuing inability to work was to be judged by reference to 'work that exists in Australia': s.94(5)(b). When considering the time when a person, who had been resident outside Australia, first developed a continuing inability to work within s.94(1)(c), it was necessary to ask a hypothetical question: when would the person:

> 'have been prevented from engaging in the person's usual kind of work for the requisite hours had that person been resident in Australia, for a period of at least two years following the point in time at which the inability to work reached that degree of incapacity'?

(Reasons, para. 21)

3. A person would be 'prevented' from engaging in work where the person was hindered from undertaking work and the hindrance was 'substantial in the sense of confining a person to no more than 30 hours a week': Reasons, para. 26.

4. The term "usual work" in s. 94(2)(a)(i) 'should be approached in a broad manner in terms of the kind of work one normally performs': Reasons, para. 29.

5. A person's continuing inability to work was to be determined as a matter of fact: if the person did continue to work for a substantial number of hours each week, despite his impairment, he could not be said to have a continuing inability to work. The fact that this was made possible by a sympathetic employer did not prevent this conclusion: 'his fortune in having an accommodating employer does not affect the position': Reasons, para. 31.

The AAT concluded that Christian had first developed a continuing inability to work while resident in the United Kingdom. He was not, at that time, an Australian resident. As he did not have 10 years' qualifying Australian residence, he could not satisfy s.94(1)(e) and did not qualify for DSP.

Formal decision

The AAT affirmed the decision under review.

[P.H.]

Compensation: judgment verdict

SECRETARY TO DSS and MESSENGER

(No. 8544)

Decided: 19 February 1993 by B.A. Barbour.

The Department of Social Security (DSS) asked the AAT to review a decision of the SSAT which had set aside a DSS decision on the appropriate preclusion period to be imposed on Messenger.

Messenger had been injured in a motor cycle accident on 3 November 1988. On 16 September 1991, a judgment was made in his favour for the sum of $168,422 which was reduced by 15% for contributory negligence, making a total of $137,565. Of this amount, $116,930.25 was agreed to be in respect of economic loss, both past and future. The DSS had treated this sum as