or debts nor was there a sexual relationship or any emotional commitment between Wattus and C. The AAT described the Wattus household as unusual—'rather attractive and certainly welcoming' because C was only one of a number of people who had been taken into the household, 'all of whom had received from Mrs Wattus great kindness, attention and consideration in illness and injury': Reasons, para. 15.

MATHEWS and DIRECTOR-GENERAL OF SOCIAL SECURITY

Decided: 11 October 1984 by A. B. Renouf.

The AAT *affirmed* a DSS decision not to grant unemployment benefit to David Mathews. The decision had been made on the basis that the income of a woman, E, should be treated as Mathews' income because E was living with Mathews as his wife 'on a *bona fide* domestic basis although not legally married to [M]'. (Section 114(3) provides that the income of a beneficiary shall include the income of the beneficiary's spouse unless the beneficiary and his spouse are living apart.)

The Tribunal found that Mathews and E had been cohabiting continuously for some 5 years, that their relationship had deteriorated but that, during the time for which Mathews had claimed unemployment benefit, the relationship had not disappeared. It may have been that Mathews believed that the relationship was at an end; but he had not taken any steps to terminate it and

> in fact allowed the relationship to go on unchanged in most of its material respects. In other words, from the beginning of the relevant period, there was not such a change in the circumstances in the relationship so as to prove that it had worsened to the point of separation under the same roof.

(Reasons, para. 17)

Invalid pension: permanent incapacity

ALESSI and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/390)

Decided: 25 September 1984 by J. Dwyer, R.G. Downes and H.W. Garlick.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 39-year-old man, who claimed to suffer from a variety of physical and psychiatric disabilities.

The AAT concluded that Alessi's physical complaints amounted only to a moderate incapacity and that his psychiatric condition was attitudinal, rather than disabling.

The Tribunal's assessment of Alessi was influenced by evidence that he had, until very recently, displayed a sign outside his home advertising his services as a tiler and plasterer; and that he appeared to have accumulated significant amounts of cash. The AAT said that Alessi's failure to call his wife, who might have corroborated his claim that he had not worked since 1979, supported the inference that his wife's evidence would not have helped him.

Assessing 'permanent incapacity'

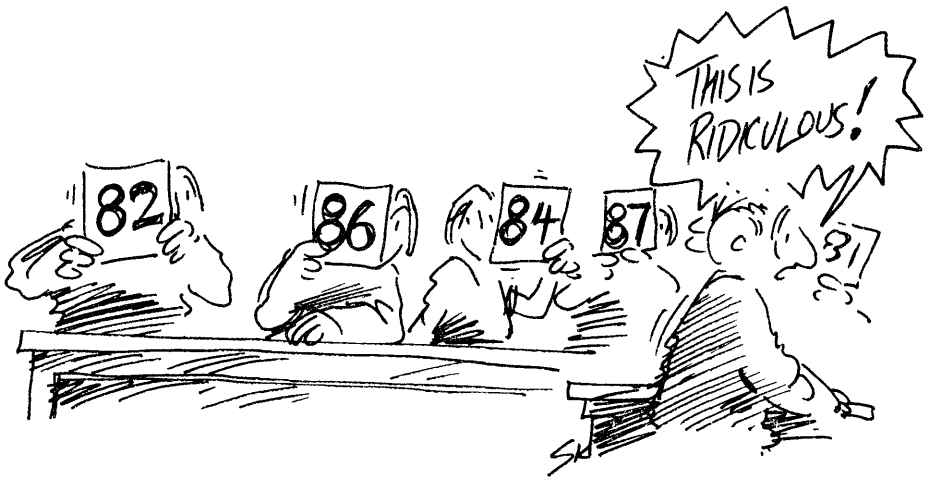
In the course of its Reasons, the AAT discussed the process of assessing 'permanent incapacity for work' under s.24 of the *Social Security Act*. This was a complex process, the AAT said, largely because of the wording of s.23, which introduced the concept of 85% permanent incapacity for work.

The AAT noted that many earlier decisions had established that 'incapacity for work is not simply a medical matter, but requires an assessment of the person's capacity to obtain work in his disabled condition in the market place': Reasons, para. 10.

That approach meant that a person with a 'medical permanent incapacity for work of any percentage may well qualify for Invalid Pension in the current economic climate'. The AAT referred to the earlier decisions in *Panke* (1981) 2 *SSR* 9, *McGeary* (1982) 10 *SSR* 95 and *Howard* (1983) 13 *SSR* 134, and concluded from those decisions that a person could be permanently incapacitated for work within s.24 of the *Social Security Act* on the basis of a partial medical impairment, quite independent of the '85%' provision in s.23.

In the light of that analysis, the AAT said, s.23 might only be relevant in those cases 'where the applicant has and is able to use a residual capacity for work which can in fact be quantified in terms of hours worked, earnings or productivity': Reasons, para. 15.

If this reading of ss.23 and 24 were correct, the AAT said, it would be appropriate for Parliament to repeal or clarify s.23. In the meantime, the practice adopted by the DSS, of asking doctors to assess incapacity in percentage terms, should be abandoned. That practice appeared to reflect an (incorrect) assumption that 'every case of incapacity can be quantified in percentage terms and that the assessment of the appropriate percentage is a medical question': Reasons, para. 9.



YUSUF and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/350)

Decided: 13 September 1984 by I.R. Thompson.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 62-year-old man, who suffered from a series of disabilities.

The DSS conceded that Yusuf was permanently incapacitated for work but claimed that he had become permanently incapacitated for work before his migration to Australia from Cyprus in 1977.

Section 25 of the *Social Security Act* prohibits the granting of an invalid pension to a person who has been resident in Australia for less than 10 years –

> . . . unless he became permanently incapacitated for work or permanently blind . . . while in Australia or during a temporary absence from Australia.

The Tribunal found that Yusuf had worked as a clerk and an architectural draftsman up to the time when he emigrated from Cyprus, but that he had been suffering from severe deafness when he left that country. The Tribunal concluded that his deafness, in combination with his limited work experience, age and lang-

uage skills meant that he was incapacitated for work when he arrived in Australia:

> 28. Because of the applicant's lack of professional qualifications as an architectural draftsman and his lack of knowledge of the English language, there was never any realistic prospect that he would be able to obtain work in Australia as a clerk, receptionist or architectural draftsman. Because of his age and because throughout his working life he had been in sedentary clerical-type jobs, his chances of obtaining work in Australia as a labourer were poor. Because of his age and his lack of knowledge of the English language, there was never any reasonable prospect that he could be trained in Australia to do any other sort of job. Anyone who at the time when he applied to be permitted to come to live permanently in Australia directed his mind to the prospects of the applicant obtaining employment in Australia would have been obliged to come to the conclusion that they were very poor . . .
>
> 29. Because of his age and previous lack of heavy work experience, the only employment that he might have stood some chance of obtaining was as a process worker in a factory where the workforce was predominantly Turkish-speaking. His deafness excluded that possibility. Accordingly, I find on a balance of probabilities that he was permanently incapacitated for work on arrival in Australia in June 1977. The decision under review must, therefore, be affirmed.

KOUMBAROULIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N82/477)

Decided: 11 July 1984 by B.J. McMahon.

The AAT *set aside* a decision of the DSS to reject a claim for invalid pension lodged by George Koumbaroulis, a 52-year-old man who spoke and wrote no English and whose work experience was confined to semi-skilled, heavy factory work.

The medical evidence showed that Koumbaroulis suffered degenerative changes to his spine and from anxiety and depression. A psychiatrist told the AAT that Koumbaroulis' immigrant status contributed to his psychiatric problems: in addition to language difficulties, there were 'difficulties of change of role that is required in coming to another country'.

The AAT observed that there were strong similarities between this case and *Di Palma* (1982) 11 *SSR* 112 and *Batzinas* (1984) 19 *SSR* 207 – Koumbaroulis had a perception of himself as an invalid which was not 'consciously motivated with a view to obtaining gain and [which was] now beyond his conscious control'; and his 'symptoms had become an entrenched part of his psychological make-up'.

Having noted that Koumbaroulis had made several unsuccessful applications for employment, the AAT concluded:

> That particular part of his evidence did no more than illustrate the obvious, namely that a man of 52, with little or no English, with a bad back, a worker's compensation claim settled arising out of a back injury, and inability to do anything other than light work and no skills, has practically no chance of attracting an employer . . .

(Reasons, p. 10)

LEWIS and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/593)

Decided: 6 July 1984 by R. Smart.

The AAT *set aside* a DSS decision cancelling an invalid pension held by a 55-year-old former labourer who had not worked since an industrial injury in 1976.

The Tribunal accepted that Lewis' capacity for physical work had been destroyed by his injuries and his continuing disabilities. 'His physical strength and stamina [which] were the employment commodities he had to sell' had disappeared and his generally frail condition [would] ensure that he [would] not obtain employment in the foreseeable future.'

The Tribunal was confident that, as a result of his disabilities, Lewis would never work again. Other problems, such as his age, the state of the labour market, his lack of education, his lack of skills and training and an alcohol problem, added to his difficulties; but the basic reason for his incapacity for work was his medical condition.

After noting Lewis had 'an alcohol problem' which stemmed from his injuries and disabilities, the Tribunal said:

> The pension is given to satisfy the basic needs of and provide for the invalid person. While I am conscious of the need not to be officious and not to intrude to the lives of individuals, nevertheless, it cannot be in the public interest for a substantial part of the invalid pension to be spent on liquor – this is not the purpose. Accordingly I think the applicant should attend for treatment and rehabilitation in relation to his alcohol condition.

(Reasons, p. 10)

PORTER and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/209)

Decided: 4 October 1984 by B.J. McMahon, D.J. Howell and J.H. McClintock.

The AAT set aside a DSS decision to refuse an invalid pension to a 54-year-old man, whose work experience had been confined to demanding manual work and who suffered from advanced lumbar spondylosis and varicose veins.

The AAT rejected an argument put by the DSS that Porter's chances of finding employment would be very much improved if he moved from the central coast of New South Wales to Sydney. The Tribunal said:

> In our view, 'work' as found in s.24 of the *Social Security Act*, must mean 'work reasonably accessible to the applicant having regard to the area in which he lives and the availability of public or private transport to such work'. An applicant's place of residence is another factor personal to him. The Act 'takes people as they are' (*Dragojlovic* (1984) 52 ALR at 165). If he lives in an area where job opportunities are scarce even for young fit people then that is the context in which we must judge whether there is any work for which he has capacity. One should not look at a hypothetical job market in some other part of Australia and require the applicant to demonstrate that he has explored that market unsuccessfully.

(Reasons, pp. 12-3).

FORD and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. Q83/69)

Decided: 24 October 1984 by J.B.K. Williams, W. DeMaria and H. Pavlin.

By a majority, the AAT *affirmed* a DSS decision to refuse an invalid pension to a 32-year-old man who suffered from a mental illness.

The majority of the Tribunal (**Williams** and **DeMaria**) preferred the evidence given by psychiatrists called by the DSS and concluded that Ford suffered from a schizoid personality disorder, which did not incapacitate him for work to the extent required by the *Social Security Act*. They discounted evidence given by Ford's treating psychiatrists, who said that his chronic anxiety would indefinitely prevent him form working. The majority believed that that evidence was coloured by the 'over protective attitude to the applicant' which his psychiatrists had adopted.

On the other hand, the dissenting member (**Pavlin**) accepted the evidence given by Ford's psychiatrists, accepting that Ford was not 'capable or sustained independent functioning [and] that his condition render[ed] him 85% incapacitated as defined by the Act.'

DILLON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/574)

Decided: 24 August 1984 by R.K. Todd.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 42-year-old woman, who suffered from a series of disabilities which she attributed to a hysterectomy performed in 1976.

The AAT accepted medical evidence to the effect that none of Dillon's disabilities was sufficient to prevent her from undertaking the type of work for which she was qualified and that her hysterectomy was unlikely to produce a significant disability for some years. The AAT said:

> The medical evidence leads to the view that in the long term the lack of naturally produced oestrogen in her body could cause the applicant more debilitating symptoms in the future. Her belief that her health will deteriorate may well be supportable. But the likelihood of deterioration cannot by itself justify the provision of invalid pension. While at some stage it may well be that the applicant will reach the plateau of incapacity required by the legislation, it cannot be said that she is now permanently incapacitated for work . . .
>
> My impression of the applicant's desire to receive an invalid pension is that it is a bene-

fit which she is anxious to receive in view of worries which would, in truth, be more consonant with what may well be a future need. At the moment however it is not possible to make a finding in favour of entitlement.

(Reasons, paras 17, 18).

MONTELEONE and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/766)

Decided: 5 October 1984 by B.J. McMahon.

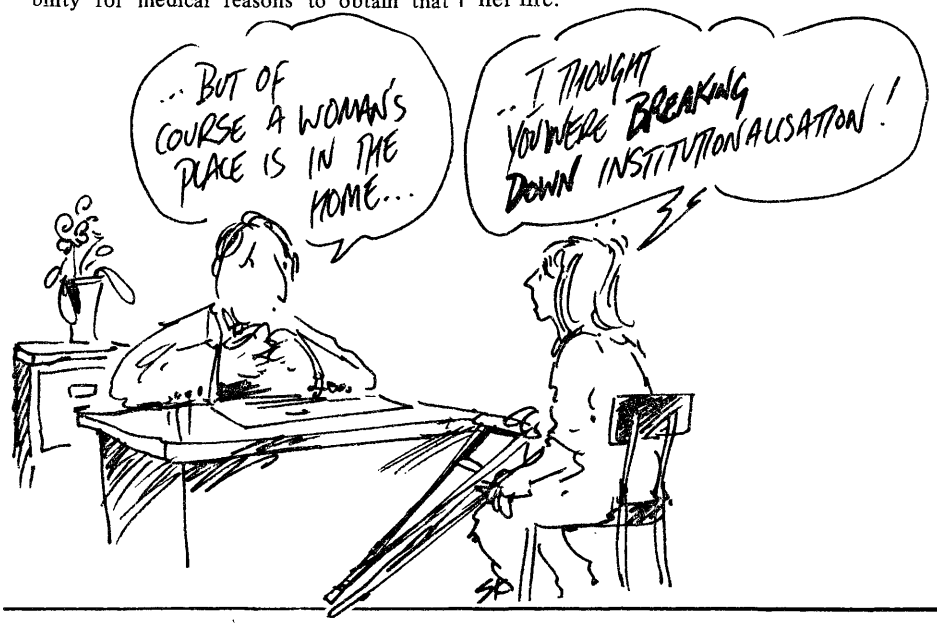
The AAT set aside a DSS decision to cancel an invalid pension held by a 42-year-old married woman who suffered from chronic depression.

In the course of deciding this matter, the AAT discussed an issue raised by the DSS. The Tribunal noted that Monteleone had last worked in 1966, when her first child had been born. She now had 4 children aged between 14 and 18. The AAT continued:

> If paid outside employment has not formed part of a woman's life pattern than an inability for medical reasons to obtain that employment may not fall within section 24 of the Act. If a woman is prevented by other factors, e.g. the need to look after young children, from obtaining outside employment then her inability for medical reasons to obtain that employment may also not fall within section 24 of the Act . . .
>
> I have not been referred to any case in which the Tribunal has addressed itself to this problem. It could easily arise in the case of a medically incapacitated woman with young children requiring constant attention whose husband is unemployed. Does the loss of the capacity to earn a wage in those circumstances mean anything if there is no practical possibility, in the absence of the disability, of earning that wage? The present application does not pose the question in such absolute terms.

(Reasons, pp. 10-11).

The AAT said that, in the present case, this type of argument could not defeat Monteleone's claim: the family income was so low that there was a real financial motivation for her to rejoin the workforce and unskilled paid work had formed part of the earlier pattern of her life.



BOX and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/561)

Decided: 28 September 1984 by R.K. Todd.

The AAT *affirmed* a DSS decision to refuse an invalid pension to a 47-year-old woman who, because of a combination of organic and psychological disability, was unfit for anything other than light work.

The Tribunal found that Box was capable of working as a dressmaker but that employment prospects in the area where she lived (the north coast of New South Wales) were very poor. The AAT said:

> 26. The Tribunal has constantly emphasised that an assessment of incapacity for work requires consideration not only of physical and/or mental disability but also of the ability of the applicant, given the presence of that disability or disabilities, to obtain and hold remunerative employment. But mere inability to obtain employment because of the state of the labour market does not qualify as a consideration for the purpose of coming to the requisite conclusion in relation to a claim for invalid pension.
>
> 27. Undoubtedly, the present applicant has a not insignificant degree of disability, and it is also true that she does not have strong employment skills, qualifications or experience. But having taken into account all of the factors, both subjective and objective, that have been put before me, and conceding the presence of a degree of disability in the applicant, and also the lack of strong job skills, qualifications or experience enabling her to find remunerative employment, I am nevertheless driven to the conclusion in this case that the applicant's degree of permanent incapacity is not so substantial as to justify a finding of entitlement to invalid pension. Her incapacity to obtain work is made up of a number of facets, but the facets which are relevant to the criteria requisite for a grant of invalid pension are not in my opinion present to the required extent. Her remaining problems lie in the employment market in the Ballina area, as set out above.

Freedom of information

K and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. N83/784)

Decided: 6 July 1984 by R. Smart.

K applied to the DSS, under s.11 of the *Freedom of Information Act*, for access to his file. The DSS refused direct access under s.41(3) of the *FOI Act*.K asked the AAT to review that decision.

The legislation

Section 41(3) of the *FOI Act* provides that an agency may provide a person with restricted access (ie, through a nominated medical practitioner) to any of its documents which contain medical or psychiatric information about that person, where –

> the disclosure of the information to that person might be prejudicial to the physical or mental health of that person.

Disclosure prevented

The document in question was a medical report, marked 'confidential', provided by K's doctor to a Commonwealth Medical Officer. Reviewing the document, the AAT said that it contained medical or psychiatric information about K.

Second, the AAT said, there was a 'real and tangible possibility of prejudice to the physical or mental health or well-being of the applicant' if the information were disclosed to him when he was not taking his medication, which controlled his schizophrenic condition.

Third, the AAT said that there was a real risk of K not taking his medication regularly. (This assessment was based on evidence given by K's current medical practitioner – not the one who had furnished the original report.) Had it not been for that risk, the AAT said, it might have exercised the discretion in s.41(3) of the *FOI Act*: but, given the risk, the discretion should be exercised against direct disclosure to K.

Moreover, the AAT said, the report could be exempt from disclosure because its disclosure would be a breach of confidence under S.45 of the *FOI Act*:

> It was properly marked 'Confidential' by its author and its contents were, in my view, of a confidential kind designed to assist in the management of the applicant. It is important that doctors be free to write confidential reports in cases such as this.

(Reasons, p.8)

Formal decision

The AAT affirmed the decision under review.