AS TO THE ADMISSIBILITY OF

Application No. 31915/96
by Alan Roy CAMBRAY
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 September 1998, the following members being present:

MM M.P. PELLONPÄÄ, President
N. BRATZA
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIČ
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs M. HION
Mr R. NICOLINI

Mrs M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 10 May 1996 by Alan Roy CAMBRAY against the United Kingdom and registered on 14 June 1996 under file No. 31915/96;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 3 December 1997 and the observations in reply submitted by the applicant on 5 February 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a British citizen, born in 1943 and living in Prestatyn (North Wales) is a mineworker. Before the Commission, the applicant is represented by Mr Glen Victor Murphy, a solicitor practising in Wrexham.

The facts of the case, as submitted by the parties, can be summarised as follows.

A. Particular circumstances of the case

On 23 June 1989 the applicant, who was then working as a faceman at Point of Ayr Colliery, suffered severe crushing injuries to his legs. The extent of the applicant's injury was described as follows:

"The [applicant] ... suffered injuries to his legs which were crushed between a stone and a pan. He had a laceration of the right calf and crushing injury to the left lower leg. He was taken to hospital. The right calf was stitched. The left leg did not recover. The knee was injured and giving way and the [applicant] had a lot of pain over the lower third of the left tibia. X-rays at the time revealed raising of the periosteum and the [applicant] had sensory loss in the saphenous nerve distribution and underwent physiotherapy.

Owing to lack of progress an exploratory operation over the medial aspect of the calf and tibia of the left leg was arranged and he still had a significant problem in the left leg following the severe soft tissues crushing injury received but the operation has not occurred. The [applicant] has pain in the knee and is aware of pain and tightness in the left lower leg and has difficulty walking on uneven ground and needs a stick when he is walking and cannot do his gardening because he cannot dig with his left foot. The [applicant] has a 6 cm scar in the right leg. ... [He] is significantly handicapped on the labour market."

After the accident, the applicant was paid statutory sick pay through his employer for the period from 29 June 1989 and to 30 October 1992. He further applied to the Department of Health and Social Security for reduced earnings allowance and invalidity benefit. He was granted reduced earnings allowance from 5 September 1990 to 26 May 1992 and invalidity benefit from 8 December 1992 to 20 June 1994. These payments constituted recoverable benefits under the Compensation Recovery Scheme ("the Scheme"). The subsequent certificate of total benefit specified that the benefits amounted to £11,725.18.

On 10 June 1992 the applicant issued proceedings for damages for personal injury and loss occasioned by negligence against the British Coal Corporation, the company for which he was working at the time of the accident. By instituting this action, the applicant sought to recover special damages, i.e. damages for loss of earnings and compensation

for other quantifiable losses occasioned by the accident. He further sought to recover general damages, to compensate for his pain and suffering, loss of amenity and loss of earning capacity. The total claim for damages amounted to between £25,000 and £50,000.

On 23 August 1995 the defendant's solicitors made a payment into court amounting to £26,725.18. From this payment into court the defendant withheld, in line with the provisions of the Compensation Recovery Scheme (paragraph 12(2)(a)(i) of Schedule 4 to the Social Security Act 1989), the sum of £11,725.18 in respect of benefits received by the applicant from the date of his accident.

Upon advice by counsel and his solicitors, the applicant accepted this payment into court.

On 20 November 1995 the Wrexham County Court made a consent order by which the applicant accepted the sum of £28,362.59 in full and final settlement of all claims against the defendant in respect of his accident. The Court accepted that the sum of £26,725.18, from which £11,725.18 had been retained by the Scheme, was paid to the applicant together with the additional sum of £1,637.41 and his reasonable legal costs and the interest accrued upon his special damages.

B. Relevant domestic law and practice

The social security benefits in issue

Where a person is injured or incapacitated by accident or disease, that person may be entitled to receive certain social security benefits from the public purse. The social security benefits relevant to the present case are statutory sick pay, invalidity benefit and reduced earnings allowance.

Statutory sick pay and invalidity benefit are contributory benefits intended to provide a measure of earnings replacement whilst a person is unable to work due to incapacity.

Statutory sick pay is an income-replacement benefit which is paid by employers to employees through their normal pay channels. To be eligible for it an employee must have had average earnings during the eight weeks before the start of his sickness which were at least as high as the lower earnings limit for the payment of National Insurance contributions. During the relevant period, statutory sick pay was paid at a single rate, and employers were able to recover a percentage of their statutory sick pay from the State. After an employee had received statutory sick pay for 168 days (24 weeks) within a period of interruption of employment, he was deemed to have met the requirements for entitlement to invalidity benefit.

Invalidity benefit is an earnings replacement benefit, which is paid at a basic personal rate. It becomes payable after statutory sick pay or sickness benefit has been received and can then be paid indefinitely.

Reduced earnings allowance was one of the benefits under an industrial injuries scheme which provided non-contributory, no-fault benefits for disablement caused by accidents at work or by one of the listed prescribed industrial diseases. The scheme only covers disablement suffered at work at a time when a person is an employed earner as defined for National Insurance purposes. The armed forces and the self-employed were excluded from the scheme. Industrial injuries benefits are generally payable in addition to other sickness and invalidity benefits and are taken into account as income in calculating entitlement to income related benefits. They are tax-free and are paid regardless of whether the recipient is working at the time of payment and regardless of his earnings, if any. Reduced earnings allowance compensated employed earners who could not return to their regular job or carry other suitable work of an equivalent standard because of the effects of an industrial accident or prescribed industrial disease. It was payable either alone or with industrial injuries disablement benefit, provided that there was a disablement assessment of 1% or more. This benefit was abolished in respect of accidents and diseases which arose on or after 1 October 1990, but existing recipients were not affected by this change, and new awards continued to be made for accidents which had occurred or diseases with a date of onset before 1 October 1990. Although entitlement to this benefit was dependent upon the level of disablement suffered being at least 1%, it was primarily intended to compensate an injured person for loss of earnings due to that disablement.

The Compensation Recovery Scheme

The Compensation Recovery Scheme ("the Scheme") was introduced by the Social Security Act 1989 and subsequently consolidated in the Social Security Administration Act 1992 ("the 1992 Act"). The 1992 Act received Royal Assent on 21 July 1989, and under transitional arrangements it applied only to compensation payments made on or after 3 September 1990 (the date of the coming into force of Section 22 of the Social Security Act 1989) where, in injury cases, the injury had been sustained on or after 1 January 1989 (Section 81(7) of the 1992 Act).

The Scheme was based upon the principles that negligent parties should not have any of their liabilities met through the social security system and accident victims should not be compensated twice. The Scheme operated on the general principle that when a negligent wrongdoer or "compensator" made a payment of compensation to an injured person, that person was required to repay to the Compensation Recovery Unit an amount equivalent to any sums already paid by way of prescribed social security benefits which were claimed and received in consequence of that injury. That sum was, in practice, paid directly to the Compensation Recovery Unit by the compensator. The prescribed benefits which were recoverable include the three benefits relevant to the present application. The Scheme applied whether or not liability had been admitted, and whether following an award of damages by a court or an out-of-court settlement. The injured person must have

been given formal notification of the amount deducted by the compensator in a certificate of total benefit.

However, the principle of recoupment was subject to certain modifications. Only sums actually paid up to the date of an award/settlement or for five years, whichever period was the lesser, were recouped (Section 81(1) of the 1992 Act). No future entitlement to benefits was taken into account. Compensation was not recouped where the settlement is £2,500 or less ("the small payment limit"), or where an injured person received payment under a private insurance policy which he had purchased (Sections 81(3) and 85 of the 1992 Act). The Scheme included an appeal mechanism, under which an individual could challenge the amount, rate, period or benefits specified in his certificate of total benefit (Section 98 of the 1992 Act).

Section 93(2)(a) of the 1992 Act provides that "where a party to an action makes a payment into court which, had it been paid directly to the other party, would have constituted a compensation payment, the making of that payment shall be regarded for the purposes to this Part of this Act as the making of a compensation payment, but the compensator may withhold from the payment into court an amount equal to the relevant deduction".

The Scheme was reformed by the Social Security (Recovery of Benefits) Bill which received Royal Assent in March 1997 and which came into force in October 1997. The basic principles remained unchanged, but the compensator became liable for all recoverable benefits and is able to off-set this liability against compensation otherwise payable to the injured party on a "like-for-like" basis. Compensation for pain and suffering is, therefore, protected. Moreover, the small payments limit has been discontinued.

COMPLAINTS

The applicant alleges a violation of Article 1 of Protocol No. 1 to the Convention, Article 6 para. 1 and Article 14 of the Convention.

Under Article 1 of Protocol No. 1, the applicant complains that he has been deprived of the fruits of his National Insurance contributions, bringing into play the requirements of "fair balance" and proportionality. He claims that he suffered a substantial injustice in this regard as he was deprived by the Scheme of part of the damages he had been awarded. He also claims that the Scheme was applied to his case notwithstanding that it related to an accident which had occurred before the Scheme was first enacted.

With regard to Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1, the applicant claims that the operation of the Scheme constituted unjustified discrimination against him. He points out that the Scheme draws a distinction between persons who receive awards of less than £2,500 (who do not face recoupment) and persons (like the applicant in the present case) who receive higher awards. He

suffered discrimination compared with persons who suffered lesser injuries. The applicant also submits that persons with private insurance schemes do not have to bring such payments into account in claims against wrongdoers. The benefits can be kept and damages recovered. The discrimination is heightened in that no recoupment whatsoever of State benefits occurs from payments made under such schemes. The applicant, however, has had to endure total recoupment, no allowance being made for his National Insurance contributions, and the recoupment extending to his compensation for pain and suffering. This discriminatory treatment is unjustified. The injustice was magnified by the retrospective nature of the Scheme, which deprived him of any opportunity to make private insurance provision before his accident and against the knowledge of how crucial such provision would be should he suffer injury at work. Instead he relied upon the adequacy of national insurance provision and the protection of the civil law. The applicant submits that applying the law to accidents that occurred before its enactment was grossly unfair.

Under Article 6 para. 1 of the Convention, read alone or in conjunction with Article 14 of the Convention, the applicant argues that the Scheme gravely interfered with his ability to pursue his action for damages for personal injury before the court.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 May 1996 and registered on 14 June 1996.

On 10 September 1997 the Commission decided to communicate the application.

The Government's written observations were submitted on 3 December 1997. The applicant replied on 5 February 1998.

THE LAW

1. The applicant complains that he has been deprived of the fruits of his National Insurance contributions, bringing into play the requirements of "fair balance" and proportionality. He claims that he suffered a substantial injustice in this regard as he was deprived by the Scheme of part of the damages he had been awarded. He also claims that the Scheme was applied to his case notwithstanding that it related to an accident which had occurred before the Scheme was first enacted. He invokes Article 1 of Protocol No. 1 to the Convention which provides as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Government submit that it is only the proceeds of the settlement that can constitute "possessions" within the meaning of Article 1 of Protocol No. 1. They maintain that prior to final determination or settlement, the claim in negligence itself is not enforceable and cannot therefore constitute a "possession". They recall that a claim will only by a possession once it has "given rise to a debt ... that was sufficiently established to be enforceable" (see Eur. Court HR, Stran Greek Refineries and Stratis Adreadis v. Greece judgment of 9 December 1994, Series A no. 301-B, pp. 84-85, paras. 60-61). The Government also submit that the social security benefits themselves are not capable of constituting "possessions", forming part as they do of a general insurance scheme based on the principle of social solidarity.

The Government further submit that the applicant's suggestion that the benefits payable to him were the "fruits" of his payments to the National Insurance Fund is misguided. They stress that the National Insurance scheme is financed on an annual basis, such that the rates and levels of contributions are set each year to ensure that the overall income to the National Insurance Fund is sufficient to pay for all benefits due. Although an individual's contributions provide a foundation for calculating entitlement to certain future personal benefits, the contributions do not actually pay for those benefits but rather for current benefits paid in that year. If recoupment of National Insurance benefits did not take place under the Compensation Recovery Scheme, an increased burden would inevitably fall on other contributors and taxpayers who had no connection with the accident in question and received no compensation in respect of it. The Government stress that the National Insurance Fund is not designed to offer a guaranteed return on the payment of contributions, nor to cover all unexpected requirements such as the inability to work due to accident, injury or disease. The system is based upon an arrangement whereby those who are working pay for the social security benefits of those who are, for example, retired, sick or unemployed. Furthermore, national insurance contributions do not only provide entitlement to certain of the benefits which are recoverable under the Compensation Recovery Scheme. The Government note that a number of the benefits covered by the Compensation Recovery Scheme, such as income support, are not funded by national insurance. They add that in any event, it was not the benefits themselves which were recouped, but an amount of the settlement award equivalent to the benefits.

The Government go on to submit that even assuming that the proceeds of the settlements constitute a "possession" under Article 1 of Protocol No. 1 to the Convention, the recoupment should properly be characterised as control of the use of property that strikes a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights. The Government argue that the principal aims behind the introduction of the Compensation Recovery Scheme in 1989 ("the Scheme") were the avoidance of double recovery by claimants, and the shifting of the burden from the taxpayer to the compensating wrongdoer. They submit that the Scheme has operated fairly and in a proportionate manner in the present case. Only those

benefits claimed and received by the applicant as a consequence of his accident or injury were recouped, recoupment occurred only up to a maximum level of the amount of compensation recovered, and no account was taken of future entitlement to benefits. Furthermore, the applicant was erroneously given the benefit of £3,648.12 in reduced earnings allowance (for the period from 27 May 1992 to 23 June 1994) which was not included in the amount recovered by the Compensation Recovery Unit (but should have been). He also claimed special damages for loss of earnings which was likely to exceed (or would at the date of settlement have exceeded) the amount of benefits to be recouped, and there was therefore no necessary erosion of the "pain and suffering" element of the award. The Government submit that the fact that the applicant chose, or was advised, to settle his claim for a sum which, after recoupment, left him with a lower award of damages, cannot be laid at the door of the Government.

The Government further submit that the benefits received by the applicant in the present case included statutory sick pay, to which specific reference was made by the Commission in its decision on the admissibility of application No. 28778/95 (Kightley v. the United Kingdom, Dec. 9.4.97, unpublished). In their view, invalidity benefit can be similarly categorised as direct replacement for loss of earnings in the relevant period. Furthermore, it was accepted in the Kightley case that the other benefits received by the applicant were properly set off against his award of damages. The Government argue that there is no distinction of principle or logic between the Kightley case and the present application. The mere fact that the extent of the injuries suffered and the damages consequently awarded in the Kightley case were greater than the present application is, in the Government's view, irrelevant to the question of the compliance of the Scheme with the Convention.

As to the applicant's allegation that the retrospective application of the Scheme to accidents suffered before the Scheme entered into force aggravated the alleged breaches of Article 1 of Protocol No. 1 to the Convention read alone or with Article 14 of the Convention, the Government submit that very often when a new scheme or law is introduced, transitional provisions are included to link the old and new rules. Under Section 22 of the Social Security Act 1989 (now Section 81(7) of the Social Security Administration Act 1992) only accidents which occurred after 1 January 1989 were affected by the new provisions, and then only if an award had not been made, or settlement reached, by 3 September 1990. This was intended to provide some opportunity for plaintiffs who wished to do so to settle claims prior to the coming into force of the Scheme. Evidence suggests that many plaintiffs took advantage of this opportunity.

Referring to the Kightley case, the Government submit that retroactivity in civil legislation is not as such prohibited by Article 1 of Protocol No. 1 to the Convention. Moreover, under the transitional arrangements the Scheme only applied to payments made on or after 3 September 1990, more than one year after the 1992 Act (in its original, 1989 form) had received Royal Assent. The applicant was not able to reach settlement or obtain an award in his case before 3 September 1990, and the Scheme therefore properly

applied to him. Accordingly, there was no retroactivity in the applicant's case even though he was injured between 1 January 1989 and 2 September 1990.

The applicant adopts, mutatis mutandis, the observations in reply to the observations of the respondent Government, submitted on behalf of the applicants in Applications Nos. 28918/95, 30135/95 and 30291/96 dated 1 December 1997.

With reference to the judgment of Pressos Compania Naviera S.A. and Others v. Belgium (Eur. Court HR, judgment of 20 November 1995, Series A no. 332) and the judgment of Stran Greek Refineries and Stratis Andreadis v. Greece (Eur. Court HR, judgment of 9 December 1994, Series A no. 301-B), he argues that his claim for damages in tort for personal injury constituted "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention. He further submits that he was entitled to payment of the benefits he received as soon as (and as long as) he satisfied certain established conditions. None of these benefits were received merely on the basis of the exercise of a discretion in his favour by the Government. In addition, more than a half of the benefits received were contributory benefits, the financing of which depended wholly or mainly on contributions by him and his employer. He stresses that just as in a private insurance scheme, following the fulfilment of certain conditions, the "insured" was entitled to payment of a certain premium or benefit for the duration of the entitlement insured. Consequently, he was entitled to invoke the protection of Article 1 of Protocol No. 1 to ensure the peaceful enjoyment of the benefits derived from his contributions to the National Insurance Fund.

The applicant further submits that contrary to the Kightley case to which the Government refer, the operation of the Scheme not only resulted in the recoupment of sums awarded by way of damages for loss of earnings for which benefits had been received but also in the recoupment of a large part of any award for pain and suffering and future loss of earnings.

He observes that the Government admit that all the relevant benefits (save for disablement benefit) are essentially loss of earning replacement benefits; it is only in relation to industrial injuries disablement benefit that the Government suggest that this benefit was "a compensation for a non-pecuniary loss". The applicant submits that industrial injuries disablement benefit was introduced by the Social Contributions and Benefits Act 1992, and can comprise disablement pension, severe disablement allowance, reduced earnings allowance, attendance allowance and increased disablement pension. He notes that under the new Scheme introduced by the Social Security (Recovery of Benefits) Act 1997, the first three of these industrial disablement benefits are to be recovered only from compensation for earnings lost during the relevant period and only the latter two are recoverable from compensation for cost of care incurred during the relevant period. Irrespective of this assessment of their purpose, the applicant maintains that under the Scheme these benefits were recouped from compensation unconnected with past loss of earnings or costs of care incurred. Furthermore, in relation to invalidity benefit and sickness benefit, one of the fundamental conditions for eligibility was that the claimant had an adequate National Insurance contribution record.

The applicant adds that the figure proved, in comparison with the Kightley case, a disproportionate impact of the Scheme in his case. Whereas Mr Kightley was left with 97.4% of his damages award, in the applicant's case the Compensation Recovery Unit recovered an excessive proportion of the overall damages which bore no relation to the special damages for past loss claimed. He claims that the operation of the Scheme amounted to an interference in relation to his claim for damages for personal injury, his right to "peaceful enjoyment" of the social security benefits to which he was entitled by virtue of his National Insurance contributions and the proceeds of his settlement of the action.

The applicant further argues that the Scheme failed to strike a fair balance and has left him to bear "an individual and excessive burden". He maintains that the lack of fair balance and/or proportionality is further demonstrated by the retrospective effect of the Scheme. In fact, the incident giving rise to the applicant's rights protected by Article 1 of Protocol No. 1 to the Convention occurred before the 1992 Act (in its original, 1989 form) received its Royal Assent, i.e. 21 July 1989, and entered into force. Nevertheless, the 1992 Act expressly applied to all accidents that occurred after 1 January 1989 thereby retrospectively applying to the applicant's accident and retrospectively interfering with his property rights. The applicant, with reference to the National & Provincial Building Society and Others v. the United Kingdom (Comm. Report 25 June 1996, Eur. Court HR, judgment of 23 October 1997, Reports of Judgments and Decisions 1997), adds that the Government and the legislature went significantly further than merely seeking to prevent accident victims from benefiting from a "windfall"; they created a system that would, with retrospective effect, deprive the applicant of most of his damages award in relation to general damages, as well as recovering those sums that could reasonably be described as a windfall.

The applicant further submits that, having regard to the fact that the average length of time that it takes to settle a case is about two and a half years (although one in ten takes more than six years) and even if his case had been an "average" case, and the accident had occurred on 2 January 1989, it was extremely unlikely to have been settled before June 1991. In any event, it was neither "average" not did it happen on 2 January 1989 but on 23 June 1989. The transitional period relied upon by the Government was therefore no more than illusory.

Finally, the applicant notes that if the payment of reduced earnings allowance made to him was not included in the amount for recovery as the Government suggest, this does not in any way detract from his submissions. Rather it simply shows that if the recovery had been properly implemented, an even greater proportion of his compensation and damages for general damages would have had to have been paid over to the Secretary of State. He maintains that he was left with substantially reduced damages for pain and suffering following his accident, as £11,725.18 was recovered by the Compensation Recovery Unit from the settlement figure of £26,725.18, which represented some 44% of the total award of damages.

The Commission first recalls that Article 1 of Protocol No. 1 to the Convention guarantees in substance the right of property. It comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, for example, Eur. Court HR, Tre Traktörer AB v. Sweden judgment of 7 July 1989, Series A no. 159, pp. 22-23, para. 54; Air Canada v. the United Kingdom judgment of 5 May 1995, Series A no. 316, pp. 36-37, para. 29).

The Commission considers that, as in the above-mentioned Kightley v. the United Kingdom case (No. 28778/95, Dec. 9.4.97, unpublished), the interference complained of in the present case was the result of the Compensation Recovery Unit's exercise of its powers under the Social Security Act 1989, as repealed and re-enacted, which provided for the Compensation Recovery Scheme. The Scheme was based on the principle that there should not be double compensation for the same loss and that the burden should be shifted from the taxpayer to the compensating wrongdoer. Where a person is injured or incapacitated by accident or disease, he or she may be entitled to claim certain social security benefits. If the injury or incapacitation is caused by the negligence of a wrongdoer, the person may also be able to sue the wrongdoer for damages in tort. When a payment of compensation is made, the person must repay to the Compensation Recovery Unit an amount equivalent to social security benefits which he or she claimed and received in the relevant period.

It was in the exercise of these powers that the sum of £11,725.18 was recouped by the defendant from the total damages awarded to the applicant and retained under the Scheme as representing benefits already received by the applicant.

Against this background, the Commission considers that the applicant's complaint falls to be examined under the head of "securing the payment of other contributions", within the rule in the second paragraph of Article 1 of Protocol No. 1 to the Convention. That paragraph explicitly reserves the right of the Contracting States to pass such laws as they deem necessary to secure the payment of other contributions (see, mutatis mutandis, Eur. Court HR, Gasus Dosier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 48, para. 59).

The Commission considers that the principle that social welfare benefits are provided on the basis of immediate need, and may therefore be recovered by the State from a subsequent award of damages, cannot be said to be incompatible with Article 1 of Protocol No. 1 to the Convention as such. It is not unreasonable to regard the social

security benefits the applicant received before and pending resolution of his claim for damages as being in the nature of payments on account of his damages for his loss.

This is particularly clear where statutory sick pay and invalidity benefits are received, and then a figure is subsequently obtained by way of special damages for loss of earnings in the relevant period. The Commission has already stated that the aim of any award of special damages is to put the victim of an accident in the same financial position as he would have been in if the accident had not happened. A person who receives both his or her salary (by way of special damages) and the various welfare benefits for which he or she is eligible, has indeed, overall, received more money than if the accident had not happened (see No. 28778/95, Kightley v. the United Kingdom, Dec. 9.4.97, unpublished).

The same principle can be applied to the further benefit the applicant received, namely reduced earnings allowance. Although entitlement to this benefit was dependent upon the level of disablement suffered being at least 1%, it was primarily intended to compensate the applicant for loss of earnings due to his disablement, the loss being recoverable by way of an award of special damages. Accordingly, it is permissible to set this benefit off against that part of the subsequent award of damages which compensated the applicant for loss of earnings and other quantifiable losses occasioned by the accident.

Article 1 of Protocol No. 1 also requires that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The requisite proportionality will not be found if the person concerned has had to bear an individual and excessive burden (see, for example, Eur. Court HR, Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 50, para. 120). In this connection the applicant complains that the Scheme led to the recovery of damages awarded for loss of earnings for which benefits had been received, but also a large part of the damages awarded for pain and suffering and for future loss of earnings, for which no benefit had been received.

At this point the Commission recalls that he applicant's total claim for damages amounted to between £25,000 and £50,000. He settled his action by acceptance of the defendant's payment into court of £26,725.18, out of which the sum of £11,725.18 was retained under the Scheme in respect of benefits received by the applicant from the date of his accident. The benefit of £3,648.12 in respect of reduced earnings allowance, which should have been but was not included in the amount recovered by the Compensation Recovery Unit, will not be taken by the Commission into account as it did not affect the settlement in the applicant's case.

The Commission notes that the benefits received by the applicant in the relevant period included statutory sick pay and invalidity benefit, both categorised as direct replacements for his loss of earnings recoverable by means of special damages, and reduced earnings allowance which compensated him for his loss of earnings due to his disablement. The applicant accepted the payment into court upon his solicitors' advice as to the prospects of success of his claim in tort. Further, in doing so, he was aware of the

amount which was to be recouped by the Compensation Recovery Unit as a result of the benefits already paid to him.

The Commission acknowledges that the applicant's decision as to whether to accept an offer of settlement made by way of a payment into court was a difficult one. If he accepted the offer, he would recover his costs to date, although, as a result of the operation of the Scheme, the sum actually received by him might be substantially less that what the applicant considered to be the true worth of his claim. On the other hand, if he did not accept the offer, he ran the risk of losing his legal aid on the ground that it would not be reasonable to proceed with the case, and the further, and not inconsiderable risk, that he would not ultimately recover damages in excess of the sum paid in, and would have therefore personally to bear the costs of both sides.

However, civil litigation involves an assessment of the likelihood of success, whether as plaintiff or defendant. The device of a payment into court enables a defendant to put pressure on a plaintiff to settle proceedings at an early stage, thereby saving costs for all and avoiding unnecessary use of costly court facilities. Of particular relevance in the present case is that the amount of risk was a matter for the applicant and his advisers. The advisers were aware of the impact of the Compensation Recovery Scheme and the risks as to legal aid and costs; they were also aware of the strengths of their own case and the level of damages they could realistically expect to obtain if the case proceeded to trial.

The Compensation Recovery Scheme was thus just one element for the applicant's advisers to consider in deciding whether to accept the payment into court. Had the applicant been likely to receive a higher amount of damages, they may well not have accepted it, but from a Convention point of view, the Commission is unable to find that the operation of the Compensation Recovery Scheme can be regarded as disproportionate in the case of the present applicant.

Finally, as regards the alleged retroactivity of the Act, the Commission recalls that retroactivity in legislation in non-criminal matters is not, in principle, prohibited by Article 1 of Protocol No. 1 to the Convention (see, for example, the National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v. the United Kingdom, Comm. Report 25 June 1996, Eur. Court HR, judgment of 23 October 1997, to be published in Reports of Judgments and Decisions 1997). In any event, the transitional arrangements of Section 22 of the Social Security Act 1989 and Schedule 4 to that Act entered into force on 3 September 1990, and apply to compensation payments made on or after this date. The Commission finds that the provisions are not, therefore, retroactive, even though the accident may have taken place between 1 January 1989 and 2 September 1990. The Commission took this approach in the above-mentioned Kightley case, and finds no reason to depart from it in the present case.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

2. The applicant complains, under Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention, that the operation of the Scheme constituted unjustified discrimination against him. He submits that there was an unjustified difference between the treatment afforded to those whose claims fell above and below the small payments limit of £2,500. He further submits that persons with private insurance schemes do not have to bring such payments into account in claims against wrongdoers. The discrimination is heightened in that no recoupment whatsoever of state benefits occurs from payments made under such schemes. The applicant claims that the retrospection in the Scheme deprived him of any opportunity to make private insurance provision before his accident and against the knowledge of how crucial such provision would be should he suffer injury at work. Instead, he relied upon the adequacy of national insurance provision and the protection of the civil law.

Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The Government submit that the small payments limit was introduced in order to avoid disproportionate costs and complexity in recovery in small cases. Their existence turned out in practice, however, to distort the proper functioning of the Scheme by pushing down the level of some settlements. The Government add that the small payments limits are not to be retained under the new scheme which came into force in October 1997.

The Government further submit that the applicant's status as a person who had not purchased private accident or long-term disability insurance, and who was therefore solely reliant upon the social security benefits provided by the State, does not constitute a relevant criterion under Article 14 of the Convention. Persons who have paid for voluntary private insurance and persons who have made compulsory National Insurance contributions are not relevantly similar classes for the purposes of this Article. They add that any different treatment of relevantly similar groups is objectively justified. The Government state that the National Insurance scheme is based upon compulsory funding, whilst private insurance is voluntary and any payments made under such a contract are a reward for thrift. Furthermore, it is almost invariably the case that a private insurer will ensure that an insured person does not benefit from double recovery. Under national law, if an insurer makes a payment under a private indemnity insurance policy, he stands in the shoes of a policyholder. If the insurer subsequently finds that the policyholder has recovered the loss from another source, the insurer can then take action to recover his outlay from the policyholder.

The applicant maintains that though the terms of private insurance are not under the control of the Government, the latter is responsible both for the supervision of the

insurance industry and the maintenance and justice of the civil justice system under which private insurance receipts cannot be taken into account when determining damages in tort. He notes that the description of the working of the National Insurance scheme in the Government's observations corresponds almost exactly to the working of private insurance schemes against loss of earnings etc. No "personalised" funds are created but the insurance premiums collected at any time are used to pay to insured persons where the insured risk has materialised. If during the life-time of the insurance policy the insured risk does not occur, the insured individual - just as under the National Insurance scheme - will not be entitled to any payment. This principle also applies to such insurances as health insurance and/or pensions - if the insured risk does not materialise no entitlement to payment arises. The applicant concludes that it is appropriate to compare his situation with that of a person covered by private insurance for the purposes of Article 14 of the Convention in relation to the interference with and/or deprivation of the property of the applicant, in particular in form of any award for general damages and future loss of earnings. The applicant adds that private insurers will generally not be entitled to recover their insurance payments out of an insured's general damages but will ensure that any sum paid out is recovered by appropriate claims under special damages.

The Commission recalls that Article 14 of the Convention affords protection against discrimination, that is treating differently, without an objective and reasonable justification, persons in "relevantly" similar situations (see, for example, Eur. Court HR, Fredin v. Sweden judgment (No. 1) of 18 February 1991, Series A no. 192, p. 19, para. 60).

The Commission finds that the comparison between a person covered by national insurance and a person who has private insurance contract is a comparison of two different factual situations, since private insurance is a matter which does not concern the State in any respect (see above-mentioned Kightley case) and as such discloses no discrimination under Article 14 of the Convention. The Commission notes that the applicant could, at any moment before his accident, have concluded a private insurance contract, but he did not do so.

The applicant also bases his allegations of discriminatory treatment on the fact that persons whose claims for damages fell below the small payments limit of £2,500 did not face recoupment.

The Commission notes that the applicant did not limit his claim, as he was entitled to do, to the sum of £2,500, with the consequence that any sum awarded would have been received free from any recoupment of the value of the benefits paid to him. Instead, he chose to claim sums substantially in excess of this figure in the knowledge that the value of such benefits would be recouped out of any sum awarded. In addition, as noted above, he chose to accept the sum paid into court, which even after the recoupment of the value of the benefits paid, left the applicant with an amount of damages substantially in excess of the figure of £2,500 and indeed of the value of the benefits. In these circumstances, the Commission finds that the applicant was not, in this

respect, subjected to treatment of a discriminatory nature in violation of Article 14 of the Convention read with Article 1 of Protocol No. 1 to the Convention.

With regard to the applicant's complaint concerning the retrospection of the Scheme and its discriminatory nature alleged by the applicant, the Commission has already examined the retrospective effect of the Scheme under Article 1 of Protocol No. 1 to the Convention and concluded that such a retrospective effect does not exist. It therefore cannot see how the same complaint would amount to discrimination.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

3. The applicant finally argues that the Scheme gravely interfered with his ability to pursue his action for damages for personal injury before the court. He invokes Article 6 para. 1 of the Convention, read alone or in conjunction with Article 14 of the Convention.

Article 6 para. 1 of the Convention, insofar as relevant, provides as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

The Government submit that the applicant was free to and did invoke his right to bring a claim for damages before the national courts in respect of the injury which he had suffered. He was legally represented throughout those proceedings, and was freely able to choose whether to pursue his claim to judgment or whether to accept a payment in settlement at an earlier stage. The Government note that the applicant, who chose to accept a voluntary settlement, did so in full knowledge of the existence and effect of the Compensation Recovery Scheme, and having taken legal advice. His allegation that he was de facto prevented from continuing the prosecution of his claim for damages, or that the essence of his litigation right was impaired, is, in the Government's view, without foundation. For the rest, the Government rely upon the Commission's reasoning in the relevant part of the Kightley case (No. 28778/95, Dec. 7.4.97, unpublished).

The applicant submits that any offer of settlement by way of payment into court puts a plaintiff in the difficult position of deciding of whether to accept such payment and have all his reasonable costs of the action paid, or to refuse such payment into court and, if the final award does not exceed this payment, to pay his own and the defendant's reasonable costs as from the date of the payment into court. Moreover, where the plaintiff is legally aided and refuses to accept an offer of settlement that he is advised by his solicitor and/or counsel is reasonable, such legal aid may be withdrawn. The applicant states that the combined effect of the Scheme and Rules of Court and/or legal aid provisions and/or the £2,500 threshold was such that he was in fact, if not in law, prevented from pursuing his claim for damages in tort through the courts.

The Commission recalls that Article 6 para. 1 of the Convention embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect. However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the organs of the Convention. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 para. 1 of the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see Eur. Court HR, Stubbings and Others v. the United Kingdom judgment of 22 October 1996, Reports of Judgments and Decisions 1996-IV, p. 1502, para. 50).

The Commission observes that the applicant was able to bring his claim for damages before the national court. He voluntarily accepted the payment into court made by the defendant. The Commission considers that, in these circumstances, the essence of the applicant's right of access to a court was not impaired. Insofar as this right was inhibited by the provisions of the domestic law, the Commission does not consider that such an inhibition failed to pursue a legitimate aim of the avoidance of double recovery by the claimant and the shifting of the burden from the taxpayer to the compensating wrongdoer, or that it was disproportionate.

The Commission adds that the applicant's submissions do not raise any further relevant issue under Article 14 of the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

M.P. PELLONPÄÄ
President
of the First Chamber