AS TO THE ADMISSIBILITY OF

Application No. 30135/96
by Thomas G. BASS
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 30 January 1996 by Thomas G. BASS against the United Kingdom and registered on 7 February 1996 under file No. 30135/96;

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 11 July 1997 and the observations in reply submitted by the applicant on 2 December 1997;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a British citizen, born in 1931, lives in Northampton. Before the Commission, he is represented by Mr I.G. Pears, a solicitor practising in Northampton.

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

A. Particular circumstances of the case

On 3 October 1989 the applicant, who at the time was working as a replacement hide stripper, suffered serious injuries due to an accident at work. The applicant's medical report described the applicant's injuries as follows:

"In the incident [the applicant] injured his right thumb and right middle finger. The injury to the middle finger was in the form of a denuded area of skin from the lateral half of the distal phalanx which bled profusely. After haemostasis this was treated by simple frequent dressing until the wound was dry.

The injury to the thumb was more severe in the form of a deep laceration over the flex or surface of the metacarpophalangeal joint associated with partial division of both digital nerves to the injured digit. This was treated with conventional sutures but was unfortunately followed by super added infection which needed anti-biotic therapy. In spite of the apparent healing of the laceration [the applicant] has been left with an extremely tender scar and marked hyperalgesia over the whole length of the injured thumb distal to the scar. There is also residual stiffness of the metacarpophalangeal and the interphalaneal joints of the right thumb. ...

[The applicant] has been assessed at over 20% disabled and as a result of his accident has had his employment terminated by the defendant."

After the accident the applicant was paid statutory sick pay through his employers for the period from 4 October 1989 to 12 April 1990. He further applied to the Department of Health and Social Security for invalidity benefit, reduced earnings allowance and industrial injuries disablement benefit. He was granted invalidity benefit from 13 April 1990 to 27 September 1994, industrial injuries disablement benefit from 17 January 1990 to 28 September 1994 and reduced earnings allowance from 13 June 1990 to 28 September 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 £41,955.77.

On 9 August 1991 the applicant issued proceedings for damages for personal injury and loss occasioned by negligence against the Anglo Beef Processors Ltd., 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 schedule of special damages dated 6 February 1995 set out the total figure for past loss incurred at £64,053.65 and for future loss £16,668.71.

In its defence the defendant denied liability and alleged that the accident was solely caused by or substantially contributed to by the applicant's own negligence. Furthermore, the defendant issued a counter schedule of special damages disputing a substantial part of the special damages claimed.

On 26 August 1993 solicitors for the defendant, who were aware of the impact the Scheme would have on the applicant, proposed a settlement of £2,500 specifying that the offer was less than the current Compensation Recovery Unit repayment figure.

The applicant was faced with the choice of accepting the offer and thereby at least recovering and retaining £2,500 out of the claim worth well in excess of £50,000 in special damages alone, or continuing and possibly foregoing the opportunity to recover any damages. In light of the severity of the injuries and the amount of damages claimed, he refused to accept this offer.

On 29 September 1993 the defendant made an increased offer of settlement of the applicant's claim in the sum of £15,000 plus costs to be taxed if not agreed. This was again refused by the applicant who decided to pursue his action for the amount of damages claimed to compensate him not only for his quantifiable loss, which alone amounted to well in excess of £50,000, but in particular for the pain and suffering and loss of amenity he continued to suffer.

On 31 January 1995, having received the certificate of total benefit, the solicitors for the defendant issued a notice of payment into court amounting to £44.23. The notice further stated that the defendant had withheld from this payment the sum of £41,955.77 under Section 93(2)(a)(i) of the Social Security Administration Act 1992.

This payment into court for the second time put the applicant, who was not legally aided in his personal injury action, in a position where he was faced with the choice of either accepting the payment, which would leave him with an inadequate amount of damages, i.e. £44.23, or to continue the action at serious risk as to costs. If he had chosen the latter option and failed to recover more than an award of £41,955.77, he would have been responsible for his own costs of litigating this action and those of the defendants, as from the date of the notice of payment in. On 21 February 1995, in light of his position in respect of the costs of the litigation and the defendants' claim of contributory negligence, the applicant accepted the payment into court.

On 8 March 1995 the applicant appealed the assessment of the amount of benefit paid to him as a consequence of the accident. The appeal was based on the medical evidence obtained by the applicant and by the defendant in the personal injury action which noted that the applicant had had Carpal Tunnel Syndrome in 1987 and that his

sleeping problems were caused by that syndrome. The applicant claimed that the benefits listed on the certificate of total benefit in their entirety or at least in part were not paid as a result of the accident.

On 7 August 1995 the Compensation Recovery Unit declared inadmissible the applicant's appeal.

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 were statutory sick pay, invalidity benefit, industrial injuries disablement 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 was unable to work due to incapacity.

Statutory sick pay is an income-replacement benefit paid by employers to employees through their normal pay channels. To receive statutory sick pay 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 reimbursed for payments through a reduction in their National Insurance contributions. 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 paid at a basic personal rate. It becomes payable after statutory sick pay or sickness benefit has been received for 168 days (24 weeks) and can then be paid indefinitely.

Industrial injuries disablement benefit is the main benefit payable under an industrial injuries scheme which provides 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 are 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. Industrial injuries disablement benefit is paid weekly after 90 days (15 weeks) from the date of the industrial accident or the onset of

the prescribed disease. The rate depends upon the degree of disablement, which is assessed at a percentage level of disability. In principle, it is subject to a minimum threshold of 14% disablement. It is not an income-replacement benefit, nor one to meet specific expenses, but a compensation for a non-pecuniary loss, directly linked to the degree of disablement arising from the work injury.

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 consequences 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 four 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 they 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 or her certificate of total benefit (Section 98 of the 1992 Act).

Section 93(2)(a) of the 1992 Act provided 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 to the Convention, the applicant complains that he has been deprived of the fruits of his National Insurance contributions, and of all the settlement he received for his civil claim, save for £44.23. He has thus been deprived by the Scheme of his property, bringing into play the requirements of "fair balance" and proportionality.

With regard to Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 to the Convention, the applicant claims that the operation of the Scheme constituted unjustified discrimination against him. He claims that someone who suffers a lesser injury and receives up to £2,500 keeps all the award or settlement. The applicant, whose injury was graver, has not even received the £2,500 award but was left with a mere sum of £44.23. The applicant submits that he has suffered another discrimination. 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 has had to endure total recoupment, with no allowance made for his contributions to National Insurance, and the recoupment extending to his compensation for pain and suffering.

Under Article 6 para. 1 of the Convention, read alone or in conjunction with Article 14 of the Convention, the applicant argues that his ability to pursue his claim for damages has been distorted by provisions of the Scheme in that sums under £2,500 will not be seized whilst the entirety of any payment beyond £2,500 will be. He submits that the Scheme effectively removed from him the ability to secure any personal benefit from a successful claim for his civil rights.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 30 January 1996 and registered on 7 February 1996.

On 9 April 1997 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 11 July 1997. The applicant replied on 2 December 1997, after two extensions of the time-limit for that purpose.

THE LAW

1. Under Article 1 of Protocol No. 1 to the Convention, 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 has thus been deprived by the Scheme of his property bringing into play the requirements of "fair balance" and proportionality.

Article 1 of Protocol No. 1 to the Convention 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 are capable of constituting "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention. 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 are not capable themselves 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 claimed special damages for loss of earnings which was likely to exceed (or would at the date of settlement or award 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.

The applicant, 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), 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 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, the applicant was entitled to invoke the protection of Article 1 of Protocol No. 1 to the Convention 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 resulted in recoupment of sums awarded by way of damages for loss of earnings for which benefits had been received but also in 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 in tort for damages for personal injury, his right to "peaceful enjoyment" of his social security benefits by virtue of the 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".

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 £41,955.77 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 benefit, having contributory character, 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).

A similar principle applies to the further benefits received by the applicant, namely industrial injuries disability benefit and reduced earnings allowance. The Commission considers that as the industrial injuries disability benefit compensated the applicant for a form of non-pecuniary loss which was recoverable by the way of an award of general damages, it is permissible to set it off against that part of the subsequent award of damages which compensated the applicant for pain and suffering, loss of amenity and earning capacity.

As to reduced earnings allowance, the Commission notes that 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 that disablement, the loss being recoverable by the way of an award of special damages. It may, therefore, be set 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 the applicant claimed £64,053.65 for past loss of earnings and £16,668.71 for future loss. He settled his action by acceptance of the defendant's payment into court of £44.23. The defendant further paid the sum of £41,955.77 corresponding to the value of the benefits received by the applicant from the date of his accident.

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, reduced earnings allowance which compensated him for his loss of earnings due to his disablement, and industrial injuries disablement benefit which, directly linked to the degree of the applicant's disablement arising from his accident, compensated him for his non-pecuniary loss. 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 and thus that the sum paid by the defendant would not fully satisfy his claim for damages.

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 at least receive his costs to date, even though he might actually receive nothing by way of general or special damages, the whole of the sum paid in being recouped under the Compensation Recovery Scheme. On the other hand, if he did not accept the offer, he ran the 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. The applicant did not run the risk of losing his legal aid because he was not legally aided in his injury action.

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 solicitors.

The solicitors were aware of the impact of the Scheme and the risks as to costs; they were also aware of the strengths of the applicant's own case and the level of damages he could realistically expect to obtain if the case proceeded to trial.

The Compensation Recovery Scheme was thus just one element for the applicant and his solicitors 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 applicant.

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 claims that someone, who suffers a lesser injury and receives up to £2,500, keeps all the award or settlement. The applicant, whose injury was graver, has not even received the £2,500 award but was left with a mere sum of £44,23. 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 has had to endure total recoupment, with no allowance made for his contributions to National Insurance, and the recoupment extending to his compensation for pain and suffering.

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 cost 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 limit 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 discrimination between 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 the 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 scheme against loss of earnings etc. No "personalised" funds are created but the insurance premiums collected at any time are used to pay out to insured persons where the insured risk has materialised. Only if the insured risk occurs is the insured entitled to a payment out. 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 out. This principle also applies to such insurances as health insurance and/or pensions - if the insured risk does not materialise no entitlement to payment out arises. The applicant concludes that it is appropriate to use those covered by private insurance as a comparator 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 the private insurers will generally not be entitled to recover their insurance payments out of the 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 of a national insured with a person who has a 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 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 of recoupment of the value of the benefits paid to him. Furthermore, the applicant did not accept the offer of £2,500 in final settlement made by the defendant. He chose to pursue his claim for sums substantially in excess of this figure in the knowledge that the value of such benefits would be recouped out of any sum awarded.

The Commission considers that the applicant had the possibility of being in the same situation as persons whose claims for damages fell below the small payments limit of £2,500 and who did not face any recoupment. 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.

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 his ability to pursue his claim for damages has been distorted by provisions of the Scheme that sums under £2,500 will not be seized whilst the entirety of any payment beyond £2,500 will be. He submits that the Scheme removed from him the ability to secure any personal benefit from a successful claim for his civil rights. 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.

The applicant submits that any offer of settlement by way of payment into court puts a plaintiff in the difficult position of deciding 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 or her 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 accepted the defendant's payment into court in settlement of his claim, having refused the defendant's previous offer of $2,500 as a small payment which was exempted from the operation of the Scheme and, the increased offer made subsequently by the defendant. The Commission considers that 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