Costs

23 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs. As the Commission has, in the main, failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Orders the Commission of the European Communities to pay the applicant, Miss B., by way of invalidity benefit the amount corresponding to a degree of invalidity of 60%, to be calculated in accordance with the provisions of Article 73 of the Staff Regulations, in addition to the amount which has already been paid to her on the basis of a degree of invalidity of 15%.**

2. **Orders the Commission to bear the costs.**

Mackenzie Stuart Sørensen Touffait

Delivered in open court in Luxembourg on 2 October 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 12 JULY 1979 [1]

Mr President,
Members of the Court,

The proceedings in which I am giving my opinion today concern settlement of the consequences of an accident sustained in the course of employment, which has already formed the subject of a judgment of this Court of 12 July 1973 (*Anna Di Blasi* v *Commission of the European Communities* Case 74/72 [1973] ECR 847). In giving an account

1 — Translated from the German.

of the circumstances of the case to date I need therefore only mention those facts which are absolutely necessary to an understanding of it and, if further details are required may refer to the aforementioned judgment and the opinion of Mr Advocate General Roemer of 21 June 1973.

On 3 January 1968 the applicant, Miss B., an official of the Commission, fell during working hours in the offices of the Commission and was taken to hospital with a "serious triple malleolar fracture with extensive bone fragmentation and a dislocation of the right foot", where she underwent an operation. Since then she has never fully recovered and, with the exception of certain short periods, has never been able to resume her employment. At the end of 1973 the applicant, who is at present on sick leave and living in Italy, had to undergo an operation for cancer.

In 1972 the Commission recognized in accordance with Article 73 of the Staff Regulations that the applicant was suffering from permanent partial invalidity amounting to 9%. After the applicant had lodged an application against that decision with a view to obtaining the fixing of a higher degree of invalidity the parties agreed to initiate arbitration proceedings in order to have the degree of permanent partial invalidity determined by an independent doctor to be appointed by both sides. The Court of Justice therefore felt bound in the aforesaid judgment to dismiss the application as inadmissible *inter alia* on the ground that the Court "cannot intervene before the arbitration procedure has been exhausted". As regards the claim for interest on the delayed payment the Court held that the amount of any such interest might only be determined when the degree of permanent partial invalidity suffered by the applicant had been established.

In his opinion of 21 February 1975 Dr Vita of Milan, who was appointed to act as arbitrator, ascertained that Miss B. was suffering from the effects and consequences of, first, a triple malleolar fracture with dislocation of the right foot accompanied by evidence of secondary arthritis and, secondly the removal of the left breast made necessary by the presence of cancer, with curettage of the armpit, as well as from a slight reactionary syndrome of depression and anxiety. He stated that the triple malleolar fracture with dislocation of the foot and the continuing anatomical and functional limitation affecting in particular the tibio-tarsal region, with muscular hypotrophy of that limb and incipient arthritis, were to be attributed to the consequences of the accident sustained by Miss B. and he therefore expressed the opinion that the injury giving rise to a claim for compensation was to be assessed at 15% of the maximum insured under the policy.

In a letter to the Commission of 25 February 1975 the applicant challenged the accuracy of that finding on the ground that the opinion only considered the physical and not the psychological consequences of the accident. At the same time the applicant requested the transfer, as an advance payment, of the amount corresponding to the degree of invalidity ascertained by the arbitrator, as well as the payment of interest from the day of the accident at the customary rate payable by the banks in Brussels.

After an extensive correspondence the parties finally agreed on the appointment of Dr Bellini of Latina as a new arbitrator on medical matters and by letter of 19 December 1975 the Commission asked him, with the applicant's agreement, whether it was necessary to fix a degree of partial permanent invalidity, in addition to that of 15% already awarded, in respect of possible injuries of a mental nature resulting directly and exclusively from the

accident. If Dr Bellini answered in the affirmative he was to fix the percentage of permanent partial invalidity in question.

In his arbitration report of 26 October 1976, which was received at the Commission on 30 October, Dr Bellini reached the following conclusion:

"Dr Vita's medical report did not take account of the mental injuries suffered by Miss B. as a result of the trauma. I consider that the injuries of a mental nature from which Miss B. is suffering, which are the direct and exclusive consequence of the accident which she sustained in Luxembourg on 3 January 1968, have resulted in her case in total permanent invalidity".

By letter of 3 February 1977 the Commission then asked Dr Bellini whether there might not be a direct and exclusive connexion between the gravity of Miss B.'s illness (tumour in the breast) and the injurious psychological consequences of the trauma connected with the accident of 3 January 1968. In his reply of 26 March 1977 Dr Bellini denied the existence of such a connexion and stated unequivocally that the injurious psychological effects found by him appeared before the onset of Miss B.'s illness.

By letter of 20 June 1977 the applicant lodged a complaint through official channels under Article 90 (2) of the Staff Regulations against the implied rejection of her request of 1 December 1976 for the implementation of the arbitration award made by Dr Bellini.

In its reply of 6 October 1977 the Commission expressed doubts whether the total permanent invalidity found by Dr Bellini, which related to the capacity for work, was to be equated with the total invalidity referred to in Article 73 of the Staff Regulations. It therefore suggested that with the agreement of the other party Dr Bellini be consulted again in order to obtain the necessary clarification. By letter of 25 October 1977 the applicant agreed to the proposal with one express reservation and suggested *inter alia* that the arbitrator be asked to what extent — expressed as a degree or percentage — the bodily and/or mental health of the victim had been impaired as a result of the accident.

On 7 December 1977 the Commission sent to Dr Bellini a fresh letter, of which the applicant only became aware later, in which it asked *inter alia* whether the effect of the impairment of mental health was comparable or identical to that caused by the incurable insanity referred to in the conditions of insurance or how else the relationship between the applicant's diminished mental health and such incurable insanity was to be assessed.

On 16 December 1977 Miss B. lodged an application to the Court.

After the application was lodged Dr Bellini informed the Commission on 10 January 1978 that it clearly results from his report that the mental injury suffered by Miss B. did not take the form of psychological disorder or disorder of consciousness but only affected her emotional faculties. He explained that the injury resulted from a state of profound depression and in particular from an incapacity for work which was emotional in origin, the result of which was that any form of work produced in the patient a feeling that her life had

been a total failure. It was however evident that despite that incapacity for work Miss B.'s mental health was not 100% impaired. The loss of mental health *resulting from the accident* could be assessed at 60% but it concerned the emotions and only affected the mental faculties indirectly.

In her reply the applicant finally asked the Court to:

— annul the implied decision by the Administration rejecting her request of 1 December 1976 and her complaint of 20 June 1977 concerning the implementation of the arbitration award made by Dr Bellini on 26 October 1976, and consequently;

— order the Commission of the European Communities to implement the aforesaid arbitration award, and consequently;

— order the Commission to pay the applicant the amount corresponding to 100% invalidity to be calculated in accordance with the provisions of Article 73 of the Staff Regulations minus the amount corresponding to 15% invalidity which has already been paid to her on account;

In the alternative:

— order the Commission to pay the applicant the amount corresponding to a loss of health of 60% to be calculated in accordance with the provisions of Article 73 of the Staff Regulations in addition to the amount corresponding to 15% invalidity which has already been paid to her on account;

— order the Commission to pay the applicant interest on the capital sum calculated in accordance with the foregoing conclusions at the legal rate of 15%;

— order the Commission to pay the entire costs of the proceedings.

After also amending its conclusions the Commission contends that the Court should:

— dismiss the applicant's main and alternative conclusions as inadmissible and unfounded;

— declare that the partial invalidity awarded to the applicant shall be in the degree of 15% and that as the corresponding capital sum has already been paid to her nothing further is due under Article 73 of the Staff Regulations;

— in the alternative, fix a higher degree of invalidity up to a limit of 40% in order to take account of the mental injuries suffered and declare due the difference between the amount thus fixed and that already paid to the applicant on the basis of the degree of 15% invalidity;

— dismiss the claim for interest as unfounded or, in the alternative, fix the period for which interest is to be paid on the basis of the principles of natural justice, taking into account the amount corresponding to 9% invalidity already paid by the Commission in March 1972;

— order each party to bear its own costs.

My opinion on those conclusions is as follows:

I — The question of the *admissibility of the application* must be dealt with first of all. Without, it is true, putting forward a formal plea of inadmissibility the Commission considers the application to

be inadmissible since in her letter of 25 October 1977 the applicant expressed agreement with its proposal for the reopening of the arbitration procedure. The Commission maintains that the application and the complaint through official channels which preceded it thereby became devoid of purpose. Irrespective of that, it is in any event to be inferred from Dr Bellini's letter of 10 January 1978 that he totally changed his opinion, since he no longer recognizes total invalidity, but only 60% partial invalidity. The Commission claims that the object of the request should therefore have been different from that originally submitted, with the result that its wording ought also to have been amended. It maintains that only if that fresh request is expressly or impliedly rejected may the applicant lodge a fresh complaint and, if that is rejected, a fresh application.

I am unable to accept those arguments for various reasons. It is incontestable that even before the Court of Justice gave judgment on 12 July 1973 the parties agreed that the medical questions in dispute be resolved by means of arbitration proceedings within the meaning of Article 13 of the insurance policy taken out by the Commission with a private insurance company and that on 18 July 1974 they agreed to instruct Dr Vita to prepare an arbitration award on the medical matters in dispute which was to be binding on both sides. We have heard that after that award was made the parties agreed to appoint a new arbitrator, Dr Bellini, and to ask him whether, in addition to the 15% invalidity found by Dr Vita, the injuries of a mental nature attributable to the accident were also to be taken into account and, if so, to what extent. Thus, by asking that additional question, the parties agreed to begin fresh arbitration proceedings which were terminated by Dr Bellini's award of 26 October 1976 which found for the applicant's permanent total invalidity as a result of the mental injuries attributable to the accident. On 1 December 1976 the applicant finally requested the implementation of that arbitration award, which in accordance with Article 13 of the aforementioned insurance policy is binding on both sides, and when implementation was not forthcoming she acted in due time and lodged a complaint through official channels on 20 June 1977. When the Commission failed to reply to the complaint within the prescribed period of four months the applicant again took steps in due time and on 16 December lodged an application against the implied rejection of her complaint. In her application she asked for the Commission to be ordered to pay her in implementation of the arbitration award the amount corresponding to the figure of 100% invalidity found by that award.

That application could therefore have become devoid of purpose only if the applicant had actually agreed to the Commission's proposal to reopen the arbitration procedure which was terminated by the opinion of 26 October 1976. There is, however, no basis for that hypothesis. It is clear from the Commission's letter to the applicant of 6 October 1977 that the Commission itself did not wish to initiate fresh arbitration proceedings but that its aim was only to put an additional question to the then arbitrator in order to obtain clarification as regards the level at which, leaving aside the incapacity for work, the injury to the applicant's bodily and mental health was to be assessed. In her reply of 25 October 1977 the applicant expressed agreement in principle with an

additional question and at the same time formulated the precise terms of the question to be put to the arbitrator concerning the injury to her bodily and mental health. She also expressed a reservation as regards any legal problems which might result therefrom. As we have already seen, the question put by the Commission did not correspond to that formulated by the applicant. An additional question put unilaterally without the agreement of both parties cannot however reopen the arbitration procedure, with the result that the answer given by Dr Bellini on 10 January 1978 — while I do not wish to consider its content — may no longer be taken into consideration within the context of the arbitration procedure which was already at an end. The application for the annulment of the implied decision rejecting the complaint of 20 June 1977 and for the implementation of the arbitration award of 26 October 1976 is therefore admissible.

II — With that I come to the question of the merits of the application.

Through her application the applicant seeks the annulment of the implied decision rejecting her request of 1 December 1976 and her subsequent complaint of 20 June 1977 and, an order that in implementation of the arbitration award of 26 October 1976 the Commission pay to her the amount corresponding to 100% invalidity to be calculated in accordance with the provisions of Article 73 of the Staff Regulations of Officials minus the amount already paid. She points out that the arbitration procedure provided for in Article 13 of the insurance policy taken out by the Commission with a private insurance company was duly implemented and that the decision of the medical arbitrator is therefore binding. That procedure, whose admissibility was, recognized by the Court in the first action between the parties, was brought to an end by Dr Bellini's award of 26 October 1976. The applicant maintains that the additional question posed by the Commission on 7 December 1977 was put without her agreement and cannot therefore be taken into account within the context of the arbitration procedure. Furthermore, as the applicant goes on to point out, Article 73 of the Staff Regulations lays particular emphasis on the fact of total permanent invalidity. She maintains that the aim of that provision is to protect the official against loss or impairment of his general capacity for work but that impairment of the capacity for work to which Dr Bellini's finding of 100% referred, must be distinguished from an impairment of a person's capacity to take his place in society.

In answer to that argument the Commission maintains that in the light of the fresh assessment by Dr Bellini on 10 January 1978, which only refers to a 60% loss of mental health, the applicant can no longer seek payment of an amount calculated on the basis of total invalidity. The erroneous statement made in Dr Bellini's first award is, in its opinion, to be explained by the fact that Article 73 of the Staff Regulations of Officials in conjunction with the insurance policy taken out by the Commission only covers those risks of accident which result in injury to a person's bodily and mental health. The Commission maintains, however, that such diminution in bodily and mental health is to be distinguished from an impairment of the capacity to perform one's duties. The opinion of the arbitrator on medical matters is only medical

and technical in nature and can only be binding on the parties or the Court of Justice if questions are raised concerning the interpretation of the Staff Regulations, in which under Article 179 of the EEC Treaty the Court of Justice has sole jurisdiction.

1. Let me now turn to the questions broached by the parties. I have already explained — to begin with the argument last put forward — that after Dr Vita made his award the parties agreed to initiate fresh arbitration proceedings and to appoint Dr Bellini as the arbitrator on medical matters. Their question, which concerned the degree of possible additional partial invalidity to be recognized as resulting from mental injuries attributable to the accident, can only be understood to mean that as arbitrator on medical matters Dr Bellini was to give his opinion on whether mental injury resulting from the accident actually exists and if so at what level it is to be assessed. It is, in fact, only possible for an arbitrator on medical matters to give an opinion on questions of that nature. If, however, the arbitrator expressed his opinion on that question it is clear from the meaning and purpose of arbitration procedure that the parties are to that extent bound by the arbitrator's decision. That is also stated in Article 13 of the insurance policy. It is therefore inconceivable that the Court of Justice should, as an authoritative legal body, proceed without more ado to deliver judgment on such a disputed medical issue on which a large number of different medical opinions exists.

If the nature and extent of the injury to the bodily and mental health of the person concerned is clearly determined in the arbitration award it is then for the Court of Justice to interpret the Staff Regulations on the purport of total or partial invalidity within the meaning of Article 73 and the level at which it is to be assessed.

If, with that in view, we consider Dr Bellini's arbitration award of 26 October 1976 it is clear that he came to the conclusion that the mental injuries suffered by the applicant as a result of the accident did not receive consideration in Dr Vita's report and that they have resulted in total permanent invalidity. The precise meaning to be given to that statement was explained by Dr Bellini in his letter of 10 January 1978 which, however, as we have seen, may not be taken into consideration within the context of the arbitration procedure in question.

In the evidence which he gave during the oral procedure before the Court on 14 June 1979 Dr Bellini however also clarified his award. In reply to a question he explained clearly that the mental injury suffered by the applicant is not to be attributed to mental disorder but only to the injury to her emotional state. He stated that the applicant suffers in particular from chronic depression, accompanied by outbursts of hysteria, which means that she is no longer able to take up any kind of regular work. To the question whether the gravity of the emotional injury is comparable with the incurable insanity listed in the table in the insurance policy and assessed at 100% the witness replied that in the light of the applicant's difficulty in continuing in her employment the answer has to be in the affirmative and that as a result she is 100% incapable of work. He stated that the figure of 60% given in his letter of 10 January 1978 referred on the other hand only to the applicant's ability to

take her place in society. As a result of her incapacity for work she suffers from depression, her will to live is reduced and she has no interest in the world around her. Dr Bellini stated that the reduced ability to make contact with others thus described must be assessed on a 60% basis.

Two percentages have thus been established from which I regard the Court as in principle unable to depart, since the arbitration procedure has binding effect. The question is therefore which of those two percentages, 60% or 100%, is to be used as the basis in calculating the amount to be paid in accordance with Article 73 of the Staff Regulations of Officials.

The Court of Justice is there required to clarify two questions of law which arise on the application of Article 73 of the Staff Regulations of Officials. First, it must state whether the degree of invalidity to be fixed in accordance with Article 73 is determined on the basis of the degree of impairment of the capacity for work of the person concerned or, on the other hand, on the basis of the degree of impairment of that person's general zest for life or ability to take his place in society. Secondly, it must also decide whether emotional disorders are included among the bodily and mental injuries for which benefits are provided under Article 73 of the Staff Regulations.

It is not easy to provide answers to those questions, since the Staff Regulations of Officials do not define the concept of invalidity and neither the insurance policy in force at the time at which the accident took place nor the Rules on Sickness Insurance for Officials of the European Communities (Staff Courrier, Spécial Interinstitutions [Special Inter-Institutional Edition], of 25 February 1977) which implement the regulations contain any clear statement on that question. Thus, as always when a lacuna appears in Community law, it only remains to try to draw certain guidelines from the wording and meaning of the provision and its position within the social security system by referring to the insurance policy and the aforementioned implementing provisions of 1 January 1977 and by considering the relevant provisions of national law.

2. Let me deal, first of all, with the first question which concerns the conditions under which invalidity may exist under the rules governing the employment of Community officials.

The Commission seeks clarification of the question whether Article 73 of the Staff Regulations only protects an official against those risks of accident which impair his bodily or mental health or whether it also covers those risks which affect his capacity for work. It considers that injury to bodily and mental health alone may in general be taken into account in determining the degree of invalidity. It believes its opinion to be confirmed by the fact that under Article 73 of the Staff Regulations in conjunction with the insurance policy an allowance is to be paid in the form of a "once for all" amount irrespective of the effect of the accident or the capacity for work of the injured party. The Commission maintains that as both the insurance policy and the implementing provisions in force since 1 January 1977 contain a table which lists fixed percentages of invalidity in respect of specific physical and mental injuries and does not relate to the particular type of employment of the individual, the question of capacity for work cannot be regarded as relevant. Furthermore, it is expressly stated in the insurance policy that as regards those cases of partial permanent invalidity for which no provision is made therein the degree of invalidity is to be ascertained by analogy

with the information given in the table without the occupation of the insured person being taken into account. The Commission regards it as also to be inferred from the final subparagraph of Article 73 (2) of the Staff Regulations and from Article 25 of the implementing provisions which entered into force on 1 January 1977 that the "once for all" amount paid in respect of invalidity within the meaning of Article 73 is to be regarded as completely distinct from the rules governing payment of a pension under Article 78 of the Staff Regulations, which expressly refer to incapacity for work. It points out that Article 2 of the implementing provisions also refers to the adverse effect on the bodily or mental health of the official but not to his reduced capacity for work.

Before I begin to deal with those arguments in detail I would like to emphasize that, in my opinion, both parties begin by stating the problem incorrectly, in that they regard the adverse effect on a persons's bodily and mental health as being in opposition to the adverse effect on his capacity for work. The two things are, however, not mutually exclusive: the medically ascertainable physical and mental injuries in fact rather offer a practical yardstick which may be applied both in assessing the reduction in capacity for work and in evaluating the diminished zest for life in general.

I am also unable to accept the Commission's view that because incapacity for work is expressly required in Article 78 of the Staff Regulations, which provides for a right to a pension, whereas it is not required in Article 73, invalidity within the meaning of Article 73 cannot include incapacity for work as such. Such an interpretation in fact assumes that an alternative only exists between a reduced capacity to perform one's duties and a dinimution in the ability to lead a normal everyday life. However, a glance at the legal systems of the Member States shows us that between these two degrees of incapacity there may also be room for incapacity to earn a living or general incapacity for work. Thus, for example, in the German law on social security incapacity to perform one's duties or to take up employment is in principle regarded as a preliminary to incapacity to earn a living. An applicant for a pension is thus regarded as incapable of performing his duties or of taking up employment if his capacity to earn a living has fallen short of a certain minimum level which is to be measured against the average value of the professional group to which an insured person with similar education and equivalent attainment belongs (see Article 246 (2) of the Reichsversicherungsordnung; Article 23 (2) of the Angestelltenversicherungsgesetz; Article 46 (2) of the Reichsknappschaftsgesetz). Incapacity to perform one's duties may therefore, *cum grano salis,* be paraphrased — to use the terms of Article 78 of the Staff Regulations — as the inability of an official to perform the duties corresponding to a post in his career bracket. Without going in detail into the various definitions in the different branches of social security I can say that the concept of incapacity to earn a living signifies in German law the total or partial loss of the ability to turn the capacity for work as such to economic advantage. That general incapacity to earn a living is itself a preliminary to inability to lead a normal everyday life. That means that when a person's capacity to take his place in society is 100 % impaired he is totally incapable of earning a living and therefore necessarily totally incapable of performing his duties. If a person is altogether incapable of applying his capacity for work to economic advantage he is logically also

completely incapable of performing his duties. That graduation also finds expression in Article 78 of the Staff Regulations which states that "an official shall be entitled ... to an invalidity pension in the case of total permanent invalidity *preventing him* from performing the duties corresponding to a post in his career bracket". When an official is no longer able to occupy a post in his grade Article 78 takes the logical step of providing for a pension.

On the other hand, the rules governing insurance against accidents and occupational diseases contained in Article 73 of the Staff Regulations deal with a different type of problem. For the purpose of that insurance the only question which arises is the extent to which the official has suffered total or partial invalidity as a result of the accident or occupational disease. If he is only a partial invalid he may still be in a condition to perform his duties, even if he is handicapped in doing so. Such handicaps or impediments justify the payment to him of the allowances due in respect of permanent partial invalidity. At the same time, however, it is also clear from what I have already said that no emphasis is laid on incapacity to perform one's duties in Article 73 of the Staff Regulations. An answer to the question whether the invalidity is to be assessed in relation to the general capacity to lead normal everyday life, or, on the other hand, to the general capacity to earn a living cannot be inferred therefrom.

In my opinion the following considerations argue in favour of the view that the term invalidity as used in Article 73 of the Staff Regulations relates to the reduction in the capacity to earn a living: For one thing, as the applicant has pointed out in particular, it must not be forgotten that both the insurance contribution and the insurance benefits are fixed in relation to the basic salary of the official concerned. That already establishes the existence of a certain relationship between invalidity and employment.

Then too reference may also be made to provisions which show that the Community legislature itself sought to make the invalidity dependent upon the evaluation of the degree of reduction in the capacity to earn a living. Article 73 appears in Chapter 2 of Title V of the Staff Regulations which is headed "Social security benefits". The corresponding rule of Community law which deals with social security is Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416). In order to implement that regulation the Council adopted Regulation (EEC) No 574/72 of the Council of 21 March 1972 (Official Journal, English Special Edition 1972 (I), p. 159). Chapter 3 of Title IV of that regulation is headed "Invalidity, old age and death (pensions)". Article 40 in Chaper 3 expressly stipulates that in order to determine the degree of *invalidity,* the institution of the Member State shall take into consideration the documents and medical reports and the information of an administrative nature abtained by the institution of any other Member State.

A glance at the legal systems of the Member States also shows that interpretation of Article 73 of the Staff Regulations of Officials to be correct. In international linguistic usage invalidity is always related to capacity to earn a living and not to capacity to take one's place in Society (see Brackmann, Handbuch der Sozialversicherung, Vol. III, p. 666 x, and the relevant encyclopaedias). As regards German law in particular, there is in the law on pensions for civil servants and judges employed by the Federal Republic and the Länder (Beamtenversorgungsgesetz) of 24 August 1976 (Bundesgesetzblatt I, p. 2485) a provision dealing with

accident insurance which is comparable to that in the Staff Regulations of Officials. Article 35 provides for compensation in respect of an accident if "as a result of an accident sustained in the course of his employment the *capacity of the injured person to earn a living* is seriously restricted for more than six months ..., so long as that condition persists". Under paragraph 2 of that provision the "reduction in capacity to earn a living shall be assessed on the basis of the physical injury affecting working life in general". Under Article 43 "an official who sustains an accident [in the course of performing duties in which his life is at risk] shall receive, in addition to a pension payable under the regulations governing public officials, when his employment comes to an end, a lump sum by way of compensation for the accident ..., if as a result of the accident his capacity to earn a living ... is impaired". Those provisions show clearly that under national law also the amount of compensation payable in respect of an accident is dependent upon the degree of diminution of the capacity to earn a living. Furthermore, the directives applied to Article 35 of the Beamtenversorgungsgesetz are those which were issued in respect of Article 139 of the Bundesbeamtengesetz, the content of which was identical and which was replaced by the aforementioned Article 35 of the Beamtenversorgungsgesetz (printed in Plog-Wiedow, Kommentar zum Bundesbeamtengesetz, Article 139). Directive No 3 provides that "the reduction in capacity to earn a living as a result of the accident occurring in the course of employment shall be expressed as a percentage of the capacity to earn a living as a result of the accident occurring in the course of employment shall be expressed as a percentage of the capacity to earn a living of the person injured, that is to say, the capacity to earn a living shall be expressed 100". Finally, like the insurance policy taken out by the Commission or the provision in Article 73 of the Staff Regulations Directive No 8 contains a table which lists minimum percentages fixed in detail in respect of specific physical injuries, without regard to the particular occupation of the individual. The intention of that rule, which clearly relates to the capacity to earn a living, is to award the injured person compensation in respect of the injury suffered on the basis of a standardized percentage whatever the nature of that person's employment. That example refutes, in particular, the Commission's argument that the existence of a table listing fixed percentages which are independent of the type of employment of the individual concerned signifies that those percentages cannot relate to that person's working life. A similar table relating to accident insurance for public servants also exists in French law. Article L. 27 of Law No 64-1339 of 26 December 1964 reforming the code of civil and military retirement pensions, which appear in the Fifth Title headed "Invalidity", provides that:

"A public servant in the civil sector who is permanently incapable of continuing to perform his duties as a result of disabilities resulting from injuries or illness ... may be retired prematurely ..."

Article L.28 continues as follows:

"A public servant in the civil sector who is retired under the circumstances provided for in Article L.27 shall be entitled to an invalidity pension for life in addition to the pension awarded for his services.

The amount of the invalidity pension shall be fixed at that fraction of the basic emoluments referred to in Article L.15 which is equal to the percentage of invalidity.

The degree of invalidity shall be determined on the basis of a standard scale which shall be fixed by decree."

In implementation of the aforesaid Article L.28, Article 1 of Decree No 68-756 of 13 August 1968 provides that:

"The degree of incapacity resulting for public servants in the civil sector from invalidity arising out of performance of their duties shall be determined in accordance with the standard scale of invalidity annexed to this decree".

That standard scale also contains an extremely detailed list of physical and mental injuries and of corresponding degrees of invalidity, which may only vary within a strictly limited percentage. No 1, subparagraph 3, for example, states that:

"In determining the degree of invalidity applicable no account shall be taken of certain factors, such as the age of the official concerned, the nature of his employment, . . . etc."

The position is similar under Belgian law. Under Article 4 of the Law of 3 July 1967 "on compensation for injuries resulting from accidents at work, accidents on the way to work and occupational diseases in the public sector" in conjunction with Article 8 of the Royal Decree of 24 January 1969 pensions payable in respect of permanent invalidity shall be determined in proportion to a recognized percentage of partial permanent invalidity. In the Rapport au Roi relating to that law it is further stated that in determining the degree of invalidity all the elements of the injury are to be taken into account, in particular, according to the preparatory documents, "the seriousness of the physiological injuries, the diminution of earning capacity, the abilities required for performance of the duties attaching to the post, the nature and stability of the post" (Document Sénat No 314, Sess. 1966-67, p. 21).

Those examples show that the Member States also consider the degree of invalidity on the basis of the diminution which has taken place in the *capacity to earn a living*. The fact that in some States the benefit is paid in the form of a pension is immaterial, since Article 73 (2) of the Staff Regulations of Officials also provides for an annuity to be substituted for payment of the lump sum. Similarly, the fact that in, for example, the tables drawn up under German and French law the accident insurance institution has a certain margin of discretion available as regards recognition of the invalidity, whereas the tables given in the insurance policy and in the rules which entered into force on 1 January 1977 provide for fixed percentages, can make no serious difference. The only decisive factor is that in both cases the particular form of employment of the injured person may not be taken into account. It is, furthermore, in that sense that Article 9 (b) of the insurance policy to which the Commission has previously referred is to be understood. According to that article the degree of invalidity involved in those cases of permanent partial invalidity which are not provided for in the table must be determined by analogy with those for which provision is made therein, without regard to the form of employment of the insured person. It is also of no consequence that the protection offered by Article 73 covers accidents occurring both in the course of employment and in private life, since the aim of the protection — which is to provide compensation for the reduction in earning capacity — is not affected by the various causes of the accident.

I therefore conclude that the degree of invalidity to be determined in accordance with Article 73 of the Staff Regulations of Officials is dependent upon the reduction which occurs in the capacity to earn a living. The reduction in the capacity to earn a living must therefore be an expression of the extent to which a person is deprived of a normal working life by reasons of health. That conclusion is, in particular, confirmed by Article 14 of the Rules which entered into force on 1 January 1977, which provides that in certain circumstances an official shall

receive an allowance in respect of any injury or permanent disfigurement which, although not affecting his capacity to work, constitutes a physical defect and has an adverse effect on his social relations. Under the second paragraph of that article this allowance "shall be determined *by analogy with* the rules laid down in the invalidity scale referred to in Article 12". That provision clearly lays down a special rule for those cases in which the capacity to work, which must otherwise be the decisive factor, is not adversely affected and it therefore only provides that the invalidity scale is to be applied by analogy. Contrary to the view held by the Commission that conclusion is not upset by Article 2 of the Rules of 1 January 1977 which only provides a definition of an accident and in so doing naturally focuses on the adverse effect on bodily or mental health without giving any reason why the benefit payable under Article 73 is provided.

3. With that I come to the further question whether those mental injuries which do not affect the intellectual faculties are also to be taken into account in determining the degree of invalidity.

The Commission maintains that emotional disorders do not fall within the sphere of application of Article 73 of the Staff Regulations. It points out that the invalidity tables in the insurance policy and in the Rules of 1 January 1977 only refer to *one* mental disorder, namely incurable insanity, which, as is well known, is to be regarded as affecting the intellectual faculties rather than the emotions. For that reason, the degree of invalidity suffered as a result of emotional disorders cannot be determined by analogy. The Commission also maintains that such disorders are an inevitable consequence of any lasting physical injury and are therefore already included in the maximum percentages indicated. It states that the tables also provide that the total allowance for invalidity on several counts arising out of the same accident shall be obtained through addition but such total shall not exceed the partial sum insured for the total loss or the complete loss of use of the limb or organ injured. According to the invalidity tables, the loss of a foot may be assessed at 40% at the most.

In that connexion it may be stated that in accordance with the case-law of the Court of Justice (see Case 101/74 *Dietrich Kurrer* v. *Council of the European Communities* [1976] ECR 259, judgment of 26 February 1976) the terms of an insurance policy taken out by the administration in the absence of rules drawn up by agreement between the institutions of the Communities cannot, in the case of conflict with the Staff Regulations, derogate from the rights which an official derives directly from those regulations. As is well known, however, the rules drawn up by agreement between the parties were not yet in force at the time the accident occurred and may only be referred to for the purpose of assisting in the interpretation of the Staff Regulations.

As we have seen, it is the reduction in the capacity to work which determines the degree of invalidity. However, that capacity is necessarily reduced if certain of the normal physical and mental functions fail or become abnormal and that applies *a fortiori* the more the functions affected. It follows therefore that the mental symptoms which

accompany any type of injury may also result in a diminution in the capacity to work and, therefor, that psychological disorders which affect the emotions must be taken into account even if they are not listed in the aforementioned tables. Of course, as there is no adequate yardstick available it is not easy to measure something for which no provision is made and it is therefore necessary to resort to percentages given which are determined on the basis of the particular situation in each individual case.

That is moreover confirmed by taking a look at both German and French law. Directive No 6 on Article 139 of the German Beamtengesetz which, as already mentioned, also applies to the Beamtenversorgungsgesetz now in force, expressly provides that in addition to the physical condition of the injured person the effects of secondary symptoms of a mental nature and pain must be taken into consideration. Chapter III, X, of the French invalidity table, to which I have already referred, expressly provides for neuroses to be taken into account.

In the present case Dr Bellini has clearly explained to us in the course of his evidence that the emotional handicap affecting the applicant's capacity for work is 100% and to that extent is to be equated with the incurable insanity referred to in the tables. As far as I am concerned there is no doubt that, within the contest of the arbitration procedure, the parties are accordingly bound by that evidence given by the arbitrator.

4. To my mind the situation cannot be changed by the objections put forward by the Commission as regards, in particular, the relationship of cause and effect between the accident and its consequences. In his evidence to the Court Dr Bellini again confirmed the statements already made in his letter to the Commission of 26 March 1977, to the effect that the mental condition which renders it impossible for the applicant ever to work again was already present before the breast tumor was discovered at the end of 1973. It is, therefore, clear that that illness has not led to a break in the relationship of cause and effect.

I also consider it unnecessary to deal with the admittedly delicate question whether the relationship of cause and effect was not ruled out by the fact that the development of the mental injury resulting from the accident was helped by an already existing morbid tendency, a problem which in national accident insurance systems is known as that of the "constitution predisposed to injury". The Commission has in fact been unable to produce any substantiated evidence to justify the hypothesis of an illness resulting from a predisposition. On the contrary, we have heard from the applicant, that before her entry into the service of the European Communities she was employed for a considerable period by the Italian State without suffering from any illness worthy of the name. Furthermore, no indication of any mental disorder was found during the medical examination on recruitment which was held before the applicant entered the service of the Communities. Accordingly it must be taken that, even if a predisposition had existed before the accident, it should be regarded in accordance with all the doctrines of causality as so trifling that the relationship of cause and effect could not thereby be ruled out.

In conclusion, therefore, I consider it clear that the Commission of the European Communities should be ordered to implement Dr Bellini's arbitration award of 26 October 1976. I

therefore do not need to deal further with the applicant's alternative conclusion, which seeks recognition by the Commission of a 60 % reduction in her mental health. However, should the Court disagree with my opinion and conclude that the degree of invalidity to be determined in accordance with Article 73 of the Staff Regulations should be calculated on the basis of the impairment of the capacity to take one's place in society it ought, having regard to my previous arguments, to recognize the applicant as suffering from the 60% invalidity referred to by Dr Bellini.

5. With that I come to the last of the conclusions in the application, which seeks an order that the Commission pay 5% interest on the amount to be calculated in accordance with Article 73 of the Staff Regulations, minus the amount corresponding to 15% invalidity which has already been paid to the applicant.

The applicant considers that amount to be due with effect from the date of the accident and that interest on it is therefore payable from that date. On the other hand the Commission considers that such amount, if any, is only due from the date on which judgment is given and that interest must therefore only be charged on it from that date.

According to the case-law of the Court of Justice (see Case 101/74 *Dietrich Kurrer* v *Council of the European Communities* and Case 115/76 *Leonardo Leonardini* v *Commission of the European Communities* judgment of 16 March 1978, [1978] ECR 735) interest is to be paid on claims arising in the context of social insurance, even if it is not expressly provided for in either the Staff Regulations or the insurance policy, provided that an applicant can establish that the delay in payment of the allowance constitutes a wrongful act or omission on the part of the defendant which has in fact caused him damage. I consider that it is therefore unnecessary for me to emphasize specifically that of course the allowance is not due with affect from the date of the accident and that in that respect the Commission did not act improperly if, in the light of the difficulties involved in determining the degree of invalidity it decided not to make payment immediately. As, however, over 11 years have now passed since the date of the accident on 3 January 1968 I think it proper in the light of the course which events have taken to ask whether the Commission has not improperly delayed payment, as the applicant maintains.

In that connexion it must not be overlooked that the applicant also did not always use all the necessary care to avoid the difficulties involved in settlement of the dispute. Thus, for example, when on 18 July 1974 the question agreed between the parties was put to Dr Vita as the first abritrator on medical matters she evidently did not insist that he be asked specifically about the degree of mental injury. It was therefore not to be expected that after the submission of Dr Vita's opinion of 21 February 1975 which assessed the degree of injury at 15 % the Commission would voluntarily pay an increased allowance to cover the alleged mental injuries. It was established at the latest with effect from submission of Dr Bellini's second mutually binding arbitration award, of which the Commission had been informed on 30 October 1976, that "the injuries of a mental nature from which Miss B. is suffering which are the direct and exclusive consequence of the accident which she sustained in Luxembourg on 3 January 1968 have resulted in her case in total permanent invalidity". Shortly afterwards, on 1 December 1976, the applicant requested the Commission to implement

the arbitration decision and thereby served formal notice on it to that effect. It was not however until 3 February 1977 that the Commission put to the arbitrator the question concerning the possible influence of the cancer on the mental injury and, after Dr Bellini had denied the existence of any possible influence, only on 6 October 1977, that is, almost a year after submission of the arbitration award, that it expressed further doubts. In my opinion that dilatory behaviour constitutes negligence for which the Commission alone is to be blamed. I therefore conclude that the demands of natural justice will be satisfied if the Commission is required to pay interest on account of the delay in making payment with effect from 1 December 1976. Payment of the 5% interest sought by the applicant is in particular necessary to compensate for the damage which she has suffered as a result of the loss of bank interest at the customary rate and monetary depreciation.

III — I therefore propose that:

1. The implied decision of rejection by the Commission of the applicant's request of 1 December 1976 and of her complaint of 20 June 1977 concerning the implementation of the arbitration award made by Dr Bellini on 26 October 1976 be annulled and that in implementation of that arbitration award the Commission of the European Communities be ordered to pay to the applicant the amount corresponding to 100 % invalidity to be calculated in accordance with the provisions of Article 73 of the Staff Regulations minus the amount corresponding to 15 % invalidity which has already been paid to her on account.

2. The Commission be ordered to pay interest at the rate of 5 % with effect from 1 December 1976 on the amount calculated.

3. The Commission be ordered to pay the costs of the proceedings.