OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 6 MAY 1982 [1]

Mr President,
Members of the Court,

This is an action for damages brought by Mario Berti, an official of the Commission of the European Communities, against that institution as a result of an accident sustained by his son, a minor, while staying at a holiday camp.

I — The facts are as follows:

By a staff memorandum of 5 February 1971 the Director General for Personnel and Administration of the Commission in Brussels informed officials and other employees of that institution that, "as in previous years, holiday camps will be organized for children during the Easter school holidays of 1971".

The "financial conditions" annexed to the memorandum indicated the cost of the stay, *"including travel and insurance"*, to be borne by the parents, from which would be deducted a contribution by the Commission the amount of which depended on their remuneration.

In the course of the proceedings we were told that the insurance in question was arranged by the Commission with the Compagnie d'Assurances Générales Mercator [hereinafter referred to as "Mercator"], in Antwerp. It comprised, to be precise, civil liability and personal accident insurance.

According to Article 11 of the Special Conditions, the "personal accident cover is alternative and may not be cumulated with the cover provided for civil liability. Accordingly, the benefits guaranteed under the head of personal accident insurance are payable only subject to a full and final discharge by the victim or those claiming under him and waiver of any right of action based on civil liability vis-à-vis the insured persons".

However, the question whether the personal accident insurance operates to the exclusion of the civil liability insurance arranged by the policy-holder is a matter which concerns solely the Commission and its insurers. The texts of the policies were never disclosed to the parents. It was merely indicated in the brochures inviting applications for places in the holiday camps that "the insurance does not cover theft and items lost or deliberately broken." As a rule, however, the person who arranges a group insurance policy (the Commission) must inform those insured (the parents) precisely what their rights and obligations are. Since that was not done, the policies constitute, as far as officials and other employees of the Commission are concerned, *res inter alios acta.*

The staff memorandum was accompanied by an application form embodying an authorization for the administration to deduct the cost of the holiday from the salary of the official or other employee; the form was to be returned to the Commission's Welfare Division.

Upon reading the memorandum Mario Berti, an official in Grade D Step 1, at

1 — Translated from the French.

the Commission in Brussels, decided to send his son Paolo who was then seven years old, to the holiday centre known as "La Petite Merveille" in Durbuy in the Belgian Ardennes, which was recommended for children of between six and fourteen years of age. Category D, which was and continues to be the category occupied by Mario Berti, covers duties involving manual work or tasks necessitating primary level education.

As regards staff, a teaching couple was responsible for the management and administration of the holiday centre and one assistant was provided for every ten children. Between 60 and 80 places were reserved for children of staff of the European institutions.

On 7 April 1971 little Paolo fell, while playing on a swing erected on land belonging to the commune of Durbuy, so badly that he fractured his upper jaw and broke his four upper permanent incisor teeth.

There has never been any question of the commune of Durbuy being liable for this accident because, apparently, defective equipment was not the issue.

On 14 April 1971 the Commission notified its insurance brokers, Van Breda, of the accident by telex, stating that the declaration form would be sent to it later.

The holiday centre, for its part, informed the Commission on 30 April 1971 that it had notified its own insurers, La Royale Belge in Brussels, on 8 April 1971, stating that "the children were playing under the supervision of two assistants". (The insurance policy covering the holiday centre has not been produced, despite the Court's request).

The Commission explains that for the six months immediately following the accident the medical expenses were covered by La Royale Belge, which was subsequently re-imbursed by Mercator, except for the portion already re-imbursed to Mario Berti under the social security scheme to which officials of the Communities belong by virtue of the Staff Regulations (Title V, Chapter 2). However, there is no documentary evidence of that in the file on the case.

On 22 May 1975 Dr P. Doms, a stomatologist, drew up a medical report in which it was stated, in particular, that one mis-shapen tooth would have to be extracted and five temporary removable prostheses would have to be fitted; the prostheses, which would have to be renewed every year, would have to be worn until the age of 18. From the age of 18 a fixed bridge with eight elements would have to be fitted.

On 3 June 1975 another specialist, Dr A. Reychler, reported that "the upper lateral incisors are absent and so is the right upper central incisor ... The upper right canine is unerupted ... Whether the left upper central incisor may be preserved seems very doubtful ... A prosthesis may be necessary ...".

On 2 April 1976 the lawyer consulted by Mario Berti wrote to the Director General for Personnel and Administration at the Commission, referring to earlier correspondence (not included in the file on the case), to inform him that the injuries had now been consolidated and to enquire as to how the Commission proposed to compensate his client, in view of the expense of the prostheses, the non-material injury (which he estimated at a minimum of BFR 250 000) and the aesthetic injury (which

he calculated to be, in view of the victim's youth, BFR 250 000).

On 28 April 1976 the Commission's Welfare Division forwarded to the Sickness Insurance Division copies of the two medical reports to which I have referred and of the letter from the lawyer, requesting that it "be kept informed as to the insurer's intentions with regard to the matter".

On 10 May 1976 Albert Wegner, an adviser in the Directorate General for Personnel and Administration, wrote to Van Breda, the insurance brokers, sending them the documents referred to above and asking them "kindly to forward them to the insurers".

After seeing the child again on 29 September 1976 Dr Reychler informed the father on 3 November 1976 that the result of the accident was the loss and extraction of the four upper permanent incisors and that "a prosthesis would evidently be required".

On 30 September 1977 Mr Wegner forwarded to the brokers a new statement of the child's medical expenses, stating that "the file on the matter must remain open".

On 18 September 1978 Mercator, referring to a letter which had been sent to it by Van Breda on 12 September 1978 (the letter is not in the file on the case), informed the brokers that the non-material and aesthetic injuries referred to by Mario Berti's lawyer in his letter of 2 April 1976 were not covered by the insurance policy — the liability of Mercator being limited to ordinary medical expenses —, that the Commission was not liable and that in any case it was no longer possible to re-open a case dating back to early 1976.

On 28 September 1978 the insurance brokers, referring to the letter from the Commission dated 18 September 1978 (the Commission has explained that the letter in question could only be the letter of 30 September 1977 by which it informed the brokers that the file must remain open), informed the Commission's Insurance Division that according to the medical reports the child's injuries had been consolidated early in 1976 and confirmed that Mercator was not liable for payment of the compensation sought by Mr Berti's lawyer for the aesthetic and non-material injuries. The brokers therefore requested the Commission to inform them whether they might "consider the case closed".

On 26 October 1978 the Commission, by a memorandum signed by Mr Wegner, informed Mario Berti that on 18 September 1978 (in reality on 30 September 1977) it had indicated to its insurers "that the file on the matter must remain open". It informed him of the reply given by Mercator described above and asked him to indicate whether it might "consider the case closed".

Lastly — and here we come to the events immediately preceding this application — Mario Berti wrote, on 17 April 1980, to the Secretary General of the Commission to request that his son be granted an allowance for permanent invalidity, brought about by the wrongful act or omission of an agent of the Commission, which should include compensation for non-material damage resulting therefrom. He stated that the file on the

accident was in the hands of Albert Wegner.

The request was registered on 22 April 1980 by the appropriate division of the Commission as a "request submitted under Article 90 of the Staff Regulations". On the following day it was transmitted to higher authorities as a "complaint", which was not correct since it was, as yet, merely a request. It met with no response.

On 29 October 1980, "since the absence of a reply amounted to an implied decision rejecting his request of 22 April 1980", Mario Berti submitted a complaint through the official channels which was registered as such on 10 November 1980 and which was again transmitted to higher authorities. Like the request which had preceded it, the complaint met with no response.

That is the background to the action brought by Mario Berti on 29 May 1981, by which he claims that the Court should declare that the Commission must compensate him for the material and non-material injury to his son as the result of the accident which he sustained, the applicant estimating the damage at BFR 500 000 but reserving the right to reduce or increase that amount in the course of the proceedings, and that it should appoint one or three experts to report on the sequelae of the accident in order to enable an objective assessment to be made of the amount of damages to be awarded to him.

II — The Commission contends that the Court has no jurisdiction in this dispute, whether the application is based on Article 179 of the Treaty (and on Articles 90 and 91 of the Staff Regulations) or on Article 178 (and Article 215) of the Treaty.

1. The Commission submits first, that, since the dispute is between the Commission and a third party and seeks reparation for the consequences of an accident of which that third party was a victim, the application falls outside the scope of Article 179 of the Treaty and Articles 90 an 91 of the Staff Regulations.

On that point, I would observe that the dispute is not between the Commission and Mario Berti's son, but between that institution and the child's father; the latter is an official who is acting on behalf of his son, over whom he exercises parental control and of whom he is the legal representative. According to Article 179 of the Treaty this Court has jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment.

2. Next, the Commission submits that the accident sustained by the applicant's son was the result, not of an unlawful act on the part of the Commission, but of an alleged wrongful act or omission of an agent of the Commission. The action is in fact based on the non-contractual liability of the Commission within the terms of the second paragraph of Article 215 of the Treaty. Moreover, the applicant admits in his reply that the action is based "in particular on Articles 178 and 215 of the Treaty", thus amending the original foundation of his action.

I do not consider, however, that the fact that the applicant pressed his claim through official channels may be used against him.

Article 43 of the Protocol on the Statute of the Court of Justice of the European Economic Community provides that: "Proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community". Those provisions, as interpreted by the Court, enable the victim of an accident who seeks to rely on Article 215 of the Treaty to bring his case directly before this Court. The fact that he approaches the relevant Community institution (in this case, the Commission) and that that institution fails to respond does not permit the period of limitation to be relied upon against him. A complaint under Article 90 of the Staff Regulations, even if it does not specify the amount claimed and even if it seeks to achieve an amicable settlement, certainly amounts to a prior application within the meaning of Article 43 of the Protocol on the Statute of the Court.

Where the victim is a Community official or a member of his family I am of the opinion that it is in accordance with the principles of sound administration for him to approach the Commission first in order to attempt to achieve an amicable settlement. His application under Article 91 of the Staff Regulations remains none the less in substance an action for damages.

By its judgment of 22 October 1975 in Case 9/75 *(Meyer-Burckhardt* [1975] ECR 1171) the Court held that:

A "dispute between an official and the institution to which he is or was answerable concerning compensation for damage is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations and, as regards in particular the question of its admissibility, lies outside the sphere of application of Articles 178 and 215 of the Treaty and of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC" (paragraph 7 of the decision, at p. 1181).

"Although the action for annulment and the action for damages are indeed distinct types of action, it is none the less the case that, within the context of disputes between officials and the institutions, Articles 90 and 91 of the Staff Regulations make no distinction between them as regards both the administrative and the contentious procedures to which they may give rise.

...

According to Article 91, in proceedings relating to the legality of an act adversely affecting the applicant, the Court has jurisdiction, whatever the nature of the action" (paragraph 10 of the decision, at p. 1182).

...

"[The applicant] was at liberty, in view of the independence of the different types of action, to choose either one or the other, or both together, but he had in any event to bring his action within the period of three months after the rejection of his complaint" (paragraph 11).

In his opinion in that case Mr Advocate General Warner expressed the view (at p. 1189) that "it is clear that the Court has in proceedings under Article 179 the same kind of jurisdiction to award damages as it has in proceedings under Article 178".

More recently, in its judgment of 17 February 1977 in Case 48/76 *(Reinarz* [1977] ECR 291), the Court added that "the unlimited jurisdiction conferred on the Court in the disputes referred to in Article 179 enables it, within the context

of such disputes, to give judgment not only on the validity of the contested act bus also on compensation for any damage suffered by the person concerned as a result of an act contrary to his rights under the Staff Regulations" (paragraph 11 of the decision, at p. 298).

It appears to me beyond dispute that this action was brought by a person in his capacity as an official, that it raises a question which must be resolved in accordance with the conditions of employment governing servants of the Community and that it originated in the employment relationship, within the widest meaning of the term, which exists between the person concerned and the institution.

Quite apart from the fact that the holiday camps were organized for the children of officials, that link is established by the fact that the cost of the stay included insurance, varied according to the basic salary of the official in question and was to be deducted from his salary and that it was primarily the social security scheme of officials which was responsible for payment of compensation for the results of the accident.

III — As to the substance of the case, the Commission contends that neither the conditions for contractual liability (first paragraph of Article 215) nor those for non-contractual liability (second paragraph of Article 215) on its part are met.

First, the holiday centre in which the children were staying was a private establishment operating in accordance with Belgian commercial law, open to all children and having its own staff; its assistants were not part of the Commission's staff.

Secondly, even if the assistants under whose supervision the child was playing when the accident occurred might be considered to be agents of the Commission, the applicant has entirely failed to demonstrate the existence of any wrongful act or omission on their part.

The circumstances in which the accident occurred are still, in fact, unclear. Article 215, however, certainly does not require the existence of a wrongful act or omission and the purpose of the insurance is precisely to meet the difficulties which may arise in establishing a wrongful act or omission.

The person who arranges insurance incurs liability by reason of the absence or inadequacy of the cover arranged with the insurer for any unusually serious injury. It would seem that the best way to avoid having the institutions overwhelmed by requests for compensation would be to provide adequate cover.

Moreover, neither the civil liability insurance nor the personal accident insurance arranged by the Commission makes any reference to a requirement of a wrongful act or omission.

According to Article 12 of the General Conditions governing all risks insured:

"The cover includes all the activities undertaken by the holiday camp, 'activities' to be interpreted in the widest sense, including:

. . .

(f) all excursions, instruction, travel, walks, visits to the countryside or sightseeing, all organized by the management of the holiday camp . . ."

According to Article 14, "the company declares itself to have sufficient knowledge of the risk at the time at which the policy is effected and requires no further description from the insured person . . .".

Under the heading of personal accident cover, the Special Conditions stated that "payment of the benefits provided for in the typed Special Conditions" (which have not been produced) was to be made "whenever one of the persons expressly referred to in those conditions suffers bodily injury in the course of the activities of the holiday camp".

According to Article 6 of the Special Conditions governing civil liability insurance, "cover is limited . . . to events which occur when such persons" (the insured persons) "are or ought to be under the direct or indirect care or control of the responsible authority or of any other person replacing it or to whom it has delegated its powers or whom it has appointed or arranged to have appointed, even by implication, as its substitute".

Whether or not the responsible authority had delegated its powers to the assistants is a question which need not concern the parents, who were ignorant of the content of that clause. As far as they were concerned the Commission had directly assumed the rôle of guardian of the children and organizer of the holiday camp, even if it was managed by the centre or its staff.

The case relied upon by the Commission (Conseil d'État, 21 March 1980, *Vanderiele*, Actualité Juridique — Droit Administratif 1980, p. 437) was decided in a different context: when a private association organizes holiday camps for the children of a commune, liability in connection with any accident suffered by one of the children is properly attributable to that association, which has a legal personality distinct from that of the commune.

In the present instance, however, the holiday camp was organized, if not by the Commission, then at least by its Welfare Division, which does not have a legal personality distinct from that of the Commission. As far as those children in the Belgian holiday centre whose parents were officials or other employees of the Commission were concerned, the centre acted as manager of the Commission's holiday camp, a welfare service. Mario Berti was therefore entitled to attribute primarily to the Commission liability for the accident sustained by his son.

IV — Lastly, the Commission adds that the victim is not in any case deprived of a remedy since under Belgian law he may bring an action against both the assistants and their private employers.

The contention appears to me to reverse the problem:

It is for the Commission to call, if appropriate, on the guarantees provided by Mercator, its own insurers, as stated in Article 14 of the civil liability insurance policy. Let me repeat, Mario Berti knew and dealt with the Commission alone. He never agreed to any release from liability and never expressly waived his right of action based on the liability of the Commission. By considering itself that the file on the matter "was not closed", the Commission supported the applicant in his view that it was responsible for compensating him.

The obligation of an insurer may not be substituted for the Commission's direct obligation under the staff memorandum which it distributed; the institution may not be permitted to leave to its insurer the task of settling, in the case of

accidents, any problems which arise with regard to insurance cover, thereby restricting its own rôle to that of intermediary between the insurer and the victim.

The first paragraph of Article 25 of the Staff Regulations provides in the most general terms that: "Officials may submit requests to the appointing authority of their institution". If the applicant — in good faith — had selected the wrong means of redress, it would have been in the interests of sound administration for the Commission to advise him of that fact. Instead of that, it responded neither to his request nor to his complaint. On a number of occasions this Court has described such reticence on the part of the administration as bad practice. In its judgment of 26 February 1981 in Case 148/79 *Korter* it held that when "the occurrence and continuation of the dispute were due in part to the attitude of the ... administration, especially ... to its refusal to give the applicant any explanation ... the applicant cannot be criticized for having brought an action in response to what he had reason to regard as arbitrary conduct on the part of the administration in relation to him" ([1981] ECR 615, at p. 629, paragraph 19).

In its judgment of 21 May 1981 in Case 156/80 *Morbelli,* the Court referred to "the good faith which must prevail in relations between the Commission and its employees, including their relations in legal proceedings" ([1981] ECR 1357, at p. 1372, paragraph 14).

I think that it should not be too difficult for the parties to reach agreement on the amount of damages. Should that not be the case, it will be necessary for them once again to bring the matter before this Court.

At the present stage in the proceedings my opinion is that the Court should hold as follows:

The objections raised by the Commission as to the jurisdiction of the Court are unfounded;

The liability of the Commission has been established in principle. Moreover, the Court should order the Commission to pay the costs.