OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 26 June 1986

My Lords,

On 7 April 1978 Mr Leussink, a Commission official, was being driven by another Commission official, on Commission business, in a car belonging to the Commission, when the vehicle went out of control, rolled over several times and stopped against a signpost beside the motorway at Würselen-Broichweiden in the Federal Republic of Germany. He suffered very serious injuries including several fractures of the skull and of his ribs, bruising to the abdomen and lungs with consequential infection, the loss of his right and a deformation of his left eye, loss of the senses of smell and taste, of strength in his left arm and of six square centimetres of tissue from his skull. He was in a coma for three months.

On 19 November 1982, pursuant to Article 73 of the Staff Regulations and to the Rules on the Insurance of Officials of the European Communities against the risk of accident and of occupational disease, the Commission notified Mr Leussink that its doctor had recognized his injuries as constituting a permanent invalidity of 50%.

On 5 April 1983 Mr Leussink made a request to the Commission for compensation of the sum of BFR 5 million for non-material damage. Since he received no reply, he submitted a complaint on 3 November 1983 but again received no reply.

By notice dated 25 April 1984, he was told that the Commission's doctor had revised the assessment of permanent partial invalidity to 65%. Not being satisfied, Mr Leussink asked that an opinion be obtained from the Medical Committee referred to in Article 23 of the Insurance Rules.

The application in his case (Case 136/84) was lodged on 23 May 1984. He seeks the annulment of the implied decision rejecting his request and his complaint under the Staff Regulations; he makes an independent claim for BFR 5 million as compensation for the non-pecuniary damage which he suffered as a result of the accident, with interest at 12% per annum from 5 April 1983 until payment, and costs. Since he has been paid his salary and his medical expenses, no question of pecuniary loss arises.

Essentially his claim is that the invalidity payment made under the Insurance Rules does not compensate him sufficiently for the tragic consequences of the accident in relation to his professional, family and social life. His personality has changed. He has lost confidence in his work and all hope of promotion. Personal relations with his wife and children have been severely affected. No longer can he enjoy social activities or sport, good food or wine.

Case 169/83 was brought by his wife in her own right and by both of them as legal representatives of their four children, though one of the children (Monica) having attained majority now pursues the claim in her own right. The Court is asked to award BFR 3 million to Mrs Leussink and BFR 1 million each to the four children (with interest at 12% from 5 April 1983 until payment), and costs, and to annul the implied decision rejecting a request which they too made on 5 April 1983, and the complaint consequent upon it, that compensation be awarded, again which request and complaint were not answered.

Their case is the converse of his; they too have suffered non-pecuniary loss because of the effect of the accident on their husband and father. They have lost the advantage of normal family relationships and indeed, for a period, Mr Leussink left them to live elsewhere and was negative, if not aggressive, in his attitude to his wife. The children suffered physically or psychologically or were disturbed in their work at school.

The two cases have been joined for the purposes of the oral procedure and the judgment.

Case 136/84

Mr Leussink puts his claim under four heads:

(a) the Staff Regulations and in particular Article 24;

(b) a general obligation of prudence and a duty of assistance by an employer to his employee;

(c) a principle of law that any wrongful act or omission on the part of the administration in the performance of its functions ('faute de service') grounds a claim for compensation for the damage caused by the wrongful act or omission;

(d) the second paragraph of Article 215 of the EEC Treaty.

The Commission contended that the action is inadmissible on the ground that his claim had the same object as the claim for compensation under the Staff Regulations in which the procedure had not been concluded at the date of the application.

In fact, that procedure was concluded subsequent to the date of the application and before the oral hearing. By letter dated 20 November 1985 the Commission told Mr Leussink that the Medical Committee had fixed the degree of partial permanent 'incapacity for work' at 75%; he had had an artifical eye which would need periodic replacement; he would need medical and psychological treatment for three years; his state of health would not show any 'distinct improvement in the future'. The details of the make-up of the 75% are given in the letter; it included 10% for psychological and non-material injury. He was accordingly paid a further BFR 967 206, bringing the total of amounts paid to him over the years under the Insurance Rules in respect of invalidity to BFR 7 254 042.

The question remains whether the claim was inadmissible on the basis that Article 73 of the Staff Regulations excludes any other claim for compensation for non-pecuniary damage. The Commission argues that the position is analogous to that taken in French

law where a 'forfait de pension' is granted to a person in lieu of a claim for general damages. The loss of a chance of a greater sum by way of damages is compensated for by the fact that the claimant does not have to establish fault. The Commission argues that this flows from the scheme of the Staff Regulations and the Insurance Rules.

There is no express provision in these Regulations and Rules to this effect. Although there is some force in the argument that the official benefits from not having to establish fault, and he knows the basis upon which compensation is awarded, I do not consider that the Staff Regulations and the Insurance Rules, by providing for the provision of compensation, implicitly exclude all further claims. There are, in my view, indications the other way.

In the first place the benefits payable under Article 73 of the Staff Regulations are based on a percentage of the official's basic salary. For total permanent invalidity the sum to be awarded is eight times his basic salary for the 12 months prior to the accident: partial invalidity is calculated as a percentage of that sum according to the scales laid down for particular injuries. It follows that a higher grade official (e.g. an A1) receives by way of compensation far more than a lower grade offical (e.g. a D1).

The scheme is clearly not ungenerous and in most cases the compensation may well be adequate even for the lower grade official in the sense that it is equal to what would have been awarded had a claim for damages been available. However, two people claiming non-pecuniary damage for identical injuries (as opposed to compensation under the Staff Regulations) ought in principle to receive the same amount; their damages should not be different just because their salaries are different. It seems to me, therefore, that if liability for a wrongful act can be established, a claim for damages is in principle available, so that the Court may ensure that adequate damages are paid. The result may be that the A1 official receives no more under a damages claim than he would receive by way of compensation under the Insurance Rules, but that the D1 official's compensation has to be 'topped up' to what is the appropriate level of damages. If the real value of salaries falls that is another reason why the Court should have a residual power to award further sums in appropriate cases for damage suffered.

It also seems to me that the Insurance Rules clearly contemplate that a payment of compensation does not preclude a claim for damages against a third party. Thus Article 8 of the Insurance Rules requires the victim to subrogate the Communities to his rights and proceedings 'up to the amount of' the benefits, allowances and reimbursement of medical expenses provided for in the Insurance Rules. The rest remains his. Similarly, Article 9 gives the victim a right of priority to any sums paid by a third party in court proceedings brought by him and by the institution to which he belongs, to the extent to which sums would have to be added to the benefits paid under Article 73 of the Staff Regulations in order to bring the compensation up to the amount 'assessed by the court before which the matter was brought'. I do not consider that the fact that the official benefits from a contributory insurance scheme justifies his

being excluded from claiming damages against his employing institution, as he would be able to claim against a third party.

Accordingly, in my view, the scheme of the Staff Regulations and the Insurance Rules does not preclude a claim for damages even if compensation is paid under Article 73 of the Staff Regulations. It goes without saying that any award of damages must not duplicate compensation awarded under Article 73; it may only be in respect of the excess over such compensation needed to provide the appropriate damages.

Nor can it be said that any general principle is to be derived from a comparative study of the law of the Member States excluding such a claim. The practice of the Member States is too varied — some prohibit further damages, others allow it, others do not have an accident insurance scheme comparable to that provided for by Article 73 of the Staff Regulations.

I would therefore reject the Commission's argument that the whole case is inadmissible.

On the other hand, on the basis of the Court's decisions in Case 9/75 *Meyer-Burckhardt* v *Commission* (1975) ECR 1171 at p. 1181; Case 48/76 *Reinarz* v *Commission and Council* (1977) ECR 291 at p. 298; and 131/81 *Berti* v *Commission* (1982) ECR 3493 at p. 3503 it seems that since the claim arises essentially out of the employment relationship it does not lie under Article 215 of the Treaty but only under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations though 'as a matter of substance this can make no difference, because 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', per Mr Advocate General Warner in *Meyer-Burckhardt* at p. 1189.

Since the principles applying to a claim based on non-contractual liability are similar whether the claim is based on Article 179 of the EEC Treaty or Articles 178 and 215, I consider that the arguments advanced by the parties on the basis of Article 215 should be considered in the context of Article 179. It is thus clear, as Mr Advocate General Warner said in *Meyer-Burckhardt* at p. 1190, that, in order to succeed in an action for damages, an applicant must prove three things: (1) that he has suffered damage; (2) that the damage has been caused by the conduct of the defendant institution; and (3) that the conduct was unlawful. The Court's jurisdiction being unlimited, it may award such damages as it thinks fair and proper (see e.g. Joined Cases 10 and 47/72 *Di Pillo* v *Commission* [1973] ECR 763).

The applicant at the hearing accepted that he must establish fault and that he cannot rely on any principle of absolute or strict liability. I think that he was right to do so. Whether, however, there is liability must be decided as a matter of Community law. The Commission's argument under Article 215, which I treat as put under Article 179, that this question must be considered under German law as the alleged *lex loci delicti* seems to me to be misconceived. There is no question of a *renvoi* to German law when the claim is put under the Treaty itself.

There is no doubt that he suffered damage in this case. The issues are therefore whether any unlawful conduct on the part of the Commission is shown and whether his damage was caused by that conduct.

In my opinion the Commission owed a duty of reasonable care to its officials in the provision of the car used for official purposes; it would be liable if it could be shown that that care had not been taken in the selection and maintenance of the car or its constituent parts or if it was driven negligently by a servant of the Commission.

The German authorities found that the accident was due to the tread coming off the rear tyre which led to the air escaping so that the car, which was then travelling at about 140 kilometres an hour, skidded and rolled over. The technical report on the accident suggested six possible reasons why the tyre may have stripped off:

(1) driving with an underinflated tyre;

(2) use of a tyre at speeds too high for its conception;

(3) rusting of the metal structure by reason of mechanical defects;

(4) insufficient resistance of the rubber mixture to shearing stresses;

(5) mechanical injury to the steel belt;

(6) an inappropriate combination of tyre and wheel.

The written pleadings do not allege any fault on the part of the driver in driving the car. A suggestion was made at the hearing that a noise was heard before the accident which ought to have alerted the driver to possible danger. That claim is not open to the applicant; in any event there is no evidence to support it.

Then it is said that the tyre in question was not one approved by the manufacturer and would not have been accepted by the German authorities. I do not regard this as sufficient to establish a lack of care since there is no evidence to show that the manufacturers disapproved of this make of tyre. The tyre used was 'a snow tyre for winter use'. I am not satisfied that it is a breach of the duty of care to leave the tyre on as late as 7 April, the practice being apparently to change the tyres a week later, and in any event the car being used in more than one Member State of the Community. There is no evidence to show that this was dangerous in the circumstances.

It is then suggested that photographs of the car after the accident indicate that the tyre may have been a remould. The Commission says that it does not use remoulds. Whether this is so or not, it seems to me that the suggestion is too tenuous. The allegation is not made out. Nor, on the evidence, can it be said that 140 kilometres an hour was too fast for the assumed pressure of the tyre.

On the other hand, it is claimed that the tread did come off the rear right tyre on the car. That does not normally happen if due care is taken in the selection and inspection and maintenance of the tyre. I accept the applicant's argument that there is a *prima facie* case of a breach of duty of care, that the probability is that proper inspection

would have revealed that there was a defect in the tread of the tyre and that this would have been discovered by proper inspection earlier than the date of the accident, even if it would not have been noticed by the driver whilst actually driving the car. The Commission has produced no evidence to rebut this *prima facie* case, which was to my mind clearly raised against it in the written pleadings. If it had shown when the tyre was bought, by whom it was supplied, when the inspections had taken place and with what result, it might well have displaced this *prima facie* case against it. The evidence of the garage or a competent employee of the Commission, who carried out maintenance or inspection work might have been sufficient to answer the *prima facie* case. There is no such evidence. The *prima facie* case has not been rebutted.

The physical damage suffered is accepted to have resulted from the accident. It is said, however, that the psychological harm and the loss of enjoyment of life did not result from the accident. Reliance is placed on brief references in the medical report to problems between Mr Leussink and his superior and his wife prior to the accident. I do not regard these as sufficient to establish the kind of personality traits now shown by Mr Leussink. In any event it seems to me plain beyond argument that those traits, even if not caused, were aggravated seriously, by the accident. In my opinion the causal link between the lack of care and the injury relied on is clearly established.

The applicant then says that the damage of which he complains is wholly outwith the compensation available under the Staff Regulations and the Insurance Rules. He is, therefore, entitled to be compensated wholly by way of damages. He relies on a distinction in Belgian law between psychological injury (covered by the Insurance Rules) and 'préjudice moral' which is not so covered.

The Commission says that the award made here was made both under Articles 12 and 14 of the Insurance Rules, read with Article 73 of the Staff Regulations, and that, even though Article 12 is concerned with invalidity which affects capacity for work, Article 14 allows compensation for the kind of damage in issue.

I do not accept the applicant's argument on this point. Article 14 of the Insurance Rules enables compensation to be paid for 'any injury or permanent disfigurement which, although not affecting his capacity for work, constitutes a physical defect and has an adverse effect on his social relations'. That, in my view, includes loss of the enjoyment of life and difficulties in personal and social relations caused by the accident which are relied on in this case. As the Commission argues, Case 152/77 *Miss B* v *Commission* [1979] ECR 2819 shows that the benefits available under Article 73 of the Staff Regulations are not limited to the financial consequences of an accident. It was, therefore, open to the Commission to compensate him for the loss in issue under the Regulations and under Article 14 of the Insurance Rules. It did so — as clearly

appears from the last item in the breakdown of the 75% assessment to which I have referred — even though, when the 65% figure was adopted, the Commission misread the doctor's reference to 'physiological' damage as being 'psychological' damage.

There being no claim for loss of future salary which might have resulted from promotion, or in respect of the purely physical injuries caused, the question is thus whether the sum of BFR 967 206 is adequate compensation by way of damages for the injury in issue. The Commission criticizes the claim for BFR 5 million on the basis that it is 'unilateral' and not based on any calculation. I do not see how it could be other than an estimation; the question is whether almost 1 million is enough or 6 million (1 million plus 5 million) too high.

The assessment of quantum in this sort of case is never easy, especially as there is no body of earlier decisions in Community law. I would accept that some of the items in the 75% (e. g. loss of an eye, disorders of the sense of smell and taste) include an element falling within the 'préjudice moral' relied on by the applicant, quite apart from the 10% 'psychological and non-material injury'. On the other hand, the break-up of his family life, the general loss of enjoyment of life, and of work, and the other psychological and personal disturbances relied on (which are described in the file and which I do not think it necessary or desirable to set out in detail in this Opinion) seem to me to be serious. I do not think that they are adequately covered by the compensation under the insurance scheme. Even allowing for the other awards made, I consider that an award of damages for 'psychological and non-material injury' should be in the region of BFR 3 million. Deducting the BFR 967 206 which he has had by way of compensation under the insurance provisions, I consider that an award by way of damages of BFR 2 million would be fair and appropriate in this case.

I do not accept the applicant's claim under Article 24 of the Staff Regulations. The Commission is, in my view, right to say that this applies only to claims against third parties.

Since Mr Leussink succeeds on his damages claim, I do not consider that it is necessary to annul the implied decision rejecting the applicant's request of 5 April 1983 or his complaint of 3 November 1983.

Case 169/83

The Commission accepts that this action is admissible. The allegations of fault are put on the same basis. The Commission denies that there was any fault and that there is any causation between the accident and the loss. It contends that the loss claimed is in any event of the kind covered by the Staff Regulations and excludes any further claim by the family.

Unlike Mr Leussink's claim, it seems to me that this claim was correctly put under Articles 178 and 215 of the Treaty, since the claim is for the independent loss of the family and is not a dispute between an official and his institution. Nor do I think that it is inadmissible for reasons which led to Joined Cases 114, 115, 116 and 117/79 *Fournier* v *Commission* [1980] ECR 1529

being rejected as inadmissible. There the claim by the family was essentially in respect of the conduct of an institution affecting the progress of the career of Mr Fournier. The Court regarded that as an attempt to circumvent the procedures laid down for disputing an official's conditions of employment. In this case there is a claim for quite separate damage consisting of the loss of family life suffered by the family as a result of the accident.

I would not reject this claim as being inadmissible.

I accept that the family have suffered the disruption of family life and the psychological and schooling problems which they allege. There is nothing to suggest that this is exaggerated. It is also clear that their problems flow from the effect on Mr Leussink of the accident, itself due to a breach of duty of care on the part of the defendant. On the other hand, it does not seem to me that Community law recognizes, or should recognize, that all consequences which can be said indirectly to result from a wrongful act are compensable in damages. Albeit that direct and immediate consequences may be so compensable, what are in effect the consequences of such consequences are not in the same position. A line has to be drawn where the responsibility of the defendant ceases. Beyond that line the consequences are too remote. Here the loss claimed by the family did not result from the breach of duty or the accident. It followed the effect of that accident on Mr Leussink. I do not consider that the damage alleged is of a kind which gives rise to non-contractual liability under Articles 178 and 215 of the Treaty. It is in my view too remote. I would accordingly dismiss this claim as unfounded.

Interest

Mr Leussink claims interest at the rate of 12% per annum as from 5 April 1983, which was the date when he made his request to the Commission for the same compensation which he is claiming in the present proceedings. No other date has been contended for as the date from which interest should start to run, although other dates suggest themselves: the date of the accident (7 April 1978), the date of consolidation of the injuries (finally fixed by the Medical Committee as 4 October 1980), the date of the complaint under Article 90(2) of the Staff Regulations (3 November 1983), the date when the application was lodged with the Court (23 May 1984) or the date of the judgment in the present case. None of these dates seems to be self-evident.

So far as claims under Article 73 of the Staff Regulations are concerned, the cases indicate that it is for the applicant to establish that the delay in payment of the allowance constitutes a wrongful act or omission on the part of the institution which has in fact caused him damage (Case 101/74 *Kurrer* v *Council* [1976] ECR 259; Case 115/76 *Leonardini* v *Commission* [1978] ECR 735; and Case 152/77 *Miss B* v *Commission* [1979] ECR 2819).

This is not, however, a claim for compensation under the Staff Regulations but for damages, so that those cases do not directly apply. If they did I should not consider that the Commission was at fault in the way in

which it paid money over the years on the basis of the medical advice available to it.

In the context of claims for damages under Articles 178 and 215 of the Treaty, the Court has ruled that the obligation to pay interest arises on the date of the Court's judgment, in that it establishes the obligation to make good the damage — Joined Cases 64 and 113/76, 167 and 239/78, 27, 28, 45/79 *Dumortier* v *Council* [1979] ECR 3091 at p. 3118 — though that case does not, in my view, cover the case where monies have been wrongfully withheld on the date when they were due to be paid.

I do not find the date of judgment the most satisfactory starting point. If the Court finds that there was liability, then the applicant was entitled to be compensated. It seems to me unfortunate that, if an applicant has to wait for his compensation after the date when he makes his claim to the Court because of the inevitable delay in dealing with the case, he should not receive interest on the money, though since it is only by issuing the claim that he seises the Court he cannot complain if he receives no interest prior to that date. I for my part would take the date of the lodging of the application with the Court as a fair and appropriate date — here 23 May 1984.

As to the rate of interest, the applicant claims a rate of 12%. His application was drafted on 16 May 1984. On that date, and up to 31 July 1985, 12% was the statutory rate of interest in Belgium. However, as from 1 August 1985 the rate has dropped to 10%: Arrêté Royal of 17 July 1985 (*Moniteur Belge*, 23 July 1985). Therefore the most that could be claimed under Belgian law at the present time is only 10%. However, the case is not governed by Belgian law but by an autonomous body of Community law, and it is for the Court to fix the rate which it considers appropriate. In my view, it is appropriate for the Court to adopt rates of interest which reflect current financial realities, and I note that the Court has already shown a willingness to move away from the rate of 6% which it had applied for a long time, by granting the 12% claimed in Case 131/81 *Berti*, judgment of 14 February 1985. In Case 118/84 *Commission* v *Royale Belge*, judgment of 20 June 1985, the Court awarded interest at the rate of 8%. Although that was not a damages claim, I think the rate used there is appropriate in current conditions despite the fact that it can be said that the award of damages reflects the fall in the value of money between the date of the application and the date of judgment. It seems to me desirable to have a common rate of interest in Community awards whether for damages or for a debt. Accordingly I propose that the Court should award interest at the rate of 8% in the present case.

Costs

The Commission should in my view pay Mr Leussink's costs. The claim on behalf of Mrs Leussink and the children does not fall within Article 70 of the Rules of Procedure. That Article has, however, been applied by analogy e. g. in Case 12/84 *Kypreos* v *Council*, judgment of 27 March 1985. In my view each party in the case brought on behalf of the family should bear its own costs.

Accordingly, I would:

(1) Dismiss the application in Case 169/83, each party to bear its own costs;

(2) Award the applicant the sum of BFR 2 million for damages in Case 136/84 with interest at 8% from 23 May 1984, and order that the Commission pay his costs of the proceedings.