and of occupational disease, the official who has suffered an accident at work and members of his family may not be denied the right to seek additional compensation where the institution is responsible for the accident according to general law and the benefits payable under the staff insurance scheme are insufficient to provide full compensation for the injury suffered.

2. The institution liable, under general law, for an accident suffered by one of its officials is not obliged to make good the non-material damage suffered by the family on account of the effects of the accident when those effects are merely the indirect result of the injury suffered by the official and do not constitute part of the harm for which the Commission may be held liable in its capacity as employer.

3. Article 70 of the Rules of Procedure, according to which costs incurred by institutions in staff cases are to be borne by them, may be applied to an action which was brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty by members of an official's family and which arises from the relationship between the official and his institution.

REPORT FOR THE HEARING
delivered in Joined Cases 169/83 and 136/84 *

I — Facts and written procedure

1. Mr Gerhardus Leussink was in a road accident which occurred on 7 April 1978 in the Federal Republic of Germany. He was on mission with a colleague from the Commission and was travelling in a Mercedes motor car belonging to the Commission, and driven by a Commission official.

Mr Leussink was seriously injured; he suffered, and continues to suffer from a number of sequelae.

The applicants describe the permanent sequelae as follows:

'Loss of the right eye, deformation of the left eyeball, diminished hearing, loss of sense of smell and taste, diminished pulmonary capacity, diminished strength in the left arm, loss of more than six square centimetres of cranial tissue, etc., quite apart from the neurological and psychological sequelae.'

2. In the accident report of 8 April 1978, the German authorities described the circumstances of the accident as follows:

'... was travelling in his car in the overtaking lane of the motorway. There, the tread of the right rear tyre came away, causing the tyre to deflate rapidly. Probably for that reason the car skidded, veered to the right of the carriageway, and collided sideways-on with a road sign ...'.

* Language of the Case: Dutch.

A report of 19 May 1978, drawn up by the Ingenieurbüro für Ursachermittlung bei Verkehrsunfällen, acting for the Staatsanwaltschaft [Public Prosecutor's Office] Aachen, discloses the following:

'4. Technical assessment of the defects found

4.1 Nature of the defect

4.1.1 Cause

With damage of this kind the cause is in general excessive shearing stress between the plies. Those stresses may be due to:

(1) driving with an under-inflated tyre,

(2) using the tyre at speeds exceeding those for which it was designed,

(3) rusting of the steel structure due to mechanical defects,

(4) insufficient resistance of the rubber mix to shearing,

(5) mechanical damage to the steel brace,

(6) unsuitable combination of tyre and wheel'

The report concludes:

'At the time of inspection the vehicle showed no technical defects (apart from the damage caused by the accident itself).

However, the combination of tyre and wheel on the vehicle is not approved by the car manufacturer and is therefore not accepted by the TÜV [Technischer Überwachungs-Verein; German vehicle-testing agency], under Paragraph 19 (2) of the Straßenverkehrs-Zulassungs-Ordnung [Code of approval for road vehicles].

On the other hand, tyre manufacturers consider that, where a 205/70 SR 14 tyre is used, the 5 1/2 J x 14 H2 wheel is the required wheel. The effective load capacity is 580 kg with an internal tyre pressure of 2.1 bar.

An internal tyre pressure of 1.9 bar, which was measured on the wheels of the front axle, corresponds to a load capacity of 530 kg.'

The combination mentioned above was the combination actually used on the car involved in the accident.

3. In its draft decision of 19 November 1982, referred to in Article 21 of the Rules on the Insurance of Officials of the European Communities against the risk of accident and of occupational disease (adopted pursuant to Article 73 of the Staff Regulations and hereinafter referred to as 'the Insurance Rules'), the Commission, relying upon an earlier report by the doctor appointed by the institution, suggested that the injuries sustained by Mr Leussink on 16 September 1982 should be consolidated as a permanent invalidity of 50%.

4. On 5 April 1983 Mr Leussink sent the Commission a request for compensation, worded in substantially the same terms as his application to the Court in Case 136/84.

5. On the same day Mrs Maria Brummelhuis, acting in her own name and jointly with Mr Leussink in their capacity of legal representatives of their four daughters, Monica, Mirjam, Mechteld and Maud, who were minors at that time, also sent the Commission a request for compensation for the non-material damage suffered by herself and the children, quantified as in the application in Case 169/83. The wording of both requests of 5 April 1983 was substantially the same.

6. After seeking and obtaining further explanations about the breakdown of the 50% figure, Mr Leussink informed the

Commission on 27 May 1983 that he could not accept that rate of invalidity and that he wished to refer the matter to the Medical Committee in accordance with Articles 21 and 23 of the Insurance Rules.

7. In the meantime, a forensic pathologist appointed in a parallel procedure (for private insurance purposes) found, by reference to a set scale, that the invalidity was 65%.

8. On 2 August 1983 Mrs Brummelhuis and the four Leussink children, represented by herself and Mr Leussink, brought an action pursuant to Article 178 of the EEC Treaty which was registered by the Court Registry under No 169/83. By letter of 11 April 1986 Monica Leussink, who in the meantime had reached the age of majority under Belgian law, expressed her wish to pursue in her own name the proceedings commenced against the Commission.

9. Pursuant to Article 90 (2) of the Staff Regulations, Mr Leussink lodged a complaint on 3 November 1983 with the Secretary-General of the Commission regarding his failure to reply to his request of 5 April 1983.

10. On 25 April 1984 the Commission informed Mr Leussink that the doctor appointed by the institution had found in favour of consolidating the injuries as at 8 March 1984 with a rate of permanent invalidity of 65%.

11. On 14 May 1984 Mr Leussink asked to be sent a breakdown of the 65% assessment and to be informed of the percentage which he might be allowed under Article 14 of the Insurance Rules.

12. Since the complaint under Article 90 (2) of the Staff Regulations remained unanswered, on 23 May 1984 Mr Leussink lodged an application at the Court Registry which was registered under No 136/84.

13. By letter of 25 June 1984 the Commission replied that the rate of 65% covered the compensation provided for in Article 12 and 14 of the Insurance Rules.

14. By that time Mr Leussink had resumed his normal duties and had been working for some time.

15. By letter of 20 November 1985 the Commission informed Mr Leussink that the Medical Committee, which Mr Leussink had asked to be consulted, had found *inter alia* that he had no pre-existing condition which could have altered the consequences of the accident, that consolidation had occurred on 4 October 1985 and that the permanent invalidity should be fixed at 75%, including 10% for psychological and non-material damage.

16. By letter of 30 December 1985 Mr Leussink notified the Commission that he was in agreement with the assessment rating of 75%.

17. The Commission paid Mr Leussink the sum of BFR 6 286 836 as compensation for a degree of invalidity of 65%, and on 5 December 1985 it paid him an additional sum of BFR 967 206, making the total compensation equivalent to a degree of invalidity of 75%.

18. The applicants describe the consequences of the accident, for which they seek compensation, as follows.

Mr Leussink states that, as far as his professional life is concerned, he has not only given up all hope of promotion but lives in permanent fear of not being able to cope with his duties or of being unable to do so in the future and of being dismissed at any time.

In his private life, his relations with his wife and children have been irreversibly disturbed. His emotional life is no longer the same as before the accident.

On 1 November 1981 he went to live by himself.

He can no longer play tennis, ski or swim. A delicious meal or a good wine no longer appeal to him and he has broken off relations with former friends and acquaintances.

As his wife, Mrs Brummelhuis found herself, after 16 years of happy married life, suddenly confronted by a different man who, since he no longer recognizes himself, reacts negatively to everything and often becomes impulsive and aggressive.

Since her mother was constantly at the bedside of her father in hospital abroad and was therefore frequently absent, Monica Leussink, who was 14 years of age at the time of the accident, suddenly became responsible for the household and for her sisters, aged 12, 10 and 7, and failed a year at school. She had to be treated by a psychologist.

Mirjam, who had initially shown great courage in so far as she never cried and was proud of that fact, finally suffered very serious after-effects.

Medical examinations and a change of school failed to provide a remedy. Since January 1983 she has been living with another family and has been suffering from anorexia nervosa. According to a Brussels psychiatrist, her illness is attributable to the disturbance in her relations with her father.

Mechteld suffered for many months from hyperventilation.

Maud, the youngest, has problems at school.

19. The Court decided to assign Case 169/83 to the Second Chamber.

20. By an order of 15 May 1985 made pursuant to Article 43 of the Rules of Procedure, the Court (Second Chamber) joined the two cases for the purposes of the oral procedure and the judgment.

21. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Second Chamber) decided to open the oral procedure and requested the Commission to reply *inter alia* to the questions set out below in section IV.

II — Conclusions of the parties

1. In his application in *Case 136/84, the applicant,* Gerhardus Leussink, claims that the Court should:

(i) Declare the application admissible and well founded;

(ii) Order the defendant to pay to the applicant as compensation for past and future non-material damage suffered by him the sum of BFR 5 000 000 together with interest thereon at the rate of 12% per annum from 5 April 1983 to the date of payment;

(iii) Annul the implied decisions rejecting the request submitted by the applicant on 5 April 1983 and the complaint submitted by the applicant on 3 November 1983;

(iv) Order the defendant to pay the costs.

In his statement of reply the applicant claims that the Court should:

(i) Allow his request;

(ii) Take note of the fact that he reserves the right to amend his claim in accordance with the final assessment of invalidity to be made by the Medical Committee in the procedure referred to in Article 73 of the Staff Regulations.

2. The *Commission* contends that the Court should:

(i) Declare the application inadmissible or at least unfounded;

(ii) Dismiss the application (after joining it, if appropriate, with Case 169/83);

(iii) Order the applicant to pay the costs.

3. In their application in *Case 169/83, the applicants*, Mrs Brummelhuis and her children Monica, Mirjam, Mechteld and Maud Leussink, claim that the Court should:

(i) Declare the application admissible and well founded;

(ii) Order the defendant to pay, by way of compensation for the non-material damage which they have suffered and will continue to suffer in the future the sum of BFR 3 000 000 to Mrs Brummelhuis and the sum of BFR 1 000 000 to each of the children together with interest thereon at the rate of 12% per annum as from 5 April 1983 to the date of payment;

(iii) Annul the implied decision rejecting the applicants' request on 5 April 1983;

(iv) Order the defendant to pay the costs.

In their statement of reply the applicants claim that the Court should:

(i) Declare the application well founded;

(ii) In the alternative, should the Court take the view that as yet it has not been not adequately shown that the relations between the applicants and their husband and father are disturbed or that a causal link between the accident and those disturbances is not, or not sufficiently, substantiated by the evidence produced to date,

(iii) Appoint one or more experts to examine the applicants in the light of the facts which underlie this case and to set down their findings in a reasoned, detailed report to be submitted within such time as the Court may determine;

(iv) In any event, take note of the fact that they reserve the right to adjust the amounts claimed depending on the final assessment of Mr Leussink's invalidity to be made by the Medical Committee in the procedure referred to in Article 73 of the Staff Regulations.

4. The *Commission* contends that the Court should dismiss the application as unfounded and order the applicants to pay the costs.

III — Submissions and arguments of the parties

The relationship between the accident insurance referred to in Article 73 of the Staff Regulations and the claim for further compensation; admissibility of the application in Case 136/84

1. The *Commission* takes the view that the sums payable to the applicant pursuant to the Staff Regulations are lump-sum compensation for the various forms of injuries and that the scheme of the Insurance Rules adopted under the Staff Regulations precludes any claim based on general law.

Since the compensation for which the Staff Regulations provide is mandatory, the victim of an accident cannot choose between the compensation afforded by those regulations and general damages and he may not in any circumstances seek to combine the advantages accruing under the two systems.

The Commission's view is in keeping with the principle of a 'forfait de pension', awardable under French administrative law, as applied in France by the Conseil d'État [State Council].

The Commission points out that Mr Leussink has not had to bear any loss of salary whatever, that all expenses directly incurred have been reimbursed and that a capital sum of BFR 6 286 836 has been paid to him by way of compensation for the invalidity as provisionally assessed, even before the final decision had been adopted. That capital sum was paid pursuant to the Insurance Rules also adopted under Article 73 of the Staff Regulations, the aim of those rules being to provide lump-sum compensation for non-material damage and for damage to social and family relationships, on which the applications are based. In that connection the Commission refers in particular to Article 14 of the Insurance Rules, which states that an official is to be granted an allowance in respect of 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. The Commission also refers to the judgment of 2 October 1979 (in Case 152/77, *Miss B* v *Commission* [1979] ECR 2819, in which the Court held that Article 73 also applies to mental injury affecting the emotions alone.

As far as Mr Leussink's application in Case 136/84 is concerned, the Commission concludes from the foregoing consideration that both the basis of the claim in this action and the extent of the compensation sought are identical to the basis and extent of the compensation claimed in the administrative procedure provided for in the Insurance Rules. Since that procedure had not ended at the time when Mr Leussink brought the matter before the Court, the application should be dismissed as inadmissible.

As regards the claims of Mr Leussink's wife and children in Case 169/83, the Commission concludes that those applicants are not entitled to call for additional compensation.

2. The *applicants* maintain that Article 73 of the Staff Regulations and the Insurance Rules are not intended to make good all the consequences of an accident in which an official is involved but only its economic consequences. In this regard Mr Leussink refers in particular to Article 10 of the Insurance Rules, which makes provision for the reimbursement of expenses, that is to say sums paid for the care and treatment designed to restore the physical and mental well-being of the official. He further argues that Article 14 of the Insurance Rules is concerned with aesthetic damage, which has to be distinguished from non-material damage. Consequently, compensation is given under the provisions of the Staff Regulations and the Insurance Rules only for economic and aesthetic damage. In pleading Article 215 of the Treaty in support of their claims, the applicants maintain that they are entitled to damages for non-material injury, which is not covered by the Insurance Rules.

It follows that the purpose of the action brought by Mr Leussink in Case 136/84 differs from that of any appeal which he might lodge pursuant to Article 28 of the Insurance Rules against the decision closing the procedure referred to in those rules. The fact that the procedure had not yet ended cannot therefore affect the admissibility of Mr Leussink's application.

It also follows that accident risks insurance provided for in Article 73 of the Staff Regulations and the Insurance Rules cannot affect the merits of the applications, which relate to uninsured non-material damage.

The Commission's liability

1. The *applicants* base their action on the second paragraph of Article 215 of the EEC Treaty. They claim that the Commission's liability should be determined in accordance

with the general principles common to the laws of the Member States and not on the basis of the national law of the Member State in which the accident occurred.

They emphasize that, according to legal writers, the authors of the Treaty, in referring to general principles, wished to leave the Court a wide margin of discretion, which, in the words of the Advocate General, means that 'it is upon [the Court] in the final analysis that the authors of the Treaty have conferred the task of settling the system of extra-contractual liability . . .' (judgment of 14 July 1967, Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245, at p. 273).

The legal writers are also of the opinion that the reference to general principles common to the legal systems of the Member States excludes a system of non-contractual legal liability based solely on the law of one State, but allows the Court to choose whichever principles it regards as the best and most progressive (see the Opinion of the Advocate General in Joined Cases 63 and 69/72 *Werhahn and Others* v *Council* [1973] ECR 1229; judgment of 13 November 1973). The most progressive principles of the Member States as regards tortious liability impose absolute or strict liability on the owner of the thing which caused the damage. That is the case under French law and the position is the same under Belgian law, which further requires that the thing in question should have a defect, that is to say, an abnormality such as might cause damage. In this particular instance, the Commission's vehicle was fitted with at least one defective tyre, since its tread became detached.

If the Court should take the view that the theory of presumed liability for things under a person's superintendence cannot found the Commission's liability, its liability none the less arises from the faults of the Commission or its agents.

The Commission was at fault in the choice of the type of tyre fitted to the vehicle because the Ingenieurbüro für Ursachermittlung bei Verkehrsunfällen found in its report that that type of tyre was not approved by the vehicle manufacturer and was therefore prohibited by the German vehicle-testing agency. The Commission and its agents were at fault and negligent in fitting the vehicle in question with an unsuitable type of tyre, contrary to the manufacturer's instructions, which was liable to cause abnormal wear, which in turn was likely to cause an accident.

Moreover, the Commission staff were negligent in maintaining and inspecting of the vehicle, since, according to the expert report, the tread had gradually become detached at certain points, although this process would not be noticeable by a technically unqualified driver.

The Commission was also at fault in choosing snow tyres in that season for travelling at high speed over dry road surfaces.

Finally, the defendant's agent was also at fault in driving at such a high speed with tyres which were neither suited to the weather conditions nor designed for high speeds. The high speed was also likely to cause the tread to become detached from the tyre.

2. The *Commission* contends that, in view of the differences between the legal systems of the Member States in the field in question, it is not possible for the time being to define any general principle truly common to all of them. In such a case, it is appropriate to apply the traditional principle of *lex loci delicti commissi.* Since the accident occurred in Germany, the Commission's liability should therefore be determined in conformity with German law.

The relevant rule in the German road-traffic statute [Straßenverkehrsgesetz], which provides for strict liability, excludes compensation for non-material damage. On the other hand, under the general law of Germany, under which damages may be awarded for non-material damage, strict liability does not exist but proof of negligence is required; the owner of a thing which caused an accident cannot be held liable where there is a hidden defect, as in this instance.

According to the Commission, the rules of German law demonstrate that each national system must always be viewed in its entirety, which means that the way of ascertaining whether liability exists or has been proved cannot be dissociated from the way of evaluating the damage requiring compensation or the question of causality. That interaction, which is especially well illustrated by the German system, is sometimes quite evident in court judgments. The wide view of liability in Belgium is in practice offset by the fact that the damages awarded by the courts for non-material damage represents only a small part of the amount claimed.

The Commission infers from this that applicants who claim compensation for purely non-material damage may not plead absolute liability on the Commission's part but must prove that it was negligent.

This problem is, moreover, closely related to the question of strict liability which has been considered by the Court. According to its decisions, strict liability must be considered an exception applicable only in the case of abnormal, special and direct damage. In view of the sums already paid pursuant to the Staff Regulations, such damage cannot be considered to exist in the present case. The Commission consequently doubts whether the second paragraph of Article 215 of the EEC Treaty covers the concept of 'absolute liability' recognized by some Member States.

The Commission denies having been negligent. It points out that the accident was due to the detachment of the tread from a tyre, the cause of which is not known.

In the report of the Ingenieurbüro für Ursachenermittlung bei Verkehrsunfällen it is stated that the type of tyre damage found is generally due to excessive tension between the plies but no less than six possible causes for such excessive tension are then listed.

The Commission denies that it was negligent in choosing a type of tyre which might have been regarded by the manufacturer as unsuitable. The only conclusions to be drawn from the expert report on that point are that the tyre/wheel combination in question:

(a) had not been expressly approved by the car manufacturer;

(b) had not been expressly disapproved by the car manufacturer;

(c) was however considered appropriate by the tyre manufacturer; and

(d) was only one of six possible causes of the accident.

The applicants have also failed to prove negligence in the maintenance and servicing of the car. Neither the expert report nor any other document laid before the Court suggests that a professional driver or a maintenance mechanic could in any way have discovered or observed the defect before it appeared on the journey in question. Indeed, the large number of possible causes support the view that it has by no means been demonstrated that the defect could have been detected before the accident.

The Commission denies that the use of a snow tyre at the time of the accident was unjustified. Since Commission vehicles are required for use on official journeys throughout Europe, it is neither possible nor rational to change the tyres according to the destination. As a rule, snow tyres are replaced by ordinary tyres on 15 April, when there is virtually no further risk of snow.

Finally, the Commission maintains that it cannot be held liable on account of the speed, which, according to the applicants, could have caused the tread to become detached from the tyre. It points out that the 'S' symbol on the tyres indicates that the vehicle may travel at a speed of 180 km per hour. After the accident, that limit was reduced to 160 km per hour for snow tyres. In this case, however, the Commission's agent was driving the car at 120 to 140 km per hour.

The damage suffered and the causal link

1. According to the *applicants,* the non-material damage suffered by Mr Leussink is clear from the medical report of 8 March 1984 drawn up by the Commission's Medical Officer in which Mr Leussink's present personality is described and a rate of invalidity proposed.

The loss of the joys of life and the disturbance caused to his conjugal, family and social relations diminished his capacity for experiencing pleasure and emotion and caused him pain and suffering. Under Article 215 of the EEC Treaty such damage may be made good.

The accident also caused a deterioration in normal family relations between husband and wife and between father and daughters. As far as the daughters were concerned, the applicants have produced medical certificates and attestations from school.

The applicants observe that the medical reports demonstrate the existence of a causal link between the accident of 7 April 1978 and the damage suffered by them. They deny that the conjugal difficulties can have any other cause than the serious and permanent injuries, mental as well as physical, caused by the accident.

However, should the Court take the view that the damage suffered by Mr Leussink's wife and children or the existence of a causal link has not been sufficiently proved, the applicants would consider it appropriate to call for expert medical reports in order to determine the extent and seriousness of the damage or to consider more closely whether there is a causal link.

The sums sought are, of course, an evaluation *ex aequo et bono* of that damage.

2. As far as the damage suffered is concerned, the *Commission* stresses once again that the lump-sum compensation provided for by the Staff Regulations and already paid to Mr Leussink also includes a sum for pain and suffering or adverse effects on his social and family relationships.

The percentages applied in order to calculate that compensation had already taken into account, to a considerable degree, personal distress and factors incapable of objective evaluation.

The applicants have failed to establish the existence of any damage susceptible of objective evaluation but not covered by the compensation paid under the Staff Regulations and the Insurance Rules.

As regards the existence of a causal link, it is uncertain, to say the least. The medical reports reveal that, even before the accident, Mr Leussink displayed particular traits of character and that he might previously have experienced difficulties with his wife and his superior. The Commission emphasizes once again that, in the legal systems of some Member States, the requirement of a causal link is at least a corrective factor in a balanced scheme of liability.

IV — Questions asked by the Court

The Court asked the Commission to reply in writing to the following questions:

(1) In the Commission's opinion, are the heads of compensation provided for in Articles 12 and 14 of the Insurance Rules mutually exclusive (requiring a choice to be made), or are they cumulative (capable of being awarded together)?

(2) Is the compensation procedure in this case, based on Article 12, Article 14, or both?

By letter of 21 April 1986 the Commission replied that the heads of compensation provided for in Articles 12 and 14 of the Insurance Rules had to be regarded as cumulative benefits which could be awarded together. In fact they relate to two different situations. Article 12 deals (implicitly) with invalidity affecting the official's capacity for work, whereas Article 14 deals with '. . . any injury or permanent disfigurement which, although not affecting his capacity for work, constitutes a social defect and has an adverse effect on his social relations.' Should an official suffer invalidity which has only a minor effect on his capacity for work, he may claim the application of both Article 12 and Article 14.

As far as the compensation procedure is concerned, in this case it was based on Article 12 and on Article 14 of the Insurance Rules.

V — Oral procedure

At the sitting on 29 May 1986, the applicants, Gerhardus Leussink, Mrs Brummelhuis and the children, Monica, Mirjam, Mechteld and Maud Leussink, represented by Benoît Humblet, and the Commission, represented by Piet Vercruyse, presented oral argument.

O. Due
Judge-Rapporteur