OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 7 MAY 1981

My Lords,

The applicant in this case is a Commission official who sustained an injury to his head at a time when he was insured against accidents in accordance with the Staff Regulations. In these proceedings he asks the Court to annul a communication dated 30 May 1980, whereby the Commission confirmed its own previous decision, made on the basis of a report of the Medical Committee, to assess his partial permanent invalidity at 3%, and to fix the point of the stabilizing of his medical condition at a date some two years after the accident. He asks the Court to declare that his partial permanent invalidity should be assessed at 15%; and he claims interest on the capital sum due to him by way of compensation from the date of the accident and the adjustment of that sum to counteract the depreciation of the currency.

The main facts are as follows.

Giorgio Morbelli has been an official of the Commission since 4th September 1975. At all material times he was employed to work in the Commission's Official Publications Office in Luxembourg.

On Saturday 21 February 1976, at about 8.40 a.m., he met with an accident in a post office in Luxembourg. He claims that as he was passing through the door giving access to the post office in Rue du Commerce the returning mechanism snapped and the door struck his head violently.

He reported the accident at the counter and was taken immediately to the Sacré-Cœur Clinic. There he was found to have a cut on his left auricle and contusions in the region of his right temple. The cut behind his ear was duly stitched, and after a radiographic examination of his cranium, which showed no fracture, he was sent home with the recommendation that he should stay away from work for ten days.

After his return home he complained of violent headaches accompanied by a feeling of torpor, a sense of disorientation and more general symptoms of sickness. He obtained further medical attention. He was subsequently examined by many doctors. It does not seem necessary to refer to all of these examinations. The principal ones can be summarized as follows.

He was seen at the Sainte-Thérèse Clinic in Luxembourg late in February or early in March 1976 where he remained for a week. After an electro-encephalogram, his doctors detected an irregularity in the electrical impulses of the brain attributable to minor concussion ("une dysrythmie asymétrique imputée à la légère commotion"). On his discharge from the Clinic, he spent about nine days convalescing. He returned to Luxem-

bourg and to work on 10 March 1976, but he found it necessary to remain away from his work from time to time on account of illness.

About three months later he underwent further medical examination in Milan, directed by Dr Franco Luckenbach. The latter submitted a full report dated 1 October 1976. He found no sign of any lesion nor of any epileptic tendency but he reported that Mr. Morbelli was inclined to depression. He concluded that the applicant's medical condition had by then stabilized, and he assessed his permanent injury at 10%.

In April 1977 Mr. Morbelli underwent a third major examination, this time in Luxembourg, by a panel of three physicians, Doctors Glaesener, Stumper and Meir. Dr. Glaesener submitted a report of that examination, dated 28 April. It concludes that the applicant had a subjective post-concussion syndrome accompanied by damage to the central vestibulary structures in the brain stem. This report, too, assessed the applicant's permanent injury at 10%. The Commission maintains that this report was drafted in accordance with the criteria for assessment used under the law of Luxembourg, for the applicant had at that time instituted civil proceedings against the Post Office.

On 12 May 1978 at the Commission's request he was examined at the Jean Monnet Building in Luxembourg by the consultant physician to the Commission's insurers. On 4th July the insurers informed the Commission that their consultant physician had assessed Mr Morbelli's partial permanent invalidity at 3%. On 16th July the Commission told him that this produced BFR 95 064 by way of compensation. He did not accept the assessment and accordingly his case was referred to Dr Semiller, the head of the Commission's Medical Service. The latter referred his case to three specialists (an opthalmologist, a neuro-surgeon, and an ear, nose and throat specialist) who examined him. After receiving their reports, Dr Semiller on 10 November 1978 reached the conclusion that the assessment of 3% was correct; but he fixed the date for the stabilizing of the applicant's medical condition in September 1978. On 16 November 1978 the Commission again offered Mr Morbelli BFR 95 064.

The applicant did not accept that offer but exercised his right to have the matter referred to the Medical Committee. Before that Committee was convened, Mr Morbelli underwent a further major examination, this time at the Mondino Clinic in Pavia. On his discharge, on 15th June 1979, that Clinic issued a very detailed report, which does not explain the extent of his injury in mathematical terms, but concludes with a brief diagnosis: post-traumatic migraine ("cefalea cronica post-traumatica").

Twelve days later Mr Morbelli appeared before the Medical Committee. This was composed of three members: Dr Elens, a traumatologist nominated by the Commission; Dr Glaesener (who had participated in the applicant's examination in April 1977) nominated by Mr Morbelli; and Dr Van Bever, a

traumatologist. On 27 June 1979 these doctors signed a report stating that Mr Morbelli's partial permanent invalidity was assessed at 3%, and that his condition should be taken to have stabilized on 25 February 1978. By a letter dated 11 September 1979 the Commission communicated the conclusions of the Medical Committee to the applicant and again offered the sum of BFR 95 064 which he refused.

On 11 December 1979 Mr Morbelli made a complaint under Article 90 of the Staff Regulations which is the origin of this action. He claimed, among other things, that his partial permanent invalidity should be based at 15%, alternatively that a new Medical Committee be set up to assess the degree of his invalidity.

In mid-February 1980 he was examined by Professor Zanalda in Turin. Professor Zanalda produced a detailed report, containing full accounts of the Applicant's examinations by Doctor Luckenbach, by Doctor Glaesener (in April 1977) and by the staff at Pavia, and an account of the decision of the Medical Committee. It placed considerable emphasis on the Applicant's psychological state. In particular, this report stated that Mr Morbelli's nervous tension was abnormal; that the psychotherapy to which he had submitted himself had produced the result, among others, of aggravating his tendency to self-denigration; and that the use of analgesics, in the dosages and for the period in which Mr Morbelli had taken them, was a factor in the deterioration of his health. Professor Zanalda observed, however, that there was no evidence to suggest that Mr Morbelli had suffered from these troubles before the accident, apart from the fact that he had a history of suffering from headaches, and he concluded that Mr Morbelli's partial permanent invalidity should be assessed at not less than 15%. That figure took account of both his physical injury and his state of hypochondria.

On 4 March 1980 Mr Morbelli submitted an addendum to his complaint, enclosing the report of Professor Zanalda. On 30 May 1980 the Commission rejected the complaint expressly. On 7 July 1980 Mr Morbelli's application was registered at the Court.

The Commission contends that this action is inadmissible because in seeking to annul the implied rejection of his complaint on 12 April 1980 (alternatively the express rejection of his complaint on 30 May 1980) the applicant is seeking to review the confirmation of a previous decision, which he is not entitled to do. In support of that proposition it cites a series of cases.

It does not seem to me that those cases support the Commission's case. It is established that an appellant who fails to challenge a decision within the periods specified in Articles 90 and 91 of the Statute cannot challenge a subsequent communication merely confirming the previous decision. The principle is expressed in the headnote to Case 24/69, *Theo Nebe* v *Commission*, [1970] 1 ECR 145 "The express rejection of a request or complaint, after the expiry of the period for lodging an application on the ground of its implied rejection, which

contains no new factor relating to the position in law or in fact existing at the time of rejection, is a purely confirmatory measure and is not capable of adversely affecting an individual".

In most of the cases on which the Commission relies, this Court, in finding the application inadmissible, pointed to an earlier decision against which the appellant had failed to appeal timeously. (See Joined Cases 50, 51, 53, 54 and 57/64, *Ralph Loebisch and Others* v *Council*, [1965] 2 ECR 825 at p. 831; Case 24/69, *Theo Nebe* v *Commission* at p. 151; Case 58/69, *Raymond Elz* v *Commission*, [1970] 1 ECR 507 at p. 511; Case 79/70, *Helmut Mullers* v *Economic and Social Committee of the EEC and EAEC*, [1971] 2 ECR 689 at p. 698; Case 33/72, *Monique Gunnella* v *Commission*, [1973] 1 ECR 475 at p. 481; Case 56/71, *Godelieve Goeth Van Schuerer* v *Commission*, [1973] 1 ECR 181 at p. 186; Case 1/76, *Ute Wack* v *Commission*, [1976] ECR 1017 at p. 1023; and Cases 33 and 75/79, *Richard Kuhner* v *Commission*, [1980] ECR 1677 at 1683).

No such consideration applies in the present case. The letter communicating to Mr Morbelli the conclusions of the Medical Committee was dated 11 September 1979. Accordingly, his complaint, deposited on 12 December, was submitted within the time-limit set out in Article 90 (1) of the Statute. Since no reply to that complaint was received within the next four months, it must be taken to have been rejected by implication on 12 April 1980, under the final paragraph of Article 90 (2). By virtue of Article 91 (3), Mr Morbelli was entitled to appeal at any time before 13 July 1980. His application to the Court was lodged on 2 July 1980.

Mr Morbelli's application is explicitly directed at the Commission's communication dated 30 May 1980 and not at the implied rejection of his complaint on 12 April 1980; but he is still within time and the substance of his complaint is clear.

The remaining authorities on which the Commission relies do not seem to me to assist their submission.

In my opinion this case is admissible and should be considered on its merits.

On the merits of the case, the appellant contends first, that the Medical Committee was not duly constituted so that any decision based on the Committee's conclusions was invalid. This point was only raised following questions put by the Court.

The composition of the Medical Committee is governed by the rules adopted in pursuance of Article 78 of the Statute. Article 23 (1) of those rules provides, in part, as follows:

"The Medical Committee shall consist of three doctors:

— one appointed by the appointing authority;

— one appointed by the official concerned or those entitled under him;

— one appointed by agreement between the first two doctors".

There is no question but that one member of the Medical Committee (Dr Elens) was appointed by the Commission and another (Dr Glaesener) was appointed by Mr Morbelli. It is the third member (Dr Van Bever) whose appointment is now called in question.

The argument is based on a passage in a letter from Dr Glaesener to Mr Morbelli's legal representative dated 26 January 1981 namely:

"I did not choose Dr Van Bever since I did not know this doctor, but this doctor was proposed to me by Dr J. F. Elens. I saw no difficulty in expressing to Dr Elens my consent to the appointment of Dr Van Bever as an expert in the above-mentioned case."

It was suggested that Dr Glaesener had merely acquiesced in Dr Van Bever's appointment and that this was insufficient to constitute an appointment by agreement. This seems to me an impossible contention but in the end Mr Morbelli's counsel conceded that Dr Glaesener had agreed to the appointment. This point in my opinion is without foundation.

A second argument was advanced on behalf of Mr Morbelli in an attempt to impugn the composition of the Medical Committee: it was said that Dr Van Bever is frequently nominated as an expert by the company which insures officials against the risk of accidental injury. The Court was told by the Commission, however, that although Dr Van Bever is a medical adviser for an important French insurance company he has no link with the company involved in the present case. There is nothing to suggest that this is inaccurate or that Dr van Bever behaved in other than an impartial way.

A number of criticisms are made as to the way in which the Medical Committee carried out its task. It is said that their examination was perfunctory, that none of them could really understand some of the medical reports written in Italian and that some of the tests were carried out by para-medical assistants. Moreover it is said that the decision is in conflict with other assessments made by other doctors.

In my opinion the Court has already made it clear that where an assessment is entrusted to a Medical Committee, the Court will not normally interfere with what is essentially a medical decision, so long as the committee is properly constituted and proceeds in accordance with the rules laid down, and in a fair way, to deal with the essential matter to be considered. It seems to me that if the committee is not properly constituted or the obligatory rules are not followed the Court may interfere. Similarly if the committee's decision is shown clearly to have proceeded on a wrong basis — either because essential matters have been left out of account or irrelevant matters included — the Court may interfere.

On the material before the Court it does not seem to me that any of the criticisms referred to above can justify the Court saying that there has been an error of law. The Medical Committee can obviously employ para-medicals if they think it appropriate. The length of the Committee's deliberation is a matter of medical judgment and not for rules of law. I am not satisfied on the evidence that the Committee failed to understand the Italian medical reports or that, even

if these were not studied in translation, this vitiates the decision of the Committee. The fact that this Committee disagrees with the opinions arrived at by other doctors, both before and after the Committee's own decision, does not mean that the Committee erred in such a way that the Court should interfere in this case.

The main point which in my opinion appeared to call for an answer in this case was the suggestion that Dr Glaesener was manoeuvred by the other doctors to sign because of their view that psychological injury was not to be taken into account. If this were correct it would mean that not only Dr Glaesener, but also the other members of the Committee, had proceeded on a wrong basis and the matter would have had to be looked at by a different committee. The table annexed to the Rules on the Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease provides for compensation for incurable insanity, at the rate of 100%, and adds that in cases of permanent partial invalidity not provided for above, the degree of invalidity is to be determined by analogy with the foregoing table. This Court has already decided in Case 152/77, *Miss B.* v *Commission*, [1979] ECR 2819 at pp. 2834-5 that a mental injury may be considered as falling within the concept of invalidity even if it only affects the emotions. Counsel for the Commission indeed accepted that this was the correct approach.

The Medical Committee stated in its report that it had taken account of the entire state of Mr Morbelli's health; and its conclusions appear to have included an assessment of psychological injury, since we know of no purely physical injuries of a permanent kind resulting from the accident.

There appears to be a residual suggestion that because Dr Glaesener had been persuaded by the other two doctors to change his mind the final result is defective. So long as the approach of the majority members of the Committee was correct this does not seem to be a ground for setting aside the decision of the Committee.

For these reasons I have formed the opinion that the conclusions of the Medical Committee are not to be disturbed.

Mr Morbelli's counsel drew the Court's attention to the fact that Dr Semiller gave September 1978 as the month in which the appellant's medical condition stabilized, whereas the Medical Committee fixed on a date in February of the year. The difference is, however, withouth significance in the assessment of the sum due to Mr Morbelli under the Rules on Insurance of Officials. At the most, it might be relevant in determining whether the applicant is entitled to arrears of interest on the capital sum due to him under the Rules, or the compensation for the depreciation of the currency between those months.

The principle governing the award of interest in cases such as the present was enunciated by the Court in Case 101/74 *Kurrer* v *Council*, [1976] ECR 259 at 269:

"since there is no provision in the Staff Regulations or of the insurance policy which expressly provides for the payment of interest 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 [Commission] which has in fact caused him damage".

The passage of time between the accident and the hearing in this Court was substantial; but that fact alone does not warrant the conclusion that the Commission has been at fault. It seems that on the view most favourable to Mr Morbelli, less than five months elapsed between the stabilizing of Mr Morbelli's medical condition and 6 July 1978 when he was, for the first time, offered compensation of BFR 95 064. His examination by three specialists nominated by the Commission, and the repetition of the first offer of compensation, followed in little over four months. The convening of the Medical Committee, and the reporting of its conclusions, took place within a year thereafter. This chronology, without more, is not such as to lead to the conclusion that the Commission was guilty of a wrongful act or omission.

Finally, the applicant asks the Court to compensate him for the loss which he has suffered by reasons of the depreciation in the purchasing power of the Belgian franc. He advanced this argument in the face of Article 73 of the Staff Regulations, which provides that in the case of partial permanent invalidity an official shall be entitled to receive compensation assessed by reference to the amount that he received by way of basic salary in the twelve months before the accident. Unless he could show that the Commission was at fault in failing to offer him the compensation to which he was entitled before 6 July 1978 (which he has failed to do) this seems to me to be an untenable argument. Whether it could ever ground a claim, it does not seem to me necessary to decide.

I am therefore of the opinion that the application should be declared admissibile but unfounded. It follows, in my opinion, that Mr Morbelli should be ordered to pay his costs, in accordance with Article 69(2) of the Rules of Procedure, and that the Commission should bear its own costs, in accordance with Article 70 of those Rules.