cases the relatives of the tenant were awarded an immediate contractual claim for damages against the landlord based on § 328 BGB in the decisions RGZ 91, 24; 102, 232; WarnRspr 1921, no 96. [The court goes on to give a dozen or so examples from its case law over the previous two decades, including the *Taxi collision* case.[36]] This more recent case law is to be followed. It represents a perspective which is indeed healthy and which lives up to the contemporary living conditions and the general sense of justice.

If the present case is adjudicated on the basis of this case law the following conclusions are to be drawn. The claimant was in a long term employment relationship with widow M as her attendant. By virtue of this position the claimant was entitled and obliged, not only in order to sustain her own health but also to look after the interests of her employer, to enter the bathroom from which the smell of gas seemed to emerge. This room was therefore designated for her to provide services, and because the gas leaked from the pipe the room was not fit to protect her against dangers for life and limb; the unfitness was due to the grossly negligent performance of the task of changing the position of the gas meter, which had been given to the defendant company, by B, the person they employed in the execution of their contractual obligations. With regard to the protection of life and limb of the attendant, Mrs M was, according to § 618(1) BGB, under obligations which the legislator considered to be so essential that the parties may not exclude or limit them in advance (§ 619 BGB). These made her liable for damages to the claimant although there was no fault on her part. For liability under § 618 BGB is contractual, and therefore § 278 BGB is applicable (RGZ 77, 408; . . .), so that Mrs M had to answer the claimant for the fault of the respondent company. . . .

Now the purpose of the contract for works which was pursued by Mrs M and which was capable of being recognised by the defendant company was to have the position of the gas meter properly changed, and in particular to prevent that the performance of the task should cause danger to life and limb of either Mrs M or of such persons to whom she might become liable under § 618 BGB. Furthermore, no objection in law can be taken against the view of the appellate judge, gained from a supplementary interpretation of the contract according to § 157 BGB, that Mrs M and the defendant company would have agreed—if all those involved had contemplated such a possibility at the time of contracting—on the latter being directly liable for all damage which could arise for the persons which would be entitled to damages against Mrs M under § 618 BGB because of the improper changing of the position of the gas meter. For Mrs M would have made the assumption of such direct liability a term of the contract, and the defendant company would have agreed to accept the term to get the job, all the more so because the defendant company in any case had to deliver the works without any defects, and it did not make a significant difference for it whether it would be directly liable for damages to the employee of Mrs M or whether it would be subject to the recourse of the latter. . . .

Notes

(1) § 618(1) BGB provides that the employer in a contract for services (here, Mrs M)

[36] See above, p 1197.

has to fit up and maintain rooms, equipment and apparatus which he has to provide for the performance of the service, and so to regulate services which are to be performed under his orders or his direction, that the employee is protected against danger to life and health as far as the nature of the service permits.

(2) In this case, § 278 BGB is relevant in two legal relationships. With regard to the contract for services between Mrs M and the claimant, it provides that Mrs M is responsible for the fault of the defendant company. With regard to the contract for works between Mrs M and the defendant company, it ensures that the defendant company is responsible for its plumber, B.

(3) The Reichsgericht refers to the huge body of case law that had come into existence since the 1915 *Taxi collision* case. It acknowledges that these decisions did not concern situations where the agreement between the parties created a right to enforce performance in the third party but rather 'cases where a third person has suffered harm', ie where the non-performance or defective performance of the contract adversely affected the third person. However, the language of the Reichsgericht is still that of an application of § 328 BGB, the provision on contracts for the benefit of third parties in the strict sense.

(4) In the 1950s it was increasingly recognised that this approach was stretching the limits of § 328 BGB too far. Legal scholars suggested that the contract in cases like this should be treated as having 'protective effects' for the third person only. Since then, actions like those in the *Leaking gas* case have been considered as being based on the 'doctrine of the contract with protective effect for third parties' (*Lehre vom Vertrag mit Schutzwirkung für Dritte*).

(5) The application of this doctrine has even been extended to the precontractual phase. It may be remembered that German law, under the doctrine of *culpa in contrahendo*, assumes contractual liability if a prospective buyer suffers physical damage during the negotiations.[37] The protective effect of the precontractual duty of care can also extend to third parties.

BGH, 28 January 1976[38] **26.20 (DE)**

Vegetable leaf

A 14-year-old girl who accompanies her mother to a self-service store derives contractual rights from the precontractual relationship between her mother and the store.

Facts: The claimant, aged 14, and her mother went to a small self-service store which was a branch of the defendant company. Whilst her mother stood at the till, the claimant went around the till to the packing counter, fell and suffered an injury. She alleged that she had slipped on a vegetable leaf and sued the defendant for damages.

Held: The first instance court rejected the claim. The appeal court granted the claim on the basis of

[37] See above, p 108 (*Falling rolls of lino*).
[38] BGHZ 66, 51, NJW 1976, 112.

delictual liability, *culpa in contrahendo* and the doctrine of the contract with protective effect for third parties, but deducted 25 per cent because of the claimant's contributory fault. The defendant's further appeal was unsuccessful.

Judgment: . . . IV. These findings [of the appeal court] are legally sound—at least as far as the result is concerned.

However, there are concerns with regard to the main line of reasoning of the appeal court, according to which the defendant is directly liable to the claimant for fault in concluding a contract (*culpa in contrahendo*), without a need to rely on the doctrine of the contract with protective effect for third parties. In cases like the present, liability for *culpa in contrahendo* is significantly more favourable to the injured party than the general delictual liability for breach of the general duty of care towards third persons, for example in respect of the aggravated liability for persons who the debtor employs in the execution of his contractual obligations (§ 278 BGB, as opposed to § 831 BGB), the longer limitation period (§ 195 BGB, as opposed to § 852 BGB) and the reversal of the burden of proof (§ 282 BGB). This head of liability is based on a legal relationship of obligation, developed in supplementation of the written law, which arises from the parties entering into negotiations and which is mostly independent of the actual conclusion or validity of the contract (BGHZ 6, 330, 333; settled case law; *cf* Larenz, *Schuldrecht*, 11th edn, vol I, pp 94, 96f, with further references) . . . However, liability for *culpa in contrahendo* in contracts of sale like this always requires that the injured party has entered the business premises with the object of concluding a contract, or at least with the object of establishing 'business contacts' (thus Larenz, *Schuldrecht*, above, pp 94ff and MDR 1954, 515)—ie at least as a *potential* customer, albeit perhaps without a firm intention to make a purchase (*cf* BGH 26 September 1961 [NJW 1962, 31] . . .) . . . It may be difficult to draw the line in a given case, above all because the distinction refers to an internal intention which is hard to prove. However, in the present case it is beyond dispute that the claimant, from the start, did not intend to conclude a contract of sale with the defendant, but rather wished to accompany her mother and help her with making her purchases. A direct application of liability for fault in concluding a contract is therefore excluded.

V. Nevertheless, the appellate judgment is correct, as far as the result is concerned, because the appeal court's alternative line of reasoning supports the decision.

1. Had the mother of the claimant suffered an injury in the same way as her daughter, the liability of the defendant for *culpa in contrahendo* would be beyond doubt—the further appeal of the defendants evidently takes this for granted . . . it is obvious that at the moment of the accident there was a legal relationship of obligation which justifies liability for *culpa in contrahendo* between the defendant and the mother of the claimant who had already made a definite selection of the goods to be purchased.

2. The claimant, too, can rely on this legal relationship of obligation to justify her contractual claim for damages. It is in line with long-established case law, particularly of this Senate, to hold that, in special circumstances, even external, third persons who were not involved in the formation of a contract can be included in its sphere of protection. As a result, they do not have a claim for performance of the primary contractual duty but they are entitled to the protection and care afforded by the contract and they can in their own name enforce claims for damages arising from the breach of these secondary duties (judgments of this Senate of 16 October

1963 . . . = NJW 1964, 33; . . .). There is no need in this case to delve into and decide on the theoretical question whether such a 'contract with protective effect for third parties' (*cf* Larenz, *Schuldrecht*, above, pp 183f and NJW 1960, 77f) is based on the supplementary interpretation of a contract that is, to this extent, incomplete (§§ 133, 157 BGB), as has been hitherto assumed by the courts, or whether direct, quasi-contractual claims derive from grounds independent of the hypothetical intention of the parties, such as custom or judicial development of the law, as is increasingly suggested by legal writers (see, eg, Palandt/Heinrichs, . . .; Larenz, . . .; Gernhuber, . . .; Esser, . . .; Canaris, . . .). In any event, according to both views, the decisive factor is that the contract, according to its purpose and object, and taking into account the requirements of good faith, requires an inclusion of the third person in its sphere of protection, and that one contractual party can honestly—and in a way that is recognizable for the other party—expect that the protection and care owed to him will similarly be afforded to the third person (*cf* BGHZ 51, 91, 96; . . .). There is no valid reason, as a general rule, to exclude contracts of sale from this kind of contractual arrangement which is legally possible—as is particularly shown by sales in shops, where the buyer potentially has to enter the seller's sphere of influence together with the third person. This has not been held by the Sixth Civil Senate, in the decision referred to above (BGHZ 51, 91, 96), either.

3. However, the inclusion of third persons in the protective sphere of the contract must be limited to narrowly confined instances if the difference in design between contractual and delictual liability, as established by the legislator, is not to be abandoned or blurred (BGH 25 April 1956 . . . = NJW 1956, 1193, . . .). It does not have to be decided whether the mere fact that the customer makes use of a third person in initiating and conducting the contract of sale in a self-service store is sufficient to justify the protective effect; in the present case there is the additional element that the mother of the claimant was, under her relationship with her, responsible for the wellbeing of her daughter (BGHZ 51, 91, 96). She could therefore, for this reason alone, reasonably—and in a way that was recognizable for the defendant—expect that her daughter who accompanied her would enjoy the same level of protection as she did. The courts have always seen such a close family law tie as a justification for the extension of the protective effect of a contract (BGH 16 May 1965 . . .).

4. It does not matter for the result that in the present case the contract of sale had not been concluded at the moment of the accident. Particularly if the duty of protection and care is regarded as the determinative element of the legal relationship of obligation which is established by the parties entering into negotiations, and if it is taken into account that the other party owes this duty of care to the same extent before and after the conclusion of the contract, it is only logically consistent to include in this legal relationship of obligation third persons who are equally worthy of protection (*cf* Larenz, *Schuldrecht*, above, p 188). Furthermore, there would be no reasonable justification to make the contractual liability contingent on the mere coincidence whether, at the moment of the injury, the contractual negotiations have led to the final conclusion of the contract or not; this is graphically shown by the present case where the 'negotiations for the sale' had been essentially completed and the conclusion of the contract was in any event, at the moment of the accident, imminent—possibly it was even delayed without the claimant's mother being responsible for this by her checking out at the till. The view raised by the defendants in their further appeal, ie that an accumulation of liability for '*culpa in contrahendo*'

and 'inclusion of a third person in the protective effect of a contract' would lead to an unpredictable extension of the seller's risk, is in principle directed against the justification of both doctrines. Indeed, it cannot be dismissed out of hand that there is a danger of opening the floodgates. However, as it has been said before, the courts have always met this concern by subjecting the inclusion of a third person in the protective sphere of a contract to strict requirements. It may be the case that with regard to merely *pre*contractual legal relationships particular reluctance may be required. But in any event, even if the lines are drawn as narrowly as possible, there are no concerns against the extension of the protective effect if—as in the present case—the person causing the damage could not reasonably have objected at the outset to the request by the mother who led the negotiations to expressly grant her child which was later injured the same level of protection as herself. Finally, insofar as the defendants in their further appeal contend that the long limitation period—combined with the reversal of the burden of proof—would intolerably worsen the evidentiary position of the person who is sued for causing damages, the doctrine of laches may provide an appropriate corrective mechanism although there is no indication that it would apply in the present case. . . .

Notes

(1) Before the 2002 reform of the German law of obligations, the limitation period applicable to contractual claims was 30 years, compared with three years for delictual claims. Today, the period is three years in both cases (§ 195 BGB).

(2) According to the doctrine of laches (*Verwirkung*), which is mentioned at the end of the excerpt, a lapse of time in pursuing a right may lead to the premature extinction of that right if the creditor has created the impression that he would waive the right.

(3) For the 'supplementary interpretation' (*ergänzende Auslegung*) of contracts under § 157 BGB, see Chapter 15 above. Would it be possible in this case to base the right of the claimant on the interpretation of the contract between the mother and the shop?

(4) The daughter of the claimant did not intend to make a purchase. Imagine she had slipped on a vegetable leaf dropped by the defendant when she was walking past the defendant's store on her way to school. Should these cases be treated differently?

The *Vegetable leaf* case shows that the Bundesgerichtshof is not overly concerned with linking the doctrine of contracts with protective effect for third parties to a particular provision of the BGB. Various suggestions for a legal base have been made over the decades. Originally, these cases were seen as a straightforward application of § 328 BGB (*Taxi collision*[39]) or as based on an analogy of § 328 BGB. It was also suggested that they be derived from a 'supplementary interpretation' of the contract between the original parties (§ 133, 157 BGB) or simply on the general duty of the parties to act in good faith (§ 242 BGB). Gradually it was acknowledged that the action awarded in these cases was purely judge-made law. Today the 'doctrine of

[39] See above, p 1197.

the contract with protective effect for third parties' has become a freestanding head of action with a number of requirements but without the need to have recourse to the notion of an implied contract for the benefit of a third party. The 2002 reform of the BGB by the Act to Modernise the Law of Obligations introduced § 311(3) (1) BGB, which is frequently said to be capable of providing a legal base:

BGB **26.20a (DE)**

§ 311: Obligations created by legal transaction and similar obligations

. . .

(3) An obligation with duties in accordance with § 241(2) may also arise towards persons who are not intended to be parties to the contract. Such an obligation arises in particular if the third party by enlisting a particularly high degree of reliance materially influences the contractual negotiations or the conclusion of the contract.

Notes

(1) § 241(2) BGB, which was also introduced in the 2002 reform deals with the 'secondary obligations' of the parties: they are required to have regard to the other party's rights, legally protected interests and other interests.[40]

(2) § 311(3)(2) BGB deals with the *liability* of third parties only. However, this sentence does not control the meaning of § 311(3)(1) BGB which is capable of covering the *rights* of third persons in cases where one of the contracting parties infringes a secondary obligation or protective duty.

(3) § 311(3)(1) BGB is silent with regard to the requirements for the inclusion of third persons in the protective sphere of contracts. These are still governed by the pre-2002 case law.

Looschelders on Obligations[41]

Requirements for the inclusion of third persons in the protective sphere
There is broad agreement in the case law and in legal writings that, as a general rule, the protective scope of the obligation may only be extended to third persons if *strict requirements* are met. The restrictive approach can be justified on the basis that the inclusion of third persons deviates from the principle of the *relativity* of duties in the law of obligations and extends the contractual debtor's risk of liability. It cannot be the case that everyone who incurs damage because of a violation by the debtor of a duty of protection may derive his own claim for damages from the contract between the contractual creditor and the debtor. The following criteria must be adhered to:

(a) Intended proximity of performance of the third person
First, the third person must, in normal circumstances, be close to the performance of the contractual debtor and must thus be exposed to the risks connected with the

[40] See above, p 374.

[41] D Looschelders, *Schuldrecht: Allgemeiner Teil*, 7th edn (Cologne, Heymanns, 2009) paras 204–06, 208–09 (citations omitted).

performance to a similar extent as the creditor (*proximity of performance* [*Leistungsnähe*]). This requirement is met, for example, if children accompany their parents who are shopping (cf the *Vegetable leaf* case) or if employees use machinery which has been leased or bought by the employer. ... Intended proximity of performance also exists for the relatives of a tenant who live together with him under one roof. However, the visitors and guests of the tenant are not included in the protective sphere of the contract with the landlord.

(b) Legitimate interest of the creditor in protecting the third person

Secondly, the contractual creditor must have a legitimate interest in protecting the third person (*interest of the creditor* [*Gläubigerinteresse*]). For cases of physical injury and damage to property, the courts have developed the so-called 'wellbeing formula' [*Wohl-und-Wehe-Formel*]. According to this, the necessary interest in protecting the third person exists 'if the creditor shares, as it were, the responsibility for the well-being of the third person because any harm done to the third person also harms the creditor, the latter owing protection and care vis-à-vis the third person'. In the first instance, this formula covers personal relationships where there is a legal obligation to provide care, such as between parents and children, between spouses or between employer and employee.

[The following two paragraphs are reproduced below, pp 1216–17.]

(c) Foreseeability of the proximity of performance and of the interest of the creditor

Thirdly, the contractual debtor must have been *able to foresee* the proximity of performance and the interest of the creditor. Foreseeability [*Erkennbarkeit*] does not require that the debtor knows the names or the number of the third persons concerned. However, since it must be possible to predict the risk of liability only a manageable and clearly defined group of persons may be included. Yet, in the case of a structural surveyor the Bundesgerichtshof held it to be sufficient that the surveyor knew that his survey would be relevant for a (potential) buyer.

(d) Third person's need of protection

Even if all the other requirements are met the inclusion of the third person can fail because he has no *need of protection*. The Bundesgerichtshof denies a need of protection if the injured person derives from the event that caused the damage a contractual claim of his own that is *of equal value*. As a result of this restriction, the sub-tenant is not included in the protective sphere of the contract between the landlord and the main tenant. Since the sub-tenant can enforce his own claim for damages under § 536a(1) [BGB] against his contractual partner—the main tenant—there is no reason to allow him, on top of this, a claim for damages under § 536a against the landlord, flowing from the doctrine of the contract with protective effect for third parties.

Note

Note the emphasis on restricting liability via the policy arguments of 'proximity' and 'foreseeability'. This is typical floodgate reasoning that is implicit in the French case law, too. We also encounter it when we turn to English law.

26.2.B.1.3 England

In English law the victims in the French and German cases reproduced in this section would not have a contractual claim. The early-twentieth-century case of *Cavalier v Pope*[42] is a good example. The owner and landlord of a dilapidated house contracted with his tenant to repair it, but failed to do so. The tenant's wife, who lived in the house, was injured by an accident caused by the want of repair. Under German law, the wife would have been included in the 'protective sphere' of the tenancy agreement between her husband and the landlord. As a consequence, she would have had a contractual remedy against the landlord. In contrast, the House of Lords held that the husband alone could sue for breach of contract in order to claim the damages he had incurred by reason of the accident of his wife. The wife did not have an action to claim for her injuries because there 'was but one contract, and that was made with the husband. The wife cannot sue upon it.'[43] The Contracts (Rights of Third Parties) Act 1999 would not provide a remedy for Mrs Cavalier either. Its section 1(3) requires that the 'third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description'.[44]

Rather than expanding contractual liability, English law relegates third party victims in situations such as described in this section to tort law. Unless a more specific head of tort liability applies, they have to rely on the general tort of negligence.[45] This requires that the defendant owed a duty of care to the claimant and caused him damage by a breach of that duty. Crucially, the tort is premised on fault, so the claimant has to prove negligence to recover.

Furthermore, the relatively restrictive rules on 'vicarious liability' make it difficult to hold a person liable for a tort committed by someone who acted on his behalf. This will only be the case if the defendant was the 'employer' (or 'master') of the other person and if the other person was the defendant's 'employee' (or 'servant') under a contract of employment (or 'contract of service'). In contrast, the defendant will not be vicariously liable for torts committed by an independent contractor employed under a contract for services.

A tort action of third party victims will not always meet these requirements. The defendant's breach of his contractual duty owed to the other party to the contract does not always amount to a breach of his duty of care owed to the third party. In *Cavalier v Pope*,[46] for example, the House of Lords held that at common law a landlord was deemed to relinquish control to the tenant by virtue of the lease: even if the landlord let a house in a dangerous state he did not owe a duty of care to anyone apart from the tenant under the terms of the lease. Therefore Mrs Cavalier did not have a remedy in tort. In the 1950s the legislator intervened by partly abrogating the immunity that this decision provided for landlords.[47] Today the relevant provision can be found in the Defective Premises Act 1972:

[42] [1906] AC 428 (HL).
[43] Ibid, 430, per Lord James.
[44] See above, p 1182.
[45] See above, pp 96–105.
[46] [1906] AC 428, 430, per Lord James (HL).
[47] s 4(1) of the Occupiers Liability Act 1957.