one in whose sphere of influence the risk originated the burden of proof about the way the damage occurred, which he is usually, though not always, in a better position to satisfy than the one to whom it occurred. So far also as the provision of 'appliances and implements', which include the means of transport, is concerned, the law has for the same reason imposed on the employer within the framework of § 831 BGB an enhanced duty of elucidation and proof. If the evaluation of the employee's conduct is under discussion, attention must also be paid to the point of view that the employee – that is the meaning of the reversal of the burden of proof – must be considered to have been unfit for his task, until the employer proves that he showed the care described more fully in § 831 I 2 BGB.

Note

1. For further discussion of the meaning of unlawfulness, see vol. I, chapter 2.

16. *Decision of the 3rd Civil Senate of 27 May 1963 (BGHZ 39, 358–65)*[1]

The plaintiff site-owner claimed damages from a local authority which had issued a building permit without adequately checking the architect's calculations regarding the load-bearing capacity of the foundations, as marked on the plan. Because of this error, the building collapsed while in process of construction, and both the builder and the architect were insolvent.

The plaintiff's claim was dismissed by the trial court and his appeal was also dismissed, for the following reasons:

1. The trial court rightly held that in checking and authorising the plans for the building the supervisory authorities are exercising a governmental function. In consequence, as the appeal court agrees, the plaintiff's claim against the defendant can only be based on the rules relating to the liability of officials (§ 839 BGB in connection with art. 34 Basic Law): it must be shown that one of the defendant local authority's officials in the exercise of the public function attributed to him was in breach of an official duty which he owed to the plaintiff...

2. In approaching the question whether, in giving building permission when it should not have done so, the local authority was in breach of official duties owed to the plaintiff the trial court correctly started by considering the purpose served by the official duty (see the references in BGB-RGRK to § 839 n. 40). In the first instance official

duties are imposed in the interest of the state and the public. If the sole function of an official duty is to promote public order, the general interest of the commonwealth in orderly and proper government, the satisfaction of exigencies within the service or the maintenance of a properly organised and functioning administration, then there is no question of any liability to third parties for its breach, even if its exercise has adversely affected them or their interest. Liability exists only where the official duty which was broken was owed by the official to the third parties themselves. Whether this is so and how wide the range of protected persons may be are questions which must be determined in accordance with the purpose served by the official duty. This purpose is to be inferred from the provisions on which the official duty is based and by which it is delimited, as well as from the particular nature of the official function in question. If, in addition to satisfying the general interest and public purposes, the official duty has the further purpose of safeguarding the interests of individuals, this is sufficient, even if the affected party had no legal claim that the official act in question be undertaken (*BGHZ* 35, 44, 46/47; BGH *VersR.* 1961, 944).

Before a building permit is issued the plans must be checked for conformity with all building regulations of public law (§ 2 II Provincial Building Ordinance). Such an investigation must encompass the structural safety of the building (§ 15 I e. § 61 Provincial Building Ordinance); as the Court of Appeal was right to emphasise, with reference to Pfundtner – Neubert (*Das neue deutsche Reichsrecht* IV g 21 Intro.), concern for safety is one of its most important aims, since unsafe buildings pose a direct threat to life and health, the value of physical property and the safe conduct of business. The supervision of buildings thus permits the avoidance of dangers (*BGHZ* 8, 97, 104; see Baltz–Fischer, *Preussiches Baupolizeirecht* I *et seq.*). The provisions requiring the verification of the calculations concerning the load-bearing capacity of buildings are directed to the dangers which threaten the public from the collapse of unsafe constructions. While these provision and the official duties which they impose serve the protection of the public – the 'public interest' (Baltz–Fischer, ibid.) – they also protect every individual member of the public who might be threatened by its unsafe condition, that is, every person who comes into contact with the building as inhabitant, user, visitor (RG Recht 1929 no. 757; SeuffArch 83 no. 134; *JW* 1936, 803, *BGHZ* 8, 97, 104), neighbour (BGH *VersR.* 1956, 447), passer by (LM to BGB

§ 839 Fe no. 1) or workman, and who relies on its being safe. The owner or developer may also be a beneficiary of this protective function if he suffers damage to his body, health or property as a result of a collapse while he is visiting the building or inhabiting it, but only if the harm is a consequence of the danger from which it is the function of the official verification of the technical specifications to protect the public and hence the individual endangered. That is not the case here. True it is that the plaintiff has suffered damage as a result of the collapse of the building, but he is not a victim of the danger from which as a member of the public he was entitled to be protected by the official duties and the provisions which created them, since it was only the building itself and no other property of his which was damaged...

Note

1. We are grateful to Mr J.A. Weir for his kind permission to reproduce here his translation of this and the following decision.

17. *Decision of the 7th Civil Senate of 30 May 1963 (BGHZ 39, 366)*

In 1951 the plaintiff contracted with the defendant builder to have a house built on his land and with the defendant architect to have the construction supervised. Cracks appeared in the ceilings because the concrete used was well below the requisite strength. The plaintiff claimed damages for the reconstruction of the ceilings which were in danger of collapse. Because he was out of time for a contract claim the plaintiff based his claim on the delict provisions § 823 I BGB and § 823 II BGB in connection with § 330 Criminal Code or § 367 no. 15 Criminal Code.

Reasons

The Court of Appeal rightly found that the facts disclosed no tort on which the plaintiff's claim for damages could be based.

1. There is no question of a claim for damages under § 823 I BGB on the basis that the plaintiff's property (Eigentum) has been damaged by fault. The land owned by the plaintiff, as compared with what it was, has suffered no harm through the defective method of construction. In so far as the land has been built on, as the Court of Appeal rightly stated, the plaintiff never owned it in an undefective condition. As the building proceeded, the plaintiff's ownership attached to each part of the building as it was constructed in the

condition in which it was constructed, with all the qualities and defects resulting from the incorporation of the building materials. To make someone the owner of a defective building is not to invade an already existing ownership (compare RG JW 1905, 367; Oberlandesgericht Karlsruhe *NJW* 1956, 913).

The decision of this senate in LM no. 4 to § 830 BGB was a different case; there defective concrete balconies which had been built on to the top storey caused the collapse of the whole building.

2. The Court of Appeal also rightly rejected the claim for damages based on § 823 BGB in connection with § 330 Criminal Code. Under this last-named provision a person 'who in supervising or erecting a building in breach of generally recognised rules of building practice acts in such a way as to cause danger to others' is guilty of an offence. The trial court found that a danger existed within the meaning of this provision and this finding is not subject to review. But as the Appeal Court stated, § 330 Criminal Code is solely designed to protect the lives and health of individuals (LK (edn. 8) § 330 VII; Schönke/Schröder StGB (edn 10) § 330 II 3 b; Oberlandesgericht Dresden OLG Rspr 18, 72; Kammergericht in Berliner Bauwirtschaft 1961, 544). It is only to this extent that the provision is a protective statute whose breach can give rise to a claim for damages under § 823 II BGB. Damages can only be claimed under this text if the harm takes the form of the invasion of a legal interest for whose protection the rule of law was enacted (*BGHZ* 19, 114, 126; 28, 359, 365f.). The claim before us is for compensation for harm to an interest other than the legal interest protected by § 330 Criminal Code.

Nor is the claim for those damages justified by the consideration that the replacement of the ceilings which are in danger of collapse is necessary to save the users of the rooms from imminent danger. It still remains the case that the cost of rendering the ceilings represents a harm which affects only the pecuniary interests of the plaintiff. This is evident if one imagines that a ceiling collapses and injures an individual: then certainly the harm attributable to the personal injuries must be compensated under § 823 II BGB and § 330 Criminal Code; but there would still remain the material harm requiring the replacement of the ceilings, and this would still affect only the economic interests of the plaintiff.[1]

3. The plaintiff finally relies on § 823 II BGB in connection with § 367 I no. 15 Criminal Code. This provision provides, inter alia, that it is an offence for a builder or building worker to construct a building