CHAPTER FIVE
LIABILITY FOR THE CONDUCT OF OTHERS

5.1. LIABILITY FOR HARM CAUSED BY EMPLOYEES

5.1.3. LIMITATIONS RELATING TO THE SCOPE OF EMPLOYMENT

BGH, 14 February 1989[1] **5.G.14., 5.E.15.**
and
House of Lords[2]
Smith v. *Stages*

FLYING/DRIVING ACCIDENTS

Under German law, flying a plane belonging to the Geschäftsherr *without its knowledge or authorization does not fall in the accomplishment of the employee's tasks pursuant to § 831 BGB. Under English law, driving to and back from a temporary work base takes place in the course of employment if the employer specifically instructed the employee to make the journey.*

A. BGH, 14 February 1989 **5.G.14.**

Flight without authorization

Facts: The first defendant, the manager of a small airline company (the second defendant), instructed H, a private pilot not in the employment of the second defendant, to bring a Cessna C 172 aircraft to an airport, where the first defendant would take some guests on board the aircraft and would pilot the aircraft for a demonstration flight. Once H had arrived at the airport, the first defendant, who was going to be late, further instructed H to greet the guests, inform them of the delay and wait with them for him to arrive. Contrary to his instructions, H did not wait for the first defendant but instead presented himself as the pilot chosen for the demonstration flight and took off with the guests. The aircraft crashed, and the relatives of the guests sued the first and second defendants. At issue was whether H was acting in the accomplishment of his tasks.

Held: The court of first instance and the court of appeal held that neither defendant was liable for H's conduct. The BGH upheld the judgment of the court of appeal.

[1] NJW-RR 1989, 723. Translation by A. Hoffmann and Y.P. Salmon.
[2] [1989] 1 AC 928.

Judgment:[3] "H was not acting as one of the [airline company's] people [*Leute*] at the time of the ill-fated flight simply because he was instructed by the airline company... to contact the passengers, inform them that the first defendant was delayed and appease them. It is true that it may be part of the accessory contractual duties of the [airline company] to inform... waiting passengers about flight delays; thus when H got in touch with the passengers, as he had been instructed to do, he was acting in the accomplishment of one of the airline's contractual duties. However, in this respect, H was... assigned a clear-cut task by the [airline company], which had nothing to do with the actual conduct of the demonstration flights. H would have acted 'in the accomplishment of his task' within the meaning of § 831(1) BGB, and consequently as one of the [airline company's] people within the meaning of § 45 LuftVG, only if there had been a substantive connection between the task assigned to him — notifying the passengers — and his unauthorized flight (*Schwarzflug*), such that the damage caused by him would have been induced by a measure taken in the accomplishment of his task.

According to § 278 BGB, a contracting party must bear the risks relating to the *Gehilfe* ("assistant") he brings in to perform his contractual obligations. That principle applies also where that person violates the instructions of the *Geschäftsherr*; in fact, it is precisely in that situation that the principle takes... its full meaning [references omitted]. The obligation incumbent on the *Geschäftsherr* to assume responsibility for the unauthorized conduct of his *Gehilfe* finds its limits, however, where the conduct of that person deviates so much from the range of tasks assigned to him that, from the point of view of an outsider, there is no longer any substantive connection between the conduct of the *Gehilfe* and the general range of tasks assigned to him. This would be the case for instance if the *Gehilfe* came to injure the protected interests of the victim through sheer coincidence; he was then merely offered the opportunity to commit an unlawful act that was completely detached from the tasks assigned to him, as if it had been committed by a stranger to the victim [references omitted]. This is the situation in the present case. In the course of carrying out his instructions to inform the passengers that the scheduled pilot was late, H actually presented himself as the pilot and thus announced the opposite of what he was supposed to announce...; giving false information to passengers would nonetheless be considered to fall within the accomplishment of the tasks assigned to H, so that the [airline company] would be liable for the damage directly resulting from that false announcement. Here, however, the injury withstood by the passengers was not caused by the false information but by the 'unauthorized flight'. The latter was not a measure taken by H in the course of the announcement but simply a course of conduct taken on the occasion of that announcement. Therefore, the connection between the task assigned to H and his course of conduct might be causal and temporal, but it is not substantive."

[3] The case is based on § 45 of the *Luftverkehrsgesetz* (LuftVG, Air Traffic Act) of 14 January 1981, BGBl.I.61, under which the operator of an airline company is responsible for the injury caused by its "people" (*Leute*), a provision which according to the BGH creates a liability regime similar to § 278 BGB (as discussed in a part of the annotated case not reproduced here).

B. House of Lords, *Smith* v. *Stages* **5.E.15.**

Accident on way back from work

Facts: The plaintiff and his co-worker Stages were specialists in insulation at power stations. They were based in Staffordshire. They were requested by their employer to go to Pembroke (a journey of some six hours) on an urgent mission which would last a week. They travelled there in Stages' car on Monday 22 August 1977 and began work on the following day. In order to be ready on schedule, they worked all night on Sunday 28 August and finished at 8:30 on Monday 29 August 1977. That day was a public holiday. The plaintiff and Stages were allowed a further day, for which they would be paid, to travel back to their work base, which meant that they had to report on Wednesday 31 August in the morning. They chose to travel back home immediately on Monday 29 August, in Stages' car with Stages driving. They were involved in an accident for which Stages was responsible. At issue was whether Stages was acting in the course of his employment at the time of the accident, so that the employer would be vicariously liable for him.

Held: The court of first instance found that Stages was not acting in the course of his employment and dismissed the claim against the employer. The court of appeal reversed the decision of the court of first instance and allowed the claim. The House of Lords upheld the decision of the court of appeal.

Judgment: LORD GOFF OF CHIEVELEY:[4] "The fundamental principle is that an employee is acting in the course of his employment when he is doing what he is employed to do... or anything which is reasonably incidental to his employment...

[W]e are here concerned with a case which may be seen as one of those cases concerned with travelling to or from work... I do not consider the present case to fall strictly within that category of case. Even so, it is helpful to use the cases in that category as a starting point. We can begin with the simple proposition that, in ordinary circumstances, when a man is travelling to or from his place of work, he is not acting in the course of his employment... If however a man is obliged by his employer to travel to work by means of transport provided by his employer, he may be held to be acting in the course of his employment when so doing.

These are the normal cases. There are however circumstances in which, when a man is travelling to (or from) a place where he is doing a job for his employer, he will be held to be acting in the course of his employment...

But how do we distinguish the cases in this category in which a man is acting in the course of his employment from those in which he is not? The answer is, I fear, that everything depends on the circumstances...

For example, the fact that a man is being paid by his employer in respect of the relevant period of time is often important, but cannot of itself be decisive...

[In the present case,] the question is this. Was Stages employed to travel to and from Pembroke? Or was the pay given to him simply in recognition of the fact that he had lost two days' work... because, in order to work at the power station at Pembroke, he would have to make his own way to Pembroke and back again to the Midlands?...

[4] Lord Keith, Lord Brandon and Lord Griffiths concurring.

I propose first to consider the problem not in relation to his journey back from Pembroke when the accident in fact happened, but in relation to his journey out to Pembroke...

I do not regard this case as an ordinary case of travelling to work. It would be more accurate to describe it as a case where an employee, who has for a short time to work for his employers at a different place of work some distance away from his usual place of work, has to move from his ordinary base to a temporary base (here lodgings in Pembroke) from which he will travel to work at the temporary place of work each day. For the purpose of moving base, a normal working day was set aside for Stages' journey, for which he was paid as for an eight hour day. In addition to his day's pay he was given a travel allowance for his journey, and an allowance for his lodgings at his temporary base in Pembroke. In my opinion, in all the circumstances of the case, Stages was required by the employers to make this journey, so as to make himself available to do his work at the Pembroke Power Station, and it would be proper to describe him as having been employed to do so. The fact that he was not required by his employer to make the journey by any particular means, nor even required to make it on the particular working day made available to him, does not detract from the proposition that he was employed to make the journey...

I turn to Stages' journey back. Another ordinary working day, Tuesday, 30 August, was made available for the journey, with the same pay, to enable him to return to his base in the Midlands to be ready to travel to work on the Wednesday morning. In my opinion, he was employed to make the journey back, just as he was employed to make the journey out to Pembroke. If he had chosen to go to sleep on the Monday morning and afternoon for eight hours or so, and then to drive home on the Monday evening so that he could have Tuesday free..., that would not have detracted from the proposition that his journey was in the course of his employment. For this purpose, it was irrelevant that Monday was a bank holiday. Of course, it was wrong for him to succumb to the temptation of driving home on the Monday morning, just after he had completed so long a spell of work; but once again that cannot alter the fact that his journey was made in the course of his employment."

LORD LOWRY:[5] "The paramount rule is that an employee travelling on the highway will be acting in the course of his employment if, and only if, he is at the material time going about his employer's business. One must not confuse the duty to turn up for one's work with the concept of already being 'on duty' while travelling to it.

It is impossible to provide for every eventuality..., but some prima facie propositions may be stated with reasonable confidence.

1. An employee travelling from his ordinary residence to his regular place of work, whatever the means of transport and even if it is provided by the employer, is not on duty and is not acting in the course of his employment, but, if he is obliged by his contract of service to use the employer's transport, he will normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so.

2. Travelling in the employer's time between workplaces (one of which may be the regular workplace) or in the course of a peripatetic occupation, whether accompanied by goods or tools or simply in order to reach a succession of workplaces..., will be in the course of the employment.

[5] Lord Keith, Lord Brandon and Lord Griffiths concurring.

3. Receipt of wages (though not receipt of a travelling allowance) will indicate that the employee is travelling in the employer's time and for his benefit and is acting in the course of his employment, and in such a case the fact that the employee may have discretion as to the mode and time of travelling will not take the journey out of the course of his employment.

4. An employee travelling *in the employer's time* from his ordinary residence to a workplace other than his regular workplace or in the course of a peripatetic occupation or to the scene of an emergency... will be acting in the course of his employment.

5. A deviation from or interruption of a journey undertaken in the course of employment (unless the deviation or interruption is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of his employment.

6. Return journeys are to be treated on the same footing as outward journeys.

All the foregoing propositions are subject to any express arrangements between the employer and the employee or those representing his interests."

Notes: (1) The two annotated cases have been included to show the intricacies of the limitations based on the scope of employment in the light of a frequent situation, namely the use of means of transportation. The first deals with the unauthorized use by an employee of a vehicle belonging to the employer, while the second concerns transportation by private means to, from and between work locations; nevertheless the reasoning in both types of cases is fairly similar.

There is a considerable body of German case-law on what has been termed *Schwarzfahrt*, i.e. the use of a vehicle belonging to the *Geschäftsherr* without the knowledge or authorization of the *Geschäftsherr*; the first annotated case stands out as the only instance involving an aircraft and not a motor car. In principle, under German law, a *Schwarzfahrt* will not fall in the accomplishment of the task (*in Ausführung der Verrichtung*) of the employee pursuant to § 831(1) BGB.[6] The *Straßenverkehrsgesetz* (StVG), which governs the specific risk-based liability regime for motor vehicles, contains a provision equally exonerating the keeper (*Halter*) of a motor vehicle from liability in cases of *Schwarzfahrt*.[7]

Nonetheless, not every minor deviation from the assigned task would constitute a *Schwarzfahrt*; as the BGH recalled in the first annotated case, the condition relating to the scope of the task takes its real significance precisely in cases where the instructions of the *Geschäftsherr* have not been followed. In the end, the distinction between a *Schwarzfahrt* and a deviation remaining within the accomplishment of the task is one of degree more than kind. As seen in BGH, 20 September 1966, reproduced above,[8] the

[6] See Staudinger-Belling/Eberl-Borges, § 831 at 93-4, para. 86-7. See also Münchener-Stein, § 831 at 1798, para. 50.

[7] Road Traffic Act of 19 December 1952, as amended, BGBl.I.837, BGBl.III.9231-1, § 7(3)(1). On this statute, see *infra*, Chapter VI, 6.2.1.A.

[8] *Supra*, **5.G.13.**

BGH found that the *Verrichtungsgehilfe* had remained within his task when he chose to drive the excavator directly on the highway instead of carrying it on a low-loading trailer, as he had been instructed to do. Similarly, minor detours undertaken on the employee's own initiative do not count as *Schwarzfahrt*.[9] By contrast, in the first annotated case, the BGH found that H had gone on a *Schwarzflug*; his task was to bring the aircraft to the airport and, as was added later, to inform the guest passengers that the first defendant would be late. The BGH found that there was no substantive relationship between that task and the course of conduct that H took, namely flying the guests himself. The task merely provided H with the opportunity to come into contact with the guests, but no more. The causal and temporal relationship between the task and H's flight was not sufficient to bring it within the execution of the task for the purposes of § 278 BGB.

Furthermore, even in cases of *Schwarzfahrt*, the *Geschäftsherr* can be liable under the StVG, (i) when the *Geschäftsherr*, as keeper of the vehicle, made the *Schwarzfahrt* possible through his or her fault (§ 7(3)(1) StVG), (ii) when the *Verrichtungsgehilfe* who went on a *Schwarzfahrt* was employed as driver or (iii) when the vehicle was left at the disposal of the *Verrichtungsgehilfe* (§ 7(3)(2) StVG).[10]

(2) As regards deviations from tasks which involve the use of a vehicle, similar developments have taken place under English law, although there as well the line between a mere detour and a "frolic of [the employee's] own" is difficult to draw.[11]

In addition, there is a line of English cases on whether transportation undertaken for the purposes of getting to and from work is part of the course of employment, the second annotated case being the most authoritative recent pronouncement in that field.[12] In his speech, Lord Goff applied the relevant principles to the facts of the case, while Lord Lowry provided a series of practical guidelines. Both speeches are relatively self-explanatory. It is interesting to note, however, what criteria are used to determine whether Stages was acting in the course of employment when returning from Pembroke. The main criterion appears to have been whether the time taken for transport was paid by the employer; however, as Lord Goff pointed out, it could be that the employee was merely compensated for the working time lost, without transportation necessarily being part of the employment. For Lord Goff, the crucial factor was that Stages had been specifically ordered by his employer to change his work base temporarily by going to Pembroke, and that therefore it was part of his task to travel to Pembroke. The fact that

[9] See Staudinger-Belling/Eberl-Borges, § 831 at 94-5, para. 88.

[10] See Staudinger-Belling/Eberl-Borges, § 831 at 94, para. 87.

[11] See *Clerk & Lindsell on Torts* at 181-2, para. 5-30; Markesinis and Deakin at 549.

[12] See *Clerk & Lindsell on Torts* at 180-1, para. 5-28 and 5-29; Rogers at 704-5; Markesinis and Deakin at 550. The same issue has also been considered by German and French courts in a few cases, where they have reached results similar to those of English law: see Münchener-Stein, § 831 at 1799, para. 52, as well as C. Rodé, *Droit du travail et responsabilité civile* (Paris: LDGJ, 1997) at 54ff., para. 86ff., respectively.

Stages then negligently chose to drive back at a time when he should have rested did not take the drive outside the course of employment; it was merely a wrongful way of discharging his task. The guidelines enunciated by Lord Lowry are in substance identical with Lord Goff's reasoning. The fifth guideline, which does not come to bear in the second annotated case, is equally applicable to cases involving a deviation from a journey undertaken as part of a task (e.g. a lorry driver on his way from the warehouse to a customer).

(3) Under French law, in the light of the broad approach to the construction of "within the functions" pursuant to Article 1384(5) C.civ. which has resulted from the decision of the Assemblée plénière of 19 May 1988,[13] injuries caused to third parties through the use of a car belonging to the *commettant* would generally fall "within the functions" of the *préposé*, since the means of causing the injury result from the *lien de préposition*. In addition, there is a presumption that the use of a car belonging to the *commettant* occurs with the authorization of the *commettant*, so that the latter bears a heavy burden of proof in order to escape liability.[14] In any event, the use of Article 1384(5) C.civ. in these cases has to a large extent been rendered irrelevant with the enactment of the Loi Badinter, the application of which will often be more favourable to the victim.[15] As long as the *préposé* remains "within his or her functions" for the purposes of Article 1384(5) C.civ., the *commettant* should be held to have remained the keeper (*gardien*) of the vehicle so as to make the Loi Badinter applicable.[16]

[13] *Supra*, **5.F.11.**

[14] See Cass. crim., 22 January 1987, Bull.crim. 1987.36; Cass. civ. 2e, 18 November 1987, D 1987.IR.245; Cass. crim., 21 March 1989, D 1989.IR.168, as well as Le Tourneau and Cadiet at 734, para. 3536.

[15] Act 85-677 of 5 July 1985, *supra*, Chapter VI, **6.F.18.** In addition, as Le Tourneau and Cadiet, *ibid.*, mentions, the Loi Badinter also modified Article L.211-1 of the Code des assurances (Insurance Code), so that the keeper (*gardien*) of a motor vehicle is bound to take out insurance coverage against liability for damages to third parties, irrespective of whether the person driving the vehicle was authorized to do so or not.

[16] It is generally agreed that, as a rule, the *préposé* cannot be the keeper (*gardien*) of a vehicle belonging to the *commettant*, since the existence of a *lien de préposition* presupposes that the *préposé* is subject to the instructions of the *commettant* as regards the vehicle. Only if the conduct of the *préposé* fell outside his or her functions could the *préposé* wrest the *garde* of the vehicle away from the *commettant* (a rare occurrence given the broad approach to the scope of employment under Article 1384(5) C.civ., as expounded *supra*, **5.F.10.-11.** and notes thereafter): see Viney and Jourdain, *Conditions* at 653-5, para. 684; Le Tourneau and Cadiet at 736, para. 3545; Bénac-Larroumet at 42-43, para. 460-1, 466-9.

Cass.crim., 23 June 1988[17] **5.F.16., 5.E.17., 5.G.18.**
SCH Atomic City
and
Court of Appeal[18]
Morris v. *CW Martin & Sons Ltd.*
and
BGH, 4 November 1953[19]

CRIMINAL ACTS AND SCOPE OF EMPLOYMENT

Under French law, a criminal act will fall "within the functions" of the préposé *for the purposes of Article 1384(5) C.civ. if it is linked by objective relevant factors (time, place, means or facilities used) to the* lien de préposition*. Under English law and German law, a criminal act is excluded from an employee's course of employment unless the criminal act is so related to the tasks of the employee that it constitutes a "wrongful mode" of executing those tasks. In addition, under German law, the employer is under a duty (depending upon the circumstances) to watch over employees to prevent them from committing criminal acts.*

A. Cass.crim., 23 June 1988 **5.F.16.**

Theft by warehouse manager

Facts: The defendant R. Moiroud Co. had been entrusted by the plaintiff SCH Atomic City with the importation of a shipment of clothes from Italy. The plaintiff requested the defendant to keep the goods in its warehouse for some time. Bonan, an employee of the defendant in charge of managing the warehouse, stole a large number of boxes of clothes from the plaintiff's shipment. In conjunction with the criminal proceedings against the defendant, the plaintiff brought an *action civile*, which thus fell to be dealt with under the rules of delictual liability. The plaintiff contended that the defendant was liable under Article 1384(5) C.civ. At issue was whether Bonan acted "in his functions" (*dans ses fonctions*) within the meaning of that article.

Held: The court of appeal found that Bonan was not acting "within his functions" in stealing the goods and held the defendant not liable. The Cour de cassation quashed the decision of the court of appeal and found the defendant liable.

Judgment: "The *commettant* can be exonerated from liability only if the *préposé* acted outside the functions for which he was employed, without authorization, *and* for purposes foreign to

[17] Bull.crim. 1988.289, No. 4. Translation by Y.P. Salmon.
[18] [1966] 1 QB 716.
[19] BGHZ 11, 151. Translation by A. Hoffmann and Y.P. Salmon.

the tasks entrusted to him.

In holding that R. Moiroud was not liable, the court of appeal stated 'that it is true that Pierre Bonan (...), in order to commit the offence at issue here, used concrete means placed at his disposal, acted during his working time and at his workplace, and profited from the opportunities afforded by his tasks; nevertheless, it appears that in acting of his own will for personal ends which are foreign to his tasks, he placed himself outside the functions for which he was employed.'

However, it was obvious from other passages in the reasons for judgment [of the court of appeal] that Bonan's task 'consisted, among others, in drawing up collection slips for merchandise stored in the outlets of R. Moiroud', and that [Bonan], having decided to appropriate part of this merchandise, had 'taken advantage of his position to draw up a collection slip for the said parcels'. It results from those passages that [Bonan] had not acted outside the functions for which he was employed, even if he had acted without authorization and for purposes foreign to the tasks entrusted to him. Accordingly, in holding as it did, the court of appeal misinterpreted the meaning and extent of the principle set out above."

B. Court of Appeal, *Morris* v. *CW Martin & Sons Ltd.* **5.E.17.**

Theft by fur cleaner

Facts: The plaintiff delivered her fur coat to a furrier, who with her consent sent it to the defendant for cleaning. The defendant entrusted the coat to one of its employees, Morrissey, who made off with it. At issue was whether the defendant was vicariously liable for the theft committed by the employee.

Held: The court of first instance found that the employee had not acted in the course of his employment. The court of appeal reversed that decision and held that the defendant was vicariously liable for the employee.

Judgment: DIPLOCK LJ:[20] "I agree that this appeal should be allowed although the legal route which has led me to this conclusion is not at all points identical with that traversed by the Master of the Rolls [Lord Denning]. After all, that is the beauty of the common law; it is a maze and not a motorway.

The plaintiff delivered her fur to Beder, a furrier. With her consent he delivered it to the defendant to be cleaned by them for reward. They knew that it belonged to a customer of Beder, but they did not know his customer's name. It was found by the [court of first instance] that the contract made by Beder with the defendants was made by him as principal and not as agent for the plaintiff. There was thus no contractual relationship between the defendants and the plaintiff... The important question for our determination is whether the defendants were in breach of any common law duty owed by them to the plaintiff.

Duties at common law are owed by one person to another only if there exists a relationship between them which the common law recognises as giving rise to such duty. One of such recognised relationships is created by the voluntary taking into custody of goods which are the

[20] Lord Denning MR and Salmon LJ delivering separate concurring judgments.

property of another. By voluntarily accepting from Beder the custody of a fur which they knew to be a property of a customer of his, they brought into existence between the plaintiff and themselves the relationship of bailor and bailee by sub-bailment. The legal relationship of bailor and bailee of a chattel can exist independently of any contract, for the legal concept of bailment as creating a relationship which gives rise to duties owed by a bailee to a bailor is derived from Roman law and is older in our common law than the legal concept of... contract...

One of the common law duties owed by a bailee of goods to his bailor is not to convert them, i.e. not to do intentionally in relation to the goods an act inconsistent with the bailor's right of property therein [reference omitted]... Stealing goods is the simplest example of conversion...

If the bailee in the present case had been a natural person and had converted the plaintiff's fur by stealing it himself, no one would have argued that he was not liable to her for her loss. But the defendant bailees are a corporate person. They could not perform their duties to the plaintiffs to take reasonable care of the fur and not to convert it otherwise than vicariously by natural persons acting as their servants or agents. It was one of their servants to whom they had entrusted the care and custody of the fur for the purpose of doing work upon it who converted it by stealing it. Why should they not be vicariously liable for this breach of their duty by the vicar whom they had chosen to perform it?...

[T]he defendants cannot in my view escape liability for the conversion of the plaintiff's fur by their servant Morrissey. They accepted the fur as bailees for reward in order to clean it. They put Morrissey as their agent in their place to clean the fur and to take charge of it while doing so. The manner in which he conducted himself in doing that work was to convert it. What he was doing, albeit dishonestly, he was doing in the scope or course of his employment... The defendants as his masters are responsible for his tortious act...

[We are not] concerned with what would have been the liability of the defendants if the fur had been stolen by another servant of theirs who was not employed by them to clean the fur or to have care or custody of it. The mere fact that his employment by the defendants gave him the opportunity to steal it would not suffice...

I base my decision in this case on the ground that the fur was stolen by the very servant whom the defendants as bailees for reward had employed to take care of it and clean it."

C. BGH, 4 November 1953 **5.G.18.**

Theft by construction workers

Facts: The riding hall adjacent to the main building on the plaintiff's property was damaged and threatened to fall down. The defendant company sent a number of its workers to the plaintiff's property in order to demolish the riding hall. After the demolition work had been completed, the plaintiff noticed that the zinc plates covering the roof of the main building had been stolen. The plaintiff sued the defendant for damages pursuant to § 831 BGB.

Held: The claim was dismissed by both the court of first instance and the court of appeal. The BGH reversed the judgment of the court of appeal and remitted the case for further consideration.

Judgment: "1. The court of appeal rightly decided that, in any event, the workers of the

defendant would not have stolen the zinc plates in the accomplishment, but rather on the occasion of the task assigned to them. Removing zinc plates from the roof of the main building did not fall within the range of the assigned tasks or even within their general framework. The mere fact that the workers were instructed to demolish the damaged building does not mean that any activity similar to demolition which they would carry out on another building on that property would also be part of their instructed task. The court of appeal rightly treats such a case of theft on the same footing as the case of an electrician who steals an object from a room on the occasion of the dismantling of a chandelier.

[In its argument,] the [plaintiff] wrongly relies on decisions concerning an arbitrary transgression of the instructions given [to the employee] [references omitted]. It is possible that such a transgression could have remained substantively connected with the actual task, if the workers had mistakenly undertaken, as part of their work, the demolition of a part of the building complex that did not need to be demolished yet. In this case, while they would have transgressed their instructions, they would not have breached the prohibition against theft on the occasion of their work...

2. The court of appeal rejected as inconclusive the plaintiff's argument that the defendant was liable for the inadequate supervision of the workers.

That reasoning is erroneous in law. When it comes to conducting the supervision of such construction work as in the present case, two layers of supervision must be distinguished. On the one hand, the management of the building contractor must maintain general supervision over [construction] workers and [office] staff. [On the other hand,] between this [general] supervision and the work of the workers itself, some supervision is also conducted on the spot by employees who are hired as supervisors. In relation to the workers, those supervisors carry out supervision. However, in relation to the employer, those supervisors are actually accomplishing a task — supervising the workers — with which they have been entrusted. If they fail to accomplish their task properly, the liability of their employer pursuant to § 831 BGB (*Geschäftsherr*) is made out... It is obvious that the actions of a large number of workers on the property of another must be assessed differently than those of an individual or even several skilled craftsmen in a private flat or some similar environment. If a large firm arranges to carry out work on the premises of a third party for a prolonged period, it creates a definite source of danger for the property of the third party... Therefore... if it goes without saying that a firm is bound to supervise its employees with a view to preventing accidents and accidental damage to the property of others in the course of the performance of their work, then it must be further recognized that when the work to be done grows in extent, duration and required manpower, the obligation to supervise [the workers] also grows... It is therefore... up to the employer to see to it that... supervision is structured in layers, so that in each case the tasks of a supervisor include the prevention, *as far as possible*, of accidental or intentional damage to the property of the person on whose premises the work is carried out [emphasis in original]. On that basis, the unlawful infliction of damage [by workers under supervision] will not be considered to have taken place in the course of the accomplishment of the task of the *supervisor* in cases where a single worker succeeds in committing theft on a convenient opportunity, while the opposite conclusion will be reached in cases where a planned and almost gang-like instance of theft was not thwarted [emphasis added]."

Notes: (1) The three annotated cases show how each system has coped with the apparent contradiction which arises when it is argued that a criminal act of the employee, *préposé* or *Verrichtungsgehilfe* came within the scope of his or her employment.

In the first annotated case, the criminal chamber of the Cour de cassation drew the logical consequences from the decision rendered by the Assemblée plénière of the court one month earlier on 19 May 1988 and reproduced above.[21] Since the court of appeal, whose decision the criminal chamber quashed, had ruled in 1985 according to the stricter approach that was current at the time,[22] the annotated case shows how the intervening decision of 19 May 1988 has changed French law.

The principle set out by the Assemblée plénière was first recalled, and then the Cour de cassation examined the reasoning of the court of appeal. The court of appeal had noted that Bonan had stolen boxes of clothes on work premises, during work time and using the facilities which his position within the defendant company offered him. The main objective relevant factors were thus present. Nonetheless, the court of appeal disregarded those objective relevant factors and duly followed the first reading of the decision of 17 June 1983, leading it to conclude that, because of the absence of authorization and the pursuit of foreign purposes (personal advantage), the employee was acting "outside his functions".[23]

Applying the decision of 19 May 1988, the Cour de cassation first examined the scope of the functions of the employee, and on the basis of the findings of the court of appeal, could not but conclude that Bonan was objectively acting "within the functions" for which he was employed. From that point on, since the three conditions set out in the decision of 19 May 1988 are cumulative, it did not matter that Bonan was obviously not authorized to steal merchandise from the warehouse or that he acted for purposes foreign to his tasks, as the Cour de cassation noted.

The first annotated case thus demonstrates that as a consequence of the position taken by the Assemblée plénière in its decision of 19 May 1988, criminal acts, in particular theft, committed by a *préposé* will not fall "outside his or her functions" for the purposes of Article 1384(5) C.civ., as long as the acts remain objectively connected (time, place, means or facilities used) with those functions.[24]

(2) The second annotated case shows the multi-faceted nature of the common law. In a separate opinion not reproduced above, Lord Denning MR reached the same result as Diplock LJ on the basis of the primary liability of the defendant as (sub-)bailee of the

[21] *Supra*, **5.F.11.**

[22] See *supra*, **5.F.10.-11.**, Notes (3) and (4).

[23] See *supra*, **5.F.10.** and Note (3) thereafter.

[24] The second civil chamber of the Cour de cassation has followed the same line of reasoning, for instance in Cass. civ. 2e, 22 May 1995, Bull.civ. 1995.II.154, D 1995.IR.172, JCP 1995.IV.1740 (theft in jewelry by employee of cleaning company) and Cass. civ. 2e, 22 January 1997, Bull.civ. 1997.II.21, D 1997.IR.53 (theft of bank notes from postal bags by luggage handlers at airport).

C. House of Lords, *Lloyd* v. *Grace, Smith & Co.* **5.E.21.**

Fraud by solicitor's clerk

Facts: The plaintiff, Mrs. Lloyd, was a widow who owned two real estate properties. She went to the defendant law firm Grace, Smith & Co., whom she knew from previous transactions, to seek advice on how to improve her income from those properties. There she met and discussed with Sandles, a person whom she did not know but believed to be a member of the firm. In fact, Sandles was a clerk who was entrusted with the conveyancing work of the firm, without supervision. At a subsequent meeting, at the request of Sandles, the plaintiff ended up signing deeds which, unknown to her, transferred her real estate property to Sandles. Sandles mortgaged the property to pay off personal debts. Mrs. Lloyd never received the income which Sandles had represented to her. She sued the defendants for the loss. At issue was whether Sandles had acted in the course of his employment.

Held: The court of first instance found that Sandles was in the course of his employment and that the defendant was accordingly vicariously liable. The court of appeal reversed that decision. The House of Lords reversed the decision of the court of appeal and allowed the claim of the plaintiff against the defendant.

Judgment: LORD MACNAGHTEN:[42] "The first line of defence set up by [the defendant] was that Mrs. Lloyd was not a client of the firm at all, but a personal friend of Sandles, and that the transaction was a private deal between Mrs. Lloyd and Sandles. It is enough to say that there is no foundation for this defence... Sandles, no doubt, was playing a double game. To Mrs. Lloyd he was Grace, Smith & Co.; to the clerks in the office Mrs. Lloyd's visits were the private visits of a personal friend.

The other line of defence... requires more consideration. It was rested on the fact that the fraud was committed, not for the benefit of the firm, but for the benefit of Sandles himself. It was contended that [*Barwick* v. *English Joint Stock Bank* (1867), LR 2 Ex 259, Exch. Ch.] is an authority for the proposition that a principal is not liable for the fraud of his agent unless the fraud is committed for the benefit of the principal.

[Lord Macnaghten then reviewed *Barwick* and subsequent cases, ending with the speech of Lord Blackburn in *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317] Lord Blackburn's view of the judgment in *Barwick*'s case requires no explanation. It is clear enough. After referring to *Barwick*'s case, he expresses himself as follows:... 'The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud.'

That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud...

The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in

[42] Earl Loreburn and Lord Atkinson concurring. Earl of Halsbury and Lord Shaw delivered separate concurring opinions.

the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate.

So much for the case as it stands upon the authorities. But putting aside the authorities altogether, I must say that it would be absolutely shocking to my mind if Mr. Smith were not to be held liable for the fraud of his agent in the present case. When Mrs. Lloyd put herself in the hands of the firm how was she to know what the exact position of Sandles was? Mr. Smith carries on business under a style of firm which implies that unnamed persons are, or may be, included in its members. Sandles speaks and acts as if he were one of the firm. He points to the deed boxes in the room and tells her that her deeds are quite save in 'our' hands. Naturally enough she signs the documents he puts before her without trying to understand what they were. Who is to suffer for this man's fraud? The person who relied on Mr. Smith's accredited representative, or Mr. Smith, who put this rogue in his own place and clothed him with his own authority?..."

D. BGH, 12 July 1977 **5.G.22.**

Fraud by bank manager

Facts: Mr. H was seeking investment opportunities for the plaintiffs, his daughter and son-in-law, and he went to Mr. O, the branch manager of the defendant bank where H was a long-standing customer. O offered him a long-term deposit with 10% interest, which would be held on an internal account of the bank. On that basis, H gave O a total of DEM 38,500 on two successive occasions, for which he received an acknowledgement on a form of the defendant bank. Some years later, when the plaintiffs sought to retrieve the sums invested, it turned out that O had not paid the funds into the internal bank account. The plaintiffs sued the defendant bank, relying on §§ 31, 278 and 831 BGB. At issue was whether O was acting in the execution of a task (*in Erfüllung einer Aufgabe*[43]) entrusted to him by the defendant when he defrauded H.

Held: The court of first instance found in favour of the plaintiffs. The court of appeal reversed. The BGH quashed the judgment of the court of appeal and remitted the case for further consideration.

Judgment: "II. The [plaintiff] rightly objects to the reasoning by which the court of appeal came to reject the contractual liability of the defendant (§§ 276, 278 BGB) for O's conduct...

[The contractual liability of the defendant] arises here... on account of pre-contractual fault [*culpa in contrahendo*].

When the plaintiffs, acting through H, entered into discussion about an investment with the defendant via O..., the defendant became under a duty to provide advice and care. If that duty was breached through O..., the defendant could be contractually liable [reference omitted]. Even though no contract might have arisen between the parties — which cannot be doubted... in the present case — the bank must take into account that it created expectations among its customers that their requests would be handled correctly. That is particularly true here, where

[43] That phrase is the functional equivalent under § 278 BGB of "in the accomplishment of the task" ("*in Ausführung der Verrichtung*") under § 831(1) BGB: see *supra*, **5.G.13.**, Note (1).

O aroused the interest of H (acting for the plaintiffs) in the investment precisely by referring to the long-standing business relationship between H and the defendant [references omitted]. For the purposes of the law of liability, the fact that O never intended to carry out the transaction for the defendant, but instead worked for his own benefit, does not preclude O from having acted 'in the execution' of the advisory tasks (and duties) entrusted to him as branch manager by the bank (as is required for O to be considered as a substitute in the execution of a contract (*Erfüllungsgehilfe*) for the purposes of § 278 BGB) [reference omitted]. Similarly, the application of § 278 BGB is not excluded because O was not authorized — certainly not under the conditions offered in the present case — to deposit money for a fixed term.... Indeed it was part of the risk related to personnel, which the defendant must assume under § 278 BGB, that O might abuse his position as manager and the related powers to deal with the clients of the bank. The outcome would be different had O's conduct fallen objectively outside the general framework of his responsibilities and therefore outside the risk which the bank had to expect; then he would have acted only on the occasion of the execution of the tasks assigned to him by the defendant [references omitted]...

III. The reasoning of the court of appeal does not justify that the delictual liability of the defendant for O's conduct was rejected.

1. The [plaintiff] however cannot succeed on the ground that... the court of appeal [would have erred] in holding that the defendant had brought forward exculpatory evidence for O according to § 831 BGB...

2. Nonetheless, it cannot be excluded that, pursuant to §§ 30, 31 BGB, the defendant would be liable for the loss of the plaintiff even though it was not at fault in selecting and supervising O. According to those provisions, the defendant cannot bring forward exculpatory evidence for the injurious conduct of 'its people', when those are members of the board or are appointed, according to the corporate statutes [of the defendant], as 'special representatives' within the meaning of § 30 BGB for certain business, and the injury was caused in the accomplishment of their tasks...

a)... § 30 BGB is also... applicable if O was 'entrusted, by virtue the internal rules or practice of the defendant, with the independent and autonomous performance of substantial activities.' This is in line with the purpose of §§ 30 and 31 BGB, which are intended to protect third parties. The decisive point is therefore whether the person in question was appointed to undertake a range of business which requires a degree of independence or responsibility similar to those of the management board [reference omitted]. The conditions of §§ 30 and 31 BGB must be assessed in the light not of the internal rank of the employee in question, but of the protection of third parties in relationships with the outside [reference omitted]. Within the internal structure [of the firm], the 'special representative' [within the meaning of § 30 BGB] can certainly be dependent upon instructions [ie an employee within the meaning of § 831(1) BGB], since his range of tasks suffice to make him a 'representative' of the firm vis-à-vis the outside world [references omitted]...

[Upon review, the BGH concluded that the court of appeal had erroneously come to the conclusion that O was not a 'special representative' within the meaning of §§ 30, 31 BGB, and decided to remit the case for further consideration in view of lacunae in the findings of fact]

IV... 1... When deciding whether the defendant is liable pursuant to the principles of pre-contractual fault [*culpa in contrahendo*], the court of appeal will have to take into account that a branch manager generally does not act outside the general framework of his tasks merely

because he attracts a long-standing customer with the perspective of an advantageous investment at his bank and then entices the customer to hand over the sums concerned to himself under the pretense of a tailor-made individual treatment... [It was O's] task as branch director to concern himself *inter alia* with investments and especially to bring 'good' customers to expand their business dealings with the bank. If he took advantage of the very mandate assigned to him in order to gain access to the plaintiffs' funds, and if his course of conduct did not appear to the outside as 'foreign' — on account of the method which he followed or the means which he used — then his misconduct still falls to be allocated to the sphere of risk which, according to § 278 BGB, the defendant must assume towards its customers in the course of contractual dealings...

2. Indeed, the liability of the defendant would have to be assessed differently if H had given the sums to be invested to O not as a bank manager, but as a private person, so that he could invest them under particularly profitable conditions for the plaintiffs..."

Notes

(1) The four annotated cases concern the specific situation where the employee, *préposé* or *Verrichtungsgehilfe* defrauds the victim. In such situations, the assessment of whether the employee, *préposé* or *Verrichtungsgehilfe* acted within the scope of the employment is further compounded by the role to be granted to the fraudulent appearance given to the victim.

In French law, the landmark decision of the Assemblée plénière of 19 May 1988, reproduced above, dealt with a case of embezzlement.[44] The Cour de cassation did not however devote much attention to the role of appearance, noting that the court of appeal had found that the victim was convinced that the *préposé* was acting for his employer.

The Cour de cassation developed its reasoning on the role of appearance in the first two annotated cases, decided within a few days of one another. In the first annotated case, the Cour de cassation set out the applicable standard. It suffices for the victim to show that he or she could entertain the legitimate belief (*croyance légitime*) that the fraudulent operation came within the tasks of the *préposé* for this operation to be held to fall in the functions of the *préposé* for the purposes of Article 1384(5) C.civ. (as opposed to showing that the victim could not possibly know that the *préposé* was in fact exceeding the scope of his or her authority). The only escape for the defendant would then be to demonstrate that the victim in fact knew that the *préposé* was acting outside of the scope of the tasks entrusted to him.[45]

In the first annotated case, the Cour de cassation concluded that the court of appeal had not erred in finding that such a legitimate belief was present, since the plaintiff knew

[44] *Supra*, **5.F.11.**

[45] Before the decision of 19 May 1988, *ibid.*, it was often argued that it was in fact up to the victim to prove that he or she did not and could not possibly have known that the *préposé* was not in fact acting within the realm of the tasks entrusted to him: see Bénac-Schmidt/Larroumet at 37, para. 393-5; Overstake at 143/29, para. 173-4; Viney and Jourdain, *Conditions* at 881-3, para. 802.

Guitard only in his quality as branch director and the operation whereby the gems, coins and stamped were bought was one which Guitard was empowered to conduct.

In the second annotated case, the Cour de cassation seemed to be somewhat stricter on the victim, since it concluded that, on the face of the conditions offered by the branch director (20% gain, tax-free, against payment in cash), the plaintiffs must have appreciated that the branch director was not offering a product from the defendant bank but rather some more obscure form of investment. Since the plaintiffs knew or must have known that the branch director was acting on his own account, the action against the defendant bank was bound to fail.

It will be noted that, in both cases, the Cour de cassation appeared to have placed little, if any, weight on the evidence relating to letterheads or other external signs.

Commenting on the two annotated cases, G. Viney notes that the Cour de cassation seems to recognize the role of appearances (*théorie des apparences*) in the assessment of whether the *préposé* was acting "within his or her functions".[46] In fact, as she remarks, all these cases fall within the contractual realm, since the victim is seeking to hold the *commettant* liable for the conduct of the *préposé* in not bringing about the contractual relationship which the victim desired. In true delictual cases, where the victim comes in contact with the *préposé* by chance (passer-by, neighbour, etc.), appearances should play no role.[47]

The Cour de cassation has confirmed its approach in subsequent cases, where the type of operations and the conditions offered to the victim have come to play a central role in assessing whether the victim could legitimately believe that the *préposé* was acting in his or her functions.[48]

(2) The third annotated case was a landmark case on the general issue of the course of employment, since it "corrected" misinterpretations of an earlier case, *Barwick* v.

[46] G. Viney, Chronique at JCP 1993.I.3727.

[47] A similar reasoning, revolving around appearances and the knowledge of the victim, has however been used under French law in cases dealing with *préposés* who took third parties on board their work vehicle despite a prohibition from the *commettant*; the third party who knew or must have known (in view of the circumstances) of the prohibition cannot argue that the *préposé* was acting "within his or her functions": see Cass. civ. 2e, 8 February 1967, Bull.civ. 1967.II.56; Cass. civ. 2e, 17 July 1968, Bull.civ. 1968.II.216 and Cass.civ. 2e, 11 July 1979, Bull.civ. 1979.II.212, as well as Le Tourneau and Cadiet at 732, para. 3530. This case-law dates from before the decision of 19 May 1988, *supra*, **5.F.11.** and furthermore it may now be irrelevant following the Loi Badinter (Act 85-677 of 5 July 1985), *infra*, Chapter VI, **6.F.18.** The same line of reasoning has been applied in Germany: see BGH, 3 November 1964, MDR 1965, 197.

[48] See other cases dealing with investments: Cass. civ. 2e, 8 June 1995, D 1995.IR.183; Cass. civ. 2e, 29 May 1996, D 1996.IR.151; Cass. civ. 2e, 2 April 1997, Bull.civ. 1997.II.111; Cass. civ. 2e, 19 November 1997, D 1998.IR.15, as well as previous cases such as Cass. civ. 2e, 11 June 1992, Bull.civ. 1992.II.164 and Cass. civ. 2e, 13 November 1992, Bull.civ. 1992.II.261. See also, outside of the financial sector, Cass. civ. 2e, 14 January 1998, Bull.civ. 1998.II.15.

English Joint Stock Bank,[49] which had been believed to be authority for the proposition that an act cannot be in the course of employment unless the employer benefits from it. Up until the third annotated case, it was thus widely held that when an employee acted for his own benefit and not for that of the employer, the employer could not be vicariously liable.[50] This constituted a significant restraint on the scope of vicarious liability.[51]

In the third annotated case, the House of Lords dispelled any uncertainty and held that the employer was responsible for the fraud of an employee (or any other self-serving conduct) which was committed in the course of employment, irrespective of whether the employer benefited from it or not.

(3) When it comes to determining whether Sandles, the fraudulent clerk, was acting in the course of his employment when he defrauded Mrs. Lloyd, Lord Macnaghten found that the perspective of Mrs. Lloyd mattered. He listed a series of facts which had led Mrs. Lloyd to believe that Sandles was acting as a member of the firm and was discharging his duties when requesting her to sign the deeds. Accordingly, under English law, the employer will be vicariously liable for the employee's fraud if the fraudulent actions came within the employee's actual or ostensible authority.[52] Furthermore, in *Armagas Ltd.* v. *Mundogas (The Ocean Frost)*,[53] the House of Lords added that, for the victim to be able to rely on ostensible authority in order to establish that an employee was within the course of employment (even if the employee had no authorization and did not purport to do something that an employee in his or her category was usually authorized to do), the representations which induced the victim to believe in the existence of that authority must have come from the employer, through words or conduct. It is not sufficient that the employee should himself or herself have declared to the victim that he or she was acting under authority from the employer.

(4) The fourth annotated judgment is not only a leading case on the impact of fraud on the limitations relating to the scope of employment under German law, but it also provides a good review of the interplay between the various provisions which come to bear in situations where an employer is sought to be made liable for fraudulent acts by an employee.

It can be seen, under III.1. of the judgment in the fourth annotated case, that the main provision concerning delictual liability for employees, § 831(1) BGB, was not significant, since the defendant had succeeded in bringing forward exculpatory

[49] (1867) LR 2 Ex 259, Exch. Ch.

[50] Rogers at 709-10.

[51] For instance, the case of *Morris* v. *CW Martin & Sons Ltd*, *supra*, **5.E.17.**, could very well have been decided otherwise, since the theft of the fur coat was also made for the employee's own benefit.

[52] *Clerk & Lindsell on Torts* at 187-90, para. 5-38 to 5-42; Markesinis and Deakin at 552-3; Rogers at 713-4.

[53] [1986] 1 AC 717, HL. See also *ibid.*

evidence.[54] The plaintiffs were more successful basing their claim on other provisions, namely §§ 278 (contractual liability for others) and 31 (liability for corporate organs) BGB, which have been interpreted so as to offer a means of circumventing the weaknesses of § 831(1) BGB.[55]

(5) The discussion of the impact of fraud took place with respect to § 278 BGB (see II.2. of the judgment in the fourth annotated case): the plaintiff argued that the defendant was liable because of a fault committed by O, its substitute (*Erfüllungsgehilfe*) in the discharge of its obligations relating to the pre-contractual phase,[56] which in German law comes under the contractual liability regime (so-called *culpa in contrahendo* or *c.i.c.*). The bank responded that O could not have acted in execution of the tasks entrusted to him by the bank (*in Erfüllung der Aufgabe*[57]), since he was acting for his own benefit and not in the interest of the bank. The BGH answered that the bank had to assume the risk of abuse by an employee such as O within the general range of his tasks (*allgemeiner Umkreis des Aufgabenbereichs*). That general range was not very precisely defined: it was broader than the actual authority of O as branch manager, as defined in the internal statutes of the bank, since it was capable of including improper conduct (abuse or *Mißbrauch*), yet it does not encompass injurious conduct for which the tasks entrusted to O would merely have provided an opportunity. The judgment of the court of appeal did not contain sufficient findings of fact, so that the BGH was forced to remit the case for further consideration. Nevertheless, at IV. of the judgment in the fourth annotated case, the BGH gave guidance as to the approach to be adopted when the case came to be reconsidered and linked the concept of "general range of one's tasks" to outside appearances: as long as, in the eyes of an outsider, the method and the means used by O would not have seemed foreign to his position as branch manager, the bank had to bear the risk of dishonest conduct by O. If, on the other hand, the client had given his money to O on a personal basis, then O would no longer have been executing his tasks for the bank and the bank would not have incurred liability under § 278 BGB. Under German law, therefore, appearances have a role to play in assessing whether the employee was acting within the scope of employment in fraud cases.

(6) In addition, the fourth annotated case shows how § 31 BGB can also be used to overcome the weaknesses of § 831(1) BGB. Just as the court of appeal had not adequately dealt with § 278 BGB, it had not properly discussed § 31, with the result that the BGH could only give directions for the further consideration of the case. Under III.2. of its judgment, the BGH explained that the determining factor is the type of functions that the person undertakes towards the outside world: when those functions involve

[54] On the means of exoneration under § 831(1) BGB, see *supra*, 5.1.1.C., under d) to f).

[55] See *supra*, 5.1.1.C., under g) (for § 278 BGB) and h) (for § 31 BGB).

[56] See *supra*, 5.1.1.C., under g).

[57] That phrase is the functional equivalent under § 278 BGB of "in the accomplishment of the task" ("*in Ausführung der Verrichtung*") under § 831(1) BGB: see *supra*, **5.G.13.**, Note (1).

"representation" of the company, then the person must be treated as a special representative under § 31 BGB, so that the company will be primarily liable for the injurious conduct of that person.[58]

[58] See *supra*, 5.1.1.C. under h).