Vicarious Liability in Roman locatio conductio?

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1 This paper is based on my dissertation ‘Die Haftung für das Verhalten anderer Personen bei der locatio conductio (2020)’.

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1. Introduction

*Locatio conductio* is a Roman synallagmatic consensual contract with a wide scope and a particular economic significance. The terminology - *locatio conductio* - refers to the mutual rights and obligations of the contracting parties: "locare" and "conducere". The general meaning of *locare* is "to place/put/arrange" and of *conducere* "to bring together/collect/assemble". In a legal sense *locare* stands for "to rent/let" while *conducere* stands for "to hire/accept something on hire".

Regarding terminology and actions, *locatio conductio* can be seen as a contractual unity. However, as there are different contractual constellations that Roman jurists classify as *locatio conductio*, a trichotomous (or less common a dichotomous) structure as proposed by the majority of modern scholars, seems justified.

Accordingly, letting and hiring of things refers to *locatio conductio rei* (contract of lease), the fulfilment of a specific task refers to *locatio conductio operis* (contract for work) and the rendering of services refers to *locatio conductio operarum* (contract of employment).

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The contracting parties of a *locatio conductio* are called *locator* and *conductor*. The *locator* is the person who leases out his property to the *conductor* (*locatio conductio rei*), who entrusts the *conductor* with a certain task (*locatio conductio operis*) or who provides his labour for the *conductor* (*locatio conductio operarum*). If a contracting party suffers loss due to a violation of contract by the other party, the *locator* is provided with the *actio locati* while the *conductor* is provided with the *actio conducti* to claim for compensation.

When someone who is not bound by the *vinculum iuris* of a certain *locatio conductio* causes harm to a contractual item entrusted to the *locator* or to the *conductor* by the other party (e.g. a leased asset or working material to be processed) the question rises whether the harmed party can assert a claim for damages against his contracting partner. In order to provide a clear answer to this question, an in-depth analysis is required. This is because there are barely any general rules regarding contractual liability for loss caused by others in classical Roman law, in contrast to modern civil law codifications.

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11 This includes everyone except for the contracting parties, such as slaves and children of the contracting parties but also (free) external parties. For all those people the general term “third party” will be used in the following.
12 The *vinculum iuris* is a non-material bond, which exclusively ties the contracting parties together and provides them with contractual rights and duties; see Axel Hägerström, ‘Über den Grund der bindenden Kraft des Konsensualkontraktes nach römischer Rechtsanschauung’ (1945) 63 SZ 268-300, pp. 278 seqq.
Therefore, Roman jurists had to respond to the following questions on a case-by-case basis: Should a contracting party of a *locatio conductio* who suffered loss caused by a third party have legal claims against the contracting partner, who is probably more accessible and solvent than the actual tortfeasor? Or should the harmed party only have (delictual) claims against the actual tortfeasor and bear the risk of the tortfeasor’s insolvency?

The analysis of various classical legal texts shows that for Roman jurists liability generally remained strictly personal. Nevertheless, there are Roman jurists who supported an unlimited contractual liability for damage caused by third parties in certain classical cases, especially in the field of *locatio conductio*. The legal basis for this kind of contractual liability of *conductores* and *locatores* is hardly ever explicitly mentioned in the fragments or is discussed in rather contrasting ways. Modern scholars likewise have different opinions thereto.

After an analysis of the structure of *locatio conductio* and its general liability framework, this paper examines the principle of personal responsibility in classical Roman and modern Austrian civil law. Thereafter, the legal basis for cases of contractual liability for loss caused by others in *locatio conductio* is examined on the basis of certain leading cases. Eventually, this paper addresses the question to what extent those liability cases are in conformity with the principle of personal responsibility in classical Roman law.

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15 See fn 69.

16 See fn 85.


2. *Locatio conductio*

2.1 The character of *locatio conductio*

The contract of *locatio conductio* came into existence not before the second century BC. A *locatio conductio* can be concluded by mere *consensus* on the essential terms (*essentialia negotii*) without any formal requirements. This contract is always entered into by a *locator* and a *conductor*. The *locator* is the person who gives something to the *conductor*: a rental property, a certain task to fulfil, or his labour. In exchange, the *conductor* rents property, fulfils a certain task, or exploits the *locator*’s labour. In return for the primary obligation its recipient has to pay a certain fee (*merces*).

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19 See Ulp. (71 ad ed.) D. 19.2.14: *Qui ad certum tempus conducit, finito quoque tempore colonus est: intellegitur enim dominus, cum patitur colonum in fundo esse, ex integro locare, et huiusmodi contractus neque verba neque scripturam utique desiderant, sed nudo consensu convalescunt*. Translation: A man who leases for a fixed term is a tenant farmer also after the term’s end; the owner is considered to lease anew when he allows the tenant to remain on the farm. Contracts of this kind require neither formal words nor writing; they take fore by mere agreement; and so if the owner, in the meantime, went mad or died, Marcellus says that it is impossible for the lease to be renewed, a view that is correct; Alan Watson, ‘The Digest of Justinian’, 2nd edn., vol. II (Philadelphia: University of Pennsylvania Press, 2009), p. 104.

20 E.g. a real estate, see Pomp. (9 ad Sab.) D. 19.2.3; an animal, see Ulp. (32 ad ed.) D. 19.2.9.4; or a slave, see Lab. (5 post. A Iavl. epit.) D. 19.2.60.7.

21 E.g. a gemstone to be set or cut, see Ulp. (32 ad ed.) D. 19.2.13.5.

22 E.g. the labour of a shoemaker’s apprentice, see Ulp. (32 ad ed.) D. 19.2.13.4.


24 Gai. (2 rec. cott.) D. 19.2.2 pr.: [...] *nam ut cumpio et vendito ita contrahit, si de preio convenerit, sic et locatio et conductio contrahit intellegitur, si de mercede convenerit*. Translation: [...] Sale and purchase is contracted if the price is agreed upon; similarly, lease and hire is considered to be contracted once the rent is agreed upon; Watson, ‘Digest II’, 101.
Locatio conductio is a *bonae fidei negotium*, entitling the contracting parties to conclude contract clauses in good faith. So-called *leges locationis/conductionis* may extend the general rights and duties of one or both contracting parties. To enforce contractual claims, a *locator* has an *actio locati* and a *conductor* an *actio conducti*. Both actions are *bonae fidei iudicia*, which means that the judge (*iudex*) has a wide margin of judicial discretion to evaluate all relevant circumstances of a given legal dispute, such as common usages, contract clauses, local customs etc.

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25 Inst. 4.6.28: *Actionum autem quaedam bonae fidei sint, quaedam stricti iuris. Bonae fidei sunt haec: ex empto vendito, locato conducto [...].* Translation: Certain actions, moreover, are of good faith and others of strict law. Those of good faith are such as arising from purchase and sale, leasing and hiring [...]; translated by the author. Gai. Inst. 4.62: *Sunt autem bonae fidei iudicia haec: ex empto vendito, locato conducto [...].* Translation: Actions of good faith are such as the following: purchase and sale, leasing and hiring; translated by the author. C. 4.65.19: *Circa locationes atque conductiones maxime fides contractus servanda est [...].* Translation: Regarding contracts of leasing and hiring, the contractual terms shall, by all means, be observed; translated by the author.


28 See fn 10.

2.2 General liability standards in *locatio conductio*

2.2.1 *Dolus, culpa* (*imperitia, infirmitas*)

During the classical period, *dolus* and *culpa* became established as general liability standards under the contract of *locatio conductio*, as the following fragments show:

Ulp. (28 ad ed.) D. 13.6.5.2

 [...] *Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa praestatur.*\(^{30}\)

Ulp. (30 ad ed.) D. 16.3.1.10

*In conducto et locato [...] et dolum et culpam praestabunt [...]*.\(^{31}\)

Ulp. (29 ad Sab.) D. 50.17.23

 [...] *Dolum et culpam mandatum, commodatum, venditum, pignori acceptum, locatum [...]*.\(^{32}\)

The majority of fragments which name *dolus* as a general liability standard in *locatio conductio* are quite vague regarding the actual meaning of the term *dolus*. Whereas *dolus* remains a relatively flexible term within the classical period, a technical meaning of the liability standard *dolus* develops with regard to *bonae fidei iudicia*. According to the fragment D. 19.2.24 pr. and following MacCormack\(^{33}\), Meissel\(^{34}\) and Du Plessis\(^{35}\) *dolus* can be defined as a deliberate breach of the principle of good faith.

The liability standard *culpa* is quite multifaceted and includes all kinds of careless behaviour.\(^{36}\) During the classical period, the term *culpa* became increasingly systematized and distinctive; however, it still lacked full abstractness even in the late

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\(^{30}\) Translation: [...] On the other hand, where, as in sale, hire, dowry, pignus, and partnership, the interest of each party is advanced, liability is for both willful conduct and fault; Alan Watson, ‘The Digest of Justinian’, 2nd edn., vol. I (Philadelphia: University of Pennsylvania Press, 2009), p. 402.

\(^{31}\) Translation: In hire [...] they [...] will be liable for both fraud and fault; Watson, ‘Digest II’, p. 12.


\(^{35}\) Du Plessis, ‘Letting and Hiring’, pp. 29 seqq.

\(^{36}\) Frier, ‘Tenant’s liability’, pp. 242 seq.
Thus, the presence of *culpa* in a certain context had to be legally assessed according to the specific circumstances and the contractual basis of each case.\(^3\)

Two subcategories of *culpa* which are most relevant for *locatio conductio operis* are *imperitia* and *infirmitas.*\(^4\) The successful completion of a specific task may require certain skills and physical strengths. Regardless of his personal ability, by entering a *locatio conductio operis* a *conductor* has to commit himself to fulfill a certain task with the professional skill of an expert (*artifex*) and with the required physical strength.\(^5\) Consequently, in the event of damage the *conductor* is also liable for his physical weakness (*infirmitas*) and his lack of professional skill (*imperitia*).\(^6\)

### 2.2.2 Custodia

Besides *dolus* and *culpa,* modern scholars discuss *custodia* as a further general liability standard in the field of *locatio conductio.* In common usage *custodia* means "safe custody/special security".\(^7\) In legal contexts *custodia* is understood as a form of responsibility of a custodian, who is obligated to safeguard a certain thing that is entrusted to him by the other contracting party; in the event of loss, the custodian has to bear the negative consequences – *custodiam praestare.*\(^8\)

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38 See Klausberger, ‘Zurechnungsgründe’, p. 60.


When a person, who is not bound by the *vinculum iuris* of a contract, commits theft (*furtum*) of an item entrusted to another person under a contract, this incident is generally classified as a fortuitous event (*casus minor*); thus, it generally does not entail a liability of the contracting party who has had the object in his keeping. However, if a person has the contractual obligation of *custodia*, classical fragments state a responsibility for (at least certain cases of) theft.

Common examples involve contracts with storage managers (*horrearii*), launderers (*fullones*) and tailors (*sarcinatores*), as well as shippers (*nautae*), innkeepers (*caupones*) and stablers (*stabularii*).

Whether there existed a general *custodia* liability in *locatio conductio* within the classical period remains highly controversial amongst modern scholars. This is because we have only one fragment that appears to indicate *custodia* to be a general liability standard in the field of *locatio conductio* besides *dolus* and *culpa*, namely rescript C. 4.65.28:

Diocl. et Maxim. C. 4.65.28 (a. 294)

*In iudicio tam locati quam conducti dolum et custodiam, non etiam casum, cui resisti non potest, venire constat.*

According to the rescript of the emperors Diocletian and Maximian, contracting parties of a *locatio conductio* are liable for *dolus* and *custodia* but not for force majeure – *casum, cui resisti non potest.*
The context to which the rescript refers is not clear. In any case, it is conspicuous that the rescript does not mention \textit{culpa} as a liability standard at all. Due to the uncertainty regarding the context of the rescript, different views were held by modern scholars.

According to the findings of \textit{Haymann}\textsuperscript{51} in 1919, the text is subject to far-reaching cuts making a reconstruction of the original version of the rescript impossible. \textit{Krückmann}\textsuperscript{52}, in 1944, examines the text with procedural considerations. According to him, the plaintiff of the case in question might just have based his claim on \textit{dolus} or \textit{custodia} while the defendant might have based his defence on the occurrence of \textit{vis maior}.

In 1951, \textit{Rosenthal}\textsuperscript{53} builds on the arguments of \textit{Haymann}. In his reconstruction of the (supposedly) interpolated\textsuperscript{54} fragment, \textit{Rosenthal} replaces, inter alia, “\textit{custodiam}” by “\textit{culpam}”, but admits that the fragment is rather useless due to the alleged severe interpolations. \textit{Mayer-Maly}\textsuperscript{55}, in 1956, argues along similar lines as \textit{Krückmann}: he assumes that the rescript refers to a particular case where only the liability/risk standards \textit{dolus}, \textit{custodia} and \textit{vis maior} had to be discussed. At the same time \textit{Mayer-Maly} relativises this view by following \textit{Haymann} and \textit{Rosenthal} with the argument that Justinian’s compilers undoubtedly made several cuts in the original version of the rescript, which would make an accurate reconstruction of the case impossible.


\textsuperscript{52} Paul Krückmann, ‘Custodia’ (1944) 64 SZ 1-56, p. 35.

\textsuperscript{53} Rosenthal, ‘Custodia und Actio furti’, p. 240.

\textsuperscript{54} The term “interpolation” refers to alterations of classical fragments, which distort their original content. Interpolations mainly resulted from the codification process of Justinian’s compilers who were commissioned to collect, shorten and edit the multitude of existing legal texts to make them concise and clear. Besides, there also happened some defects during the process of transcription within the past centuries; Wolfgang Kaiser, ‘Justinian’, in David Johnston (ed.), The Cambridge Companion to Roman Law (Cambridge: Cambridge University Press, 2015) 119-149, pp. 128 seqq.; Franz Wieacker, ‘Zur Technik der Kompilatoren: Prämissen und Hypothesen’ (1972) 89 SZ 293-323, pp. 293 seqq. Especially from the late 19\textsuperscript{th} century until the middle of the 20\textsuperscript{th} century the method of “interpolation criticism” was pursued by several scholars to deconstruct and remodel (classical) fragments in order to remove passages which contradict their own theses; Max Kaser, ‘Ein Jahrhundert Interpolationenforschung an den römischen Rechtsquellen’, in Max Kaser (ed.), Römische Rechtsquellen und angewandte Juristenmethode (Wien – Graz: Böhlau, 1986) 112-154, pp. 112 seqq. Today, scholars generally assume the classicity of fragments, which date back from the classical period, unless there are significant facts indicating post-classical alterations; Kaser, ‘Interpolationenforschung’, pp. 112 seqq.; Paul Kretschmar, ‘Kräfte der Interpolationenkritik’ (1939) 59 SZ 102-218, p. 102 seqq.

\textsuperscript{55} Mayer-Maly, ‘Locatio Conductio’, p. 214.
MacCormack\textsuperscript{56}, in 1972, assumes, too, that there are substantial cuts within the fragment and believes that the original version of the rescript also covered the liability standard culp\textsuperscript{a}. Nevertheless, he considers it to be possible that there was a general custodia liability in locatio conductio during the classical period. Ten years later, Molnár\textsuperscript{57} analyses the fragment by following the arguments of Krückmann and Mayer-Maly. According to Molnár, the assessment of culpa in the particular case was either not relevant or was taken into consideration as far as it is to be located between dolus and custodia. He further believes that during the classical period, every conductor/locator who was entrusted with an object by his contracting partner was subject to custodia liability.

In 1987, Robaye\textsuperscript{58} draws a large-scale comparison between what is stated in the rescript and in several other fragments dealing with liability standards in the field of locatio conductio. According to his findings, a general custodia liability under the contract of locatio conductio cannot be derived from C. 4.65.28. The opposite view would be incompatible with several other classical fragments in which custodia is (at least implicitly) denied to be a general liability standard under the contract of locatio conductio.

There are several reasons to follow Robaye’s opinion. On the one hand, there are a number of fragments\textsuperscript{59} which explicitly deal with general liability standards in the field of locatio conductio but only mention dolus and culpa as such and not custodia. On the other hand, the rescript is too fragmentary that a general assertion could be derived from it. Finally, the rescript dates back as late as 294 AD, the post-classical era, and therefore does not necessarily reflect classical law. For all these reasons, it can be stated that custodia is most likely not a general liability standard under the contract of locatio conductio within the classical period.\textsuperscript{60} In conclusion, only dolus and culpa can be categorised as general liability standards in the field of locatio conductio.

\textsuperscript{56} MacCormack, ‘Custodia and Culp\textsuperscript{a}’, p. 205.
\textsuperscript{58} Robaye, ‘L’obligation de garde’, pp. 193 seqq.
\textsuperscript{59} See Du Plessis, ‘Letting and hiring’, pp. 26 seqq.
3. The principle of personal responsibility

3.1 Introduction

In modern legal theory, legal norms are separated into rules and principles. Rules are specific legal norms which are characterised by strict applicability. Principles are legal norms with a high degree of generality, demanding that their normative content is realised to a large extent, even though they have to be balanced with opposing principles.

In Roman law, principles are to be considered as judicial guidelines. A certain principle has to be applied if relevant for a given case and if there are no opposing principles. In case there are opposing principles, they have to be balanced according to the particularity of a certain case. Furthermore, if the application of a certain principle leads to an inadequate result because of the particular circumstances of a certain case, this principle has to be disregarded in favour of an appropriate (individual) decision.

Contrary to modern European civil law codifications, classical Roman law is not based on a closed set of norms. As a result, its jurisprudence is predominantly characterised by casuistry, i.e. legal assessment on a case-by-case basis. Resorting to the casuistic case practice, Roman jurists developed certain principles inductively.

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66 Ibid.


These maxims are in part explicitly phrased as principles, in part their character as principles can only be derived from the wording of several corresponding case decisions. In modern Austrian civil law², § 1313 ABGB pronounces a principle of personal liability: “Generally a person is not liable for illegal actions of someone else in which he did not participate [...]”⁷. In classical Roman law, there is no such general-abstract provision regarding personal responsibility. In the absence of an explicitly phrased principle of personal responsibility, such a principle might still be formulated in view of the wording of a variety of case decisions. The most relevant text in this regard is D. 39.1.5.5:

Ulp. (52 ad ed.) D. 39.1.5.5

*Si plurium res sit, in qua opus novum fiat et uni munitetur, recte facta munificatio est omnibusque dominis videtur denuntiatum: sed si unus aedificaverit post operis novi munificationem, ali, qui non aedificaverint, non tenebuntur: neque enim debet nocere factum alterius ei qui nihil fecit.*

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³ The legal comparison with modern Austrian law, as drawn in this paper, emphasises the continuing close dependence of modern Austrian torts and contractual liability law on its Roman foundations; see Gábor Hamza, ‘Die Entwicklung des Privatrechts und die römischrechtliche Tradition in den österreichischen Erbländern /Erbländer/ und in Österreich’ (2009) 13 AFDUDC, 321-334, p. 325; Herbert Hausmaninger, ‘Roman Tort Law in the Austrian Civil Code of 1811’, in Herbert Hausmaninger et al. (eds.), *Developments in Austrian and Israeli Private Law* (Wien – New York: Springer, 1999) 113-133, pp. 114 seqq. The comparison shows how far-sighted the decisions of Roman jurists were almost 2000 years ago and how contemporary they still are today.


⁸ § 1313 ABGB: “Generally a person is not liable for illegal actions of someone else in which he did not participate. Even in the event the opposite is provided by law, he can claim regress against the culpable party”; Peter Eschig/Erika Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code* (Wien: LexisNexis-Verl. ARD Orac, 2013) p. 313.

⁹ That is not surprising, since Roman law is more flexible compared to modern private law codifications; see Giaro, ‘Werkmittel’, pp. 216 seqq.


¹ Translation: If the property on which new work is being carried out belongs to several persons and a notice is served on one of them, that notice has been correctly served and is regarded as having been served on all the owners. However, if one of them carries out building-work after the serving of the notice of new work, the rest, who have not done so, will not be liable, since the action of one person
A community of owners starts to construct a new building, whilst an objection against the continuation of the construction (*operis novi nuntiatio*) is made. Contrary to the objection, one of the co-owners continues the construction process. The legal question is whether the other co-owners can also be held accountable for the unlawful continuation of the construction process.

The *operis novi nuntiatio* is a legal tool to regulate new constructions on neighbouring property.\(^78\) If there is a certain predictable impairment of interests, the owner of a property or a person entitled by easement can object to a new construction on a neighbouring property.\(^79\) If the construction is continued unlawfully\(^80\) – as obviously in the case under review –, the claimant obtains an *interdictum* (*demolitorium*)\(^81\) which entitles him to demand the removal of the construction that was pursued after the objection.\(^82\) If the constructor refuses to do so, he is condemned to pay compensation.\(^83\) Especially in cases in which the defendant is insolvent the question arises whether the co-owners can also be held liable.

In D. 39.1.5.5 Ulpian decides that only the person who unlawfully continued to construct the new building is liable for loss resulting from the continued construction process. In contrast, the co-owners – most likely – just have to tolerate the removal of the unlawfully constructed building on their property in conformity with D. 39.1.22\(^84\), where heirs of a piece of land on which the decedent constructed a new

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\(^{79}\) Ulp. (52 ad ed.) D. 39.1.1.16: Nuntiatio fit aut iuris nostri conservandi causa aut damni depellendi aut publici iuris tuendi gratia. Translation: Notice is given either in order to preserve our own rights or to prevent the occurrence of injury or to protect public rights; Watson, ‘Digest III’, p. 375.


\(^{81}\) The name of the *interdictum* dates back to the era of the glossators; Rainer, ‘Bau- und nachbarrechtliche Bestimmungen’, p. 188; Finkenauer, ‘Stipulation’, p. 253.


\(^{84}\) See Marcell. (15 dig.) D. 39.1.22: *Cui opus novum nuntiatum est, ante remissam nuntiationem opere facto decessit: debet heres eius patientiam destruendi operis adversario praestare: nam et in restituendo huiusmodi opere eius, qui contra edictum fecit, poena versatur, porro autem in poenam heres non succedit.* Translation: A person on whom a notice of new work had been served died after carrying out work before the relaxation of the notice. His heir must give his adversary permission to
building despite an expressed *operis novi nuntiatio* had to tolerate the removal of the building, too. Beyond that the continued construction of their co-owner must not be to their detriment, since the action of one person must not harm another person who has done nothing – *neque enim debet nocere factum alterius ei qui nihil fecit*.

Besides D. 39.1.5.5 there are further legal texts which refer to a concept of personal responsibility in similar wording and various legal circumstances.\(^{85}\) Taking all these cases into consideration, there is a strong indication that a principle of personal responsibility has been developed within the classical period, despite the absence of an explicit general rule thereto. In fact, it is noteworthy that the phrase “*neque enim debet nocere factum alterius ei qui nihil fecit*”, which describes the principle of personal responsibility best of all classical fragments, is almost identical to the wording of § 1313 ABGB.\(^ {86}\) It does not seem unlikely that this Ulpian fragment has been taken as a template in the codification process of this modern Austrian legal provision.\(^ {87}\)

### 3.2 The principle of personal responsibility in *locatio conductio*

The assumption that a principle of personal responsibility has been developed during the classical period is confirmed by several fragments dealing with liability under the contract of *locatio conductio*.\(^ {88}\) A text that exemplifies the principle well is D. 19.2.60.7:

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\(^ {85}\) See Alf. (2 dig.) D. 18.6.12; Alf. (5 dig.) D. 28.5.45 (44); Nerat. (4 membran.) D. 44.4.11 pr.; Pomp. (13 ad Sab.) D. 10.2.45.1.; Paul. (6 ad ed.) D. 2.10.2; Ulp. (52 ad ed.) D. 39.1.5.5.; Ulp. (9 ad ed.) D. 3.3.27 pr. For the discussion of these cases see David Tritremmel, ‘Die Haftung für das Verhalten anderer Personen bei der locatio conductio’ (Dissertation: University of Vienna, 2020) pp. 65 seqq.; Knittel, ‘Haftung’, pp. 359 seqq.

\(^ {86}\) In the opinion of *Franz von Zeiller*, one of the leading drafters of the Austrian Civil Code, the principle of personal responsibility as stipulated in § 1313 ABGB is so obvious that it would not have been even necessary to be enshrined in law; *Franz von Zeiller, ‘Commentar über das allgemeine bürgerliche Gesetzbuch’, vol. III/2 (Wien: Geistinger, 1813)*, p. 741: „Daß man für ganz fremde beschädigende Handlungen, woran jemand weder unmittelbar, noch mittelbar (§1301.) Theil genommen hat, wo man also auf keine Art als Beschädiger betrachtet werden kann, nicht verantwortlich sei, ist eine so einleuchtende Wahrheit, dass sie in dem Gesetzbuche keiner Erwähnung bedürfte […].“

\(^ {87}\) See Hausmaninger, *‘Roman Tort Law’, p. 133.

\(^ {88}\) See Lab. (5 post. a Iavol. epit.) D. 19.2.60.7; Paul. (22 ad ed.) D. 19.2.45 pr.; Ulp. (32 ad ed.) D. 19.2.9.4; Ulp. (18 ad ed.) D. 9.2.27.11.
A slave is hired as a muleteer. Due to his negligence, a mule belonging to the conductor gets killed. The legal question is whether the locator who leased out the slave is contractually liable for the loss that the conductor has suffered. Regarding the conductor’s liability for the loss caused by his slave, two scenarios are distinguished in the fragment:

If the slave entered the locatio conductio himself – scenario one –, his dominus is subject only to a limited liability within the framework of the actiones adiectitiae qualitatis. The actio de peculio, one of the granted actiones adiectitiae qualitatis, is limited to the value of an existing peculium that was previously given to the slave by his dominus/pater familias. The actio de in rem verso, which is also granted by the jurists, is limited to the amount of the dominus’ enrichment (versio) resulting from the contract. It refers to the amount of the paid rental fee (merces).

In case that the dominus leased out his slave as a muleteer – scenario two –, Iavolenus/Labeo raise the question of his unlimited contractual liability. According to the jurists, there is no contractual liability, if there is no dolus malus or culpa that

89 Translation: You hired my slave as a muleteer; due to his carelessness your mule died. If he leased himself out, I [Labeo] decide that I will be held responsible to you for the loss up to the value of his peculium or the amount of benefit I [the lessor] took; but if I leased him out, I will be held responsible to you for no more than the absence of my bad faith and fault; Watson, ‘Digest II’, p. 115.

90 If the slave had a peculium, the hirer would have the actio conducti as actio de peculio. The scope of this action is limited with the amount of the peculium. Otherwise, if the dominus of the slave received the rental fee, the hirer has the actio conducti as actio de in rem verso in the amount of the enrichment (versio) of the dominus [...]; translated by the author. Regarding actiones adiectitiae qualitatis see Andreas Wacke, ‘Die adjektizischen Klagen im Überblick. Erster Teil: Von der Reeder- und der Betriebsleiterklage zur direkten Stellvertretung’ (1994) 111 S 280-362, pp. 280 seqq.


the locator could be blamed for – non ultra me tibi praestaturum, quam dolum malum et culpam meam abesse.

Two conclusions may be drawn from this fragment: first, there is (in general) no unlimited contractual liability in the field of locatio conductio without personal misconduct (dolus, culpa). Second, the mere fact that a slave who was leased out as a muleteer negligently caused loss to the conductor during his work does not necessarily have to be linked to a misconduct of the locator.

4. Liability for damages caused by others in locatio conductio

4.1 Introduction

In modern Austrian civil law, there are certain provisions stipulating a contractual liability for losses caused by third parties, despite the general principle of personal liability as laid down in § 1313 ABGB. Most prominently, there is § 1313a ABGB, introduced by the Third Partial Amendment (1916) to the Austrian Civil Code of 1811, providing a strict vicarious liability. Furthermore, there is – for instance – § 1314 ABGB stipulating the liability of whoever employs or accommodates unreliable persons who cause harm to the (rented) property of a landlord. Both provisions were of particular relevance for contractual relationships classified as contracts of locatio conductio in classical Roman law.

In comparison with modern Austrian law, classical Roman law barely consists of general liability provisions of this kind. With regard to the fragments mentioned in chapter 3, rather the idea of a personal responsibility seems to have prevailed. Nevertheless, there are certain fragments which affirm a contractual liability for losses caused by third parties in the field of locatio conductio. Consequently, the question arises on what legal basis the liability decisions are founded and to what extent these cases are in conformity with the postulated principle of personal responsibility. In

93 § 1313a ABGB: Whoever is obliged to perform [a service] to someone else is liable to him for fault of his legal representative as well as of persons who he employs to deliver the performance [of the service] as for his own; Eschig/Pircher-Eschig, ‘The Austrian Civil Code’, p. 313.
94 § 1314 ABGB: Whoever employs an employee without a reference or knowingly keeps or provides housing to a person who is dangerous due to his physical or mental state is liable to the landlord and the cohabitants for compensation for the damage caused by the dangerous nature of this person; Eschig/Pircher-Eschig, ‘The Austrian Civil Code’, p. 313.
95 For a comprehensive overview of several cases see Tritremmel, ‘Haftung’, pp. 87 seqq.
order to approach this question in the following subsections, several leading cases will be examined and structured into different liability models.

### 4.2 Contractual noxal liability

Noxal liability is a liability regime *sui generis* dating back to the Twelve Tables (about 450 BC).\(^{96}\) It refers to the strict liability of a *dominus* for torts committed by persons in his power (*patría/dominica potestas*), who themselves cannot be successfully sued.\(^{97}\) Noxal liability is not only strict but also limited insofar as a *dominus insciens* - who is unaware regarding the commitment of a tort by a person in his power - can surrender the actual tortfeasor to the harmed person by the so-called *noxae deditio*\(^{98}\) to escape his own full liability.\(^{99}\) In the archaic period\(^{100}\), the “value” of a surrendered tortfeasor lied in the possibility of enacting vengeance.\(^{101}\) During the classical period,

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96 See Table 12.2a: *Ex maleficio filiorum famílias servorumque, veluti si fúrtem fecerint aut iniuriam conuuiuerint, noxales actions prodictae sunt, uti liceret patri dominóre aut litis asestinationem sufférre aut noxae dedere*. Translation: From delinquency of children of the household and of slaves actions shall be appointed in a way that the father or the master may be permitted either to undergo assessment of the claim or to deliver the delinquent for punishment; translated by the author. See also Gá. Inst. 4.7.5; Dieter Flach, ‘Das Zwölftafelgesetz – Leges XII tabularum’ (Darmstadt: Wiss. Buchges., 2004) pp. 129 seqq.


98 See Ulp. (23 ad ed.) D. 9.4.21: *Quotiens dominus ex noxali causa convenitur, si nolit suspicere indicium, in ea causa res est, ut debet noxae dedere eum, cuius nomine indicium non suspicatur [...]*. Translation: Whenever an owner is sued on noxal grounds, if he does not wish to defend the action, the position is that he must noxally surrender the slave on whose account he makes no defense [...]; Watson, ‘Digest I’, p. 300.

99 If the *dominus insciens* wants to keep the noxious person in his power, he has to pay the same amount of compensation that a person *sui iuris* must pay, if he had committed the tort himself; Paul F. von Wyss, ‘Haftung für fremde culpa’ (Zürich: Schultheiß, 1867) p. 36.


a more economic approach was pursued, namely to exploit the manpower of the surrendered person.\textsuperscript{102}

The historical starting point for the development of regimes of contractual liability for losses caused by others was most likely a controversy between the Sabinian School and the Proculeian School concerning contractual noxal liability, as stated in Coll. 12.7.9:\textsuperscript{103}

Ulp. (18 ad ed.) Coll. 12.7.9

Sed et si qui servi inquilini insulam exusserint, libro X Urseius refert Sabinum respondisse lege Aquilia servorum nomine dominum noxali iudicio conveniendum: ex locato autem dominum teneri negat. Proculus autem respondit, cum coloni servi villam exusserint, colonum vel ex locato vel lege Aquilia teneri, ita ut colonus servos posset noxae dedere et si uno iudicio res esset iudicata, altero amplius non agendum.\textsuperscript{104}

A locator leases a tenement house (insula) to a conductor. Slaves of the conductor subsequently cause a fire, which burns down the house. The legal question is whether the conductor is (contractually) liable for the damage caused by his slaves. Urseius reports a responsum by Sabinus stating that the locator can bring actio legis Aquiliae noxalis against the conductor. Urseius adds that the contractual actio locati is not applicable.

In contrast, Proculus provides the locator, in a comparable case where slaves of the conductor burn down the rented house (villa) not only with the delictual action but also with the contractual actio locati as an alternative. Nonetheless, the actio locati is limited by the option of noxae deditio, too, according to Proculus.

In both cases the conductor was obviously not at fault, as the noxal limitations indicate. What is remarkable about this fragment is the quite uncommon\textsuperscript{105} regime of

\textsuperscript{102} Wicke, ‘Hafung’, p. 46; Benöhr, ‘Sklavendelikte’, p. 274.


\textsuperscript{104} Translation: But if some slaves of an urban tenant burn down an apartment house, according to Urseius in Book 10 Sabinus responded that the owner may be sued, on the account if his slaves, by a noxal trial under the Aquilian law; but he (Urseius) denies that the owner is liable on the lease. But Proculus responds that when a tenant farmer’s slaves burn down a farmhouse, the tenant is liable either on the lease or from the Aquilian law, with the conditions that the tenant can surrender the slaves noxally, and that if the matter is adjudged in one trial there should be no further suit by the other; Frier, ‘Landlords and Tenants’, p. 233.

\textsuperscript{105} But see Paul. (32 ad ed.) D. 17.1.26.7 regarding actio mandati and Ulp. (19 ad ed.) D. 10.2.16.6 regarding actio familae erciscundae.
contractual liability with noxal limitation as proposed by Proculus, which has led to a controversy\textsuperscript{106} between the Sabinian School and the Proculeian School. In the fragment under review there is no indication concerning the rationale behind Proculus’ decision. However, there are certain hypotheses amongst modern scholars regarding the legal basis of contractual liability with noxal limitation.

Schipani\textsuperscript{107} and Knütel\textsuperscript{108} trace the limited contractual liability to the principle of good faith which underlies the contract of locatio conductio. Von Lübtow\textsuperscript{109} believes that the conductor is contractually liable for the misconduct of his slaves because of his abstract ability to exercise control over the leasehold. While Frier\textsuperscript{110} questions the purpose of the limited contractual liability and thus its classicity, there are several practical explanations for the alternative contractual action: the delictual actio legis Aquiliae noxalis and the contractual actio locati have different prerequisites for claims that a certain case does not necessarily cumulatively fulfil. If the prerequisites for both claims are fulfilled, the option to choose between the two actions might still have a positive effect with regard to provability\textsuperscript{111}, as a plaintiff generally bears the burden of

\begin{thebibliography}{99}


\bibitem{108} Knütel, ‘Haftung’, p. 396.

\bibitem{109} Ulrich von Lübtow, ‘Untersuchungen zur lex Aquilia de damno iniuria dato’ (Berlin: Duncker & Humboldt, 1971) p. 71.

\bibitem{110} Frier, ‘Tenant’s liability’, p. 263.

\end{thebibliography}
proof regarding the facts on which the claim is based.\textsuperscript{112} Finally, the calculation of damages can differ between the delictual and the contractual action, provided that the tenant waives his right to surrender the noxious person(s) in his power.\textsuperscript{113}

Besides these arguments there is another reason to treat Coll. 12.7.9 as classical, namely the Ulpian fragment D. 9.2.27.11:

\textit{Ulp. (18 ad ed.) D. 9.2.27.11}

\textit{Proculus ait, cum coloni servi villam exussissent, colonum vel ex locato vel lege Aquilia teneri, ita ut colonus possit servos noxae dedere, et si uno iudicio res esset indicata, altero amplius non agendum. Sed haec ita, si culpa colonus careret [...]}.\textsuperscript{114}

Slaves of a \textit{conductor} cause a fire that burns down the \textit{villa} located on the leasehold. The legal question is whether the \textit{conductor} is (contractually) liable for this damage. Proculus decides that the \textit{conductor} is liable not only delictually but also contractually. However, according to Proculus, the \textit{conductor}'s contractual liability is limited insofar as he can surrender the noxious slaves in order to escape personal liability, if there was no personal misconduct on the \textit{conductor}'s part – \textit{si culpa colonus careret}.

Three important conclusions can be drawn from this text: first, the contractual liability with noxal limitation is classical; second, it seems that the Proculeian opinion on contractual noxal liability prevailed against the Sabinian opinion by the end of the classical period, as the late-classical jurist Ulpian just refers to the opinion of Proculus but not of Sabinus; third, D. 9.2.27.11 relativises and simultaneously confirms the principle of personal responsibility by awarding contractual noxal liability for losses caused by persons under one’s control while denying unlimited contractual liability if there was no personal \textit{culpa}.


\textsuperscript{113} Knütel, ‘Haftung’, p. 393.

\textsuperscript{114} Translation: Proculus says that when the slaves of a tenant farmer have burned down the country house, the tenant is liable either on the contract of tenancy or under the lex Aquiliae, but with the privilege that the tenant is able to hand over the slaves for punishment. And if the case is decided in one of these actions, the other cannot be brought in addition. But the position is thus only if the tenant farmer was free of fault; Watson, ‘Digest I’, p. 284.
4.3 Liability for violation of a certain contract clause

When entering into a *locatio conductio* the parties frequently add certain contract clauses (*pacta adiecta*). Due to the principle of good faith, which is applicable in *locatio conductio*, contract clauses can be enforced regardless of any formal requirements. Quite regularly, *pacta adiecta* are agreed to impose special duties on the person who under the contract receives a certain item (e.g. a leased property or working material to fulfil a certain task) from the other contracting partner. The non-fulfilment of such a special duty can lead to an unlimited contractual liability even in cases in which harm is directly caused by a person that is not bound by the contract, as D. 19.2.11.4 and D. 19.2.12 show:

Ulp. (32 ad ed.) D. 19.2.11.4

*Inter conductorem et locatorem convenerat, ne in villa urbana faenum componeretur: composit: deinde servus igne illato succedit. Ait Labeo teneri conductorem ex locato, quia ipse causam praebuit inferendo contra conductionem.*

Hermog. (2 iur. epit.) D. 19.2.12

*Sed etsi quilibet extraneus ignem iniecerit in villam urbanam, ubi conductor adversus conventionem faenum composuerat, damnì locati iudicio habebitur ratio.*

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116 See fn 25 seqq.
117 Klausberger, ‘Zurechnungsgründe’, p. 353; see also Finkenauer, ‘Stipulation’, pp. 3 seqq.
120 Translation: Lessee and lessor agreed that hay not be stacked in a city villa. He [the lessee] stacked hay, and his slave then set a fire and ignited it. Labeo says that the lessee is liable on the lease because he himself furnished the cause by bringing in [hay] against the contract of hire; Watson, ‘Digest II’, p. 102.
121 Translation: But if some outsider sets the fire in the city villa in which hay was stacked against the contract, an assessment of the loss will also be made in the action on lease; see Watson, ‘Digest II’, p. 103.
Under a lease contract locator and conductor agreed that hay must not be stacked in the town house (villa urbana) of the leasehold. Contrary to the contract clause, hay was stacked in the mansion and so it happened that a slave, as in D. 19.2.11.4, or a stranger (extraneus), as in D. 19.2.12, set fire and ignited the villa. The legal question is whether the conductor is (contractually) liable for the damage. Labeo and Hermogenian hold the tenant liable ex contractu. As Labeo states, the tenant contributed to the damage by stacking hay in the town house contrary to the contractual agreement.

Without the lex contractus the tenant would only be delictually liable for the damage directly caused by his slave or possibly contractually, but in the absence of personal fault with the option of novae dedition. Regarding damages caused by an extraneus, the conductor would not even face noxal liability, provided that he was not at fault himself.

In the case under review, however, the conductor breached the contract clause, not to stack hay in the town house of the leasehold. By doing so, he violated the principle of good faith. As the damage is connected to the breach of the contract clause – quia ipse causam praebuit inferendo contra conductionem –, which was obviously stipulated for the very purpose of protecting the mansion against fire, Labeo and Hermogenian hold the conductor fully liable ex contractu, although the damage was directly caused by another person.  

4.4 Liability for culpa in eligendo

With regard to the concept of culpa in eligendo – contractual liability for negligent selection of a person to fulfil a certain task – the Ulpian fragment D. 9.2.27.9 is most relevant:

Ulp. (18 ad ed.) D. 9.2.27.9

Si fornicarius servus coloni ad fornacem obdormisset et villa fuerit exusta, Neratius scribit ex locato conventum praestare debere, si neglegens in eligendis ministeris fuit:


125 See also Lab. (3 post. a Iavol. epist.) D. 19.2.60.7; Ulp. (18 ad ed.) D. 9.2.27.34.
In this fragment Ulpian discusses two separate scenarios, only one of which deals with *culpa in eligendo*. The other part of the fragment covers a similar but independent case of delictual liability. The caesura is marked by the end of the phrase “*si neglegens in eligendis ministeriis fuit*”.

The first scenario deals with a case in which a fire is lit in a furnace on the leasehold, then spreads and burns down the leasehold. The spreading of the fire is possible because the slave who was selected by the *conductor* to guard the fire fell asleep. The legal question is whether the *conductor* is (contractually) liable for the damage. Neratius decides that the *conductor* is fully liable *ex contractu*, if he was negligent in selecting this particular slave for guarding the furnace – *si neglegens in eligendis ministeriis fuit*.

If the *conductor* guarded the furnace himself, every violation of care leading to the leasehold being damaged would result in his personal (*culpa*) liability. As the damage was not caused by the *conductor* himself but by his careless slave and as there was no special contract clause breached, there is no obvious argument for an unlimited contractual liability of the *conductor*. However, as Neratius points out, an unlimited contractual liability is applicable, if the tenant was negligent in selecting this particular slave for guarding the fire.

With regard to Coll. 12.7.9 and D. 9.2.27.11 – the Ulpian fragments that have been discussed in subsection 4.2. – it seems questionable, according to what criteria the

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126 Translation: If a tenant farmer’s stoker-slave drops asleep at the furnace and the house is burned down, Neratius says that the tenant must nevertheless make good the damage in accordance with agreement in the contract of letting, if he was negligent in choosing his workers. But if one man lighted the furnace but another watched it carelessly, will the one who lighted it be liable? For he who watched it did nothing, while the one who lightened it be liable? For he who watched it carelessly, will the one who lighted it be liable? For he who watched did nothing, while the one who is lighted it properly was not at fault. What is the answer? I think that an actio utilis lies just as much against the man who fell asleep at the furnace as against him who watched it negligently, nor can anyone say that he who fell asleep was only afflicted by a normal human failing; for it was his duty either to put out the fire or take such care that it did not escape; Watson, ‘Digest I’, p. 284.

127 Frier does not adequately distinguish the independent scenarios; Frier, ‘Tenant’s liability’, p. 237.
selection (of a certain person) is to be qualified as being negligent (culpa in eligendo) and thus leading to an unlimited contractual liability. Unfortunately, Neratius does not further discuss this question in the fragment under review. What seems most relevant in tackling this question is that according to D. 19.2.11.2, a conductor faces a general legal obligation to maintain the leasehold in good condition. Keeping fire in the furnace of a leased villa always poses a certain threat to the leasehold, which is why a high level of diligence is demanded of the persons involved. Eventually, by selecting an unsuitable person to guard the fire the tenant himself acted in a way that endangered the safety of the leasehold. This behaviour can (at least) be qualified as culpa, thus leading to the conductor’s unlimited contractual liability.

4.5 Liability for culpa in habendo vel inducendo

Building on Neratius’ concept of culpa in eligendo, Ulpian describes a different but similar form of culpa-liability for loss directly caused by others. In accordance with some modern scholars, this concept is referred to as culpa in habendo vel inducendo. A particularly relevant source in this regard is D. 19.2.11 pr.:

Ulp. (32 ad ed.) D. 19.2.11 pr.

Videamus, an et servorum culpam et quoscumque induxerit praestare conductor debeat? Et quatenus praestat, utrum ut servos noxae dedat an vero suo nomine tencatur? Et adversus eos quos induxerit utrum praestabit tautum actiones, an quasi ob propriam culpam tenetitur? Mihi ita placet, ut culpam etiam eorum quos induxit praestet suo nomine, etsi nihil convenit, si tamen culpam in inducendis admittit, quod tales haberetur vel suos vel hospites: et ita Pomponius libro sexagesimo tertio ad edictum probat.

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128 As neglegentia is a form of culpa, it is appropriate to use the modern term of culpa in eligendo, see Frier, ‘Landlords and Tenants’, p. 136; Kaser, ‘Römisches Privatrecht I’, p. 512.

129 Ulp. (32 ad ed.) D. 19.2.11.2: Item prospicere debet conductor, ne aliquo vel ius rei vel corpus deterius faciat vel fieri patiatur. Translation: Likewise, the lessee should take care in no way to lower in value the thing's legal or physical condition, nor to allow it to become lower; Watson, ‘Digest II’, p. 102. See also Mayer-Maly, ‘Locatio Conductio’, p. 177; Emilio Costa, ‘La locazione di cose nel diritto romano’ (Torino: Bocca, 1915) p. 27; Jöhne/Kölén/Weber, ‘Kolonien’, pp. 216 seq.


131 For details see Tritremmel, ‘Culpa in eligendo’, pp. 205 seqq.

132 See also Ulp. (18 ad ed.) D. 9.2.27.11.

133 Translation: Should a lessee be held responsible for fault on the part of his slaves and of those whom he admits? And to what extent responsible: to surrender his slaves noxally or rather to be liable in his own right? And will he just present the actions against those he admits, or will he be liable as if the fault were his own? My view Is that that he is responsible in his own right for the fault of those he
Persons under the conductor's control or (free) guests of him cause damage to the leasehold. The legal question is whether and to what extent the conductor is (contractually) liable. In his assessment of the case Ulpian raises three legal questions: First, he considers whether the tenant is liable at all for the culpa of his slaves and of those who he admitted to the leasehold. Second, Ulpian examines the scope of liability regarding the torts of his slaves, i.e. whether the tenant is liable without limitation or with the possibility of noxae deditio. Third, he discusses whether the tenant can only be forced to cede his actions against the actual tortfeasor or whether he is fully liable (in case of personal fault).

Unfortunately, only the answer to the last question is preserved. Ulpian states that - despite the absence of a certain contract clause - the conductor is contractually liable if he was at fault in admitting those persons who caused damage to the leasehold. Due to the incompleteness of the fragment, considerable cuts must be assumed. However, as there are not any convincing arguments within the existing text-critical analyses, it should not be assumed that the given part of the fragment is unclassical.

By the phrase “etsi nihil convenit” Ulpian en passant refers to the well-established concept of liability for violation of a contract clause. In the case under review such a clause, however, does not exist. Still, Ulpian and Pomponius support the conductor's contractual liability without limitation. As Ulpian states, contractual liability in this case is based on the conductor's fault in admitting untrustworthy persons to the leasehold – si tamen culpam in inducendis admissit, quod tales habuerit vel suos vel hospites.

In the absence of further information in the Ulpian fragment regarding the specific fault of the conductor, the following legal aspects have to be considered: as described above, a conductor has a general obligation to maintain the leasehold in good condition. Thus, he must avoid putting the leasehold in danger. In contrast to D. 9.2.27.9, previously analysed in subsection 4.4, the conductor did not select a certain person to perform a responsible task that the person was unsuitable for.

admitted even if the parties did not agree to this, provided that he is guilty of fault in admitting them because he has such people as members of his household or as guests. Pomponius supports this view in the sixty-third book of his Edict; Watson, ‘Digest II’, p. 102.


136 See subsection 4.3.

137 See fn 129.
Another difference is that D. 19.2.11 pr. does not only concern the contractual liability for damages caused by a slave but also by (free) guests. Whereas a conductor might be able to control his slaves comprehensively due to his far-reaching dominica potestas, his influence over guests who have been introduced to the leasehold is quite limited.

For these reasons, it must in all likelihood have been discernible to the conductor that the persons whom he admitted to the leasehold were (especially) untrustworthy – quod tales habueri. Under this presumption, person were recklessly admitted to the leasehold who then caused damage to the locator, which was foreseeable based on their supposedly untrustworthy character. As soon as these people were admitted to the leasehold the conductor might not even have been able to prevent the damage, but to admit them to the leasehold in the first place is most likely what Ulpian and Pomponius blame the conductor for and classify as culpa in habendo vel inducendo.

4.6 D. 19.2.25.7 – indication of a strict vicarious liability?

The liability concepts that have been discussed so far concern cases in which – except for cases of noxal liability – a person who is not bound by the vinculum iuris of a certain locatio conductio causes damage to a contractual item of one contracting party while the other party is held liable ex contractu on the basis of a previous form of culpa (or dolus). This last subsection 4.6., in contrast, discusses whether there is a form of strict vicarious liability in the field of locatio conductio in classical Roman law that does not require any personal fault on the part of the liable contracting party.

The basis for this debate is the famous Gaius fragment D. 19.2.25.7:

Gaius (10 ed. prov.) D. 19.2.25.7

Qui columnam transportandum conduxit, si ca, dum tollitur aut portatur aut reponitur, fracta sit, ita id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit: culpa autem abest, si omnia facta sunt, quae diligentissimus quisque observaturus fuisset. idem scilicet intellegemus et si dolia vel tignum transportandum aliquis conduxerit: idemque etiam ad ceteras res transferri potest.141

141 Translation: A man undertook [as a task] to transport a column. If it broke while being raised or carried or repositioned, he is held responsible for the damage if this happens due to his own fault or that of those whose labour he employs; but there is no fault if all precautions were taken which a very careful person would have observed. I would obviously construe the same result if someone...
A carrier (conductor) commits himself to transport a column belonging to his client (locator). This column breaks during the dismantling, transportation, or repositioning process. The legal question is whether the conductor is contractually liable only for his own fault or also for the fault of his assistants. According to Gaius, the carrier is contractually liable, “si qua ipsius eorumque, quorum opera uteretur, culpa acciderit”.

The conductor and locator entered into a locatio conductio operis concerning the transportation of a certain column. Accordingly, the conductor was obliged to successfully fulfil his task (dismantling, transportation, and repositioning of the column) whereas the locator owes the fee agreed by the parties.

To fulfil his contractual obligation, the conductor (most likely) hired the service of assistants – eorumque, quorum opera uteretur. In the case under review the conductor did not successfully fulfil his task. On the contrary, the column broke during transportation.

In general, the transportation of columns in ancient Rome was quite challenging and required the help of several people besides the use of certain technical devices. By using assistants to fulfil his task, the conductor did not per se violate the contract. Quite controversial, however, is the legal question whether the conductor is just liable for his own culpa – as is customary in the classical period (in the field of locatio conductio) – or also for the culpa of his assistants.

The reason for this debate is the ambiguous phrase “id periculum praestat, si qua ipsius eorumque, quorum opera uteretur, culpa acciderit”. The particle “que” in eorumque may stand for “and” or for “or”. If Gaius understood the particle copulatively, the liability of the conductor required his own fault and the fault of his assistants, who – most likely – caused the damage to the column. If the particle was understood disjunctively, either his own fault or his assistants’ fault was sufficient to make the conductor contractually liable without the limitation of noxae deditio.

Especially before 1950, the majority of scholars argued that substantial parts of the Gaius fragment were either interpolated or they at least rejected the possibility of the disjunctive interpretation of “que”. Several of those opinions are discussed in detail.
by Mayer-Maly and Knütel. Mayer-Maly\textsuperscript{145} shares the opinion that the fragment contains extensive interpolations but he considers the fragment to be classical in its core and supports the disjunctive translation of \textit{\textquotedblleft que\textquotedblright}. Knütel\textsuperscript{146} is more cautious regarding suspicions of interpolation. He classifies the fragment as substantially classical and - like Mayer-Maly - he supports the disjunctive translation of \textit{\textquotedblleft que\textquotedblright}.

Regarding the controversy about the specific meaning of the particle \textit{\textquotedblleft que\textquotedblright} the following arguments stand in opposition. In support of a disjunctive interpretation of \textit{\textquotedblleft que\textquotedblright} one can point to another Gaius fragment\textsuperscript{147} that contains the particle \textit{\textquotedblleft que\textquotedblright}, too, but where there is no doubt that the particle has to be understood disjunctively. Furthermore, the latter part of the Gaius fragment under review starting with \textit{\textquotedblleft idemque etiam ad ceteras res transferreri potest\textquotedblright} suggests the disjunctive translation of \textit{\textquotedblleft que\textquotedblright}. What holds against the disjunctive translation is that this would be unique as a case to indicate an unlimited contractual liability for the mere fault of another person in the field of \textit{locatio conductio} within the classical period.\textsuperscript{148} This argument may be rebutted insofar, as the copulative translation of \textit{\textquotedblleft que\textquotedblright} would require personal fault of the \textit{conductor} as well as fault of (at least) one of his assistants to establish the liability of the \textit{conductor}. Thus he could be exempt from liability if only he was at fault but not his assistants.\textsuperscript{149} To put it differently and more pointedly, if \textit{\textquotedblleft que\textquotedblright} was understood copulatively, the \textit{conductor} could hold himself exempt from liability by using assistants who are incapable of tort.\textsuperscript{150}

For those reasons and in accordance with the prevailing opinion amongst modern scholars\textsuperscript{151} the disjunctive translation of \textit{\textquotedblleft que\textquotedblright} seems reasonable. Thus, the \textit{conductor}
is allowed to make use of assistants to fulfil his task of transporting the column belonging to the *locutor*, but he is liable - *periculum praestat* - , regardless of whether the column was damaged due to his own fault or the fault of his assistants.

The liability of the *conductor* ends where everything was done with the utmost care - *culpa autem abest, si omnia facta sunt, quae diligentissimus observaturus fuisset*. The negative wording „*culpa autem abest*” indicates a reversal of the burden of proof. Accordingly, in the case of damage the *conductor* is only exempt from liability if he is able to prove that everyone contributing to the transportation was acting with the utmost care - *diligentissimus quisque*.

According to Gaius, the same liability regime is applicable if someone undertakes the transportation of barrels or beams - *idem scilicet intellegemus et si dolia vel tignum transportandum aliquis conduxerit*. This opinion seems plausible insofar as the...

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152 Some scholars refer the phrase „*periculum praestat*” to a risk regime because it can be translated as „he bears the risk” and because damages which are caused by others are generally considered risks (casus minor); Alonso, ‘Fault’, p. 73; Honssell, ‘Haftung’, p. 781; Wolfgang Ernst, ‘Das Nutzungsrisiko bei der Pacht’ (1988) 105 SZ 541-591, p. 547; Mohnr, ‘Verantwortung’, pp. 603 seq. Others understand the phrase „*periculum praestat*” as a liability regime and translate it as „bear the damage”; Knütel, ‘Haftung’, p. 419; MacCormack, ‘Culpa in eligendo’, p. 541. Du Plessis is uncertain regarding the phrase, as he speaks of „risk regime” on the one hand, and of „vicarious liability” on the other; Du Plessis, ‘Letting and Hiring’, p. 93. As Gaius demands the conductor’s *culpa* or the *culpa* of at least one of his assistants for the *conductor* to be liable, the phrase does most likely not refer to a risk regime but rather to a (vicarious) liability regime; Zimmermann, ‘Law of Obligations’, p. 399.

153 See Knütel, ‘Haftung’, pp. 422 seq.

transportation of both goods, which are also fragile and quite valuable, requires the cooperation of several people and their special knowledge.\textsuperscript{\textit{155}}

The last sentence of the fragment indicates a broad applicability of this liability regime \textit{\textit{idemque etiam ad ceteras res transferri potest}}. According to Gaius, the strict liability for acts of others shall also be applicable regarding other things \textit{\textit{ad ceteras res}}. This statement by Gaius is, too, not without suspicion of being a post-classical interpolation.\textsuperscript{\textit{156}} In my opinion, an interpolation of this passage cannot be assumed with certainty.\textsuperscript{\textit{157}} However, if one argues that the last passage of the fragment is not interpolated, I think that the generalisation has to be understood quite restrictively, namely that the regime of strict vicarious liability in transportation contracts is not applicable in every case but only regarding goods that are \textit{\textit{due to their (replacement) price, their fragility, their need of special diligence and assistance \textit{\textit{- similar to columns, barrels, and beams}.}}\textsuperscript{\textit{158}}

Whereas the vicarious liability concept as mentioned in D. 19.2.25.7 seems economically and socially plausible, there is a need for further considerations as to the dogmatic explanation of Gaius’s decision, which constitutes a deviation from the principle of personal responsibility. An explanation can possibly be found in the \textit{\textit{bona fides}}-standard of the \textit{\textit{locatio conductio}}: when a \textit{\textit{conductor}} undertakes the transportation of (valuable) goods, he commits himself to fulfil the task with professional skill and an occurring damage that is based on his incapacity results in the well-established \textit{\textit{imperitia}}-liability.\textsuperscript{\textit{159}} In case that the \textit{\textit{conductor}} uses the help of assistants because the transportation of a certain object \textit{\textit{- like a column \textit{\textit{- needs the cooperation of several people, the \textit{\textit{conductor}} expands his range of operations.\textsuperscript{\textit{160}} Simultaneously, there is an extended number of people who may potentially cause damage to the object in performing the transport. Whereas the use of assistants is in general not impermissible under a contract of transportation,\textsuperscript{\textit{161}} the increased risk ensuing from the involvement of several people to perform the contract can more easily be calculated by the \textit{\textit{conductor}} than by the \textit{\textit{locator}}.\textsuperscript{\textit{162}}

\begin{footnotesize}
\footnotesub{155} Knütel, ‘Haftung’, pp. 420 seq.
\footnotesub{156} Haymann, ‘Textkritische Studien’, p. 194.
\footnotesub{157} See Knütel, ‘Haftung’, p. 421.
\footnotesub{158} Rainer, ‘Bauvertrag’, p. 507.
\footnotesub{159} See Klausberger, ‘Zurechnungsgründe’, p. 189.
\footnotesub{161} See Klausberger, ‘Zurechnungsgründe’, p. 362.
\end{footnotesize}
against each carless assistant, considering that the locator probably does not have the necessary insight into the transportation process. Actually, it would be quite challenging to determine who of the assistants involved in a certain transportation process was negligent. Eventually, the solvency of any assistant is questionable especially with regard to the high (replacement) price of columns. A combination of all these reasons was possibly the reason for Gaius to establish a strict form of vicarious liability in the field of locatio conductio (operis).

Finally, it has to be re-examined whether the liability regime as stated in D. 19.2.25.7 could possibly be generalised to all forms of locatio conductio or even to other Roman contracts, comparable with the general vicarious liability regime of § 1313a ABGB stipulating that “[w]hoever is obliged to perform a [service] to someone else is liable to him for fault of his legal representative a well as of persons who he employs to deliver the performance [of the service] as for his own”.

In the late classical adage D. 50.17.149 the following is proclaimed: “Ex qua persona quis lucrum capit, eius factum prestare debeit” – a person who profits from using assistants shall be liable for their misconduct. This Ulpian fragment which – according to Lenel – refers to the interdicta „Quorum bonorum“ and „Quod legatorum“ suggests the development of a strict vicarious liability in Roman contract law. However, based on the preserved classical legal texts such a general concept of strict vicarious liability most likely had not developed until the post-classical era of Justinian in the sixth century AD.

5. Conclusions

During the classical period, different concepts of contractual liability were established with regard to the dynamic economic development in the field of locatio conductio. Building on the concept of contractual noxal liability which was developed by the

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Proculeian School, various regimes of unlimited contractual liability in \textit{locatio conductio} were introduced by Roman jurists.

For instance, the breach of a contract clause by a \textit{conductor/locator} can lead to his unlimited contractual liability, although a certain loss of his contracting party might have been directly caused by a third party. Another established concept is \textit{culpa in eligendo}, the liability for negligent selection of a person to fulfil a certain (responsible) task. A different but similar concept is referred to as \textit{culpa in habendo vel inducendo}. According to this liability model, a \textit{conductor} is fully liable \textit{ex contractu} for admitting (especially) untrustworthy persons to the leasehold, who then cause damage to the \textit{locator}. Eventually, there is the concept of vicarious liability according to which a \textit{conductor} who committed himself to transport a column or certain other goods is fully liable for damages caused by his assistants, regardless of his personal fault.

At first sight the examined liability cases in the field of \textit{locatio conductio} indicate a deviation from the described principle of personal responsibility. A closer look at these various liability cases reveals quite a differentiated picture. On the one hand, the fragments show that the demands on the (formerly strict) \textit{culpa}standard gradually declined. On the other hand, the fragments by and large comply with the concept of personal responsibility as - apart from cases of limited noxal liability and from the singular case D. 19.2.25.7 - contractual liability still depends on personal fault, although it might be a previous, strictly objectified, or implied form of \textit{culpa}. 

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