Vicarious Liability in Roman *locatio conductio*?[1]

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Contents

[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".[2] In a legal sense *locare* stands for "to rent/let" while *conducere* stands for "to hire/accept something on hire".[3]

Regarding terminology and actions, *locatio conductio* can be seen as a contractual unity.[4] However, as there are different contractual constellations that Roman jurists classify as *locatio conductio*, a trichotomous (or less common a dichotomous[5]) structure as proposed by the majority of modern scholars, seems justified.[6] 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).[7]

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[2] Paul J. Du Plessis, 'Letting and Hiring in Roman Legal Thought: 27 BCE – 284 CE' (Leiden – Boston: Brill, 2012) p. 9.

[3] See Adolf Berger, 'Encyclopedic dictionary of Roman law' (Philadelphia: American Philosophical Society, reprint 1991) p. 567.

[4] Most recently Du Plessis, 'Letting and Hiring', pp. 13 seq.; Roberto Fiori, 'La definizione della ‚locatio conductio': Giurisprudenza romana e tradizione romanistica' (Napoli: Jovene, 1999) pp. 361 seqq.

[5] See Philipp R. Springer, 'Die Wurzeln der werkvertraglichen Gefahrtragung im römischen Bauvertragsrecht' (Dissertation: University of Vienna, 2017) pp. 51 seqq.

[6] Most recently Armando J. Torrent Ruiz, 'La Polemica sobre la tricotomia ‚res', ‚operae', ‚opus' y los origines de la Locatio-Conductio' (2011) 4 TSDP 1-51, pp. 49 seq.; Pokécz Kovács, 'Quelques observations sur la division de la locatio-conductio', in Hamza et al. (eds.), Iura antiqua – iura moderna: Festschrift für Ferenc Benedek zum 75. Geburtstag (Pécs: Dialog Campus Kiadó, 2001) 217-230, pp. 217 seq.; see also A.D.E. Lewis, 'The trichotomy in locatio conductio' (1973) 8 Irish Jurist 164-177, pp. 176 seqq.

[7] Reinhard Zimmermann, 'The Law of Obligations: Roman Foundations of the Civilian Tradition', (Oxford: Oxford University Press, 1990: reprint 1996) pp. 339 seq.; Max Kaser, 'Das römische Privatrecht I: Das altrömische, das vorklassische und klassische Recht', 2nd edn. (München: C.H. Beck, 1971) p. 564; Theo *Mayer-Maly*, 'Locatio conductio: eine Untersuchung zum klassischen römischen Recht', (Wien – München: Herold, 1956) pp. 18 seqq. Regarding the special type "locatio conductio irregularis" see Nikolaus Benke, 'Zum Eigentumserwerb des Unternehmers bei der "locatio conductio irregularis"' (1987) 104 SZ 156-237.

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The contracting parties of a *locatio conductio* are called *locator* and *conductor*.[8] *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*).[9] 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.[10]

When someone[11] who is not bound by the *vinculum iuris*[12] 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[13] Roman law, in contrast to modern civil law codifications.[14]

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[8] See Ulp. (32 ad ed.) D. 19.2.11.4; Inst. 3.24; Kaser, 'Römisches Privastrecht I²', p. 563.

[9] See Zimmermann, 'Law of Obligations', p. 339.

[10] Inst. 3.24: [...] *competit locatori quidem locati actio, conductori vero conducti*. Translation: The *locator* is entitled to *actio locati*, the *conductor* certainly to *actio conducti*. For the *formulae* of the actions see Dario Mantovani, '*Le formule del processo privato romano*', 2nd edn. (Padova: Cedam, 1999) p. 54; Otto Lenel, 'Das Edictum Perpetuum: Ein Versuch zu seiner Wiederherstellung', 3rd edn. (Leipzig: Tauchnitz, 1927) pp. 299 seqq.

[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.

[13] The classical period of Roman law is a legal historical era starting with the Principate (27 BC) until roughly the end of the Severan period (235 AD). Within the classical period the Roman jurisprudence reached a particularly high level as regards legal concepts and casuistic reasoning, what the continuation of Roman law for centuries is based on; Ulrich Manthe, 'Geschichte des römischen Rechts', 4th edn. (München: C.H. Beck, 2011) pp. 87 seqq.; Kaser, 'Römisches Privatrecht I²', pp. 2 seqq.; Franz Wieacker, 'Vom römischen Recht: zehn Versuche', 2nd edn. (Stuttgart: Koehler, 1961) pp. 161 seqq.; Fritz Schulz, '*Geschichte der römischen Rechtswissenschaft*' (Weimar: Böhlau, 1961) pp. 117 seqq.

[14] See Hermann Seiler, 'Die deliktische Gehilfenhaftung in historischer Sicht' (1967) 22 JZ 525-529, p. 526.

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Therefore, Roman jurists had to respond to the following questions on a case-by-case basis[15]: 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[16] 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.[17]

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.

[15] See fn 69.

[16] See fn 85.

[17] The most relevant papers thereto are Philipp Klausberger, 'Objektive und subjektive Zurechnungsgründe im klassischen römischen Haftungsrecht' (Habilitationsschrift: Universität Wien, 2019); Du Plessis, 'Letting and Hiring'; Hartmut Wicke, 'Respondeat Superior: Haftung für Verrichtungsgehilfen im römischen, römisch-holländischen, englischen und südafrikanischen Recht' (Berlin: Duncker und Humblot, 2000); Rolf Knütel, 'Die Haftung für Hilfspersonen im römischen Recht' (1983) 100 SZ 340-443; Imre Molnár, 'Verantwortung und Gefahrtragung bei der locatio conductio zur Zeit des Prinzipats', in Hildegard Temporini (ed.), *Aufstieg und Niedergang der römischen Welt II: Principat*, vol. XIV (Berlin: New York, 1982) 583-681; Bruce W. Frier, '*Tenant's liability for damage to landlord's property in classical Roman law*' (1978) 95 SZ 232-269; Mayer-Maly, 'Locatio Conductio'.

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2. *Locatio conductio*

2.1 The character of *locatio conductio*

The contract of locatio conductio came into existence not before the second century BC.[18] A *locatio conductio* can be concluded by mere *consensus* on the essential terms (*essentialia negotii*) without any formal requirements.[19] 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[20], a certain task to fulfil[21], or his labour[22]. In exchange, the *conductor* rents property, fulfils a certain task, or exploits the *locator*'s labour.[23] In return for the primary obligation its recipient has to pay a certain fee (*merces*).[24]

[18] See Cic. (de off.) 3.70; see also Du Plessis, 'Letting and Hiring', pp. 9 seqq.; Fiori, 'Locatio Conductio', pp. 11 seqq.; Mayer-Maly, 'Locatio Conductio', pp. 15 seqq, 82; Horst Kaufmann, 'Die altrömische Miete: ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatlicher Vermögensverwaltung Altrömische Miete' (Köln – Graz: Böhlau, 1964) pp. 22 seqq.

[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 Iavol. 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.

[23] Nadi Günal, 'An example of consensual contracts: Locatio Conductio Rei', (2004) 1:2 Ankara Law Review 201-211, p. 204.

[24] Gai. (2 rer. cott.) D. 19.2.2 pr.: [...] *nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic et locatio et conductio contrahi 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.

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Locatio conductio is a *bonae fidei negotium*[25], entitling the contracting parties to conclude contract clauses in good faith.[26] So-called *leges locationis/conductionis* may extend the general rights and duties of one or both contracting parties.[27] To enforce contractual claims, a *locator* has an *actio locati* and a *conductor* an *actio conducti*.[28] 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.[29]

[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.

[26] See Paul J. Du Plessis, 'The Roman Concept of lex contractus' (2006) 3 RLT 79-94, pp. 79 seqq.; Carsten H. Müller, 'Gefahrtragung bei der locatio conductio: Miete, Pacht, Dienst- und Werkvertrag im Kommentar römischer Juristen' (Paderborn – München: Schöningh, 2002) p. 103; Bruce W. Frier, 'Landlords and tenants in imperial Rome' (Princeton: Princeton University Press, 1980) pp. 61 seqq.; Zimmermann, 'Law of Obligations', pp. 355 seqq.; Pieter W. Neeve, 'Colonus: private farm-tenancy in Roman Italy during the Republic and the early Principate' (Amsterdam: Gieben, 1984) pp. 5 seqq.; Frier, 'Tenant's liability', pp. 243 seqq., Mayer-Maly, 'Locatio Conductio', pp. 106 seqq.

[27] Tobias Tröger, 'Arbeitsteilung und Vertrag: Verantwortlichkeit für das Fehlverhalten Dritter in Vertragsbeziehungen' (Tübingen: Mohr Siebeck, 2012) pp. 83 seqq.; Du Plessis, 'Lex contractus', pp. 81 seqq.; Müller, 'Gefahrtragung', p. 103; Zimmermann, 'Law of Obligations', pp. 355 seqq.; Frier, 'Landlords and tenants', pp. 61 seqq, 142; Neeve, 'Colonus', pp. 5 seqq.; Antonino Metro, 'L'obbligazione di custodire nel diritto romano' (Milano: Giuffrè, 1966), pp. 174 seqq.; Mayer-Maly, 'Locatio Conductio', pp. 106 seq.

[28] See fn 10.

[29] Martin J. Schermaier, 'Bona fides im römischen Vertragsrecht', in Luigi Garofalo et al. (eds.), Il ruolo della buona fede oggettiva nell' esperienza giuridica storica e contemporanea: Atti del Convegno internazionale di studi in onore di Alberto Burdese, vol. III (Padova: CEDAM, 2003) 387-416; Susan D. Martin, 'The Roman Jurists and the Organization of Private Building in the Late Republic and Early Empire' (Bruxelles: Latomus: Revue D'Études Latines, 1989), p. 30; Klaus-Peter Johne/Jens Köhn/Volker Weber, 'Die Kolonen in Italien und den westlichen Provinzen des Römischen Reiches: Eine Untersuchung der literarischen, juristischen und epigraphischen Quellen vom 2. Jahrhundert v.u.Z. bis zu den Severern' (Berlin: Akademie Verlag, 1983), p. 188; Kaser, 'Römisches Privatrecht I²', pp. 485 seqq.; Alexander Beck, 'Zu den Grundprinzipien der bona fides im römischen Vertragsrecht', in Juristische Fakultät der Universität Basel (ed.), Aequitas und bona fides: Festgabe zum 70. Geburtstag von August Simonius (Basel: Helbing & Lichtenhahn, 1955) 9-27.

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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

[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.

[32] Translation: [...] Mandate, loan for use, sale, acceptance in pledge, hire [...] involve [the liability criteria] bad faith and culpability; see Alan Watson, 'The Digest of Justinian', 2nd edn., vol. IV (Philadelphia: University of Pennsylvania Press, 2009), p. 472.

[33] Geoffrey MacCormack, 'Dolus, Culpa, Custodia, Diligentia' (1994) 22 Index 189-209, p. 206.

[34] Franz-Stefan Meissel, 'Dolus', in Hubert Cancik/Helmuth Schneider (eds.), Der Neue Pauly (Stuttgart – Weimar: J.B. Metzler, 1997), vol. III, pp. 736 seq.

[35] Du Plessis, 'Letting and Hiring', pp. 29 seqq.

[36] Frier, 'Tenant's liability', pp. 242 seq.

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classical period.[37] Therefore, 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.[38]

Two subcategories of *culpa* which are most relevant for *locatio conductio operis* are *imperitia* and *infirmitas*.[39] 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 fulfil a certain task with the professional skill of an expert (*artifex*) and with the required physical strength.[40] Consequently, in the event of damage the *conductor* is also liable for his physical weakness (*infirmitas*) and his lack of professional skill (*imperitia*).[41]

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".[42] 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*.[43]

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[37] Du Plessis, 'Letting and Hiring', pp. 26 seq, 36; Paul J. Du Plessis, 'Liability and locatio conductio', in Roberto Fiori (ed.), Modelli teorici e metodologici nella storia del diritto private, vol. IV (Napoli: Jovene, 2011) 63-95, p. 66; MacCormack, 'Dolus, Culpa, Custodia, Diligentia', pp. 196 seq.; Frier, 'Tenant's liability', p. 242.

[38] See Klausberger, 'Zurechnungsgründe', p. 60.

[39] Molnár, 'Verantwortung', p. 612.

[40] Susan D. Martin, 'Imperitia: The Responsibility of Skilled Workers in Classical Roman Law' (2001) 122 AJP 107-129, pp. 109, 115; Michael J. Rainer, 'Zur locatio conductio: Der Bauvertrag' (1992) 108 SZ 505-525, p. 507; Carlo A. Cannata, '*Sul Problema della Responsabilità nel Diritto Privato Romano* (Catania: Libr. Ed. Torre, 1996) pp. 56 seqq.; see also § 1299 ABGB.

[41] Gai. (7 ad ed. prov.) D. 9.2.8.1; Klausberger, 'Zurechnungsgründe', p. 427; Rainer, 'Bauvertrag', p. 506; Molnár, 'Verantwortung', p. 611; Geoffrey MacCormack, 'Custodia and Culpa', (1972) 89 SZ 149-219, pp. 194 seq.

[42] See Hermann G. Heumann/Emil Seckel, 'Handlexikon zu den Quellen des römischen Rechts', 11th edn. (Graz: Akademische Druck- u. Verl.-Anst., 1971) p. 116; Berger, 'Encyclopedic dictionary', p. 422; see also Franz-Stefan Meissel, 'Zur Haftung für Furtum beim römischen Leihevertrag: Diebstahlsverfolgung und Drittschadensproblem' (1993) 94/4 JAP 212-218, p. 213; G.C.J.J. Van den Bergh, 'Custodiam Praestare: Custodia-Liability or Liability for Failing Custodia?' (1975) 43 TR 59-72, p. 63; MacCormack, 'Custodia and Culpa', p. 155; Carlo A. Cannata, 'Richerche sulla responsabilità contrattuale nel diritto romano' (Milano: Giuffrè, 1966) pp. 49 seqq.

[43] Paul J. Du Plessis, 'Between Theory and Practice: New Perspectives on the Roman law of Letting and Hiring' (2006) 65 CLJ 423-437, p. 426; Zimmermann, 'Law of Obligations', p. 194; Meissel, 'Furtum', p. 213; MacCormack, 'Custodia and Culpa', pp. 155 seqq.; Cannata, 'Responsabilità

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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.[44] However, if a person has the contractual obligation of *custodia*, classical fragments state a responsibility for (at least certain cases of) theft.[45] Common examples involve contracts with storage managers (*horrearii*)[46], launderers (*fullones*) and tailors *(sarcinatores*)[47], as well as shippers (*nautae),* innkeepers *(caupones)* and stablers *(stabularii)*[48].

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:[49]

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.[50]

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.*

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contrattuale', pp. 24 seqq.; Joachim Rosenthal, 'Custodia und Aktivlegitimation zur Actio furti' (1951) 68 SZ 217-265, p. 222.

[44] See Knütel, 'Haftung', p. 356; Molnár, 'Verantwortung', pp. 597, 629.

[45] See Van den Bergh, 'Custodiam praestare', p. 67; Knütel, 'Haftung', p. 357.

[46] See Lab. (5 post. a Iavol. epit.) D. 19.2.60.9; Lab. (5 post. a Iavol. epit.) D. 19.2.60.6; Paul. (2 sent.) D. 19.2.55 pr.; Paul. (5 resp.) Coll. 10.9.1; C. 4.65.1; C. 4.65.4 pr.-2.

[47] See Gai. (5 ad ed. prov.) D. 4.9.5 pr.; Gai. Inst. 3.205-206; Ulp. (29 ad Sab.) D. 47.2.14.12; Iavol. (9 post. Lab.) D. 47.2.91 pr.; Lab. (5 post. a Iavol. epit.) D. 19.2.60.2; Ulp. (43 ad Sab.) D. 12.7.2; Paul. (22 ad ed.) D. 9.1.2 pr.; Gai. (10 ad ed. prov.) D. 19.2.25.8; Ulp. (42 ad Sab.) D. 47.2.48.4; Ulp. (29 ad Sab.) D. 47.2.12 pr.; Ulp. (29 ad Sab.) D. 47.2.10.

[48] See Papin. (8 quaest.) D. 19.5.1.1; Gai. (5 ad ed. prov.) D. 4.9.5 pr.; Gai. (5 ad ed. prov.) D. 4.9.5.1; Ulp. (38 ad ed.) D. 47.5.1.4; Ulp. (14 ad ed.) D. 4.9.1 pr.; Ulp. (14 ad ed.) D. 4.9.3.1; Ulp. (14 ad ed.) D. 4.9.1.1; Ulp. (14 ad ed.) D. 4.9.3.1.

[49] See René Robaye, 'L'obligation de garde: essai sur la responsabilite contractuelle en droit Romain' (Bruxelles: Publications des Facultés universitaires Saint-Louis, 1987) p. 193.

[50] Translation: In the contracts of letting and hiring it is established that the lessor can bring suit on the ground of fraud or lack of safeguarding, but not for unavoidable accident; translated by the author.

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The context to which the rescript refers is not clear. In any case, it is conspicuous that the rescript does not mention *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 *Haymann*[51] in 1919, the text is subject to far-reaching cuts making a reconstruction of the original version of the rescript impossible. *Krückmann*[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 *dolus* or *custodia* while the defendant might have based his defence on the occurrence of *vis maior*.

In 1951, *Rosenthal*[53] builds on the arguments of *Haymann*. In his reconstruction of the (supposedly) interpolated[54] fragment, *Rosenthal* replaces, inter alia, "*custodiam*" by "*culpam*", but admits that the fragment is rather useless due to the alleged severe interpolations. *Mayer-Maly*[55], in 1956, argues along similar lines as *Krückmann*: he assumes that the rescript refers to a particular case where only the liability/risk standards *dolus*, *custodia* and *vis maior* had to be discussed. At the same time *Mayer-Maly* relativises this view by following *Haymann* and *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.

[51] Franz Haymann, 'Textkritische Studien zum römischen Obligationenrecht' (1919) 40 SZ 167-350, p. 235.

[52] Paul Krückmann, 'Custodia' (1944) 64 SZ 1-56, p. 35.

[53] Rosenthal, 'Custodia und Actio furti', p. 240.

[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 19th century until the middle of the 20th 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, 'Kritik der Interpolationenkritik' (1939) 59 SZ 102-218, p. 102 seqq.

[55] Mayer-Maly, 'Locatio Conductio', p. 214.

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MacCormack[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 *culpa*. 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*[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*[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[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.[60] In conclusion, only *dolus* and *culpa* can be categorised as general liability standards in the field of *locatio conductio*.

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[56] MacCormack, 'Custodia and Culpa', p. 205.

[57] Molnár, 'Verantwortung', pp. 613 seq.; see also Wolfgang Hoffmann-Riem, 'Custodia-Haftung des Sachmieters untersucht an Alf./Paul. D. 19,2,30,2.' (1969) 86 SZ 394-403, p. 396.

[58] Robaye, 'L'obligation de garde', pp. 193 seqq.

[59] See Du Plessis, 'Letting and hiring', pp. 26 seqq.

[60] See Robaye, 'L'obligation de garde', pp. 193 seqq.; Du Plessis, 'Between Theory and Practice', pp. 426 seq.; MacCormack, 'Custodia and Culpa', p. 161; Rosenthal, 'Custodia und Actio furti', pp. 238, 263.

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3. *The principle of personal responsibility*

3.1 Introduction

In modern legal theory, legal norms are separated into rules and principles.[61] Rules are specific legal norms which are characterised by strict applicability.[62] 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.[63]

In Roman law, principles are to be considered as judicial guidelines.[64] A certain principle has to be applied if relevant for a given case and if there are no opposing principles.[65] In case there are opposing principles, they have to be balanced according to the particularity of a certain case.[66] 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.[67]

Contrary to modern European civil law codifications, classical Roman law is not based on a closed set of norms.[68] As a result, its jurisprudence is predominantly characterised by casuistry, i.e. legal assessment on a case-by-case basis.[69] Resorting to the casuistic case practice, Roman jurists developed certain principles inductively.[70]

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[61] Ronald M. Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14-46, pp. 22 seqq.; Robert Alexy, 'Rechtsregeln und Rechtsprinzipien', in Robert Alexy et al. (eds.), Elemente einer juristischen Begründungslehre (Baden: Nomos, 2003) 217-233, pp. 218 seqq.; Michael Potacs, 'Rechtstheorie', 2nd edn. (Wien: facultas, 2019) pp. 105 seqq.

[62] Dworkin, 'The Model of Rules', p. 25.

[63] Alexy, 'Rechtsregeln und Rechtsprinzipien', p. 224.

[64] See Laurens C. Winkel, 'The Role of General Principles in Roman Law' (1996) 2 Fundamina 103-120, pp. 112 seqq.

[65] See Potacs, 'Rechtstheorie', pp. 109 seq.

[66] Ibid.

[67] See Max Kaser, 'Zur Methode der römischen Rechtsfindung', 2nd edn. (Göttingen: Vandenhoeck & Ruprecht, 1969) pp. 60 seqq.

[68] Kaser, 'Methode', pp. 50 seqq.; Richard Böhr, 'Das Verbot der eigenmächtigen Besitzumwandlung im römischen Privatrecht: Ein Beitrag zur rechtshistorischen Spruchregelforschung' (München: Saur, 2002) p. 25.

[69] Tomasz Giaro, 'Über methodologische Werkmittel der Romanistik' (1988) 105 SZ 180-262, pp. 210 seqq.; Dieter Nörr, 'Spruchregel und Generalisierung' (1972) 89 SZ 18-93, p. 90.

[70] See Franz Horak, Dogma und Dogmatik: Zur Genese und Entwicklung eines Begriffs in der Wissenschaftsgeschichte (1984) 101 SZ 275-293, p. 279.

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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.[71] In modern Austrian civil law[72], § 1313 ABGB pronounces a principle of personal liability[73]: "Generally a person is not liable for illegal actions of someone else in which he did not participate [...]"[74]. In classical Roman law, there is no such general-abstract provision regarding personal responsibility.[75] 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.[76] 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 nuntietur, recte facta nuntiatio est omnibusque dominis videtur denuntiatum: sed si unus aedificaverit post operis novi nuntiationem, alii, qui non aedificaverint, non tenebuntur: neque enim debet nocere factum alterius ei qui nihil fecit.[77]

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[71] See Bruno Schmidlin, 'Die römischen Rechtsregeln: Versuch einer Typologie' (Köln – Wien: Böhlau, 1970) p. 7; Nörr, 'Spruchregel', pp. 37 seqq.

[72] 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 /Erblanden/ 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) 113-135, 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.

[73] Rudolf Reischauer, '§ 1313 ABGB', in Peter Rummel (ed.) Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, 3rd edn., (Stand 1.1.2004, rdb.at) para 1.; Eva Ondreasova, '*Die Gehilfenhaftung: eine rechtsvergleichende Untersuchung zum österreichischen Recht mit Vorschlägen zur Reform*' (Wien: Manz, 2013), p. 15. For the development of the legal framework towards a regime of fault-based liability see Hausmaninger, 'Roman Tort Law', pp. 118 seqq.

[74] § 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.

[75] That is not surprising, since Roman law is more flexible compared to modern private law codifications; see Giaro, 'Werkmittel', pp. 216 seqq.

[76] See Knütel, 'Haftung', pp. 359 seqq.

[77] 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

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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

ought not harm another who has done nothing; Alan Watson, 'The Digest of Justinian', 2nd edn., vol. III (Philadelphia: University of Pennsylvania Press, 2009) p. 376.

[78] Michael J. Rainer, 'Bau- und nachbarrechtliche Bestimmungen im klassischen römischen Recht' (Graz: Leykam, 1987), p. 169.

[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.

[80] Regarding the constructor's lawful possibilities for action to suspend the *operis novi nuntiatio* see Rainer, 'Bau- und nachbarrechtliche Bestimmungen', p. 169; Thomas Finkenauer, 'Vererblichkeit und Drittwirkungen der Stipulation im klassischen römischen Recht' (Tübingen: Mohr Siebeck, 2010) p. 253.

[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.

[82] Rainer, 'Bau- und nachbarrechtliche Bestimmungen', pp. 177 seq.; Finkenauer, 'Stipulation', p. 253.

[83] Rainer, 'Bau- und nachbarrechtliche Bestimmungen', p. 193.

[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

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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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demolish the construction, since in respect of restoration of a construction of this kind it is the person who acted in the contravention of the praetor's edict who is subject to a penalty. But the heir certainly does not succeed to the penalty; Watson, 'Digest III', p. 380.

[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.; Knütel, '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.

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Lab. (5 post. a Iavol. epit.) D. 19.2.60.7

Servum meum mulionem conduxisti: neglegentia eius mulus tuus perit. si ipse se locasset ex peculio dumtaxat et in rem versum damnum tibi praestaturum dico: sin autem ipse eum locassem, non ultra me tibi praestaturum, quam dolum malum et culpam meam abesse [...].[89]

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*[90]. The *actio de peculio*, one of the granted *actiones adiectitiae qualitatis*, is limited to the value of an existing *peculium*[91] 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 himelf 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 Uberblick. Erster Teil: Von der Reeder- und der Betriebsleiterklage zur direkten Stellvertretung' (1994) 111 SZ 280-362, pp. 280 seqq.

[91] A *peculium* is a personal property that is held by a person under one's power and was entrusted by the person's *dominus/pater familias*. For further information and references see Richard Gamauf, De nihilo crevit – Freigelassenenmentalität und Pekuliarrecht: Einige Überlegungen zur Entstehung von Sklavenpekulien; in Ulrike Babusiaux/Peter Nobel/Johannes Platschek (eds.), Der Bürge einst und jetzt: Festschrift für Alfons Bürge (Zürich – Basel – Genf: Schulthess, 2017) 225-253 pp. 225 ff; Richard Gamauf, 'Slaves Doing Business: The Role of Roman Law in the Economy of a Roman Household' (2009) 16:3 European Review of History 331-346, pp. 331 seqq.; Andreas Wacke, 'Peculium non ademptum videtur tacite donatum: Zum Schicksal des Sonderguts nach der Gewaltentlassung' (1991) 42 Iura 43-95, pp. 51 seqq.

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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[92], providing a strict vicarious liability.[93] Furthermore, there is – for instance – § 1314 ABGB[94] 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*.[95] 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

[92] See Herbert Hausmaninger, 'The Third Partial Amendment and Austrian Tort Law', in Herbert Hausmaninger et al. (eds.), *Developments in Austrian and Israeli Private Law* (Wien – New York: Springer, 1999) 137-157, pp. 139 seqq.

[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.

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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 (*patria/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 unware 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,

[96] See Table 12.2a: *Ex maleficio filiorum familias servorumque, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem sufferre aut noxae dedere*. Translation: From delinquency of children of the household and of slaves actions for damages 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 Gai. Inst. 4.75; Dieter Flach, 'Das Zwölftafelgesetz – Leges XII tabularum' (Darmstadt: Wiss. Buchges., 2004) pp. 159 seqq.

[97] Martin Pennitz, '§ 107. Die Noxalhaftung', in Ulrike Babusiaux et. al. (eds.), *Handbuch des Römischen Privatrechts* (Tübingen: Mohr Siebeck, forthcoming) p. 4; Martin Pennitz, 'Obligatio domini und Obligatio servi', in Jan D. Harke (ed.), Drittbeteiligung am Schuldverhältnis: Studien Zur Geschichte und Dogmatik des Privatrechts (Berlin – Heidelberg: Springer, 2010) 71-95, pp. 71 seqq.; Hans-Peter Benöhr, 'Zur Haftung für Sklavendelikte' (1980) 97 SZ 273-287, p. 276.

[98] See Ulp. (23 ad ed.) D. 9.4.21: *Quotiens dominus ex noxali causa convenitur, si nolit suspicere iudicium, in ea causa res est, ut debeat noxae dedere eum, cuius nomine iudicium non suscipitur [...]. 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: Schultheß, 1867) p. 36.

[100] The archaic period of ancient Rome lasts approximately until the 3rd century BC; Helmuth Schneider, 'Rom von den Anfängen bis zum Ende der Republik (6. Jh. bis 30 v. Chr.)', in Hans-Joachim Gehrke/Helmuth Schneider (eds.) Geschichte der Antike: Ein Studienbuch, 5th edn. (Stuttgart: J.B. Metzler Verlag, 2013) 277-352, p. 277.

[101] Peter Gröschler, 'Considerazioni sulla funzione della responsabilità nossale in diritto romano', in Carmela R. Ruggeri (ed.), Studi in onore di Antonino Metro, vol. 3 (Milano: A. Giuffrè, 2010) 195-222, pp. 198 seqq.; Schmidlin, 'Rechtsregeln', pp. 94 seqq.; Otto Lenel, 'Die Formeln der actiones noxales' (1927) 47 SZ 1-28, p. 19.

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a more economic approach was pursued, namely to exploit the manpower of the surrendered person.[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:[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.*[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[105] regime of

[102] Wicke, 'Haftung', p. 46; Benöhr, 'Sklavendelikte', p. 274.

[103] Du Plessis, 'Letting and hiring', p. 36; Wicke, 'Haftung', pp. 42 seqq.; Knütel, 'Haftung', pp. 392 seqq.

[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 Tennants', p. 233.

[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*.

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contractual liability with noxal limitation as proposed by Proculus, which has led to a controversy[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[107] and *Knütel*[108] trace the limited contractual liability to the principle of good faith which underlies the contract of *locatio conductio*. *Von Lübtow*[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*[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[111], as a plaintiff generally bears the burden of

[106] For the law schools and their controversies in the classical period see Okko Behrends, 'Wie haben wir uns die römischen Juristen vorzustellen?' (2011) 128 SZ 83-129, pp. 83 seqq.; Johannes Platschek, 'Nochmals zum "Paradigmenwechsel" in der römischen Jurisprudenz' (2010) 38 Index 401-406, pp. 401 seqq.; Detlef Liebs, 'Hofjuristen der römischen Kaiser bis Justinian' (München: Verl. d. Bayer. Akad. d. Wiss., 2010) pp. 5 seqq.; Tessa G. Leesen, 'Gaius meets Cicero: law and rhetoric in the school controversies' (Leiden – Boston: Martinus Nijhoff Publishers, 2010) pp. 7 seqq.; Dieter Nörr, 'Exempla nihil per se valent' (2009) 126 SZ 1-54, pp. 44 seq.; Franz Horak, 'Wer waren die Veteres? Zur Terminologie der klassischen römischen Juristen', in Georg Klingenberg/Michael J. Rainer/Herweig Stiegler (eds.), Vestigia iuris Romani: Festschrift für Gunter Wesener zum 60. Geburtstag am 3. Juni 1992 (Graz: Leykam, 1992) 201-236, pp. 201 seqq.; Heinrich Vogt, 'Die sogenannten Rechtsschulen der Proculianer und der Sabinianer', in Dieter Nörr/Dieter Simon (eds.), Gedächtnisschrift für Wolfgang Kunkel (Frankfurt am Main: Klostermann, 1984) 515-521, pp. 515 seqq.; Okko Behrends, 'Institutionelles und prinzipielles Denken im römischen Privatrecht' (1978) 95 SZ 187-231, pp. 192 seqq.; Wolfgang Kunkel, 'Römische Rechtsgeschichte', 2nd edn. (Graz – Wien – Köln: Böhlau, 1967) pp. 107 seqq.

[107] Sandro Schipani, 'Responsabilità "ex lege Aquilia". Criteri di imputazione e problema della "culpa"' (Torino: Giappichelli, 1969) p. 428.

[108] Knütel, 'Haftung', p. 396.

[109] Ulrich von Lübtow, 'Untersuchungen zur lex Aquilia de damno iniuria dato' (Berlin: Duncker & Humblot, 1971) p. 71.

[110] Frier, 'Tenant's liability', p. 263.

[111] On the relevance regarding questions of evidence in the Roman jurisprudence see Richard Gamauf, 'Vindicatio Nummorum: Eine Untersuchung zur Reichweite und praktischen Durchführung des Eigentumsschutzes an Geld im Klassischen Römischen Recht' (Habilitationsschrift: Universität Wien, 2001) pp. 88 seqq.

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proof regarding the facts on which the claim is based.[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.[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:

Ulp. (18 ad ed.) D. 9.2.27.11

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 iudicata, altero amplius non agendum. Sed haec ita, si culpa colonus careret [...].[114]

Slaves of a *conductor* cause a fire that burns down the *villa* located on the leasehold. The legal question is whether the *conductor* is (contractually) liable for this damage. Proculus decides that the *conductor* is liable not only delictually but also contractually. However, according to Proculus, the *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 *conductor's* part – *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 *culpa*.

[112] See Andreas Wacke, 'Zur Beweislast im klassischen Zivilprozeß: Giovanni Pugliese versus Ernst Levy' (1992) 109 SZ 411-449, pp. 419 seqq.

[113] Knütel, 'Haftung', p. 393.

[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.

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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*).[115] Due to the principle of good faith, which is applicable in *locatio conductio*,[116] contract clauses can be enforced regardless of any formal requirements.[117] 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.[118] 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,[119] 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: composuit: deinde servus igne illato succendit. Ait Labeo teneri conductorem ex locato, quia ipse causam praebuit inferendo contra conductionem.[120]

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

Sed etsi quilibet extraneus ignem iniecerit <in villam urbanam, ubi conductor adversus conventionem faenum composuerat>,[121] *damni locati iudicio habebitur ratio.*[122]

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[115] Du Plessis, 'Lex contractus', pp. 79 seqq.; Müller,' Gefahrtragung', p. 103; Zimmermann, 'Law of Obligations', pp. 355 seqq.; Neeve, 'Colonus', pp. 5 seqq.; Frier, 'Tenant's liability', pp. 243 seqq., Mayer-Maly, 'Locatio Conductio', pp. 106 seq.

[116] See fn 25 seqq.

[117] Klausberger, 'Zurechnungsgründe', p. 353; see also Finkenauer, 'Stipulation', pp. 3 seqq.

[118] Frier, 'Landlords and Tennants', p. 63.

[119] Tröger, 'Arbeitsteilung', pp. 83 seq.; Wicke, 'Haftung', p. 63; Frier, 'Landlords and tenants', p. 142; Metro, 'L'obbligazione di custodire', pp. 174 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] <Amendment> of the source according to Otto Lenel, 'Palingenesia iuris civilis: iuris consultorum reliquiae quae Iustiniani digestis continentur, ceteraque iuris prudentiae civilis fragmenta minora secundum auctores et libros', vol. 1 (Lipsiae: Tauchnitz, 1889) p. 270.

[122] 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.

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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 *noxae deditio*. 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.[123]

4.4 Liability for *culpa in eligendo*

With regard to the concept of *culpa in eligendo*[124] – contractual liability for negligent selection of a person to fulfil a certain task – the Ulpian fragment D. 9.2.27.9 is most relevant:[125]

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 ministeriis fuit:

[123] See Riccardo Cardilli, 'L'obbligazione di "praestare" e la responsabilità contrattuale in diritto romano' (Milano: Giuffrè, 1995) p. 369; Dieter Nörr, 'Causa mortis: Auf den Spuren einer Redewendung' (München: Beck, 1986) p. 16, 22; Reinhard Willvonseder, 'Die Verwendung der Denkfigur der „condicio sine qua non" bei den Römischen Juristen' (Wien – Graz: Böhlau, 1984) p. 19; J.A.C. Thomas, '*Actiones Ex Locato/Conducto and Aquilian Liability*' (1978) 20 Acta Juridica 127-134, p. 128.

[124] For details see David Tritremmel, 'Culpa in eligendo et culpa in habendo bei der locatio conductio rei', in Esther Ayasch/Jaqueline Bemmer/David Tritremmel (eds.), Wiener Schriften: Neue Perspektiven aus der jungen Romanistik (Wien: Manz, 2018) 191-214, pp. 192 seqq.

[125] See also Lab. (5 post. a Iavol. epit.) D. 19.2.60.7; Ulp. (18 ad ed.) D. 9.2.27.34.

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ceterum si alius ignem subicerit fornaci, alius neglegenter custodierit, an tenebitur qui subiecerit? Nam qui custodit, nihil fecit, qui recte ignem subiecit, non peccavit: quid ergo est? puto utilem competere actionem tam in eum qui ad fornacem obdormivit quam in eum qui neglegenter custodit, nec quisquam dixerit in eo qui obdormivit, rem eum humanam et naturalem passum, cum deberet vel ignem extinguere vel ita munire, ne evagetur.[126]

In this fragment Ulpian discusses two separate scenarios, only one of which deals with *culpa in eligendo*.[127] 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

[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. 257.

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selection (of a certain person) is to be qualified as being negligent (*culpa in eligendo*)[128] 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.[129] 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.[130] 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*.[131] A particularly relevant source[132] 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 teneatur? Et adversus eos quos induxerit utrum praestabit tantum actiones, an quasi ob propriam culpam tenebitur? Mihi ita placet, ut culpam etiam eorum quos induxit praestet suo nomine, etsi nihil convenit, si tamen culpam in inducendis admittit, quod tales habuerit vel suos vel hospites: et ita Pomponius libro sexagesimo tertio ad edictum probat.[133]

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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 Privastrecht I²', 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; Johne/Köhn/Weber, 'Kolonen', pp. 216 seq.

[130] See Frier, 'Tenant's liability', p. 258.

[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

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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.[134] 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.[135]

By the phrase "*etsi nihil convenit"* Ulpian en passant refers to the well-established concept of liability for violation of a contract clause.[136] 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 admittit, 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.[137] 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.

[134] See Wicke, 'Haftung', p. 59; Pasquale Voci, 'Diligentia, custodia, culpa: I dati fondamentali' (1990) 56 SDHI 29-143, pp. 110 seq.; Knütel, 'Haftung', p. 403, Molnár, 'Verantwortung', p. 630; Geoffrey MacCormack, *'Culpa in eligendo'* (1971) 18 RIDA 525-551, p. 541; Mayer-Maly, 'Locatio Conductio', p. 201.

[135] *Wicke*, 'Haftung', p. 59; Voci, 'Diligentia', pp. 110 seq.*; Knütel*, 'Haftung', p. 403.

[136] See subsection 4.3.

[137] See fn 129.

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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*[138], his influence over guests who have been introduced to the leasehold is quite limited.[139]

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 habuerit*.[140] 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 transportandam conduxit, si ea, 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]

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[138] Richard P. Saller, 'Patria potestas and the stereotype of the Roman family' (1986) 1 Continuity and Change 7-22, pp. 7 seqq.

[139] Knütel, 'Haftung', p. 404.

[140] MacCormack, 'Culpa in eligendo', p. 544.

[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

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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*.[142] 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.[143] 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 parcticle *"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*".[144] Several of those opinions are discussed in detail

undertakes [as a task] to transport storage jars or wood; and the same rule can be applied also to other things; Watson, 'Digest II', p. 108.

[142] See Knütel, 'Haftung', pp. 420 seq.

[143] See Vitr. (de arch.) 10.2.11.

[144] Haymann, 'Textkritische Studien', pp. 193 seq.; Fritz Schulz, 'Die Haftung für das Verschulden der Angestellten' (1911) 38 GrünhutsZ 9-54, pp. 26 seq.; Bernhard Windscheid, 'Lehrbuch des

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by *Mayer-Maly* and *Knütel*. *Mayer-Maly*[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 „*que*". *Knütel*[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 *„que"*.

Regarding the controversy about the specific meaning of the particle "*que*" the following arguments stand in opposition. In support of a disjunctive interpretation of "*que*" one can point to another Gaius fragment[147] that contains the particle *„que"*, 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 "*idemque etiam ad ceteras res transferri potest"* suggests the disjunctive translation of „*que*". 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 *locatio conductio* within the classical period.[148] This argument may be rebutted insofar, as the copulative translation of "*que*" would require personal fault of the *conductor* as well as fault of (at least) one of his assistants to establish the liability of the *conductor*. Thus he could be exempt from liability if only he was at fault but not his assistants.[149] To put it differently and more pointedly, if "*que*" was understood copulatively, the *conductor* could hold himself exempt from liability by using assistants who are incapable of tort.[150]

For those reasons and in accordance with the prevailing opinion amongst modern scholars[151] the disjunctive translation of "*que*" seems reasonable. Thus, the *conductor*

Pandektenrechts', 6th edn., vol. II (Frankfurt am Main: Rütten & Loening, 1887) p. 541; more recently see Molnár, 'Verantwortung', p. 603.

[145] Mayer-Maly, 'Locatio Conductio', pp. 28 seq.

[146] Knütel, 'Haftung', pp. 419 seq.

[147] Siehe Gai. (15 ed. prov.) D. 26.8.11: *Si ad pupillum aut furiosum bonorum possessio pertineat, expediendarum rerum gratia et in agnoscenda et in repudianda bonorum possessione voluntatem tutoris curatorisque spectari debere placuit: qui scilicet si quid eorum contra commodum pupilli furiosive fecerint, tutelae curationisve iudicio tenebuntur.* Translation: If a pupillus or a lunatic is affected by bonorum possessio, in order to settle the matter, it seems right to consider the wishes of the tutor or curator both in claiming and in repudiating bonorum possessio. Certainly, if they do anything contrary to the interests of the pupillus or the lunatic, they will be liable in an action on tutelage or curatorship; Watson, 'Digest II', p. 317.

[148] Kaser, 'Römisches Privastrecht I²', p. 513.

[149] Wicke, 'Haftung', p. 70.

[150] Knütel, 'Haftung', p. 422.

[151] Klausberger, 'Zurechnungsgründe', p. 361; Du Plessis, 'Letting and Hiring', p. 93; José L. Alonso, 'Fault, strict liability and risk in the law of the papyry', in Jakub Urbanik (ed.), Culpa: Facets of Liability

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is allowed to make use of assistants to fulfil his task of transporting the column belonging to the *locator*, but he is liable – *periculum praestat*[152] –, 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 quisque observaturus fuisset.* The negative wording „*culpa autem abest*" indicates a reversal of the burden of proof.[153] 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*.[154]

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

in Ancient Legal Theory and Practice (Warsaw: The Raphael Taubenschlag Foundation, 2012) 19-81, p. 73; Tröger, 'Arbeitsteilung', p. 89; Wicke, 'Haftung', p. 70; Heinrich Honsell, 'Die Haftung für Hilfspersonen', in Andrea Büchler/Markus Müller-Chen (eds.), Festschrift für Ingeborg Schwenzer zum 60. Geburtstag (Bern: Stämpfli, 2011) 779-789, p. 781; Zimmermann, 'Law of Obligations', pp. 399 seq.; Voci, 'Diligentia', p. 107; Knütel, 'Haftung', p. 422; Apollonia J. M. Meyer-Termeer, 'Die Haftung der Schiffer im griechischen und römischen Recht' (Zutphen: Terra Publ., 1978) p. 182; Frier, 'Landlords and tenants', p. 148; MacCormack, 'Custodia and Culpa', p. 202 Fn 149; MacCormack, 'Culpa in eligendo', p. 541; Kaser, 'Römisches Privastrecht I", p. 513; Mayer-Maly, 'Locatio Conductio', pp. 28 seq.

[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; Honsell, 'Haftung', p. 781; Wolfgang Ernst, 'Das Nutzungsrisiko bei der Pacht' (1988) 105 SZ 541-591, p. 547; Molnár, '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 liabilty" 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.

[154] Especially scholars of the 20th century classify the term „*diligentissimus quisque*" as a post-classical interpolation; Mayer-Maly, 'Locatio Conductio', p. 29; Haymann, 'Textkritische Studien', pp. 193 seq. The quite unspecified interpolation criticism can be rebutted, since this standard of care appears in other (Gaius) fragments too; see Gai. (9 ad ed. prov.) D. 13.6.18 pr.; see also Ulp. (11 ad ed.) D. 4.4.11.5. Due to the lack of convincing arguments indicating a post-classical interpolation, the classicity of the term „*diligentissimus quisque*" has to be assumed; Knütel, 'Haftung', pp. 421 seq.; Herbert Hausmaninger, Diligentia quam in suis: in Dieter Medicus/Hans H. Seiler (eds.), *Festschrift für Max Kaser zum 70. Geburtstag* (München: C.H. Beck, 1976) 265-284, pp. 273 seq.; Zimmermann, 'Law of Obligations', p. 400.

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transportation of both goods, which are also fragile and quite valuable, requires the cooperation of several people and their special knowledge.[155]

The last sentence of the fragment indicates a broad applicability of this liability regime – *idemque etiam ad ceteras res transferri potest*. According to Gaius, the strict liability for acts of others shall also be applicable regarding other things – *ad ceteras res*. This statement by Gaius is, too, not without suspicion of being a post-classical interpolation.[156] In my opinion, an interpolation of this passage cannot be assumed with certainty.[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 – due to their (replacement) price, their fragility, their need of special diligence and assistance – similar to columns, barrels, and beams.

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 *bona fides*-standard of the *locatio conductio*: when a *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 *imperitia*-liability.[158] In case that the *conductor* uses the help of assistants because the transportation of a certain object – like a column – needs the cooperation of several people, the *conductor* expands his range of operations.[159] 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,[160] the increased risk ensuing from the involvement of several people to perform the contract can more easily be calculated by the *conductor* than by the *locator*.[161] Thus, it would not be consistent with the principle of good faith to confine the *locator* to delictual claims

[155] Knütel, 'Haftung', pp. 420 seq.

[156] Haymann, 'Textkritische Studien', p. 194.

[157] See Knütel, 'Haftung', p. 421.

[158] Rainer, 'Bauvertrag', p. 507.

[159] See Klausberger, 'Zurechnungsgründe', p. 189.

[160] Zimmermann, 'Law of Obligations', p. 397; Kaser, 'Römisches Privatrecht I²', p. 571.

[161] See Klausberger, 'Zurechnungsgründe', p. 362.

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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.[162] 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"[163].

In the late classical adage D. 50.17.149 the following is proclaimed: "*Ex qua persona quis lucrum capit, eius factum praestare debet*" – a person who profits from using assistants shall be liable for their misconduct. This Ulpian fragment which – according to *Lenel*[164] – refers to the interdicta „*Quorum bonorum*" and „*Quod legatorum*"[165] 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.[166]

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

[162] Mayer-Maly, 'Locatio Conductio', p. 29.

[163] Eschig/Pircher-Eschig, 'The Austrian Civil Code', p. 313.

[164] See Otto Lenel, 'Palingenesia iuris civilis: iuris consultorum reliquiae quae Iustiniani digestis continentur, ceteraque iuris prudentiae civilis fragmenta minora secundum auctores et libros', vol. 2 (Lipsiae: Tauchnitz, 1889) p. 802 fn 7.

[165] See Jörg Domisch, 'Zur Frage eines Besitzübergangs auf den Erben im klassischen römischen Recht' (Berlin: Duncker & Humblot, 2015) p. 204; Philipp Lotmar, 'Zur Geschichte des Interdictum Quod legatorum' (1910) 31 SZ 89-158, pp. 89 seqq.

[166] See Knütel, 'Haftung', pp. 441 seqq.; Andreas Wacke, 'Zur Aktiv- und Passivlegitimation des gutgläubigen Sklavenbesitzers: Grenzen prozessualistischer Betrachtungsweise der römischen Rechtsquellen', in Heinz Hübner/Ernst Klingmüller/Andreas Wacke (eds.), Festschrift für Erwin Seidl zum 70. Geburtstag (Köln: P. Hanstein, 1975) 179-219, p. 187.

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Proculeian School, various regimes of unlimited contractual liability in *locatio conductio* were introduced by Roman jurists.

For instance, the breach of a contract clause by a *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 *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 *culpa in habendo vel inducendo.* According to this liability model, a *conductor* is fully liable *ex contractu* for admitting (especially) untrustworthy persons to the leasehold, who then cause damage to the *locator*. Eventually, there is the concept of vicarious liability according to which a *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 *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) *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 *culpa*.

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