The Liability of Mandatary

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The liability of the mandatary is not a solved problem. Because of the differences in the texts, Romanists do not aggree on the standard of liability. While some scholars accept that mandatary was liable for only *dolus* or *fraus*[1], others suggest that there was no fixed standard of liability in mandate, and the liability of mandatary varied between *culpa* and *dolus* according to the circumstances[2].

According to the first group, throughout classical period the mandatary was liable for *dolus* only, but in post-classical law, liability was widened and references to *culpa* came to be interpolated into the classical texts[3]. By reason of *mandatum* was a gratuitous transaction, mandatary, same as depositarius, was accepted liable only for *dolus* or to some extent for *culpa lata*[4]. But it can be said that sometimes

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[1] BUCKLAND, W.W., *A Textbook of Roman Law*, 1963, 516; SCHULZ,F., *Classical Roman Law*, 1951, 556; KASER, M., *Römisches Privatrecht I*, 1955, 483; GORDON, *Syntelia Arangio-Ruiz I*, 1964, 202

[2] ZIMMERMANN, R., *The Law of Obligation*, 1995,426 sqq.; WATSON, A., *Contract of Mandate in Roman Law*, 1961, 194 sqq; MAC CORMACK,G., *The Liability of the Mandatary*, Labeo 18, 1972, 156 sqq.

[3] It is difficult to explain how the compilers forgat some texts that imply liability for *culpa*. Ulp.D.50.17.23; Paul.D.17.1.26.7; WATSON, 214

[4] Coll.10.2.3 *In mandati vero iudicium dolus, non etiam culpa deducitur;* C.2.12.10

mandatum may be for the benefit of the mandatary. So the liability only for *dolus* might not seem adequate[5].

Cic.pro Roscio Amerino 38.lll is an example for this result and at the same time, it is an example state the standard of liability under mandate. "*In privatis rebus, si qui rem mandatam non modo maliotiosius gessisset, sui quaestus aut commodi causa, verum etiam neglegentius, eum maiores summum admisisse dedecus existimabant.*" Cicero tells us that, mandatary at least somethimes was liable not only for *dolus*, but also for *neglegentia*[6].

Cic.39. ll3 is another example for mandatary's liability where the mandatary makes a profit out of the commission. "*In minimis rebus qui mandatum neglexerit, turpissimo iudicio condemnetur necesse est.... In minimis privatisque rebus etiam neglegentia in crimen mandati iudiciumque infamiae vocatur, propterea quod, si recte fiat, illum neglegere oporteat qui mandarit non illum qui mandatum receperit.*" Cicero holds the mandatary liable for neglegentia as in the former example. But, for the opposing jurists, making a profit from the commission by mandatary is one of the circumstances which made mandatary liable for *dolus*. Total failure to carry out the mandate is another example for liability for *dolus*[7].

Likewise, the jurists accept mandatary liable only for *dolus*, imply that *infamia* would be the result of condemnation in the action that could ony lie for *dolus*. But, the *infamia*, to be the result of mandatary's condemnation isn't a sufficent reason to accept liability only for *dolus*. Because there might be cases where the mandatary was negligent, was condemned to pay, but not made infamous[8]. On the contrary, sometimes, mandatary's *neglegentia* could be the reason of *infamia*[9].

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[5] G.3.156; WATSON, 196; "Where the *mandatum* is either *mea et tua* or *tua et aliena gratia*, the *mandatarius'* activity can hardly be described as altruistic, even if he is not remunerated for his services." ZIMMERMAN, 427

[6] WATSON, 199 sq.; MAC CORMACK, 170; The GORDON thinks that *neglegentius* or *neglegentia* means complete neglect of the mandate, not negligence in carrying it out., 204

[7] MAC CORMACK, 170

[8] WATSON,196-197; ZIMMERMANN,428

[9] Cic.Pro Roscio 38.III, Cicero helds that a *mandatarius* who acts neglegentius will suffer *infamia* just as one who acts *malitiosius*.; Ulp.D.17.2.52.3

One of the problems in Roman Law that the jurists discussed, is on the meaning of *culpa*. *Culpa* in the texts doesn't always mean negligence, it may be used in the sense of "fault" or "imputability". *Culpa*, in classical Roman Law, didn't have a precise, rigidly defined meaning, so it could cover a broad range of situation. It was both provided a Roman equivalent to the modern concept of negligence, (for example, the failure to excercise the care that a *bonus paterfamilias* would have exercised) and could also refer to fault or blameworthiness in general (including *dolus*)[10]. So, *culpa* in the sense of fault may be used for all diffirent situations and express a fault serious enough to count as *dolus*[11]. There is not necessarily an inconsistency between the proposition that the mandatary was liable for *dolus* but not for *culpa* and a decision in which a spesific mandatary was held responsible on account of his *culpa*[12].

The liability standard which applied would depend on all the circumstances, Such as the respective interesse of the parties, the bonds of friendship and duty which united them, the nature of the assignment, all are effectual for decision. Depend upon the circumstances, liability appears to have been sometimes for only *dolus*[13], sometimes for *dolus* and *culpa lata*[14], and in other instances for the full range of *culpa*[15]. Sometimes the mandatary's fault may not be serious enough to qualify as *dolus*, so the rule that the mandatary was liable for *culpa* could readily be extended to a case where the fault was only slightly less serious than *dolus*[16].

The differences in the standard of mandatary's liability can be explained by means of the texts on mandate. The first fragment to examine is Ulp.D.50.17.23.

D.50.17.23 Ulpianus libro vicensimo nono ad Sabinum

Contractus quidam dolum malum dumtaxat recipiunt, quidam et dolum et culpam. Dolum tantum depositum et precarium. Dolum et

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[10] MAC CORMACK, 156 sqq.; ZIMMERMANN, 427; GORDON, 203
[11] MAC CORMACK, 157
[12] ZIMMERMANN, 427; MAC CORMACK, 157
[13] Mod.Coll.10.2.3; Paul.D.17.1.26.8
[14] Ulp.D.17.1.8.10
[15] Ulp.D.50.17.23; Paul.D.17.1.22.11; Paul.D.17.1.26.7
[16] MAC CORMACK, 158

culpam mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutelae, negotia gesta; in his quidem et diligentiam[17].

The jurists often alleged that it was very much interpolated but it can be thouht that Ulpianus was giving the maximum liability possible in each of the *bonae fidei iudicia*[18]. So, probably, *culpa (culpa levis)* was used to mean a standard of liability and not merely in the general sense of fault.

Some texts deal with a mandatary's claim for expenses, some of them with loss incurred by the mandator and others with general statements of the position. We find three texts on mandatum that the mandatary may recover expenses.

D.17.1.26.8 Paulus libro trigensimo secundo ad edictum

Faber mandatu amici sui emit servum decem et fabricam docuitdeinde vendidit eum viginti, quos mandati iudicio coactus est solvere: mox quasi homo non erat sanus, emptori damnatus est: Mela ait non praestaturum id ei mandatorem, nisi posteaquam emisset sine dolo malo eius hoc vitium habere coeperit servus. Sed si iussu mandatoris eum docuerit, contra fore: tunc enim et mercedem et cibaria consecuturum, nisi si ut gratis doceret rogatus sit[19].

A workman by the direction of a friend buys a slave and teaches him the craft. He sells him for more than he gave. He is compelled to account for and to pay the profit to the mandator by actio mandati. But at the same time, he can claim the expenses incured for the maintenance

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[17] Ulp. D.50.17.23 Some contracts only involve bad faith, some also culpability. Deposit and *precarium* involve only bad faith. Mandate, loan for use, sale, acceptance in pledge, hire, likewise grant of a dowry, grant of tutelage, unauthorized administration involve bad faith and culpability; and indeed, among these we include diligence.

[18] WATSON, 215-216

[19] Paul.D.17.1.26.8 A workman, by the direction of a friend, bought a slave for ten *aurei*, and taught him his trade; he then sold him for twenty *aurei*, which he was compelled to pay by an action on mandate. Afterwards, he had judgment rendered against him in favor of the purchaser, on the ground that the slave was not sound. Mela says that the mandator will not be obliged to make good to him what he paid, unless, after he made the purchase, the slave became unsound without bad faith on his part. If, however, he had given him instructions by order of the mandator, the contrary would be the case, for then he could recover what he had expended, as well as what had been paid for the maintenance of the slave, unless he had been asked to instruct him gratuitously.

of the slave. These are normal expenses arising under the mandate[20]. However, if the mandatary is made liable for a defect in the slave's health, after the sale of the slave, either he can recover the expenses that the mandatary would not expect to incur or can not, is a very difficult quaestion.

Paulus reports Mela, as holding that the mandator is liable if the defect arose after the slave had been acquired by the mandatary and he had been no *dolus malus*. If *dolus malus was* an intention to harm the mandator for Mela, he might have been prepared to infer the existance of such an intention from any deliberate or reckless ill treatment of the slave. Mela may have held that the mandatary was barred from recovering the damages even in circumstances where he has not an intention to harm the mandator[21].

The workman retain the slave to train of his own volition, and so acting ultra vires, prevented the mandator from finding out that he was ill when redhibition was possible, and so he is prevented from bringing the *actio mandati* to shift the loss to the mandator. Because the full training of the slave would take longer than the period for which redhibition or the *actio quanty minoris* was available[22].

In another fragment, Neratius and Africanus discuss the mandatary's claim where a slave whom he has acquired under mandate steals from him.

D.17.1.26.7 Paulus libro trigensimo secundo ad edictum

Sed cum servus, quem mandatu meo omeras, furtum tibi fecisset, Neratius ait mandati actione te consecuturum, ut servus tibi noxae dedatur, si tamen sine culpa tua id acciderit: quod si ego scissem talem esse servum nec praedixissem, ut possis praecavere, tunc quanti tua intersit, tantum tibi praestari oportet[23].

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[20] WATSON, 107 sqq
[21] MAC CORMACK, 166
[22] WATSON, 107
[23] Paul D.17.1.26.7 Where, however, a slave steals from you what you had purchased by my direction, Neratius says that you can bring an action on mandate to compel the slave to be surrendered to you by way of reparation, if this happened without your fault; but if I knew that the slave was dishonest, and did not warn you, so that you could provide against it, I must then make good to you the amount of your interest.

The text isn't concerned with the mandatary's standard of liability. It relates only to mandatary's claim for recovery of his expenses for compensation for loss suffered. It can be said that the text cancels the claim when the mandatary himself was responsible for his loss[24]. That is if the mandatary was in culpa, he will suffer his own culpa. We find the same remark in D.47.2.62.7.

D.47.2.62.7 Africanus libro octavo quaestionum

Haec ita puto vera esse, si nulla culpa ipsius, qui mandatum vel depositum susceperit, intercedat: ceterum si ipse ultro ei custodiam argenti forte vel nummorum commiserit, cum a lioquin nihil umquam dominus tale quid fecisset, aliter existimandum est[25].

Africanus says that there is mandatary's culpa and he can not recover because, in entrusting valuables to the slave, he has done something which the *dominus* would not have done. No *dominus* would normally entrust valuables to a slave; if the mandatary does he is at fault and cannot make the mandator bear the loss of the theft. No quaestion of *dolus* arises in these circumstances. The mandatary has been careless with his own property, not the mandator's. Yet one can not assume that Mela would have reached a decision different from Neratius and Africanus[26].

The decisions on the liability of the mandatary for loss suffered by the mandator are expressed in a very varied terminology. There are references to *fraus, dolus, culpa lata* and *culpa*[27].

D.17.1.22.11 is Paulus' discussion of the effect of renunciation by the mandatary:

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[24] GORDON, 203; STEIN, P., Fault in the Formation of Contract in Roman Law and Scots Law, 1957,159-160; TAMER, D., Vekalet Verenin Sorumluluğu Üzerine (D.47.2.62.5), İ.Ü.H.F.M., LV-4, 1997,140-141

[25] Africanus D.47.2.62.7 All this I think to be true, provided that the mandatory or depositee has not himself been remiss; if such a person should have entrusted the slave with the care of silver or coins, when, in no circumstances, would his master have done so, a different opinion must be adopted.

[26] MAC CORMACK, 167

[27] Ulp.D.14.5.6 Ulp.D.14.5.6 following Marcellus, holds that a *filius* who pretends that he is a *paterfamilias* and is given a mandate to enter into a stipulation is liable to the mandator. He justifies the decision on the ground of the mandatary's *dolus*.

D.17.1.22.11 Paulus libro trigensimo secundo ad edictum

Sicut autem liberum est mandatum non suscipere, ita susceptum consumari oportet, nisi renuntiatum sit (renuntiari autem ita potest, ut integrum ius mandatori reservetur vel per sev el per alium eandem rem commode explicandi) aut si redundet in eum ceptio qui suscepit mandatum. Et quidem si is cui mandatum est ut aliquid mercaretur mercatus non sit neque renuntiaverit sen on empturum idque sua, non alterius culpa fecerit, mandati actione teneri eum convenit. Hoc amplius tenebitur, sicuti Mela quoque scripsit, si eo tempore per fraudem renuntiaverit, cum iam recte emere non posset[28].

If the mandatary don't carry out his undertaking through his *culpa* , he is liable for any loss suffered by the mandator. He commits a grave fault which Paulus preferred to speak of *culpa*. Because there was no intention on the part of the mandatary to make a profit for himself of specifically to harm the mandator or because he was considering the effect of fault not only on the part of the mandatary but also on the part of the prospective seller[29]. In the latter case, it was inappropriate to speak of *dolus*. Paulus reports a case of fraus, from Mela. This case is concerned with a particular situation, where a person fraudulently renounces the mandate after it is too late for him to perform it. What he is trying to do is escape liability for not having performed the mandate. Mela held the mandatary liable only if there was some element of deceit. The conditions of the mandatary's liability could be stated in terms of *culpa*[30].

D.17.1.8.9 Ulpianus libro trigensimo primo ad edictum

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[28] Paul.D.17.1.22.11 However, just as one is free not to accept a mandate, so if it is accepted it must be executed, unless it is revoked. Moreover, it can be revoked in such a way that the right will be reserved unimpaired to the party giving the mandate to conveniently dispose of the matter, either by himself or by someone else; or where he who undertook the performance of the mandate might be taken advantage of. And if the party to whom the mandate was given to purchase something does not do so, and does not state that he will not purchase it, he will be responsible for his own negligence, and not for that of another; and it is settled that he will be liable to an action on mandate.He will still further be liable (as Mela also has said) if he should fraudulently revoke the mandate at a time when he could not properly make the purchase.

[29] MAC CORMACK, 168

[30] MAC CORMACK, 169

Dolo autem facere videtur, qui id quod potest restituere non restituit[31].

D.17.1.8.10.Ulğianus libro trigensimo primo ad edictum

Proinde si tibi mandavi, ut hominem emeres, tuque emisti, teneberis mihi, ut restituas. Sed et si dolo emere neglexisti (forte enim pecunia accepta alii cessisti ut emeret)aut si lata culpa (forte si gratia ductus passus es alium emere), teneberis. Sed et si servus quem emisti fugit, si quidem dolo tuo, teneberis, si dolus non intervenit nec culpa, non teneberis nisi ad hoc, ut caveas, si in potestatem tuam pervenerit, te restituturum.sed et si restituas, et tradere debes et si cautum est de evictione vel potes desiderare, ut sibi caveatur, puto sufficere, si mihi hac actione cedas, ut procuratorem me in rem meam facias, nec amplius praestes quam consecuturus sis[32].

According to these texts, even where the mandatary has not carried out the contract, the mandator will be liable to restore. Sometimes the jurists accept the liability for dolus by bringing within its scope cases of *culpa lata*. Here *dolus* and *culpa* are used technical terms for different standards of liability. And they helds the texts to be interpolated[33]. The specific mention of *culpa lata* suggest that the mandatary was held liable to restore only where the circumstances disclosed grave fault[34].

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[31] Ulp.D.17.1.8.9 However, a man who has not handed over what he is able to hand over is held to have acted in bad faith..

[32] Ulp.D.17.1.8.10 And so if I have given you a mandate to buy a slave and you have bought (him), you will be liable to m efor his delivery. Indeed, you will be liable, if you have neglected to make the purchase as a result of bad faith (fo r example, if you have accepted a bribe from a third party to stand down so that he could buy (the slave), or if (you have failed to make the purchase) through gross negligence (for example, if, being kindly disposed toward another, you have allowed him to buy (the slave). Further, even if the slave whom you purchased has fled, you will be liable if this was the result of bad faith on your part. But if there has been no bad faith or fault, you will only be liable to give an undertaking that you will turn the slave over (to me), should it become possible for you to do so. Furthermore, if you hand him over, you must convey him (to me). And if an undertaking has been given in respect of eviction, or you are in a position to request that (such an) undertaking be given to you, I think it sufficient if you allow met o take over this action, by making me a procurator in connection with my own affairs; nor will you be liable to pay any more than you would obtain.

[33] GORDON, 204

[34] MC CORMACK, 169

In this case, a slave has been bought by the mandatary but has run away before he can be transferred to the mandator. If the slave ran away through the mandatary's *dolus* he is liable. But he goes on to say that if there is not *dolus* or *culpa*, the mandatary is not liable. If *culpa* is taken to mean such fault as is sufficient to entail liability there is no conflict between the decision in the case where the mandatary does not buy and the case where he buys but does not produce the property for conveyance to the mandator[35].

As we have seen, source of the problems on mandatary's liability are differences between Ulpianus' and Modestinus' opinions. In a general discussion of contractual liability, while Ulpianus classifies mandate as a contract in which liability is for *dolus* and *culpa* (D.50.17.2), Modestinus accepts liability for *dolus* but not *culpa* (Coll.10.2.3). Dolus and *culpa* are words expressing fixed and exclusive areas of liability, so it is possible to reconcile the texts. There is nothing surprising in the fact that the mandatary might be described as liable for *dolus* or for *culpa*. So, *culpa* expresses fault of a gravity sufficient to constitute *dolus* or *dolo proximum* or somethimes less serious faults which do not constitute *dolus* or even *dolo proximum*. The jurists held that liability could be extended and they might express their decision in the form, the mandatary is liable for *dolus* and *culpa*. Ulpianus appears to be recording this approach. On the other hand, Modestinus takes a slightly more conservative approach formulates restrictively the liability of the mandatary. His statement that the mandatary is liable for *dolus* not for *culpa* may be understood in the sense that there is a range of faults for which the mandatary is not liable[36].

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[35] MAC CORMACK, 170; WATSON, 213 sq

[36] MAC CORMACK, 171