The Liability of Mandatary

Diler Tamer*

The liability of the mandatary is not a solved problem. Because of the differences in the texts, Romanists do not agree on the standard of liability. While some scholars accept that mandatary was liable for only dolus or fraus¹, 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 circumstances².

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 texts³. By reason of mandatum was a gratuitous transaction, mandatary, same as depositarius, was accepted liable only for dolus or to some extent for culpa lata⁴. But it can be said that sometimes

---

*Assoc. Prof. Dr., Istanbul University Law Faculty. Chair on Roman Law.
³ It is difficult to explain how the compilers forgot 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 judicium dolus, non etiam culpa deducitur; C.2.12.10
mandatum may be for the benefit of the mandatory. So the liability only for dolus might not seem adequate\(^5\).

Cic.pro Roscio Amerino 38.iii 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 mandatum non modo maliotiosius gessisset, sui quaeestus aut commodi causa, verum etiam neglegentius, eum maiores summum admississe dedecus existimabant.” Cicero tells us that, mandatory at least sometimess was liable not only for dolus, but also for neglegentia\(^6\).

Cic.39. iii is another example for mandatory’s liability where the mandatory makes a profit out of the commission. “In minimis rebus qui mandatum neglexerit, turpissimo iudicio condemnetur nesses est.... In minimis privatisque rebus etiam neglegentia in crimen mandati iudiciuimque infamiae vocatur, propterea quod, si recte fiat, illum neglegere oporteat qui mandariit non illum qui mandatum receperit.” Cicero holds the mandatory liable for neglegentia as in the former example. But, for the opposing jurists, making a profit from the commission by mandatory is one of the circumstances which made mandatory liable for dolus. Total failure to carry out the mandate is another example for liability for dolus\(^7\).

Likewise, the jurists accept mandatory liable only for dolus, imply that infamia would be the result of condemnation in the action that could only lie for dolus. But, the infamia, to be the result of mandatory’s condemnation isn’t a sufficient reason to accept liability only for dolus. Because there might be cases where the mandatory was negligent, was condemned to pay, but not made infamous\(^8\). On the contrary, sometimes, mandatory’s neglegentia could be the reason of infamia\(^9\).

---

\(^{5}\) 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 altruisistic, 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 situations. It was both provided a Roman equivalent to the modern concept of negligence, (for example, the failure to exercise the care that a *bonus paterfamilias* would have exercised) and could also refer to fault or blameworthiness in general (including *dolus*). So, *culpa* in the sense of fault may be used for all different situations and express a fault serious enough to count as *dolus*. 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 specific mandatary was held responsible on account of his *culpa*.

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*, sometimes for *dolus* and *culpa lata*, and in other instances for the full range of *culpa*. 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*.

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.

*Ulpianus libro vicensimo nono ad Sabinum*

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

---

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
16 MAC CORMACK, 158
culpam mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutelae, negotia gesta; in his quidem et diligentiam.

The jurists often alleged that it was very much interpolated but it can be thought that Ulpianus was giving the maximum liability possible in each of the bonae fidei iudicia. 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 editum

Faber mandatu amici sui emit servum decem et fabricam docuit deinde vendidit eum viginti, quos mandati iudicio coactus est solvere: mox quasi homo non erat sanus, emptori damnatus est: Mela aut 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 consequeturum, nisi si ut gratis doceret rogatus sit.

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 incurred for the maintenance

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. 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 existence 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.

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.

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, tan tum tibi praestari oportet.

---

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 mandatory’s standard of liability. It relates only to mandatory’s claim for recovery of his expenses for compensation for loss suffered. It can be said that the text cancels the claim when the mandatory himself was responsible for his loss. That is if the mandatory 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 suscepterit, intercedat: ceterum si ipse utro ei custodiam argenti forte vel nummorum commiserit, cum a lioquin nihil umquam dominus tale quid fecisset, aliter existimandum est.

Africanus says that there is mandatory’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 mandatory 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 mandatory 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.

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

D.17.1.22.11 is Paulus’ discussion of the effect of renunciation by the mandatory:

---


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 mandatory’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 mandatorii reservetur vel per sev el per alium eandem rem commode explicandi) aut si redundet in eum ceptio qui susceptit 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 mandatory 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 mandatory 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 mandatory but also on the part of the prospective seller29. 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 mandatory liable only if there was some element of deceit. The conditions of the mandatory’s liability could be stated in terms of culpa.30

D.17.1.8.9 Ulpianus libro trigensimo primo ad edictum

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 restitui non restituit\textsuperscript{31}. 

D.17.18.10. Ulgi\'anus 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 dolo non intervenit nec culpa, non teneberis nisi ad hoc, ut caveas, si in potestate 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 mean facias, nec amplius praestes quam consecuturis sis\textsuperscript{32}.

According to these texts, even where the mandatory 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\textsuperscript{33}. The specific mention of culpa lata suggest that the mandatory was held liable to restore only where the circumstances disclosed grave fault\textsuperscript{34}.

\textsuperscript{31} Ulp.D.17.18.9 However, a man who has not handed over what he is able to hand over is held to have acted in bad faith.

\textsuperscript{32} Ulp.D.17.18.10 And so if I have given you a mandate to buy a slave and you have bought (him), you will be liable to me for his delivery. Indeed, you will be liable, if you have neglected to make the purchase as a result of bad faith (for 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 me to 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.

\textsuperscript{33} GORDON, 204

\textsuperscript{34} MC CORMACK, 169
In this case, a slave has been bought by the mandatory but has run away before he can be transferred to the mandator. If the slave ran away through the mandatory's *dolus* he is liable. But he goes on to say that if there is not *dolus* or *culpa*, the mandatory 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 mandatory does not buy and the case where he buys but does not produce the property for conveyance to the mandator\(^\text{35}\).

As we have seen, source of the problems on mandatory'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 mandatory 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 mandatory 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 mandatory. His statement that the mandatory is liable for *dolus* not for *culpa* may be understood in the sense that there is a range of faults for which the mandatory is not liable\(^\text{36}\).

---

\(^{35}\) MAC CORMACK, 170; WATSON, 213 sq

\(^{36}\) MAC CORMACK, 171