Limiting Liability: Roman Law and the Civil Law Tradition

David Johnston
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I. INTRODUCTION**

This Article concerns vicarious liability in Roman law, and, in particular, the various ways in which that liability might be limited. The general principle in Roman legal thought was that there should be no liability for others: Gaius writes that “our condition can be made better but not worse through our slaves”\(^1\); a fortiori, it could not be made worse by those who were not members of the family. That general statement was made with reference to contractual obligations only, and is not true of delict. But, even in contract various bases of liability for others were established. These bases always were subject to limits, no doubt to make the inroads into principle seem more tolerable.

This introductory section sketches out the main contexts in which vicarious liability arose, and the three main modes of limiting it. These contexts are considered more fully in Sections II to V. Section VI makes some selective rather than systematic observations about the use of the various different modes of limiting liability in later legal history.

The first two models of limited liability appear in the context of contract. There, the general principle, as already noted, is that there is no liability for the actions of others. The notion of obligation is personal: a contract binds the parties to it, but not normally any third party, even one who may have one of the contracting parties in his power (potestas). This principle, however, is modified in two ways, each of which involves liability within limits. First, the actio de peculio could be brought against a paterfamilias on account of an obligation

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\** This Article uses the following abbreviations. C = Justinian's Code; D = Justinian's Digest. Both of these sources are in the standard edition of the Corpus iuris civilis edited by Th. Mommsen and P. Krueger. SZ = Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (this is a German legal-history periodical); RIDA = Revue internationale des droits de l'antiquité.

1. The most recent comprehensive discussion of liability for others is R. Knütel, (1983) 100 SZ 340-443.

2. Gaius 8 ad edictum provinciale D. 50.17.133: melior condicio nostra per servos fieri potest, deterior fieri non potest.
entered into by a slave or a son subject to his power. In this case, a creditor could have recourse against the *paterfamilias* — not to the full extent of the debtor’s obligation — but only up to the maximum of the amount in the *peculium*. The *peculium* was a fund of property that remained the property of the *paterfamilias* and could be revoked by him, but over which the person in power had been given charge, and with which he could effectively deal as if it were his own. It was also necessary to determine which acts did, and which did not give rise to a claim against the *peculium*.

Second, the general principle was modified by the availability of two similar actions, the *actiones institoria* and *exercitoria*. The first allowed a claim against a “principal,” a person who had placed an “agent” (an *institor*) in charge of a business, for acts done by him in the course of the business; the second allowed a claim against a shipowner (exercitor) for the acts of the ship’s captain. Here, the *institor* or captain could be entirely free, or a person in the power of a *paterfamilias*, or a slave, but in any of these situations, liability was not limited by a financial sum. Instead, the circumstances in which liability could arise at all were restricted by the terms of appointment (*praepositio*) of the *institor* or captain: in modern terms, by the authority given by the principal to the agent. In contrast to the *peculium* limit on liability, this approach may be called a “functional” mode of limiting liability. With later commentators, this rule of liability without a financial limit found little favor. Grotius thought the *actio exercitoria* a most unhealthy innovation, principally because the shipowner’s liability was not subject to any financial limit. Grotius’s unfavorable reaction prompts us to consider what factors, if any, mitigated the strict rule of unlimited liability which might otherwise, as he suggests, operate as a deterrent to commerce.

3. Sometimes, it is convenient to use the terms “principal” and “agent.” But, it is not intended that they should bear any connotations from the modern law of agency. In particular, the terms should not be taken to imply that an agent contracting on behalf of a principal does not become bound personally.


5. If the *institor* or captain was a slave in power and had a *peculium*, it was disregarded for the purposes of determining the principal’s liability to these actions, unless (which is hard to imagine) the principal was ignorant that the business was actually being carried on: see G. Pugliese, (1957) 3 *Labeo* 308-43 at 325-26.

6. In this respect there is a resemblance to another action, which ought to be mentioned for the sake of completeness: the *actio quod iussu*. There, the *paterfamilias* authorized an act by a member of his family and became liable himself in full. The difference is that this action was available only where there was that status relationship; the present actions are not so restricted.

7. H. Grotius, *De iure belli ac pacis* (ed. used: Blaeu, Amsterdam, 1646) 2.11.13.
The third mode of limiting liability appears in the context of delict, where the broad principle was that there was no liability for the actions of others unless they were in one’s own power. Exceptions to this rule are referred to later (Section IV). For those in power (dependent children or slaves), however, a different regime applied: the paterfamilias was liable for their delicts. But his liability was noxal: as an alternative to paying damages he could surrender the wrongdoer to the plaintiff. Accordingly, the liability of the paterfamilias was limited by the value of the wrongdoer.

II. Actio Institoria and Exercitoria

The principle underlying these two actions is that a principal was liable without limit for the actions of his agent, the institor or magister navis. Here, the liability arose out of contracts between the agent and a third party. If the institor was a free person, then he would be bound by the contract; the actio institoria simply offered an additional remedy—an alternative defendant from whom the creditor could attempt to recover.8 If the institor was a slave, there would be no personal liability, and the actio institoria against the principal would be the only remedy. In either situation, however, there was no financial limit on the liability of the principal. In later times, as we have seen, this result was regarded as a fundamental flaw. It is easy to see the lack of attraction to the principal of unlimited liability for the actions of his agent, when the very fact of delegation to the agent makes the closeness of personal supervision difficult.

Yet, to protest too much about the lack of a financial limit on liability is to ignore the functional limit which restricted the circumstances in which the principal’s liability arose in the first place. Ulpian, in his discussion of the actio institoria, states that “not every transaction with an institor binds the person who appointed him, but only if the contract was made on account of the business to which he was appointed, that is, to the extent of the appointment.”9 There are many similar statements in relation both to the institor and to the ship’s captain; and elsewhere Ulpian remarks that the praepositio, the appointment, sets the terms for the contractors, stating that an agent who goes beyond these terms does not bind his principal (modum

8. Ulpian 28 ad edictum D. 14.1.1.17; 63 ad edictum D. 15.1.44; bringing one of the claims to court will, however, consume both. On terminology, cf. note 3.
9. Ulpian 28 ad edictum D. 14.3.5.11: non tamen omne quod cum institore geritur obligat eum qui praeposuit sed ita si eius rei gratia cui praepositus fuerit contractum est, id est dumtaxat <ad> id [ad] quod eum praeposuit.
egressus non obligabit exercitorem). Furthermore, the principal had the option to reduce the scope of, or avoid, a liability that would otherwise arise by giving express notice to parties contracting with his agent; there is a certain amount of discussion about what language such notices must be in, and how large and visible they must be. What is most significant, however, is that the effectiveness of this limit on the principal's liability depends on the stringency with which the appointment is interpreted. In other words, the disadvantages of the lack of a financial limit on liability can be mitigated considerably according to the strictness of the interpretation applied to the terms of the appointment. Two Roman texts concerning loans offer guidance in this area.

First, it is important to be clear about what form the creditor's action should take. A creditor suing for repayment of a loan would bring a condictio. In this case, the condictio would be modified to account for the loan being made to the institor rather than to his principal. The formula for such an action is reconstructed by Lenel as follows: "If it appears that Lucius Titius, who was put in charge of a business by the defendant, ought on that account to give 10,000 sesterces to the plaintiff, let the judge condemn the defendant to pay that to the plaintiff; if it does not appear, let him absolve." In formula, as far as the functional limit on the liability of the principal for his institor is concerned, the key words are "on that account" (eius nomine); how strictly were they interpreted?

Ulpian 28 ad edictum D. 14.3.13 pr. reads as follows:

Someone had a slave in charge of an olive oil business in Arles, and the same slave in charge of borrowing money. The slave had borrowed money, and the creditor, thinking he had done so for the business, sued with the present action. He could not prove that the slave had borrowed the money for the business. Although the action was extinguished, and the creditor could not sue again on the basis that the slave had also been put in charge of borrowing money, none the less Julian says he has an actio utilis.

10. Ulpian 28 ad edictum D. 14.1.1.12; cf. D. 14.3.5.15; 14.3.11.5; C. 4.25.2 (222).
12. O. Lenel, Das Edictum perpetuum (3rd. ed., Leipzig, 1927) 264: si paret Lucium Titium, qui a No No tabernae instructae praepositus est, eius rei nomine Ao Ao HS X milia dare oportere, eius iudex Nm Nm Ao Ao condemna, si non paret absolve.
13. Habebat quis servum merci oleariae praepositus Arelate, eundem et mutuis pecuniis accipiendis: acceperat mutuum pecuniam, putans creditor ad merces eum acceptisse egit proposita actione: probare non potuit mercis gratia eum acceptisse. licet consumpta est actio nec amplius agere poterit, quasi pecuniis quoque mutuis accipiendis esset praepositus, tamen Julianus utilem ei actionem competere ait.
What has to be envisaged here is that in the action the creditor made reference to the oil business (*merx olearia*), and pleaded that on that account (*eius nomine*) he had advanced money to the slave. But because he failed to prove this, he lost. This result indicates the strict interpretation of the words *eius nomine*: the creditor must show that the loan was made for the purposes of the business over which the slave was *praepositus*. The requirements of proof, however, are left rather unclear: is the creditor required to prove that the slave actually spent the money on buying oil, or simply that he had good reason to think that the slave would? Or, was there any reference in the contract dealing with the purpose of the loan? All these questions are unfortunately left obscure; but some of them are clarified in a text dealing with the *actio exercitoria*.15

Africanus 8 quaestionum D. 14.1.7 pr.-2 reads as follows:

Lucius Titius appointed Stichus captain of a ship. He borrowed money and stated in the contract that he had received it for repairs to the ship. The question arose whether Titius would only be liable under the *actio exercitoria* if the creditor proved the money had been spent on repair of the ship. He replied that the creditor could successfully sue if, when the money was lent, the ship was in a condition such that it required repair: for it is not proper for the creditor to be compelled personally to take charge of repairing the ship and carrying out the owner’s business, which would certainly be the case if he had to prove that the money was spent on repair: what is required is that he knows he is lending for a purpose a captain has been placed in charge of, which certainly cannot happen otherwise than if he also knows that money is needed for repair: so although the ship was in a condition such that it required repair, if much more money was lent than was necessary for that, an action ought not to be given for the full amount against the shipowner. [1] Sometimes it must even be considered whether, in the place where the money was lent, the thing on account of which it was lent can be acquired: for what, he says, if someone has lent money for purchase of a sail on an island on which there is absolutely no sail to be had? In sum, the creditor must show a certain diligence in this matter. [2] Much the same is to be said, he says, if the question is about the *actio institoria*: there too the creditor ought to know that purchase of the goods is necessary, and that the slave has been put in charge of purchase. It is enough if he lent for that purpose, and not also necessary that he should himself take care whether the money was spent on that thing.16

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14. Cf. C. 4.25.1 (212) and C. 4.25.5 (294), where the creditor is required to prove that the *institor* had authority to borrow money.

15. For further discussion of points in this text not dealt with here, see Pugliese, *op. cit.* (note 5) 318-20.

16. Lucius Titius Stichum magistrum navis praeposuit:
Here Africanus, reporting Julian, is concerned with what the creditor must prove to be able to claim repayment of a loan from the shipowner. The main propositions are: the creditor must prove that the loan was made for a purpose falling within the terms of the captain's appointment (*praepositio*), and that the loan was necessary for a purpose falling within the appointment. But, the creditor need not prove that the captain actually spent the money for that purpose. The narrow reading of the appointment emerges from this reasoning: the creditor will not know that he is lending for a purpose within the appointment unless he knows that the money is needed for some such purpose. So, it is not enough for the creditor that the borrower is indeed the captain of a ship, appointed to manage it by a shipowner. Instead, the creditor must also know that there is a purpose within the appointment that justifies lending the requested amount. In practice, this means that the creditor can recover from the *exercitor* only if he has satisfied a rather stringent duty of inquiry, although the duty is one that can be satisfied on the spot. The extent of this duty of inquiry is perhaps surprising given that, according to Ulpian, the reason for the *actio exercitoria* (more pressing in the case of ships than of other businesses) was that transactions with captains were sometimes urgent and left no time for investigation of the credit-worthiness of the captain himself.\(^\text{17}\)

It is important to be clear that the liability of the principal does not turn on enrichment; and it is essentially that line of reasoning which is excluded by the jurist in saying that the creditor need not concern himself with how the money was actually spent. If this proof was a prerequisite of the principal's liability, then there would be good

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\(^\text{17}\) D. 14.1.1 pr.
reason to say that the ground for liability was that a benefit had been *in rem versum* of the principal; in other words, that he had been enriched at the creditor's expense. But it is clear from Julian's discussion that matters do not go this far: all that is required is that the amount lent be necessary for a purpose within the authority of the captain. Accordingly, it is perfectly possible for there to be liability even though the shipowner is not enriched (if for example the captain absconds with the money or gambles it away).\(^1\) It follows that the liability of the shipowner is indeed a matter of contract. Moreover, it is notable that in this contract the creditor bears a strict duty of inquiry, and correspondingly, a heavy onus of proof in the action.

How can this be explained? It seems most likely that the jurist was eager to confine this remedy, the *actio exercitoria* (and indeed the *actio institoria*), within clear limits. This remedy broke with the fundamental principle of privity of contract, and it exposed a principal to liability without financial limit. Consequently, it was important that the departure from the well-established rule be kept within strict bounds, and that the creditor be able to have recourse against the principal only when he had done all that he reasonably could do to satisfy himself that the loan was being made for a purpose necessary for the principal's business. So, in spite of the heavy burden imposed on the creditor, and the likely impracticability of discharging this burden in a case of urgency, the jurist may have thought that this approach represented a reasonable balancing of the interests of principal and creditor. In later times, the demise of the strict Roman insistence on privity of contract disturbed this delicate equilibrium. As will appear in Section VI, attention then turned to another type of limitation on liability, this time of a financial nature.

### III. Actio de Peculio

The actions previously discussed concerned the actions of free persons as well as slaves: what mattered was the terms of the *praeposition* rather than the status of the parties. These are actions based on relations of contract. By contrast, the present action was available only in respect of the actions of a person under the power (*potestas*) of a *paterfamilias*, that is, his slaves or children. This action is based on relations of status. The amount recoverable in the action was limited, as already noted, to the value of the *peculium*. But valuation of the

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18. This is the reason for the different approach taken by Ulpian 29 ad edictum D. 15.3.3.9 in discussing the *actio de in rem verso*: there liability must be founded on actual enrichment.
peculium was not quite a straightforward matter. The paterfamilias was able, when sued de peculio by a creditor, first to deduct any sums "owed" (in a loose sense) by the peculium to him to establish the actual extent of the fund.\textsuperscript{19} This special position of the paterfamilias reflected that as a matter of law he was still owner of the peculium.

It is often said that any act of a slave or son who had a peculium would bind the paterfamilias, subject only to the limit of the value of the peculium.\textsuperscript{20} But, so far as slaves are concerned, this view goes too far. While the peculium did place a financial limit on liability, and that was without doubt its main significance, it is equally clear that in the case of slaves there also was a functional limit on liability: not every act of a slave would bind the paterfamilias. In this connection, the jurists use the terms causa peculii or (once) utilitas peculii as a touchstone of those cases in which liability can be brought home to the paterfamilias. The following passage illustrates this situation, as well as the different position of the son in power.

Ulpian 29 edictum D. 15.1.3.5-6, 9 states:

If a son in power or slave has guaranteed a debt or otherwise stood surety or mandated payment, the question arises whether there is an actio de peculio. The better view is that in the case of a slave the ground for the guarantee or mandate must be examined, which is a view approved in the case of guarantees by slaves by Celsus in book 6. If therefore the slave has interceded as a surety, not carrying on the business of the peculium, the owner will not be liable de peculio.\textsuperscript{[6]} Julian too writes in book 12 of his digesta that, if a slave has given a mandate for payment to my creditor, it is relevant what the ground for the mandate was: if he mandated payment on behalf of his own creditor, the owner is liable de peculio; but if he performed the function of a surety, the owner is not. . . .\textsuperscript{[9]} But if a son has become guarantor or surety, the question arises whether he binds the father de peculio. The correct opinion is that of Sabinus and Cassius, who thought a father was always liable de peculio and that this was a difference from the case of slaves.\textsuperscript{21}

\textsuperscript{19} Gaius, Institutes 4.73; Ulpian 29 ad edictum D. 15.1.5.4 and 9.3.
\textsuperscript{21} Si filius familias vel servus pro aliquo fideiusserint vel alias intervenerint vel mandaverint, tractatum est an sit de peculio actio. et est verius in servo causam fideiubendi vel mandandi spectandam, quam sententiam et Celsus libro sexto probat in servo fideiussore. si igitur quasi intercessor servus intervenerit non rem peculiarem agens, non obligabitur dominus de peculio. (6) Iulianus quoque libro duodecimo digestorum scribit, si servus mandaverit ut creditori meo solveretur, referre ait quam causam mandandi habuerit: si pro creditore suo solvi mandavit, esse obligatum dominum de peculio: quod si intercessoris officio functus sit, non obligari dominum de peculio. . . . (9) sed si filius fideiusser vel quasi interventor acceptus sit, an de peculio patrem obligat quaeritur, et est vera Sabini et Cassii sententia existimantium semper obligari patrem de peculio et distare in hoc a servo.
These texts demonstrate that a guarantee given by a slave did not invariably give rise to liability on the part of his owner subject only to the limit of the value of the peculium. Rather, it might not go to the peculium at all. The test whether it did is expressed in various ways, but use of the term causa predominates: Celsus says that what is relevant is the causa of the guarantee; Julian agrees, here and elsewhere;\(^{22}\) Papinian speaks of the utilitas peculii.\(^{23}\) Gaius, discussing the relevance of a guarantee by a slave in the case of a pact not to sue, reports Julian’s view that there can be an action against the slave’s owner de peculio if the slave had a iusta causa intercedendi (for example because he owed that amount to the principal debtor).\(^{24}\) Elsewhere Sabinus speaks more precisely, of liability if the guarantee was given in rēm domini or ob rem peculiarem: if it concerned the owner’s own business or the business of the peculium.\(^{25}\)

The case of sons in power is different, as the last section of the passage quoted above shows: in these cases liability always existed, irrespective of the causa of the transaction. The reason for this result is that a son in power had the capacity to enter into obligations and was bound himself as a matter of civil law, ius civile, even though he might not have funds of his own. In the present case, therefore, his guarantee was a valid guarantee at civil law. It would have been open to the jurists to hold that, in spite of that, it did not bind his paterfamilias, owing to a lack of causa. But, the jurists appear to have preferred the view that liability of the one entailed liability of the other. This is in accordance with their general approach: father and son are liable for the same debt, the son’s liability being as principal debtor, the father’s being similar to that of a surety, here a surety by implication of law.\(^{26}\) Following this approach, if the son’s contract was valid, the question of causa did not arise.\(^{27}\)

Thus, the peculium presents two modes of limiting the paterfamilias’ liability. The pure case is the case of sons, where the only limit on liability is the financial one: all that needs to be done to establish the

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22. Julian 4 ex Minicio D. 46.1.19: a contrast between a guarantee ex causa peculiari and one extra causam peculii.
23. Papinian 8 quaestionum D. 46.3.94.3.
25. Paul 4 ad Plautium D. 15.1.47.1
27. The passage immediately following that quoted above, D. 15.1.3.10-11, speaks of actions by the son that would not give rise to an action against his paterfamilias. It seems most likely that here the jurists are thinking of actions in relation to the son’s military peculium (peculium castrense), where the father did not come under any obligation and accordingly was not liable to defend any action; see Maecianus 1 fideicommissorum D. 49.17.18.5.
limit on the paterfamilias' liability is to value the peculium. In the case of slaves, however, the financial limit applies in the same way, but there is the further limitation that liability will occur only in certain circumstances. Consequently, in the latter case, there are elements of a functional, and of a financial limit. To modern eyes, this is the most unusual of the various modes of limiting liability: it does not depend on any delegation of a particular function or authority (which might be expected in some way to set limits on the liability), nor does it depend purely on relations of status (where liability for those of that status might be expected to be unlimited). Rather, it depends on the revocable grant of a fund of property to a person who stands in a certain relationship of status to the paterfamilias. Accordingly, commerce and status are intertwined. But the impression of a commercial arrangement is somewhat dispelled because the fund of property still belongs to the paterfamilias, is still freely revocable, and can only be granted to those of a certain status.

IV. Delictual Liability

Here there are two regimes to consider. First, there is liability for those who are not members of the family, and who stand in no relation of status to the principal. In this case, the general principle is that there is no liability whatsoever for their wrongdoing. Of course, this general rule has exceptions. The notable exceptions are two of the quasi-delicts: the strict liability of shipowners, innkeepers, and stablekeepers for loss sustained by their customers on the premises, and the strict occupier's liability for objects thrown from a building into a public place. Although these are not insignificant, they are exceptions which prove the rule; they are qualifications of the general principle introduced on policy grounds.

It is widely believed that the liability in these cases was not based on fault, but on public policy, and statements in the Digest support this theory. Indeed, the references in the texts to the basis of liability being fault or a presumption of fault have been attacked as unclassical. But for present purposes it is enough to note that this is a class

29. Cf. Grotius, De jure beli ac pacis 2.17.20, noting that a liability for others in the absence of personal fault is not a rule of the ius gentium, nor a general rule of ius civile, but one introduced against sailors and certain others for special reasons, ex rationibus peculiariibus.
30. D. 4.9.1.1; D. 9.3.1.1.
of case in which a principal bears liability for the acts of independent third parties. Both actions give rise to a claim for damages for double the loss sustained by the plaintiff;\textsuperscript{32} the principal’s liability for that claim is unlimited.

Although in the case of innkeepers and shipowners the principal’s liability derives from his operation of a certain type of business, there is no real discussion in the Roman sources restricting the principal’s vicarious liability to cases where harm is caused in the course of his business (i.e. the functional limit on liability). That restriction seems rather to have been taken for granted, and its boundaries never explored. Therefore, little material existed for exploitation by later legal theorists. Almost all we find is that in the case of shipowners, the relevant loss must be sustained on board the ship.\textsuperscript{33}

The second delictual regime is liability for members of the family, namely the children and slaves in the power of the \textit{paterfamilias}. The \textit{paterfamilias} was liable for their delicts, and (subject to what follows) there was no functional or financial limit on this liability. But rather than paying damages for the delict, the \textit{paterfamilias} had the option of surrendering the wrongdoer to the plaintiff: \textit{noxal} surrender. (This system died out for children, but was retained for slaves.) Accordingly, the liability of the \textit{paterfamilias} for the delicts of those in his family was limited by the value of their persons. This point (though doubtless not the origin of \textit{noxal} liability) was appreciated during the classical period: Gaius writes that “it would be inequitable that the misconduct [of sons and slaves] should involve their parents or masters in loss going beyond their own persons.”\textsuperscript{34} The matter can be put more generally for the case of slaves: the owner’s liability could not exceed the value of the piece of property giving rise to the liability. In later times, as we shall see, that general proposition found broad application.

\textsuperscript{32} W.W. Buckland, \textit{A textbook on Roman law} (3rd. ed. by Peter Stein, Cambridge, 1963) 598-99.

\textsuperscript{33} Ulpian 18 ad edictum D. 4.9.7. pr.: si in ipsa nave damnum datum sit. Since this text comes from book 18, it was evidently originally concerned not with \textit{receptum}, the title in which it now appears, but with the quasi-delictual action. Equally, so far as the \textit{receptum} itself is concerned there appears only the bland statement that innkeepers and others are liable only if they have undertaken safekeeping of property in the course of their business: Ulpian 14 ad edictum D. 4.9.3.2: exercentes negotium suum; ceterum si extra negotium receperunt, non tenebuntur.

\textsuperscript{34} Gaius Inst. 4.75: erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisve damnosam esse; \textit{cf.} Just. Inst. 4.8.2.
V. SOME PROVISIONAL REFLECTIONS

The last three sections prompt some general reflections. But first a few words are required on one Roman legal institution which contributes less than might be expected to the notion of limited liability: the contract of mandate. There is no doubt that this contract gave rise to considerations about whether the actions of the mandatary were within or in excess of the terms of the mandate.³⁵ But the discussion in the Digest about acts in excess of a mandate is very limited (far more limited than that concerning the actiones institoria and exercitoria), and its influence on subsequent legal thought in this context appears to be correspondingly slight. In part, this limited treatment may be because of the eventual acceptance that the mandatary still could enforce the terms of a mandate he had exceeded, provided he was prepared to bear personally any expenses which went beyond the mandate.³⁶ That rule blurred the clear edges of the notions of limited authority under a mandate, and of the limited liability of the mandator.

So far, we have seen that the Roman sources present three different modes of limiting liability, two in the case of contract, one financial and one functional, and one—a financial one—in the case of delict. Of the two variants on financial limits on liability, the noxal one is the purer: there is a straightforward equivalence between the value of the wrongdoer and the limit on liability. This liability differs from the case of the peculium, where there is a fixed maximum liability, but because (in the case of slaves) the question of causa peculii may arise, there is no certainty that any given act will bind the principal. To that extent, the peculium model represents a hybrid, with elements of both a functional and a financial limit.

In the law of delict, there is no trace of any developed functional limit on liability and, special cases apart, the cases simply divide into those where vicarious liability cannot arise and those where it can. Where it does arise, it is a liability that depends on relations of status, and is subject to a financial limit.

In the law of contract, a financial limit on liability was available only in the case of slaves and children in power. In other words, it required a relationship of status between what one would otherwise call "principal" and "agent." Where free persons were concerned, the only limit recognized on contractual liability was a functional limit.

³⁵ Paul and Gaius D. 17.1.3.2-5.4; 41.
(praepositio), which could also apply to slaves and sons in power. If a slave or son in power was running a business, then in principle either limitation on liability could apply. What limitation applied in a given case, however, depended on the paternomatrias' relationship with the business. The texts make it clear that there was liability de peculio even if the paternomatrias had no idea what his slave or his son was doing; on the other hand, there was liability to the actio exercitoria or institoria only if the principal had actually placed the agent in charge of the business, thereby showing his intention that the agent could operate the business.\textsuperscript{37} It is evident the Roman jurists thought it appropriate to refer to the paternomatrias' intentions in determining whether there was a financial limit on his contractual liability. In adopting this approach, the jurists granted the paternomatrias considerable flexibility in arranging his business affairs and the liability that might arise from them.

VI. LATER DEVELOPMENT OF THE ROMAN MODELS

What was the fate of these three different models of limiting liability? This Article only attempts to give some impression of the evolution of law by the adoption of one rule, adaptation of another, and rejection of a third. Moreover, this impression is limited to a number of jurists of the seventeenth and eighteenth centuries, in part because the effect of their own approach to these questions can still be felt in various modern systems of law. Therefore, although this discussion is not comprehensive, as a matter of the history of substantive law, it can nonetheless illustrate the methodologies of later jurists in redeploying Roman materials.

A. The Law of Delict and the Functional Limit

Against the Roman background already sketched out, it comes as a surprise to find the functional limit on liability characteristic of the actio institoria creeping into the law of delict. Johannes Voet, in volume I of his commentary on the Digest states that, as an institor binds his principal in contracting, he also binds his principal by committing a delict in the office to which he has been appointed. Voet also cites various passages from the Digest, to which we turn in a moment.\textsuperscript{38}

37. See, e.g., Justinian's Institutes 4.7.2-4; see recently T. Chiusi, Contributo allo studio dell'editto de tributoria actione (Rome, 1993) 387-89 on the trichotomy ignorantia (actio de peculio); scientia (actio tributoria); voluntas (actio institoria).

38. J. Voet, Commentarius ad Pandectas (edition used: vol. I: Verbessel, Leiden, 1698; vol. II: de Hondt, The Hague, 1704) 14.3.4: "porro, ut institor contrahendo praeposentem obligat, ita...
Elsewhere, in dealing with noxal actions, Voet points out that “masters and fathers are liable in full for delicts of their servants (famuli) and sons committed in an office or position to which they were appointed by the father or master, even if no wage, or an amount of wages much smaller than the delictual liability is due to the servant; since it is to be imputed to the father or master that he employed the work of negligent or wrongful persons in a certain office or position.”

In France, a similar extension of the contractual principle of functional liability into the sphere of delict has been laid at the door of Domat. This idea is based on his discussion in book I of *Les loix civiles dans leur ordre naturel* of what might loosely be called contractual agency. Domat discusses the case of the institor and ship’s captain, citing several passages from the relevant Digest titles, and argues that agents, “commis” and other “préposez” represent their principals within their sphere of authority, so that the act of the agent is that of the principal. He continues, “they are obliged to ratify transactions made with their commiss. So too they are liable for the actings, fraud, and deception of their préposez.” This last remark, however, must be read in a very narrow context: book I is concerned only with contract; “crimes et délits” are not discussed within Domat’s work at all; and liability for negligence, Aquilian liability, is addressed elsewhere. The key to Domat’s concerns is provided by one of the Digest texts to which he refers, in which Ulpian states that the exercitor, rather than the creditor must bear the loss if a ship’s captain cheats on the price of goods he buys. The context of Ulpian’s text is not alto-

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39. The limit on liability by reference to unpaid wages does not appear to owe anything to Roman law, although it bears a slight similarity to rules relating to noxal liability. It is referred to in the *Sachsenspiegel* 2.32, and that tradition rather than the Roman one is the more likely source for Voet in this passage. See T.B. Barlow, *The South African law of vicarious liability* (Cape Town, 1939) 31-32, 60-64.

40. Voet, *Commentarius* 9.4.10 . . . , quoties illi deliquerunt in officio aut ministerio, cui a patre dominove fuerunt praepositi; cum his imputandum sit, quod negligentium aut malignorum operas ministerio certo aut officio addixerint; citing D. 4.9.7 pr., 4 and 6; D. 9.2.27.9; D. 39.4.1 pr., 6 and 12.1-2; D. 47.5.1; D. 48.3.14 pr.


43. Introductory section to title 2.8, “Des dommages causez par des fautes qui ne vont pas a un crime ny a un delit.”


45. Ulpian 28 ad edictum D. 14.1.1.10: sed et si in pretiis rerum emptarum fefellit magister, exercitoris erit damnum, non creditoris.
gether clear, but it appears\(^{46}\) that the captain borrows money for the
purchase of goods, having misled the creditor as to their true cost; the
captain converts the money not actually required to buy the goods to
his own use; and the jurist holds that the \textit{exercitor} can still be sued by
the creditor for the full amount lent and therefore bears the loss. Ac-
cordingly, Ulpian’s, and in all probability, Domat’s discussions, are actu-
al concerned not with the general question of the liability of an
employer for the delicts of his employees within the scope of their
employment, but with the question whether the creditor satisfied his
duty of inquiry so as to allow him to bring the \textit{actio exercitoria} for the
full amount lent.

Nonetheless, in France, views similar to those of Voet are ac-
knowledged by Pothier. In his \textit{Traité des obligations}, he states: “It is
not only in contracting that employees bind their employers. A per-
son who has entrusted another with a certain function is responsible
for the delicts and quasi-delicts which his employee has committed in
the exercise of the functions for which he has been employed.”\(^{47}\)
From the perspective of Roman law, it is the reliance that Pothier
places on D. 14.3.5.8 to justify imposition of vicarious liability in delict
on an employer (\textit{commettans}) that is interesting. This same text was
relied upon by Voet for the same purpose. It bears closer
examination.

Ulpian 28 ad edictum D. 14.3.5.8 states:

He [Labeo] says that if an undertaker had a slave for cleaning
corpses who robbed a dead body, an \textit{actio quasi institoria} should be
given against him, although both an action for theft and an action
for insult would lie.\(^{48}\)

Here, there are concurrent actions because the slave has evi-
dently removed something from the body. Consequently, he has not
merely committed the delict of \textit{iniuria} by his wrongful interference
with the body, but the delict of theft; there is no difficulty in allowing
two delictual actions where the same act founds liability for both de-
licts. Furthermore, there is said to be an \textit{actio quasi institoria}, which
one would (at least at first sight) assume to be a contractual action
directed at the undertaker on the basis of the slave’s contract. Since

\(^{46}\) This is consistent with what has already been said about the creditor’s duty of inquiry.
\(^{47}\) “Ce n’est pas seulement en contractant que les \textit{préposés} obligent leurs \textit{commettans}.
Quiconque a commis quelqu’un à quelque fonction est responsable des délits et quasi-délits que
son \textit{préposé} a commis dans l’exercice des fonctions auxquelles il étoit \textit{préposé}.” R.J. Pothier,
\(^{48}\) Idem ait, si libitinarius servum pollinctorem habuerit isque mortuum spoliaverit,
dandam in eum quasi institoriam actionem, quamvis et furti et iniuriarum actio competeter.
there has been no personal breach of contract on the part of the undertaker, one would not expect a "direct" contractual action to lie against him.\textsuperscript{49}

There has been much discussion about the fact that the jurist allows not an \textit{actio institoria}, but only an \textit{actio quasi institoria}.\textsuperscript{50} For the present, what matters is that the availability of one action or the other indicates that there is a transaction, a \textit{negotium}, between the slave and the person who asked for the body to be cleaned; and that the slave can therefore be said to be either an \textit{institor} proper or else a \textit{quasi institor}. From this assumption, it follows that liability to the \textit{actio} (\textit{quasi}) \textit{institoria} will be liability of the undertaker to an \textit{actio locati} with \textit{formula institoria}, the damages being the \textit{locator}'s interest in the contract not having been breached by the slave in this way. The undertaker's liability will be unlimited, provided the slave was acting within the terms of his appointment (\textit{praepositio}).

On the other hand, the liability of the undertaker to the delictual actions arises in principle only in the event that the slave is in his \textit{potestas}; and his liability is limited by the opportunity for \textit{noxal} surrender and so by the value of the slave. Equally, liability arises not because the slave was acting in the course of his duties, as a cleaner of corpses, but because the slave was the property of the undertaker. This case, therefore, displays two different models of limiting vicarious liability: (i) in delict, liability is founded on \textit{potestas} and limited \textit{noxally}; (ii) in contract, liability is founded on \textit{praepositio} and unlimited within its terms.\textsuperscript{51}

When we turn to Pothier, however, we find that rather than keeping these two models of vicarious liability distinct and separate, he has merged them and appropriated the text for the new purpose of suggesting that delictual liability for others also is subject to the limitation that it should have occurred within the terms of the employee's appointment. Voet does the same. In his discussion of the \textit{actio institoria}, referred to earlier,\textsuperscript{52} he deals with the text immediately following, where a baker sends his slave to sell bread, and the slave

\textsuperscript{49} \textit{Cf.} D. 14.3.5.10, where in the event of a breach of a warranty given by the \textit{conductor} as to the reliability of his employees, the \textit{conductor} is personally liable.

\textsuperscript{50} \textit{Quasi} because the slave is appointed for a single act rather than placed in charge of a business? Or, because there is no real business (\textit{negotatio, quaestus})? Or, because the delictual act is not connected with the scope of the \textit{institor}'s business? See N. Benke, (1988) 105 \textit{SZ} 592-633 at 605 with further literature.

\textsuperscript{51} \textit{Cf.} D. 14.1.1.2 where in another context the need to keep contractual and delictual heads of liability distinct is asserted.

\textsuperscript{52} Voet, \textit{Commentarius} 14.3.4.
takes advance payments for bread from customers. Then, the slave embezzles the money and absconds,\textsuperscript{53} and the baker is liable. This text is used to support the proposition that a principal is liable for the delicts of his \textit{institor} within the scope of his appointment. But, even if one accepts that the text is concerned with liability for the delict of theft committed in the scope of an appointment as \textit{institor}, there is again no reason why the liability should be thought to be anything other than a \textit{noxal} liability in delict that arises regardless whether the slave was an \textit{institor}.\textsuperscript{54} Similar objections apply to other authorities cited in support of the proposition. A glance at those authorities conveys the clear impression that some scraping of barrels was required in order to come up with any textual support at all.\textsuperscript{55}

Thus, both Pothier and Voet redeploy the functional liability developed by the Roman jurists for the case of contractual agency in the new context of liability for delicts committed by agents or servants. In Roman law, principals were not liable for the delicts of their free agents; now they are liable for them within the scope of their appointment. In Roman law, fathers and slave owners were liable \textit{noxally} for the delicts of their children and slaves in general; now, \textit{noxal} surrender being obsolete, there is a tendency to restrict that general liability, sometimes using the notion of the scope of their appointment.\textsuperscript{56} At least in some jurisdictions, the extension of the liability for independent persons, and the contraction of liability for dependent persons, come to turn on the same question of fact: whether the person was acting in the scope of an appointment, and what the terms of that appointment were. The approach to the question whether a person is

\textsuperscript{53} D. 14.3.5.9. This is in fact not quite clear on the text: the word \textit{conturbaverit} may mean simply that the slave goes bankrupt, but Voet glosses it \textit{id est decoxerit}, making it clear that he is thinking of theft by the slave.

\textsuperscript{54} The text expressly says that the \textit{institor} is \textit{servus suus}.

\textsuperscript{55} The following passages are referred to by Voet (cf. notes 38 and 40): (i) D. 39.4.12.1-2 appears to be concerned with an owner's liability for his own slaves; D. 39.4.1 pr. and 6 may go beyond that and provide some support for the proposition; but the context, as Voet notes elsewhere (\textit{Commentarius} 39.4.19) is a very special one; (ii) in D. 9.2.27.9 the question of fault in choosing suitable employees is raised in the contractual context; nothing is said to suggest that liability for delict committed by a slave should be anything other than \textit{noxal}; (iii) in C. 9.27.1 (382) the concern is with criminal liability at public law; (iv) so too in D. 48.3.14 pr.; (v) D. 4.9.7 pr., 4 and 6 and D. 47.5.1 are concerned with the special case of shipowners, innkeepers etc., already discussed in note 33 above.

\textsuperscript{56} Various different rules being attested, this is subject to qualification: Pothier draws a distinction between slaves and children, making it an additional requirement for a father (but not a master) to be liable that he should have been able to prevent the delict (\textit{Op. cit.} (note 47), § 456); Voet, on the other hand, speaks of liability in full (\textit{in solidum}) for children and servants only in the scope of their appointment; otherwise the liability is limited to wages due, a test not always of obvious utility for children (\textit{Op. cit.}, 9.4.10).
liable for the delicts of others moves away from a noxal liability dependent on status to a liability turning on the terms of a contractual appointment. In short, it is an illustration of Sir Henry Maine's well-known dictum that "the movement of the progressive societies has hitherto been a movement from status to contract."

These considerations have played their part in the formation of the French Civil Code. The precise origin of the rules governing the liability in delict of maîtres and commettans for their préposés is somewhat obscure. Two reasons for the master's liability given by the drafters of the Code are: his presumed fault in choosing the delinquent domestic or préposé, and poor supervision. The original draft for the Code allowed the employer to escape liability by proof of diligence and lack of opportunity to prevent the harm. But, this clause was rejected, apparently on the view that it was right that a master should bear the consequences of the harmful acts of those from whom he profits. Moreover, this view was already the solution of the "ancien Droit." It should be noted, however, that this rationale—that the taking of benefits should involve the bearing of burdens—is precisely that given in the Roman sources for the contractual (rather than delictual) liability of the principal for his institor.

Accordingly, Domat's concerns were not with the principal's functionally limited liability in the sphere of delict. Nor does it seem probable that he provoked a confusion of principles and ideas between delict and contractual agency, as has been suggested. Instead, the fact that both Pothier and Voet argue for the same type of limitation of vicarious liability in delict strongly suggests a deliberate manipulation of the Roman sources to achieve ends thought to be socially and legally desirable. Indeed, the Roman texts on delict provided little assistance in achieving these ends. But, the notion of praepositio, which had been developed with some sophistication in Roman law, provided an elegant solution, and one which was not burdened with

58. Art. 1384 al. 5.
61. J.G. Locré, La législation civile commerciale et criminelle de la France (Paris, 1827) vol. 13 p. 25. (The due diligence defense is part of German law: BGB para. 831.)
62. Colin and Capitant, ibid.; Domat, op. cit (note 42) 1.16.3 no. 1; Pothier, op. cit (note 47) para. 456 and Traité du Contrat de louage (Œuvres vol. VIII) 193; F. Bouron, Le droit commun de la France et la coutume de Paris (Paris, 1770) 6.3.1 no. 3 (Châtelet de Paris).
63. D. 14.3.1 pr.: sicut commoda sentimus ita obligamur.
64. Planiol, op. cit. (note 41) 292.
notions of status that belonged to a bygone age. That this notion had been developed for application in an entirely different context was of no significance when the balance for—or against—its application was weighed.

B. Public and International Law and the Functional Limit

The functional limit can also be detected in public and international law. In book three of his *De iure belli ac pacis*, Grotius raises the question of the authority of generals (*duces*) in war to bind the state (*summa potestas*). He argues that states can be bound by generals' actions where there has been either an express statement of such intent by the *summa potestas*, or intent can be gathered from the *praepositio*. The same distinction is later made, in different words, between what is regarded as falling within the terms of the office and, beyond that, what is within the terms of a particular *praepositio* which is known publicly, or at least to those concerned in the matter.65 Grotius even relies on arguments based on the *actio institoria*: he concludes that some nations are bound to a greater, some to a lesser, degree by the acts of their leaders, according to how far their laws and institutions are known to the other side. This argument is based directly on Ulpian's discussion of the principal's power to exclude or limit liability for his *institor* by express notice to parties contracting with him.66

This general line of argument is taken over by Christian Wolff and developed in both his *Ius naturae*67 and *Ius gentium methodo scientifica pertractatum*.68 In the *Ius gentium*, Wolff essentially applies to public or international questions notions which he has developed in a private law context in the *Ius naturae*. Since, he says, promises made through an agent have been dealt with there, the same can be applied to the promises of minor powers in war.69 These are the principles of mandate, of the *contractus institorius*, and of the *contractus exercitorius*. If the supreme power expressly mandates something to a minor power, or allows it by the law of war, the minor power is either in the position of a mandatary, so far as a certain function is mandated

65. *Op. cit.*, 3.22.2. The distinction seems similar to that between the ostensible and actual authority of an agent.
69. Para. 772; minor powers (*potestates minores*) are defined in para. 368 as persons who have a certain authority deriving from, and exercised in the name of, the supreme powers (*summae potestates*); the *summae potestates* are defined there as those *qui summum imperium habent.*
to him, or beyond the prescribed office, so far as he is obliged to do
certain things or not to do them, he is in the position of an *institor* or
*exercitor*. Accordingly, any promise made by a minor power without
a mandate, or beyond the limits of mandate, or the function mandated
to him or the office prescribed by law, is only a pact; it is to be com-
pared with the actions of the mandatory *extra limites mandati* and the
*institor* and *exercitor* *extra fines praepositionis vel legem*.

This brief discussion demands little summing up. Doctrine from
Roman private law is transposed into questions of public law with
some attention to detail. In short, the notion of *praeposito*, de-
veloped in a narrow context by the Roman jurists, had the capacity for a
remarkable future in areas that they would never have thought to ap-
ply it.

**C. The Law of Contract and the Financial Limit**

While the functional limit familiar to the *actiones exercitoria* and
*institoria* colonized the law of delict, and elsewhere, in the law of con-
tract attention turned to establishing financial limits on a principal’s
liability. The problem appears to have been felt particularly in con-
nection with the *actio exercitoria* (although this impression may be in
some measure due to the maritime concerns of the Dutch jurists). As
previously discussed, Grotius thought the *actio exercitoria* a most un-
healthy innovation of Roman law that accorded neither with natural
equity nor with public utility. Its offense against public utility was that
it imposed joint and several liability on each of several owners of a
ship, and that it set no financial limit on liability. This unlimited liabil-
ity deterred men from owning ships for fear of liability *quasi in infin-
itum* for the actions of their captains. Indeed, because of this fear,
Holland applied a different rule, one that limited liability to the value
of a ship and its cargo (*ad aestimationem navis et eorum quae in navi
sunt*). The same criticisms are to be found in Voet’s commentary,
where he notes that, contrary to the Roman rule, in modern practice
each of several *exercitores* is liable only for his own share on the con-
tracts made by the ship’s captain. Furthermore, the *exercitor* can be
relieved of all debts arising from the captain’s contracts if he is willing
to cede his whole share, and all rights which he has in the ship, includ-
ing its equipment, to the creditor; for it was thought excessively harsh

70. Para. 773; it should be noted that Wolff uses the term *exercitor* as parallel to *institor* and
therefore as referring to the agent rather than the principal, not the Roman usage.
71. H. Grotius, *De iure belli ac pacis* 2.11.13. He makes the same point in his *Inleiding tot
that one person should be liable for the contract or actions of another beyond what he had entrusted to his responsibility or care. Voet also cites policy reasons for this limit: people should not be deterred from maritime trade by a potentially infinite liability, such as might arise through a captain who had long concealed his lack of morals, but then fraudulently dissipated money.

By analogy with the case of the exercitor, where there are several principals of a business, each is liable for the actions of the institor only up to his own share; and a principal may rid himself of an obligation arising from his institor’s contract by ceding to the creditors whatever he has entrusted to the management of the institor. This rule is said to be established in practice (usu receptum). Accordingly, a principal can now limit his liability to the amount that he has invested in it, in any kind of business.

With the advent of a strict financial limit, it is interesting to note that the extensive duty of inquiry placed by Roman law on those dealing with a ship’s captain can be abandoned. Voet notes that now the only requirements are that one should, knowing someone to be a ship’s captain, lend money to him as such in good faith for the purposes of navigation, and not laboring, under supina ignorantia. Voet states that the reason this requirement suffices is: (i) because the liability of the exercitor is no longer unlimited, but limited by the value of the ship and its equipment; (ii) because few people know what manner, quantity, size, and nature of equipment is necessary for any given ship, and few will lend to a ship’s captain if they have to know it; and (iii) because the greater fault rests with the exercitor for appointing a cheat as a captain. The most substantial of these reasons is surely the first, the second and third going essentially to policy. Indeed, it is right that there should be a relationship between the liability to which someone is exposed, and the terms on which he is exposed to it. Thus, there is a counterpoint between the financial and the functional limits.

72. Voet, Commentarius 14.1.5: dum durum nimis creditum, ex alieno alium contractu factove teneri ultra id, quod ejus fidei curaeque permisit.
73. Ibid.
74. Voet, Commentarius 14.3.2, citing Grotius, Inleiding (note 71) 3.1.39 (should be 3.1.31); Antonius Matthaeus, de auctionibus (ed. used: M. Parys, Antwerp, 1680) 1.5.8; cf. also Voet at 14.4.7.
75. Ibid., citing Simon van Leeuwen, Censura forensis theoretico-practica (ed. used: Gelder, Leiden, 1678) part 1.4.3.10.
76. Voet, Commentarius 14.1.6.
77. Ibid.
The most interesting assertion made by Voet, however, is that it would be harsh to find a principal liable beyond his investment in the business. This idea is reminiscent of Gaius’ justification for noxal liability. Other authors also make the same point.78 Donellus writes that “it is unfair for us to be liable on account of our property beyond its value,” and that this principle applies to damage caused by animals, damage caused by slaves, and to damage caused by the collapse of a building.79 These remarks, however, were made in the context of delict. What is new in Voet’s discussion is the notion that this idea should be extended to business, and therefore, to liability arising from contracts made in that business. If it is right to see in this a reminiscence of noxal liability, then it is striking that that notion has been detached from all consideration of status, and has emerged as an abstract rule: there should be an equivalence between the value of the property and the owner’s liability arising from it. Once that abstract rule has been arrived at, it is amenable to wide application. It does indeed seem to justify an owner in simply walking away from his property, whether a house, a ship, or a business, and relinquishing all liability, leaving the creditors to satisfy themselves from whatever the value of the property may be.

What is also striking in these arguments about the limits on contractual liability is that no use is made of the idea of peculium. There, it might be thought, ready made, was the concept of a limited fund ripe for adoption. The reason for this neglect is far from clear. It may be that here the dissociation of the notion of peculium from the status (slave, child in power) with which it was associated in Roman law was not achieved. But that does not explain why not. It is possible that the fact that the paterfamilias remained owner of the peculium, the special position that arose from that fact, and the resulting complexity of the Roman rules for calculating the value of the peculium net of all sums due to a slave’s owner, were thought unhelpful and inappropriate. Thus, the Digest provided too many texts that might be hostages to fortune for any attempt to establish clear limits on liability. Consequently, it was safer to resort to a system in which the principal’s liability could be more readily measured by the value of the business.

78. Cf. Grotius, De iure belli ac pacis 2.17.21, who states that noxal liability is a matter of the ius civile, there being by nature no liability on an owner who is not at fault.

79. H. Donellus, Commentarii iuris civilis (ed. used: Opera omnia, Florence, 1840-47) 15.51.4: non enim aequum est nos ex rebus nostris ultra earum aestimationem onerari, citing D. 9.1.1; D. 39.2.7.1 (where in particular the connection with paupertas and damnum infectum is brought out); D. 9.4.2 pr. and Inst. 4.8.
VII. SOME GENERAL CONCLUSIONS

Most of the Roman rules on limiting vicarious liability depended on consideration of status. In contract, the financial limit of the peculium depended on the existence of a relationship of status between owner and slave, or father and child, and on rules about valuation of the peculium, which reflected rules about ownership that were themselves dependent on status. In delict, the financial limit supplied by noxa also depended on status, and the relationship of owner and slave and father and child. The exception to the status-based approach of Roman law was the contractual model instanced by the actiones institoria and exercitoria. Yet, the model of vicarious liability that was limited only by function, and not by amount, could work successfully only if the function was interpreted with extreme stringency; arguably with stringency of an impracticable degree. Therefore, in the later tradition of Roman law, application of any of these regimes of limited liability to societies quite different in structure was not straightforward: a pure functional limit in contract posed practical problems; while the financial limits known to the Romans were tied to statuses which no longer existed in the same form.

In the law of contract, disquiet was felt about a liability for others which was limited only functionally—not by amount. A strict financial limit seemed simpler. Yet, for some reason the peculium-based limit on liability did not seem attractive; perhaps because it brought with it too much inconvenient textual baggage. It seemed reasonable that liability should not exceed the value of the principal’s investment in the business. That principle was the modern version of the Roman principle of noxal surrender; the idea behind it was the simple but abstract one that an owner’s liability should not exceed the value of the property from which it arose. This view had the attraction of supplying a clear limit on liability; with that once established, a corresponding relaxation of the rigors of the functional limit on liability was possible.

Delictual liability, on the other hand, needed to be limited somehow since noxal surrender had disappeared. The best model that presented itself existed in the Roman law of contract, where the functional limit could be adopted with little trouble other than that of finding some textual justification for the change, and where it would serve without importing inconvenient rules depending on status.

This evolution illustrates a number of general propositions. First, in their impact on other societies, legal ideas based on contract are as
a rule more potent than those based on status—but even from ideas based originally on status, abstract principles can be derived with potential for the future. Second, the potency of a legal idea need bear little relation to the context in which it was originally developed. In the present case, the striking feature is a wholesale redeployment of the Roman rules. The law of contract supplied a mode of limiting liability that was to become absolutely fundamental in the modern law of delict; while the law of delict contained the germ of a concept that bore fruit in the modern law of contract. 80

80. I am grateful to Peter Stein for commenting on a draft of this paper.