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## THE NATURE OF THE MULE

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### Abstract:

This paper is concerned with the emergence of the concept of *imperitia* (lack of skill) as a form of *culpa* (fault) in the context of the Roman contract of letting and hiring. After revisiting the state of the debate, this paper focuses on one of the many different contexts in which lack of skill is discussed in Roman juristic thought, namely the mule driver. The central question posed by this article is why mule drivers were deemed in law to be “skilled” workers and how this assessment fits into the Roman jurists’ assessment of lack of skill as a form of fault.

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**Summary.** 1. Introduction. 2. What is an “expert”? 3. The problem with mules. 4. Conclusions.

## **1. Introduction**

The teaching of Roman law as a component of contemporary legal education is not without differing opinions regarding how the subject should be taught. Some scholars prefer a contextual approach in which the growth and decline of Roman legal rules are explained with reference to larger contexts, while others, who prefer a more abstract, dogmatic approach, see the enduring value of the subject primarily in the teaching of isolated *regulae iuris*, shorthand statements expressing a key principle of the civilian tradition, to students in an abstract manner, which could then be applied in a deductive manner to contemporary legal problems arising in legal systems founded on Roman law.<sup>2</sup> Both approaches are, of course valid, but given the tendency of those who support the latter approach to negate the value of the contextual approach, it is worth demonstrating, as this article will do, why the abstract, dogmatic approach is not the panacea that it pretends to be.<sup>3</sup> A strictly dogmatic approach, while potentially valuable and useful in certain contexts, is not without drawbacks. Chief among these is that it tends to downplay the extent to which these *regulae* are compressed arguments that require significant intellectual unpacking to retain their utility in different (read: modern) contexts. To demonstrate this

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<sup>2</sup> Babusiaux, ‘The Future of Legal History’., generally.

<sup>3</sup> Zimmermann, ‘Savigny’s Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science’., generally.

point, this piece will focus on one such rule, found in a Roman-law text on the contract of letting and hiring, namely that lack of skill (*imperitia*) counts as fault (*culpa*).<sup>4</sup> The idea is articulated in several Roman-law texts, but perhaps nowhere as clearly as one by the Roman jurist, Ulpian. The text expresses it in the following manner:

D. 19, 2, 9, 5 Ulp. 32 ad ed.

*Celsus etiam imperitiam culpa ad numerandam libro octavo digestorum scripsit: si quis vitulos pascendos vel sarciendum quid poliendumve conduxit, culpam eum praestare debere et quod imperitia peccavit, culpam esse: quippe ut artifex, inquit, conduxit.*

In this text, Ulpian cites the work of the jurist Celsus with approval. According to Celsus, in the eighth book of his *Digesta*, lack of skill (*imperitia*) should count (*adnumerare*) as fault (*culpa*). What follows is a summary of the main points of the Celsinian argument. Celsus lists three examples from commercial practice to substantiate his position. If someone undertakes to complete the task of raising calves, mending cloth, or polishing gems or marble, they will be liable under the contract of letting in hiring for any damage caused by their fault. In cases such as the ones listed, lack of skill (*imperitia*) amounts to fault, for the purposes of the law. The crux of Celsus' reasoning is summarised rather succinctly – the reason why lack of

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<sup>4</sup> Martin, 'Imperitia', for a full survey of the appearance and development of this concept in Roman law.

skill amounts to fault is because those who entered contracts of this kind had done so “as an expert” (*utartifex*).

## 2. What is an “expert”?

The statement in D. 19, 2, 9, 5 Ulp. 32 ad ed. requires some unpacking. The default standards of liability in letting and hiring are either *dolus* or *culpa*.<sup>5</sup> In legal terms, this meant that the parties to the contract were obliged by law to fulfil their duties under it in good faith as encapsulated in the *lex contractus* or according to wider norms accepted within a specific case. Any behaviour which deviated from these duties, depending on its severity, would be termed either *dolus* or *culpa*, and would lead to the termination of the contract and a suit for damages. The terms *dolus* and *culpa* were abstract labels given by the Roman jurists to specific types of behaviour manifesting within the context of the contract itself. In purely abstract terms, they meant very little. In assessing whether behaviour in any given situation should be classed as culpable, the legal actors in the case (whether the Roman jurists providing advice

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<sup>5</sup> D. 50, 17, 23, Ulp. 29 ad Sab. *Contractus quidam dolum malum dumtaxat recipiunt, quidam et dolum et culpam. dolum tantum: depositum et precarium. dolum et culpam mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutelae, negotia gesta: in his quidem et diligentiam. societas et rerum communio et dolum et culpam recipit. sed haec ita, nisi si quid nominatim convenit (vel plus vel minus) in singulis contractibus: nam hoc servabitur, quod initio convenit (legem enim contractus dedit), excepto eo, quod Celsus putat non valere, si convenerit, ne dolum praestetur: hoc enim bonae fidei iudicio contrarium est: et ita utimur. animalium vero casus mortisque, quae sine culpa accidunt, fugae servorum qui custodiri non solent, rapinae, tumultus, incendia, aquarum magnitudines, impetus praedonum a nullo praestantur.*

or the judge presiding over the case) had to look at the facts.<sup>6</sup> But facts in themselves were not sufficient. Apart from the facts of the case, these actors also had to take the broader context into account. While the Roman jurists tended to reason using abstractions, these were informed by and wholly dependent upon the world in which they inhabited (more about this presently).<sup>7</sup>

In the Roman legal text quoted above, the default position on liability has been expanded, or rather, rendered more precise. Ulpian, citing Celsus with approval, states that lack of skill should count as a form of *culpa*. This development suggests that the Roman jurists began to separate out a group or list of tasks which required specialist skills (*utartifex*). The historical processes whereby these types of tasks came to be recognised as specialised is lost in the mists of time.<sup>8</sup> As Martin pointed out in her study:

“[T]he jurists’ development of *imperitia* as a legal doctrine was the product of a complex relationship between law and its social and economic context.”<sup>9</sup>

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<sup>6</sup> Ando and Sullivan, *The Discovery of the Fact.*, especially chapters 2 and 8 for insights into the construction of facts in Roman legal reasoning.

<sup>7</sup> Easterbrook, ‘Abstraction and Authority’, for a survey of the functions of abstraction in legal reasoning. For a survey of the modes of reasoning of the Roman jurists, see the essays collected in Spagnolo and Sampson, *Principle and Pragmatism in Roman Law / Edited by Benjamin Spagnolo and Joe Sampson.*, generally.

<sup>8</sup> Martin, ‘Servum Meum Mulionem Conduxisti’, 311.

<sup>9</sup> Martin, ‘Imperitia’, 108.

As the text (D. 19, 2, 9, 5 Ulp. 32 ad ed.) quoted above shows, it was an open-ended list that included matters as diverse as raising cattle, to mending clothes. There is no evidence that a *numerus clausus* of “specialist tasks” ever formed in the minds of the Roman jurists. Some of these tasks, such as construction and medicine, have left a larger footprint in the Roman legal sources but it is clear from the texts that no comprehensive and definitive list ever existed of specialist skills for the purposes of this area of the law. Although the issue of specialist skills centres around the term “specialist” (*artifex*), Roman legal sources show that no constitutive definition of the term was ever formed. Apart from the mention in the text above, only three further references exist in Roman legal sources.<sup>10</sup> Of these, two are insightful, primarily because they refer to types of specialist skills which have left a bigger footprint in the Roman legal sources:

D. 19, 2, 13, 5 Ulp. 32 ad ed.

*Si gemma includenda aut insculpenda data sit eaque fracta sit, si quidem vitio materiae fractum sit, non erit ex locato actio, si imperitia facientis, erit. huic sententiae addendum est, nisi periculum quoque in se artifex receperat: tunc enim etsi vitio materiae id evenit, erit ex locato actio.*

D. 19, 2, 22, 2 Paul. 34 ad ed.

*Cum insulam aedificandam loco, ut sua impensa conductor omnia faciat, proprietatem quidem eorum ad me transfert et tamen locatio est: locat enim artifex operam suam, id est faciendi necessitatem.*

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<sup>10</sup> The remaining one is D. 38, 1, 7, 5 Ulp. 28 ad Sab., which contains a reference to a “*histrionum vel alterius voluptatis artifex*”.

The first text concerns the cutting and polishing of a precious gem.<sup>11</sup> Ulpian argues that if the gem shatters owing to a fault in the stone, the gem cutter won't be liable to the customer, the owner of the stone, under contract for the loss suffered. This is contrasted to the case where the fragmenting of the stone was caused by the lack of skill of the gem cutter. In such a case, he will be liable under the contract. The latter part of the text shows that the parties could vary these terms by way of contract. Thus, the gem cutter could expand his liability also to include faults in the gem. The motivations for doing so are not given, but may relate, for example, to a gem cutter being so confident in their skills and, having inspected the gem beforehand, that they would be prepared to undertake a riskier bargain.

The second text refers to the construction of a tenement building which has been tendered out.<sup>12</sup> It is written from the perspective of the customer wishing to have the tenement constructed. In this case, the details deviated from the industry norm. Whereas normally, the customer would supply the building materials from which the tenement should be constructed, in this case the builder did everything (*omnia faciat*) and presented the customer with the completed building. The question posed here is whether this would still qualify by law as a construction contract (*l.c. operisfaciendi*), to which Paul answers in the affirmative, the

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<sup>11</sup> See Wacke, 'Bruchschäden an Diatretglass Und Gemme', generally, for a fully survey.

<sup>12</sup> Martin, 'The Case of the Collapsing Watercourse', generally.

reason being that what is contracted for is the specialist skill (*locat enim artifex operam suam*).

As these two cases demonstrate, the term *artifex* was context dependent. The Roman jurists did not formulate a constitutive definition of what constituted “an artisan” or which professions were indicative of “specialist skills”.<sup>13</sup> Rather, it was a matter which could only be determined by looking at the specific context in which the legal issue had arisen and the prevailing contexts (mainly socio-economic). Martin, in her article on construction as a specialist skill in Roman law formulated it as follows:

“Building contracts were an area in which specialized knowledge had an important role to play. These contracts normally created a relationship between a skilled individual and one who had no particular knowledge of construction. Many lawsuits probably developed as a result of disappointed expectations, as for example, if the employer did not feel that the construction perfectly implemented his vision of the project, or the builder considered the employer’s expectations unrealistic. The jurists doubtless preferred to avoid assessing on a case-by-case basis the degree to which individual expectations of skill had been fulfilled. This task would also presuppose a certain degree of knowledge about building. Instead, they increasingly referred to the prevailing standard in the trade as a valid standard for the law of contract.”<sup>14</sup>

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<sup>13</sup> Martin, ‘Imperitia’, 108.

<sup>14</sup> Martin, ‘The Case of the Collapsing Watercourse’, 435–36.

The final sentence of this quotation is particularly insightful. Even though the Roman jurists dealt with abstractions, these were not wholly divorced from the world in which they operated. After all, as experts who advised clients and Roman officials, they were at the thin end of the wedge when it came to law-making. Whatever concepts and categories they developed in their juristic writing, these would have been rooted in their experience of applying the law to achieve justice. Their experiences of the world around them continued to feed into the abstractions created for the purposes of the law.

### 3. The problem with mules

To illustrate this point, I will focus in this piece on one specific manifestation of *imperitia* discussed in the Roman legal sources, namely in relation to drivers of mules.<sup>15</sup> Although there are several references to *imperitia* and the drivers of mules in the Roman legal corpus, none is perhaps clearer than the following statement by Gaius:

D. 9, 2, 8 Gai. 7 ad ed. provinc.

*Idem iuris est, si medicamento perperam usus fuerit. sed et qui bene secuerit et dereliquit curationem, securus non erit, sed culpa reus intellegitur. mulionem quoque, si per imperitiam impetum mularum*

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<sup>15</sup> Martin, 'Servum Meum Mulionem Conduxisti', for a survey.

*retinere non potuerit, si eae alienum hominem obtriverint, volgo dicitur culpa nomine teneri. ...*

This text, preserved in the context of discussions of wrongful damage to property, shows that lack of skill on the part of a doctor, manifesting in improper aftercare of a patient on which he had operated carefully, and lack of skill of a mule driver in controlling his mules, thus leading to wrongful damage, both qualify as *culpa* under the *lex Aquilia*.<sup>16</sup>

To explain further why context is important in relation to mule driving as a specialist task, the proverbial net must be drawn somewhat wider to a survey of four-footed animals, specifically those classified as beast of burden, in Roman law. As most scholars of Roman law will be aware, there were three animals of the kind that crop up in Roman legal texts with some regularity, namely the donkey, the horse, and the mule. Although other types of beasts of burden, like the camel, are mentioned in passing, they leave a rather small imprint upon the Roman legal sources.<sup>17</sup> Many reasons may be offered for this, ranging from the focus of the legal texts to the activities of Justinian's commissioners. The most plausible reason may be one of legal focus:

Epit. Ulp. 19, 1.

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<sup>16</sup> Israelowich, 'Professional Liability and Forensic Science in the Context of the Lex Aquilia', on doctors. The contractual basis of the relationship between patient and doctor could have been more strongly addressed in this article.

<sup>17</sup> On camels, see D. 9, 2, 2, 2 Gai. 7 ad ed. provinc., D. 50, 4, 18, 11 Arcad. l. s. de mun. civil., Gai. 2, 16, Epit. Ulp. 19, 1., CTh. 1, 15, 11, 0. (380 April. 4). Idem AA. Iustiano vic. Ponticae.

*Omnes res aut mancipi sunt aut nec mancipi. Mancipi res sunt praedia in italico solo, tam rustica, qualis est fundus, quam urbana, qualis domus; item iura praediorum rusticorum, velut via, iter, actus, aquaeductus; item servi et quadrupedes, quae dorso collove domantur, velut boves, muli, equi, asini. Ceterae res nec mancipi sunt. Elefanti et cameli, quamvis collo dorsove domentur, nec mancipi sunt, quoniam bestiarum numero sunt.*

Donkeys, horses, and mules were *res mancipi*, while more exotic animals such as elephants and camels were not. This classification of the three most common beasts of burden in the ancient Mediterranean as belonging to a special class of property, ownership of which could only be transferred using a formalised ritual known as a *mancipatio*, suggests that such animals would be at the forefront of juristic discussions than others. Evidence for this can also be seen, for example, in the frequency with which these types of beasts of burden appear in juristic discussions of the *lex Aquilia*, chapter 1, which catered for wrongful destruction of, among others, four-footed animals of burden.

When comparing the legal profiles of these three types of beasts of burden across Roman legal sources, however, important differences appear. By “legal profiles” here is meant the way in which the Roman jurists abstracted “donkey”, or “horse” across their juristic discussions. As will presently become clear, these abstractions contain important insights. Let us take the donkey first.

A survey of the references to donkeys across all Roman legal texts shows that they are treated in an entirely passive manner.<sup>18</sup> I use the term “passive” here to highlight the fact that no reference is made by any Roman jurist to the natural temperament of the animal. Thus, Roman juristic discussions involving donkeys treat them entirely passively as the objects of wrongful damage to property, for example, or as forming part of the *instrumentum* of a business or a piece of land, or as the object of a legacy. I will cite two texts as examples:

D. 33, 7, 12, 10 Ulp. 20 ad Sab.

*Et molas et machinas, fenum stipulas, asinum machinarium, machinam frumentariam, vas aeneum, in quo sapa coqueretur et defrutum fiat et aqua ad bibendum lavandamque familiam paratur, instrumenti esse, et cribra, et plaustra quibus stercus evehatur.*

D. 9, 2, 2, 2 Gai. 7 ad ed. provinc.

*Ut igitur apparet, serois nostris exaequat quadrupedes, quae pecudum numero sunt et gregatim habentur, veluti oves caprae boves equi muli asini. sed an sues pecudum appellatione continentur, quaeritur: et recte Labeoni placet contineri. sed canis inter pecudes non est. longe magis bestiae in eo numero non sunt, veluti ursi*

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<sup>18</sup> D. 9, 2, 2, 2 Gai. 7 ad ed. provinc., D. 32, 60, 3 Alf. 2 dig. a Paulo epit., D. 33, 7, 12, 10 Ulp. 20 ad Sab., D. 33, 7, 18, 2 Paul. 2 ad Vitell., D. 47, 2, 52, 20 Ulp. 37 ad ed., I. 4, 3, 1, Gai. 1, 120, Paul. 3, 6, 37., Paul. 3, 6, 64., Epit. Ulp. 19, 1., Lex agraria. 16., CTh. 8, 5, 38, 0. (382 April. 24). Idem AAA. Floro pp., CTh. 8, 5, 41, 0. (382 Sept. 20). Idem AAA. Filagrino com. Orientis.

*leones pantherae. elefanti autem et cameli quasi mixti sunt (nam et iumentorum operam praestant et natura eorum fera est) et ideo primo capite contineri eas oportet.*

As these two legal texts show, donkeys are treated as domesticated and docile, without any reference to potential harm that they might cause.

Compared to donkeys, horses and mules are approached quite differently in Roman legal texts. I will treat horses first, before moving on to mules.<sup>19</sup>The first thing to note is the point of contact between donkeys and horses, as the following legal text shows:

D. 47, 2, 52, 20 Ulp. 37 ad ed.

*Si quis asinum meum coegisset et in equas suas τῆς γονῆς dumtaxat χάρην admisisset, furti non tenetur, nisi furandi quoque animum habuit. quod et Herennio Modestino studioso meo de Dalmatia consulenti rescripsi circa equos, quibus eiusdem rei gratia subiecisse quis equas suas proponebatur, furti ita demum teneri, si furandi animo id fecisset, si minus, in factum agendum.*

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<sup>19</sup> D. 6, 1, 5, 2 Ulp. 16 ad ed., D. 9, 1, 1, 4 Ulp. 18 ad ed., D. 9, 1, 1, 7 Ulp. 18 ad ed., D. 9, 1, 5, Alf. 2 dig., D. 9, 2, 57, Iav. 6 ex post. Labeonis., D. 13, 6, 5, 7 Ulp. 28 ad ed., D. 13, 6, 23, Pomp. 21 ad Q. Muc., D. 16, 3, 1, 5 Ulp. 30 ad ed., D. 17, 2, 58, pr Ulp. 31 ad ed., D. 21, 1, 38, 7 Ulp. 2 ad ed. aedil. curul., D. 21, 1, 38, 14 Ulp. 2 ad ed. aedil. curul., D. 31, 65, 1 Pap. 16 quaest., D. 47, 14, 3, pr Call. 6 de cogn., D. 49, 15, 2, 1 Marcell. 39 dig., D. 49, 16, 12, 1 Macer 1 de re milit., I. 2, 1, 37, I. 4, 1, 6, I. 4, 9, pr, Gai. 3, 196, Gai. 4, 27, Paul. 2, 4, 3., Paul. 5, 18, 1., Paul. 5, 18, 4., Interpr. Paul. sent. II 4, 3., Coll. 11, 3, 1., Coll. 11, 5, 1., Coll. 11, 8, 1., Edict. Theodor. lvii., Edict. Theodor. lviii.

This text, usually cited owing to the information it reveals about Modestinus, reveals that the mule is the offspring of a male donkey and a female horse. The focus of the text is “theftuous intent” where a person’s donkey has been used to impregnate the mares of another.

When surveying the references to horses across Roman legal sources, certain stock themes emerge. Much like donkeys, horses were moveable objects that could be sold, lent, and stolen. Evidence of the greater economic value of horses is to be found in juristic discussions concerning “permissible use” where a horse has been lent out, or the number of horses that had to be stolen before someone would be treated under Roman criminal law as an *abigeus* or *abactor* (cattle thief) who was subject to more severe penalties than a common thief. I cite two legal texts to demonstrate these stock themes:

Gai. 3, 196

*Itaque si quis re, quae apud eum deposita sit, utatur, furtum committi; et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur, veluti si quis argentum utendum acceperit, quasi amicos ad cenam invitaturus /rogaverit /, et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius /cum /aliquo duxerit, quod veteres scripserunt de eo, qui in aciem perduxisset.*

I. 4, 1, 6

*Furtum autem fit non solum, cum quis intercipiendi causa rem alienam amovet, sed generaliter cum quis alienam rem invito domino*

*contractat. Itaque sive creditor pignore sive is apud quem res deposita est ea re utatur sive is qui rem utendam accepit in alium usum eam transferat, quam cuius gratia ei data est, furtum committit. Veluti si quis argentum utendum acceperit quasi amicos ad cenam invitaturus et id peregre secum tulerit, aut si quis equum gestandi causa commodatum sibi longius aliquo duxerit, quod veteres scripserunt de eo, qui in aciem equum perduxisset.*

Apart from these, there is one aspect of the discussion of horses in Roman legal sources which is noteworthy, primarily because of its difference to the discussion of donkeys. In Roman legal texts in which horses are mentioned, their natural temperament, more specifically their tendency to kick, is mentioned where it is relevant to the legal matter to hand. Thus, for example, in the two text below:

D. 9, 1, 1, 4 Ulp. 18 ad ed.

*Itaque, ut Servius scribit, tunc haec actio locum habet, cum commota feritate nocuit quadrupes, puta si equus calcitrosus calce percusserit, aut bos cornu petere solitus petierit, aut mulae propter nimiam ferociam: quod si propter loci iniquitatem aut propter culpam mulionis, aut si plus iusto onerata quadrupes in aliquem onus everterit, haec actio cessabit damnique iniuriae agetur.*

D. 9, 1, 5, Alf. 2 dig.

*Agaso cum in tabernam equum deduceret, mulam equus olfecit, mula calcem reiecit et crus agasoni fregit: consulebatur, possetne cum domino mulae agi, quod ea pauperiem fecisset respondi posse.*

Both texts are concerned with the ancient remedy of *pauperies*, a form of liability assigned to the owners of four-footed animals where they cause loss of their own accord, in other words through their natural temperament, rather than because of human interference.<sup>20</sup> In the latter case, of course, delictual liability under the *lex Aquilia* would be potentially available. In both texts concerning *pauperies*, the natural temperament of the horse is to kick. In fact, in the first text, the horse is described as *calcitrosus* (inclined to/prone to kicking).

The observant reader will have noticed that in D.9.1.1.4, another four-footed animal is mentioned whose natural temperament may lead to liability under *pauperies*. This is, of course, the mule.<sup>21</sup> In this text, mules are described as having “excessive ferocity” (*aut mulae propter nimiam ferociam*). This then brings us back to the following text cited at the start of this piece:

D. 9, 2, 8 Gai. 7 ad ed. provinc.

*Idem iuris est, si medicamento perperam usus fuerit. sed et qui bene secuerit et dereliquit curationem, securus non erit, sed culpa reus*

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<sup>20</sup> Jackson, ‘Liability for Animals in Roman Law’, generally.

<sup>21</sup> D. 9, 1, 1, 4 Ulp. 18 ad ed., D. 9, 2, 8, 0<sup>1</sup>gai. 7 ad ed. provinc., D. 9, 2, 52, 2 Alf. 2 dig., D. 14, 3, 5, 5 Ulp. 28 ad ed., D. 19, 2, 60, 7 Lab. 5 post. a Iav. epit., D. 19, 2, 60, 8 Lab. 5 post. a Iav. epit., D. 32, 60, 1 Alf. 2 dig. a Paulo epit., D. 32, 99, 2 Paul. l. s. de instrumenti sign., D. 33, 7, 12, 9 Ulp. 20 ad Sab., D. 47, 2, 67, 2 Paul. 7 ad Plaut., I. 4, 3, 8, C. 12, 50, 4, 1 Iul., C. 12, 50, 17, Arcad./Honor. AA. Vincentio pp., Paul. 3, 6, 72., Paul. 3, 6, 91.

Interpr. Paul. sent. III 10, 75 (HAE.) = tit. vi, 91 (ps. ed.), CTh. 7, 14, 1. (398 Feb. 19)., CTh. 8, 5, 10. (358 Oct. 27)., CTh. 8, 5, 14, 2., CTh. 8, 5, 31. (370 Aug. 15)., CTh. 8, 5, 34, 1., CTh. 8, 5, 53. (395 Mart. 18)., CTh. 8, 5, 58. (398 Feb. 18)., Nov.Iust.22 CAPUT XVI.

*intellegitur. mulionem quoque, si per imperitiam impetum mularum retinere non potuerit, si eae alienum hominem obtriverint, volgo dicitur culpa nomine teneri. idem dicitur et si propter infirmitatem sustinere mularum impetum non potuerit: nec videtur iniquum, si infirmitas culpa adnumeretur, cum affectare quisque non debeat, in quo vel intellegit vel intellegere debet infirmitatem suam alii periculosam futuram. idem iuris est in persona eius, qui impetum equi, quo vehebatur, propter imperitiam vel infirmitatem retinere non poterit.*

Mule drivers are liable for loss if their inexpert handling of the mule caused loss. The reasons for this are because the average person without the expertise of a mule driver would not be able to control the “excessive ferocity” that constitutes the natural temperament of a mule. This may also go some way to explaining the vicarious liability of the owner for the actions of servile mule drivers. Take the following text:

D. 19, 2, 60, 7 Lab. 5 post. a Iav. epit.

*Servum meum mulionem conduxisti: negligentia eius mulus tuus perit. si ipse se locasset, ex peculio dumtaxat et in rem versum damnum tibi praestaturum dico: sin autem ipse eum locassem, non ultra me tibi praestaturum, quamdolum malum et culpam meam abesse: quod si sine definitione personae mulionem a me conduxisti et ego eum tibi dedissem, cuius negligentia iumentum perierit, illam*

*quoque culpam me tibi praestaturum aio, quod eum elegerem, qui eiusmodi damno te adficeret.*

In the latter part of this text, the owner of the servile mule driver is held liable precisely because he chose the specific individual, thereby vouching for his expertise.

#### 4. Conclusions

In her discussion of the development of *imperitia* as a legal concept in Roman law, Martin stated that:

“[T]he jurists never state clearly what standard should be used to evaluate the worker’s performance. Analysis of the evidence showed that the jurists tend to favor a method of evaluation that focuses on the quality of the performance based upon external, objective criteria, rather than the individualized fault of the workers.”<sup>22</sup>

In my view, one can take this statement slightly further. In the case of mule driving as an “skilled task”, the “objective criteria” as Martin calls them to which the jurists referred when judging whether damage had been caused through lack of skill were intimately connected to commonly held perceptions concerning the

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<sup>22</sup> Martin, ‘Imperitia’, 108.

nature of the animal in question. It was generally agreed in Roman society that mules had “excessive ferocity”. That there may have been awareness that this trait had been inherited from their equine parent cannot be ruled out. In any event, in establishing whether a mule driver was suitably skilled (or lacked the necessary skills), the Roman jurists incorporated this *topos* into their reasoning. An unskilled mule driver was someone who could not adequately control the “excessive ferocity” for which mules were known.

This then brings us back to the role of *regulae iuris* in the teaching of Roman law. There is no doubt that the teaching of a *regula iuris* such as “lack of skill counts as fault” can be useful to a law student. In an abstract sense, it creates a proverbial “hook” on which to hang a modern argument in law, especially when the same rule has been retained in the contemporary legal system in which they have been trained. Additionally, a study into the historical reception of this *regula* into contemporary law might also provide interesting insights as to the reasons for its retention. At the same time, however, neither of these two methods can replace a proper understanding of the reasoning, found in the works of the Roman jurists, which led to the creation of this *regula* in the first place.<sup>23</sup> It is only once one understands the reasoning behind the *regula* that it truly acquires didactic value.<sup>24</sup> And for this, I fear, a reduction of

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<sup>23</sup> Nasti and Schiavone, ‘Jurists and Legal Science in the History of Roman Law’, for a survey of the importance of legal reasoning in understanding Roman law.

<sup>24</sup> Roman legal definitions were never monolithic. When a mechanical application of a definition gave rise to injustice, the Roman jurists could adjust it. This is exactly what the jurist Iavolenus meant when he wrote: D. 50, 17, 202, Iav. 11 epist. *Omnis definitio in iure civili periculosa est: parum est*

Roman law as a subject merely to the teaching of abstract *regulae iuris* will not do.

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*enim, ut non subverti posset.* This must not be forgotten. Thus, a canonical approach to legal maxims, as a way of teaching Roman law causes more harm than it resolves. The true didactic value of Roman law lies in demonstrating the relationships between law and life. It lies in an appreciation that there are multiple answers to a single problem which should be fleshed out using juristic reasoning.

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