Grounds of Delictual Liability in Classical Roman Juridical Literature

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Abstract

Modern law draws a distinction between delict (or tort) and crime. The former is a wrong against an individual, for which the wrongdoer must render compensation following a private action brought by the victim. On the other hand, crime is a wrong deemed to be so serious as to be directed against the state, for which the wrongdoer must be punished. Here the state institutes the action and imposes the penalty. In Roman law the corresponding distinction was between delictum and crimen. The term delictum denoted an unlawful act that caused loss or injury to the person, property, or reputation of another. The word crimen, on the other hand, signified a wrongful act that was directed against the state. However, Roman law did not clearly distinguish between the law of delicts and criminal law: the law of delicts, besides being concerned with compensation for the victim, sought also to inflict punishment on the wrongdoer. In Roman law the principal point of distinction between delict and crime was that in the former case the victim could recover compensation and inflict punishment on the wrongdoer by means of a private action in civil proceedings and not through prosecution by the state. The present paper outlines aspects of the development of the Roman law of delicts and discusses the principal grounds on which delictual liability was based. The analysis of substantive law includes consideration of the subjective and objective requirements for delictual liability as detailed in the works of the classical Roman jurists and other juridical sources. Particular attention is paid to the delict of wrongful damage to property and the lex

Aquilia, the legislative enactment from which it was derived, as well as the legal remedies available to the person who suffered loss. It is hoped that the paper will be of value to scholars interested in the fields of Roman law, European legal history, tort law, and comparative private law.

Introduction

In Roman law the term *obligatio* (obligation) denoted the legal relationship that existed between two persons, in terms of which one person was obliged towards the other to carry out a certain duty or duties. Obligation may otherwise be defined as a bond recognized by the law (*iuris vinculum*) in terms of which one party, the creditor (*creditor*), had a personal right (*ius in personam*) against the other party, the debtor (*debitor*). The jurist Gaius, in his Institutes, states that obligations fell into two principal categories: obligations arising from contract (*obligationes ex contractu*), and obligations arising from delict (*obligationes ex delicto*). [(1)] The term *contractus* was understood to denote any lawful juristic act capable of producing rights and obligations, and enforceable by means of an action at law. As most lawful juristic acts creating obligations were transacted because there was agreement on the part of the parties to establish an obligation, it was in time recognized that agreement (*consensus*) was the essence of a contract. The *delictum* was an unlawful act (also referred to as *maleficium*) that was detrimental to the lawful rights and interests of

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（1） G 3. 88.

another person, and which generated an obligation between such person and the malefactor. The content of such obligation was directed at satisfaction, compensation, or a penalty (*poena*). Gaius' original dichotomy of the sources of obligations was subsequently deemed unsatisfactory, since an obligation could also arise from a legal act with respect to which there was no agreement on the part of the parties concerned. Accordingly, a third category of obligations (also attributed to Gaius) appears in the Digest: obligations arising from various causes (*obligationes ex variis causarum figuris*) other than from contract or delict. [(2)] The phrase *variae causarum figurae* refers to juristic acts that were not based on agreement yet were deemed wholly lawful. Gaius' final classification was probably the precursor of the fourfold division of the sources of obligations adopted by the compilers of Justinian's Institutes. According to the latter scheme, an obligation may arise: (i) from contract (*ex contractu*); (ii) as if from contract (*quasi ex contractu*); (iii) from delict (*ex delicto* or *ex maleficio*); and (iv) as if from delict (*quasi ex delicto* or *quasi ex maleficio*). [(3)] The term quasi-contract was used to denote those lawful acts that, although not based on agreement between two or more parties, created an obligation. In contrast, the category of quasi-delict did not differ substantially from that of delict as explained later in this essay. [(4)]

Delictual Obligations in Roman Law

In modern law a distinction is drawn between delict (or tort) and crime, or between the delictual (or tortious) and criminal aspects of an act. In general, the

（2） D 44. 7. 1 pr (Gaius *libro secundo aureorum*).

（3） *Inst* 3. 13. 2.

（4） The introduction of quasi-delict as a distinct category was probably connected with Justinian's intention to create a more systematic approach to the law of obligations.

distinction is between an act that endangers the order or security of the state, and one that violates an individual's rights to his person, property or reputation. The difference between delict and crime corresponds to the difference between the two principal objects the law is concerned with, namely redress and punishment. With respect to delict, the chief aim of the law is to compensate the injured party rather than punish the wrongdoer. With respect to crime, on the other hand, the principal aim of the law is to punish the wrongdoer with a view to preventing him and others from committing the same or similar crimes in the future and/or satisfying the public sentiment that wrongdoing must be met with retribution. In Roman law the corresponding distinction was between *delictum* and *crimen*. The term *delictum* or *maleficium* denoted an unlawful act that caused loss or injury to the person, property, honour or reputation of another. From this act there arose an obligation on the part of the wrongdoer to pay a penalty or compensate the victim for the harm suffered. The word *crimen*, on the other hand, signified a wrongful act that was directed against the state or the community as a whole, and prosecuted by state organs. Examples of *crimina* recognized from an early age included treason (*perduellio*), murder (*parricidium*), sacrilege and arson.

Nevertheless, Roman law did not clearly distinguish between the law of delicts and criminal law: the law of delicts, besides being concerned with compensation for the victim, sought also to inflict punishment on the wrongdoer. This can be explained on the ground that the sum payable to the injured party originated as the formalization of the primitive right of revenge. Such sum was a fine (*poena*) imposed as a punishment on the wrongdoer that went, however, not to the state as in the ordinary criminal process, but to the victim. The penal character of the Roman delict was manifested in various ways: first, the sum a wrongdoer was condemned to pay usually far exceeded the cost of the damage suffered by the victim; secondly, if more than one person had jointly committed a delict, each was liable in full and atonement

by one did not release the others; and, thirdly, liability *ex delicto* did not descend to the wrongdoer's heirs, since against the latter there was no right of revenge. In Roman law the principal point of distinction between delict and crime was that in the former case the victim could recover compensation and inflict punishment on the wrongdoer by means of a private action in civil proceedings and not through prosecution by state organs.

The dual nature of the Roman law of delict is clearly shown by the types of action the injured party (i.e., the creditor) could institute against the wrongdoer (i.e., the debtor). A distinction is usually drawn between three types of action: *actiones rei persecutoriae*, directed at restoring the victim to the financial position he would have possessed had the harmful event not occurred; *actiones poenales*, by means of which the plaintiff sued for payment of a penalty; and *actiones mixtae*, which as the name denotes combined punitive and compensatory functions. An example of an *actio rei persecutoria* was the *condictio furtiva*, by means of which the victim of theft (*furtum*) could claim the recovery of the stolen property. This action should be distinguished from the *actio furti*, a penal action (*actio poenalis*) directed at the payment of a monetary penalty the amount of which depended on the kind of theft committed. [(5)] Finally, an example of an *actio mixta* was the *actio legis Aquiliae* that arose from wrongful damage to property. By way of this action the victim could claim damages as well as a penalty from the wrongdoer. [(6)]

（5） It should be noted that the method for determining the amount of the penalty in the case of *actiones poenales* was different from the way in which the amount of damages was calculated in the case of *actiones rei persecutoriae*. In some cases a fixed tariff was laid down for penalties, whilst in other cases the penalty was determined by the judge at his discretion and in accordance with what he considered to be 'good and equitable' (*bonum et aequum*). The relevant calculation was usually based on the value of the property affected and, depending on the circumstances, the penalty was proportionate to such amount or was a multiple thereof.

（6） See *Inst* 4. 6. 18.

As previously noted, a delict was a wrongful act that gave rise to an obligation between the wrongdoer and the victim. This, however, does not mean that every act whereby a person caused harm to the person or property of another engendered an obligation. For an act to qualify as a delict, certain requirements had to be met.

Originally, the law required that the relevant injury had been caused by a direct physical act. In later law, however, remedies were granted even in a case of indirect causation of damage or, in exceptional circumstances, in the case of an omission. Furthermore, the injury must have been the result of a wrongful act (*damnum iniuria datum*) – *iniuria* in this context meant no more than unlawfulness (*non iure*), i.e., there must have been no lawful defence for the relevant act as there would be, for example, in the case of justifiable self-defence. In primitive Roman law, the element of fault was not expressly required for delictual liability as someone causing harm to the person or property of another was presumed to have acted willingly. In time, however, intent (*dolus*) became an explicit requirement of all delictual liability. Thus, delicts were punishable only if the wrongdoer had committed the relevant act knowingly and intentionally. Negligence (*culpa*) constituted a requirement of liability under the *lex Aquilia*, which was concerned with damage to property. At the final stage of this legal development, the element of fault (*dolus and culpa*) was treated as distinct from wrongfulness which was thus recognized as a separate requirement of delictual liability. [(7)]

The Roman *delicta privata* developed casuistically and the Roman jurists did not formulate an abstract concept of delict. Justinian follows Gaius in classifying the principal delicts into four categories: theft (*furtum*), robbery (*rapina*), wrongful damage to property (*damnum iniuria datum*) and insult (*iniuria*). There were many

（7） Fault could not be attributed to an insane person (*furiosus*) nor to a person below the age of puberty (*impubes*) who was *doli incapax*, i.e. had no capacity of understanding the wrongful character of his actions. See D 9. 2. 5. 2; D 47. 2. 23; D 47. 8. 2. 19.

other forms of delict (civil and praetorian) [8] but for present purposes this discussion may be restricted to these four categories.

Furtum

One of the oldest forms of delict known to Roman law was *furtum*, generally translated as theft. However, the Roman concept of *furtum* was broader in scope than the modern concept of theft. [9] It encompassed not only the actual removal of another's thing but also a diversity of acts involving intentional interference with a movable object without the knowledge of, or contrary to an agreement with, the owner of such object. [10] According to the well-known definition attributed to the jurist Paulus: "Theft is the fraudulent interference with a thing, whether with the thing itself or the use or possession of it, with a view to gain – an action that is forbidden according to natural law." [11] From this definition the principal elements of *furtum* can

（8） Reference may be made, for example, to the fraud of creditors (*fraus creditorum*), which came to the fore when a debtor, for the purpose of deceiving creditors, alienated property in order to become insolvent and hence unable to pay his debts. A creditor thus deceived could seek the rescission of such fraudulent alienation by means of the *actio Pauliana*. Other forms of delict were the bribery or corruption of a slave (*corruptio servi*); the violation or desecration of a grave (*violatio sepulcri*); and the unlawful chopping down of trees (*arbores succisae*).

（9） *Furtum* was derived from the word *ferre* (to bear or carry).

（10） In general, all that was required for the commission of theft was *contrectatio* or the physical handling of an object against the will of its owner. However, in primitive Roman law *furtum* probably referred only to the act of removal of an object (it also included the removal of a person under the *potestas* of another – see G 3. 199). The broadening of its scope in later times was probably due to the fact that the remedies for *furtum* were applied in practice to a diversity of cases lying outside their original scope so that by the time the jurists came to formulate a definition *furtum* could no longer be limited to acts of removal.

（11） D 47. 2. 1. 3. This definition is repeated in the Institutes, with the omission of the phrase "with a view to gain." See *Inst* 4. 1. 1.

be derived.

The first element was *contrectatio*: the handling of an object against the will of the owner (*invito domino*) or the person who had a lawful interest in such object. Examples of *contrectatio* included the removal of a thing, embezzlement, receiving stolen goods, disposing of a pledged thing without being authorized to do so (by a *pactum distrahendi*), accepting an object that the owner had handed over by mistake, and hiding an escaped slave. Furthermore, a pledgee or depositee who made use of the pledged or deposited object committed *furtum* as did the borrower who misused the thing lent and even the owner who fraudulently removed a thing from one who had a real right in it or from a hirer with a right of retention for expenses.(12) Secondly, there had to be intent (*dolus malus*) on the part of the thief to appropriate the thing (sometimes referred to as *animus furandi* or *adfectus furandi*) together with the intention to derive some form of gain or profit from such appropriation. Thus, children and insane persons could not commit theft since they lacked the requisite *animus furandi* nor could a person removing or handling a thing under the mistaken belief, for example, that the thing was his or it had been abandoned by its owner.(13) Moreover, the stolen thing had to be a moveable corporeal object.(14) The act of seizing possession of immovables, even by force, did not constitute theft; although the person who was dispossessed in this manner had remedies for retrieving his possession. Finally, the thing had to be a *res in commercio* in which someone had a lawful interest. Thus, there could be no *furtum* if the thing was a *res nullius*, i.e. it belonged to no one.

A distinction was drawn between three basic forms of theft: *furtum rei*, *furtum usus* and *furtum possessionis*. The first, *furtum rei*, was the unlawful appropriation of

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(12) G 3. 195-196; G 3. 200; D 47. 2. 15. 1. And see *Inst* 4. 1. 6-7; *Inst* 4. 1. 18; D 13. 1. 18; D 16. 3. 29 pr; D 41. 2. 3. 18; D 47. 2. 25 pr-1; D 47. 2. 48. 1; D 47. 2. 43 pr; D 47. 2. 52. 7; D 47. 2. 68 pr; C 6. 2. 14.

another person's movable property. This existed as the most frequently occurring form of theft. *Furtum usus*, or theft of use, consisted of the improper use of a thing belonging to another where the thing was obtained from the owner for a specific purpose and was in the possession of the thief. Examples of this kind of theft included those of the *depositarius* who used an object deposited with him for his own purposes, or of the *commodatarius* who used an object handed over as a loan for a purpose different from that for which it had been lent. [(15)] The third form of theft, *furtum possessionis* or theft of possession, arose when an owner improperly removed his own thing from the possession of another person who had the right to hold it (e.g. a usufructuary or a pledgee). [(16)]

A further important distinction inhabiting the law of theft was that between manifest theft (*furtum manifestum*) and non-manifest theft (*furtum nec manifestum*). This distinction, recognized by the Law of the Twelve Tables, was important because

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(13) G 3. 197; *Inst* 4. 1. 7. In general, the *animus furandi* of a thief (*fur*) involved his awareness that the owner or the person possessing an interest in the thing would not have allowed the handling; or, according to some jurists, he lacked a reasonable belief that such owner or person with an interest in the thing would have allowed the handling. Moreover, the law required that the consent of the owner or person having an interest in the thing was actually lacking (and this would be the case even where the owner's consent was induced by mistake, force, fraud or fear). However, there were cases in which the wrongdoer's knowledge that the owner would object did not entail *animus furandi*. For instance, if A damaged B's property out of spite and with no intention of deriving profit, he would be liable for wrongful damage to property (under the *lex Aquilia*) but not for theft. This appears to make the intention to derive profit a necessary element of *animus furandi*. It should be noted that profit or gain was construed broadly to mean any advantage of a pecuniary and non-pecuniary nature.

(14) Originally, it was unclear whether immovables could be stolen but at an early stage the view prevailed that there could be no theft of immovables. However, things attached to land could be stolen when severed.

(15) G 3. 196-197; *Inst* 4. 1. 6-7; D 47. 2. 1. 3; D 47. 2. 12. 2; D 41. 3. 4. 21; D 47. 2. 77 pr.

(16) G 3. 200; *Inst* 4. 1. 10; D 47. 2. 15. 1; D 47. 2. 19. 6; D 47. 2. 75; D 47. 4. 1. 15.

the punishment imposed for manifest theft was much harsher than that imposed for non-manifest theft. Originally, theft was considered to be *manifestum* if the thief was caught in the act. In the classical era, however, various interpretations of *furtum manifestum* were proposed by the jurists. As Gaius narrates, some jurists maintained that manifest theft was theft detected while being committed; others held that it was sufficient if the thief was found on the premises where the theft was committed; and others, ventured further in proposing that theft was manifest where the thief was caught with the stolen property before he had carried it to his destination. (17) The law of Justinian admitted all the above-mentioned cases as *furtum manifestum*.

According to the Law of the Twelve Tables, a manifest thief (*fur manifestus*) who tried to defend himself with arms or who was caught stealing by night, could lawfully be killed. (18) In all other cases, the thief was presented before a magistrate, flogged and handed over to the person from whom he stole. (19) In the later republican age the penalties established by the Law of the Twelve Tables fell into disuse as a new penal action, the *actio furti manifesti*, for four times the value of the property stolen was created by the praetor. This action remained throughout the ages to the time of Justinian's reign.

In all the cases that did not meet the requirements of *furtum manifestum* the thief was considered to be non-manifest (*nec manifestus*) and the *actio furti nec manifesti*, directed at payment of twice the value of the stolen property, was instituted

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（17） G 3. 184. Gaius also points out that the third of these perspectives as well as the view that theft should be considered manifest if the thief was seen at any time with the stolen property were not accepted at his time.

（18） In these cases the person who suffered the theft was required to call the people of the neighbourhood together as witnesses.

（19） The position of the thief was apparently similar to that of an *adiudicatus*, i.e. the debtor who defaulted on his debt and was surrendered to the creditor to work off the debt. If the thief was a slave, he was first flogged and then put to death.

for the punishment of the thief. [20]

Originally, the *actio furti* could only be instituted by the owner of the stolen property, [21] but in later law it was made available to others who had a legitimate interest in such property, especially persons liable for *custodia*. In general, it may be asserted that the action was available to any person considered to have an interest in the property not being stolen such as the pledgee, the usufructuary, the *bona fide* possessor and other persons in a similar position. [22] It should be noted that where the *actio furti* was instituted by a person who had an interest in the object stolen, an action by the owner was in principle precluded. [23]

The *actio furti manifesti* could be instituted only against the thief and his accomplices, i.e., those who actually committed the *contrectatio*. The *actio furti nec*

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(20) The Law of the Twelve Tables provided that a person in whose house a stolen object was detected through a ritual search (*quaestio lance et licio*) was to be regarded as a *fur manifestus*. By the classical era the ritual searching of a house fell into disuse and was replaced by an informal search for which special legal remedies were made available. By way of the *actio furti concepti* the person in whose possession stolen goods were found during such a search was condemned to pay a sum amounting to three times the value of the goods. The *actio furti oblati* could be instituted against a person who had received stolen goods for three times the value of the stolen goods. Moreover, the praetor granted the *actio furti prohibiti* by which a sum amounting to four times the value of the stolen property could be claimed from a person who had obstructed a search for stolen goods; and the *actio furti non exhibiti* against the person who failed to produce stolen goods located on his premises. These actions were no longer in use in the time of Justinian. See in general G 3. 183-194; *Inst* 4. 1. 3-5; D 47. 2. 3; D 47. 2. 5-8; D 47. 2. 50 pr. It should be noted that the person who was condemned in terms of the *actio furti* was branded with *infamia*: the loss of esteem among one's fellow citizens.

(21) See D 47. 2. 47; D 47. 2. 67. 1; D 47. 2. 81. 1.

(22) The relevant interest might be 'positive' such as that of the usufructuary or the pledgee; or 'negative', where a person had the thing in question in his control and was liable to the owner if it was stolen, e.g. the *commodatarius* or the *conductor operis faciendi*, such as a cleaner of clothes (*fullo*). See in general G 3. 203-207; *Inst* 4. 1. 13-17; D 47. 2. 10; D 47. 2. 12.

manifesti, on the other hand, could be instituted also against the person or persons who assisted the thief by aid and counsel (*ope et consilio*) or who incited him to commit the theft. The liability was cumulative in the sense that each wrongdoer was liable for the same penalties. (24)

In addition to the *actio furti*, the owner of the stolen property could institute an *actio rei persecutoria* for the recovery of such property or its value. One such action was the *actio rei vindicatio*, a real action by means of which he could reclaim the possession of his property from any person (whether *bona fide* or *mala fide*) who may have held it without a right to do so. The *condictio furtiva* was an alternative comprised of a personal action that the owner could launch against the thief or his heirs for the recovery of the stolen object or its value (also applicable to the case where the *rei vindicatio* could not be instituted because the relevant object no longer existed). (25) Depending on the circumstances of the case, other *actiones rei persecutoriae* could apply such as the *actio depositi*.

Rapina

The delict *rapina* (robbery) came to the fore when a person appropriated a

(23) It should be observed that the *actio furti* could not in principle be employed within the family circle. Thus, a son could not bring this action against his father nor a husband against his wife (and vice versa). However, if either spouse had taken property belonging to the other in contemplation of a divorce that actually occurred, redress could be sought by a special action referred to as *actio rerum amotarum*. See D 25. 2; C 5. 21.

(24) G 3. 202; *Inst* 4. 1. 11; D 47. 2. 34; D 47. 2. 50. 1-3.

(25) See in general *Inst* 4. 1. 19; D 13. 1; C 4. 8; D 13. 1. 1; D 13. 1. 7. 2; D 13. 1. 8 pr; D 47. 2. 14. 16; D 13. 1. 2-3; D 13. 1. 5; D 13. 1. 7. 2. It should be noted that the *rei vindicatio* could be brought only by the owner, while the *condictio furtiva* could be brought by the owner or the pledgee.

moveable corporeal object belonging to another with the use of violence (*vis*). As *rapina* was originally regarded as a form of theft (*furtum*), the rules that applied to theft applied also to robbery. Hence, the person who had been robbed could employ the *actio furti* as well as the *actiones rei persecutoriae* available to the victim of theft.

Since, as a rule, a person who committed robbery was not caught in the act, the punishment for *furtum manifestum* would seldom have applied and thus the robber was liable in terms of the *actio furti nec manifesti* to pay twice the value of the object in question. Such penalty was apparently too light and with the increasing incidents of robbery in the closing years of the Republic the praetor introduced a special action, the *actio vi bonorum raptorum*, in terms of which the robber was liable for four times the value of the property that had been taken. [(26)] If there was more than one robber, liability was cumulative and so each robber had to pay the full penalty. However, the law required that the *actio vi bonorum raptorum* was instituted within a year of the robbery. If this time limit was not met, the action lay only for the value of the stolen object. It should be noted, further, that this action could be instigated by the person who had been robbed (i.e., the person in charge of the object at the moment of the robbery) or by his heirs against the robber and his accomplices (but not against their heirs). [(27)]

In the classical period the victim of robbery could institute, cumulatively with the *actio vi bonorum raptorum*, an *actio rei persecutoria* (usually the *rei vindicatio* or the *condictio furtiva*) for the recovery of the stolen property or its value. Under the law of Justinian, the *actio vi bonorum raptorum* was deemed a mixed action (*actio mixta*), i.e., an action directed not only at the punishment of the wrongdoer but also at the recovery of the object taken or its value in one claim. In practice, this reduced the

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(26)　As in the case of the *actio furti*, the condemned robber was branded with infamy (*infamia*).

(27)　On the *actio vi bonorum raptorum*, see in general G 3. 209; *Inst* 4. 2 pr; D 47. 8. 1; D 47. 8. 2 pr; D 47. 8. 2. 27; D 3. 2. 1; *Inst* 4. 16. 2.

actual punishment to three times the value of the object and the *actiones rei persecutoriae* (i.e., the *rei vindicatio* or the *condictio furtiva*) were thus precluded. (28)

Damnum iniuria datum

Without doubt the most important of all Roman delicts was wrongful damage to property (*damnum iniuria datum*). (29) This delict originated in the *lex Aquilia*, a plebiscite passed probably in the third century BC. (30) Prior to the enactment of this law, the Law of the Twelve Tables and other *leges* provided remedies for several instances of wrongful damage to property. For example, there was the *actio de vitibus succisis*, granted against a person who cut down the vines of another (this was in time extended to apply to the chopping down of trees as well); the *actio de pastu pecoris*, employed against the owner of cattle which trespassed and grazed upon another person's land; and the *actio pluviae arcendae*, available when an owner of land initiated constructions by which the flow of rainwater was redirected in such a way as to cause damage to neighbouring property. All these specific delicts were superseded by the *lex Aquilia*, which introduced provisions of a general character relating to wrongful damage to property. (31)

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(28) Consider G 4. 8. as opposed to *Inst* 4. 2 pr. And see *Inst* 4. 6. 19; D 13. 1. 10. 1; D 47. 8. 2. 10.

(29) Literally translated as 'damage wrongfully caused'. The legal principles governing *damnum iniuria datum* provided the foundation for some of the basic principles in many modern legal systems relating to the general law of delict with particular reference to wrongful damage to property.

(30) The exact date of this enactment is unknown. Cicero articulates that the enactment originated from a very early age (*pro Tullio*, 4. 8), and some references in the law seem to confirm this view. Later sources speak of this law as being contemporaneous with the *lex Hortensia* of 287 BC. This is probably only a guess, but may be not far from the truth.

(31) D 9. 2. 1 pr.

The *lex Aquilia* was divided into three sections or chapters. The first and third chapters dealt with wrongful damage to property while the second chapter dealt with the *adstipulator*, a special kind of surety or joint creditor in a *stipulatio*. [(32)] In the course of time the provisions of the second chapter fell into desuetude, [(33)] and for present purposes the discussion may be limited to the first and third chapters.

The first chapter of the *lex Aquilia* provided that whoever wrongfully killed another person's slave or four-footed grazing animal (*pecus*) [(34)] should be condemned to pay the owner the highest value that such slave or animal had in the year preceding the killing. [(35)] This chapter is limited in primitive style to a specific kind of damage inflicted on particular kinds of property. The use of the verb *occidere* (to slay) indicates that killing effected in another way, in principle, fell outside the ambit of the provision. The word *pecus* introduced a further limitation, since animals that were neither four-footed nor grazing in herds were excluded from the provision. [(36)] The third chapter, by contrast, manifests a striking advance in juristic thinking: it introduces a general concept of loss (*damnum*) brought about in ways that are described in such a general way that any material damage to property could be said to be covered. This chapter provided that, in cases not covered by the first chapter, if a person caused damage to another by wrongfully burning (*urere*), breaking (*frangere*) or destroying (*rumpere*) his property, he should be condemned to pay to the owner the highest value which the relevant thing had during the preceding thirty days. Although

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(32)　The role of the *adstipulator* has been discussed in the section above dealing with the contract of *stipulatio*.

(33)　See D 9. 2. 27. 4; *Inst* 4. 3. 12.

(34)　This category of animals encompassed animals normally living in a herd, such as sheep, oxen, horses, mules, donkeys and goats, and later expanded to include pigs and camels. Dogs and wild animals were excluded. See D 9. 2. 2. 2.

(35)　*Inst* 4. 3 pr. And see G 3. 210; D 9. 2. 2 pr.

(36)　Furthermore, no reference is made to the wrongful wounding of a slave or *pecus*.

the modes of damaging another's property were initially limited to burning (*urere*), breaking (*frangere*) or destroying (*rumpere*), in the period following the enactment of the *lex Aquilia* the ambit of chapter three was extended by way of interpretation. Thus, the word *rumpere* (destroying) was construed to mean *corrumpere* in the sense of spoiling in general. Furthermore, the terms *occidere* (as encountered in the first chapter), *urere* and *frangere* were likewise extended in scope thereby rendering any form of harm caused by positive conduct to fall under the Aquilian law. (37)

The chief requirements of the delict of wrongful damage to property, in its pre-classical form, were that some form of physical damage had occurred entailing economic loss (*damnum*); such damage had been caused wrongfully (*iniuria*), without lawful justification; and moreover, it had been caused directly by a positive act of the wrongdoer to a tangible object (*damnum corpore corpori datum*). Thus, damage caused indirectly or through omission (*omissio*) did not fall within the scope of the relevant provisions. Further, it should be noted that fault in the form of intent (*dolus*) or negligence (*culpa*) was not originally a prerequisite of liability under the *lex Aquilia*. This fact can be explained on the grounds that the notion of wrongfulness (*iniuria*) initially referred only to an act carried out unlawfully or without justification (*non iure* or *contra ius*). As this suggests, liability in the absence of a valid justification (such as self-defence, necessity or lawful authority) was absolute. At a later stage probably before the end of the Republic, it was recognized that liability for damage was contingent on the existence of fault (*culpa*) in its widest sense; (38)

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(37) The wrongful wounding of another person's slave or four-footed grazing animal, as well as the killing or injuring of animals, falling outside the category of *pecus* were thus assimilated within the scope of the third chapter. See in general *Inst* 4. 3. 13; G 3. 217; D 9. 2. 27. 14; D 9. 2. 27. 15-20; D 9. 2. 27. 22-24; D 9. 2. 27. 33; D 9. 2. 42; D 9. 2. 7. 1-2; D 9. 2. 7. 5; D 9. 2. 7. 7-8; D 9. 2. 27. 6-8; D 9. 2. 27. 12.

(38) D 9. 2. 5. 1. Consider also G 3. 211.

although no clear distinction between the elements of fault and wrongfulness was made. Finally, liability under the Aquilian law presupposed that the object damaged was the property of the plaintiff. Other interested parties who may have suffered loss, such as a usufructuary or a pledgee, had no remedy under this law.

The standard action available to the person who suffered injury under the Aquilian law was the *actio legis Aquiliae*, which was a mixed action (*actio mixta*) insofar as it aimed at recovering the damage inflicted and also punishing the wrongdoer. The punitive element in this action is shown by the fact that the action could not be instituted against the wrongdoer's heirs, unless they had been enriched as a consequence of the wrongful damage to property. (39) It also appears from the fact that the wrongdoer was held liable for the highest value of the damaged property in the preceding year or thirty days rather than for the actual value of such property at the time of the damage. (40) Although the aim of the relevant provisions was to punish the wrongdoer by compelling him to pay more than the actual damages suffered, in some cases the practical result might possibly have been contrary to this goal. Finally, the punitive nature of the *actio legis Aquiliae* is manifested by the fact that where more than one person committed *damnum iniuria datum* the liability was cumulative, i.e. each wrongdoer had to pay the full amount of damages owed to the victim.

Notwithstanding the broadening of Aquilian liability in the pre-classical era, there remained instances of wrongful damage to property with respect to which the *lex Aquilia* did not provide any redress. Consequently, during the classical period the field of application of this law was further extended and adapted to the needs of a developed society. This evolution is displayed by the fact that the *actio legis Aquiliae*, which was originally granted only to the owner of the damaged property or to his

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(39)　On the other hand, the heirs of the person who suffered the damage could employ the action. D 9. 2. 23. 8.

(40)　*Inst* 4. 3. 9.

heir, was later rendered available (usually in the form of a praetorian *actio in factum* or *actio utilis*) [41] to other interested parties who had suffered financial loss, such as the *bona fide* possessor, usufructuary, pledgee, usuary and leaseholder. [42] Furthermore, contrary to the original *lex Aquilia* that provided a remedy for damage only to a tangible thing (*res*) and not to a person, the relevant action was extended to incorporate physical injury inflicted on a free-born person. [43] Another development of importance, largely derived from the contribution of the jurists, related to the assessment of damages. Whereas the amount of compensation initially depended upon the objective value of the damaged or destroyed object, it was later calculated by reference to the extent to which the interest of the aggrieved party (*id quod interest*) had been affected. This amount was then construed to include consequential damages (*damnum emergens*) as well as lost profit (*lucrum cessans*). [44] In this way, the actual loss suffered by the prejudiced person became redressable. [45]

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(41) An *actio in factum* was an 'ad hoc' action granted on equitable grounds to a person who suffered injury in circumstances not covered by existing law. When such an action was allowed, the actual facts of the case were incorporated into a new formula (*formula in factum concepta*). An *actio utilis* was devised by the praetor to deal with a case which was not covered by the existing law but which was analogous to another case with an available legal remedy. However, there was probably no difference in practice between these actions. Indeed, many examples can be found in the sources in which the *actio utilis* and *actio in factum* seem to have been used interchangeably. For example, see D 9. 2. 7. 6; D 9. 2. 9 pr; G 3. 219.

(42) D 9. 2. 11. 10; D 9. 2. 12; D 9. 2. 17; D 9. 2. 27. 14; D 9. 2. 30. 1.

(43) D 9. 2. 5. 3; D 9. 2. 7 pr; D 9. 2. 13 pr. As a result of this extension of the scope of Aquilian law, *damnum iniuria datum* may seem to overlap to some extent with the delict of *iniuria*. In this respect, it should be noted that the extension was intended to make the relevant action available against a person who caused personal injury through negligence, given that *iniuria* primarily envisaged personal injury that was inflicted intentionally.

(44) *Inst* 4. 3. 10; G 3. 212; D 9. 2. 21. 2; D 9. 2. 22; D 9. 2. 23 pr-7; D 9. 2. 33 pr; D 9. 2. 37. 1; D 9. 2. 7 pr; D 9. 2. 27. 17; D 9. 2. 29. 3; D 9. 2. 41 pr; D 9. 2. 45. 1. It should be noted that sentimental value (*affectiones*) was not taken into consideration.

As previously noted, the *lex Aquilia* originally required that the damage had been caused directly by means of a physical act. However, as Roman society evolved this requirement was considered too restrictive. Thus, the requisite link between cause and effect was discerned even in cases where damage had been caused indirectly and consequently the scope of Aquilian liability was considerably extended. Such a link was recognized, for example, in a case where a slave had been locked up in a barn and died of starvation, or where one helped a slave to escape. In such cases the praetor granted *actiones in factum* or *actiones utiles*, since the *actio legis Aquiliae* applicable under the *ius civile* was not allowed. No general rule was laid down, but these praetorian actions were made available, in a casuistic fashion, whenever the causal link between the wrongdoer's conduct and the damage was recognized by society as existing and not being too remote. A mere omission to act did not give rise to delictual liability. However, this rule was subject to the qualification that a person who had previously made a positive undertaking had to carry it through to its proper completion. (46)

Finally, although initially Aquilian liability only required that the damage caused was done unlawfully (*iniuria*), the jurists began to interpret *iniuria* in a broader sense involving both wrongfulness and fault (*dolus* or *culpa*) as two distinct elements. This development, which culminated in the post-classical era, was probably precipitated by the extension of the casual link from direct to indirect causation. An

(45) It should be noted that if the defendant acknowledged liability *in iure*, the case that followed was concerned with establishing the amount of compensation he had to pay. See D 9. 2. 23. 11; D 9. 2. 24; D 9. 2. 25. 2. However, if he denied liability and the ensuing case entailed a judgment against him, he was ordered to pay twice the fixed amount of compensation. See D 9. 2. 2. 1; D 9. 2. 23. 10; G 4. 9; G 4. 171; C 3. 35. 4-5.

(46) A well-known example of an omission giving rise to delictual liability relates to the doctor who failed to provide adequate post-operative care to a patient. See *Inst* 4. 3. 6. Consider also D 9. 2. 8 pr; D 9. 2. 27. 9; D 9. 2. 30. 3.

action causing damage to property was wrongful if it had been committed with intention (*dolus*) or negligence (*culpa*). [47] Furthermore, such action had to be done without lawful justification or excuse. The main defences that could be pleaded by the defendant were self-defence, [48] necessity, [49] acquiescence or consent, [50] incapacity [51] and lawful exercise of disciplinary authority. [52]

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(47) With regard to negligence as a form of fault it was stated that even the slightest negligence would give rise to liability for damage to property. As previously explained, negligence was construed as a failure to foresee what a reasonable man (*bonus paterfamilias*) would have foreseen. A person practising a profession requiring special knowledge or skill had to exhibit a reasonable degree of such knowledge or skill. Failure to do so amounted to negligence, even though the ordinary reasonable man would not have that knowledge or skill. See in general D 9. 2. 44 pr; D 9. 2. 11 pr; *Inst* 4. 3. 7; *Inst* 4. 3. 8; D 9. 2. 8. 1. See also G 3. 202; G 3. 211; *Inst* 4. 3. 3-4; *Inst* 4. 3. 14; D 9. 2. 5. 1-2; D 9. 2. 6; D 9. 2. 8 pr; D 9. 2. 29. 2-4; D 9. 2. 30. 3; D 9. 2. 31.

(48) This defence was based on the claim that the defendant had caused damage in defending his person or property against the plaintiff. However, for the defence to succeed it was required that the defendant had used no more force than was necessary to prevent the harm. Moreover, where a person in trying to defend himself or his property accidentally inflicted injury on another (*aberratio ictus*: diversion of the blow), he was liable to the third party. On the defence of self-defence see D 9. 2. 4 pr-1; D 9. 2. 5 pr; D 9. 2. 30 pr; D 9. 2. 45. 4.

(49) In this context, the defendant claimed that he had caused damage to another's property to save his own life or to protect his own property. See D 9. 2. 29. 3; D 9. 2. 49. 1; D 47. 9. 3. 7.

(50) It was recognized that where a person expressly consented to certain harm or risk of harm, he had only himself to blame for any actual harm. This ground of justification is recited in modern law as *volenti non fit iniuria* ("no injury is done to a person who consents"). On this defence see D 2. 14. 7. 13; D 9. 2. 27. 29; D 47. 10. 1. 5; D 9. 2. 11 pr; D 9. 2. 7. 4.

(51) Lunatics and children under the age of seven could not be held liable as they were considered to be incapable of *dolus* or *culpa*. D 9. 2. 5. 2.

(52) No more than a light form of chastisement (*levis castigatio*) was allowed. D 9. 2. 5. 3; D 19. 2. 13. 4.

Iniuria

The term *iniuria* in its widest sense signified wrongfulness in general or the absence of a right. As the name of a particular delict, however, it had a more specific meaning: it denoted the intentional and unlawful infringement of the body, honour, or reputation of a free person. (53)

Originally there was no general delict of *iniuria*, but the Law of the Twelve Tables recognized a diversity of specific cases in which remedies were granted for attacks on a person's right to his personal integrity. For instance, penalties were imposed for the use of magical incantations or the casting of spells over a person (*malum carmen incantare* or *occentare*). (54) However, the provisions of this law, from which the classical delict of *iniuria* eventually descended, dealt principally with physical assaults. The mutilation or permanent disablement of a limb (*membrum ruptum*) was initially punished by means of *talio* (an eye for an eye and a tooth for a tooth) but could later be redeemed by payment of a penalty; whilst the breaking of a bone (*os fractum*) invoked fixed pecuniary penalties. (55)

In the course of time, the early forms of delict involving injury to person elaborated in the Law of the Twelve Tables were superseded by a general delict of *iniuria* – a development precipitated by the activities of the praetor and completed by the jurists. (56) A pivotal point in this process was the introduction by the praetor of the *actio aestimatoria iniuriarum* in place of the obsolete *talio* and the fixed monetary

(53)　D 47. 10. 1 pr.

(54)　*Malum carmen incantare* and *occentare* are identified by later writers with *iniuria* (as later understood) caused by defamatory words or songs. For example, see Cicero, *De repub*. 4, 10, 12.

(55)　Relatively small penalties were imposed for other forms of violence deemed in Roman law as less serious, such as rape, simple wounding and deprivation of freedom. See G 3. 223.

penalties that had become derisory as a result of inflation. This legal device was a penal action (*actio poenalis*) by means of which the victim could claim an amount assessed in accordance with the circumstances of the case as well as the judge's views on a just and equitable outcome. Originally the action was promised as a separate action in each particular case, but at a later stage it was made applicable to all cases of *iniuria*. At the same time, a series of edicts induced an expansion in the meaning of *iniuria* to include not only physical assaults but also an ever-growing range of offences against a person's honour or reputation. (57)

The principal element of *iniuria* was *contumelia*: a wrongful infringement of another person's bodily integrity, honour or reputation that ultimately encompassed even wanton interference with another person's public or proprietary rights. (58) It was required that the victim had suffered a discernible injury to his feelings or senses. Thus, if the victim did not show immediate resentment it was assumed that he did not feel the injury and the relevant action would not lie. (59) Furthermore, the infringement

(56) It should be noted that the *lex Cornelia de iniuriis* (81 BC), enacted in the time of Sulla, introduced a remedy in the form of criminal prosecution for certain forms of personal assault and for breaking into another person's dwelling. See D 3. 3. 42. 1; D 47. 10. 5 pr; *Inst* 4. 4. 8. In classical and later law it was possible for the aggrieved person to utilize both civil and criminal remedies. See *Inst* 4. 4. 10.

(57) D 47. 10. 1. 1. The term *convicium* encountered in this section denoted an insult expressed in a crude language. Consider also *Inst* 4. 4 pr-1; G 3. 220. In the course of time the jurists extended the scope of *iniuria* to encompass any wanton interference with another person's rights.

(58) Examples of such infringements included assault and battery, defamation, trespass, public abuse against another, malicious prosecution, the exercise of a servitude without a claim of right, the violation of the chastity of a woman or child, threatening, throwing rubbish on a neighbour's property, causing nuisance with water or smoke, making a false announcement that someone owes one a debt, preventing someone from taking a seat in a theatre or from using a public washing facility, and preventing someone from fishing in the sea - in sum, any form of unwarranted interference with another's rights.

had to be committed intentionally or deliberately (i.e., with *animus iniuriandi*: an intention of injuring). (60) The delict of *iniuria* did not encompass a negligent or fortuitous act that could cause harm to another person. (61) Finally, the injury-causing act had to be unlawful, i.e. it was committed without a recognized justification or defence. Such defences included the lawful exercise of disciplinary authority, (62) retortion or self-defence, (63) mistake, (64) incapacity, (65) acting in the heat of the moment, (66) acting in jest or joviality, (67) or telling the truth. (68)

Delictual liability for *iniuria* could arise directly or indirectly, for example by

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(59) See *Inst* 4. 4. 12. It was asserted that such action was one of *vindictam spirans* (‘breathing revenge’) to indicate that the plaintiff was vengeful and wished for the removal of the *contumelia*.

(60) D 47. 10. 3. 1; G 3. 220; *Inst* 4. 4. 1. The term *animus iniuriandi* does not appear in Roman juridical literature.

(61) As noted earlier, this explains the necessity for expanding the effect of the *lex Aquilia* to provide a remedy for bodily harm caused by negligence.

(62) Deeds committed by an official by virtue of his authority provided no ground for delictual liability for *iniuria*. See D 47. 10. 13. 6. Moreover, it was recognized that a patron or master might legitimately exercise light discipline towards his freedman or slave respectively.

(63) For such a defence to succeed the retortion had to be proportionate to the injury caused. See C 8. 4. 1.

(64) This defence could be relied upon if the defendant *bona fide* believed that he was justified in committing the deed elaborated in the plaintiff’s complaint. However, a mistake as to the identity of the victim did not exclude liability for *iniuria*. D 47. 10. 3. 4; D 47. 10. 18. 3.

(65) Lunatics and children under the age of seven could not be held liable for *iniuria* since they were deemed incapable of forming the requisite intent. D 47. 10. 3. 1. Intoxication was not recognized as a defence in classical law, but it might have been accepted as such in the post-classical period. See C 9. 7. 1.

(66) A defendant could claim that because the injury-causing deed was committed in the heat of anger, during a quarrel or after provocation, he had not formed a clear intention to injure. See D 50. 17. 48.

(67) The defendant might assert that his act or words was intended as a joke. D 47. 10. 3. 3.

insulting the wife, children or other dependants of another and thereby injuring the husband, father or master. For a person to claim that he suffered injury indirectly or as a consequence of a wrongful act directed against another (*iniuria per consequentias*), he had to prove that the requisite relationship between him and the person immediately affected existed at the time the injury was inflicted as well as at the time the relevant legal action was instituted. It was required, moreover, that the wrongdoer was aware of such relationship. (69)

As already noted, the action available to the aggrieved person was the *actio aestimatoria iniuriarum* (also referred to as *actio iniuriarum*) in terms of which the judge was required to determine the amount of the penalty in light of all the surrounding circumstances. (70) In this action the injured party made an initial assessment of the amount of the penalty and the judge was instructed to sentence the defendant to what seemed to him as right and equitable (*bonum et aequum*), but not to a larger sum than that demanded by the plaintiff. (71) The *iniuria* could be assessed as slight or grave (*iniuria atrox*), depending on the circumstances in which it was committed. An injury might be *atrox* by reference to the manner in which it was

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(68) The defendant might claim that, when he made the comment complained of, he was simply telling the truth about the misdeeds of the plaintiff. Such a claim operated as a defence on the grounds that a person should not be allowed to recover for injury caused by his own behaviour, as well as on the public policy grounds that wrongdoings should be made public. However, this defence would fail where there was an obligation of secrecy on the part of the defendant arising from a personal or confidential relationship. D 47. 10. 18 pr; D 9. 2. 41 pr.

(69) G 3. 221; *Inst* 4. 4. 2; D 47. 10. 1. 3. Originally a husband suffered *iniuria* when an offence was committed against his wife only if she was in his *manus* (see the relevant discussion in the chapter on the law of persons above). A wife was not considered to suffer injury by an insult to her husband. It should be noted that if the person immediately affected consented to the injury, this did not preclude his or her relatives from instituting an action against the wrongdoer. See D 47. 10. 26.

(70) G 3. 224; *Inst* 4. 4. 7; D 47. 10. 7 pr; D 47. 10. 17. 5.

inflicted (*ex facto*); the place where it occurred (*ex loco*); the status of the victim (*ex persona*); and the part of the body injured (*ex loco vulneris*). (72) In the case of *iniuria atrox* the praetor prescribed a sum for which the defendant was required to provide security (*vadimonium*). Such security served as assurance that the defendant would appear in court and defend the action. From this security the sum due to the plaintiff, if the latter won the case, was also paid. The *actio iniuriarum*, being penal, could be brought only by the aggrieved person himself against the wrongdoer personally but not against his heirs. (73) Furthermore, the action was cumulative against accomplices and accessories, i.e. each offender had to pay the full penalty. (74)

Quasi-Delicts

A fourth category of obligations referred to in the Institutes of Justinian are the obligations arising from quasi-delicts (*obligationes quasi ex delicto* or *quasi ex maleficio*). The term *quasi-delictum* denoted a wrongful act that did not qualify as a *delictum* but which nevertheless engendered an obligation between the aggrieved person and the actor, even though the latter may not in fact be blameworthy. (75) Justinian enumerates four kinds of wrongdoing under the heading of quasi-delicts, of which the last three appear to have related to vicarious liability.

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(71) In the case involving a claim for *iniuria per consequentias*, the penalty recoverable by the relative was not necessarily the same as that recoverable by the person directly affected by the wrongdoer's action. For example, if the daughter of a state official was insulted, the official would probably recover more than his daughter. See D 47. 10. 30. 1.

(72) G. 3. 222 & 225; *Inst* 4. 4. 7 & 9; D 47. 10. 7. 8; D 47. 10. 8; D 47. 10. 9 pr-4.

(73) D 47. 10. 13 pr; G 4. 112.

(74) D 47. 10. 11 pr; D 47. 10. 11. 6. The action had to be brought within one year after the wrongful act complained of had occurred. See C 9. 35. 5. Condemnation in terms of this action entailed *infamia*. D 3. 2. 4. 5.

Iudex qui litem suam facit

A judge (*iudex*) who formulated a wrong decision either deliberately or negligently [76] with the result that a litigant wrongfully suffered damage was personally liable and could be sued by the aggrieved litigant with a praetorian action for damages. [77] It should be recalled that a judge in Roman society was originally a private citizen and not necessarily an expert in legal matters. This remained so even at a later stage when the role of judge was granted to magistrates and imperial officials. Furthermore, if a judge did issue a wrong decision there was either no possibility of appeal or only a limited possibility. It was necessary, therefore, to provide some protection to litigants prejudiced by a wrong or unfair judgment owing to the judge's dishonesty, negligence, or ignorance.

Res deiectae vel effusae

The occupier of a building from which objects were thrown (*deiectae*) or poured (*effusae*), no matter by whom, onto a public place could be sued with a

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(75) The rationale for the classification of certain obligations as quasi-delicts remains unclear. Evidence suggests that this classification originated in the law schools of the Eastern Roman Empire and was probably the result of interpolation. This approach seems to derive support from the fact that in classical law the relevant institutions were subsumed in the category of *obligationes ex variis causarum figuris* (obligations arising from various causes). See D 44. 7. 1 pr.

(76) Such a judge was said to 'make the case his own' (*qui litem suam fecerit*). This phrase originally meant that the judge behaved as if he were a party to the case, not a judge, but it later came to refer to any irregularity in the decision-making process.

(77) *Inst* 4. 5 pr; D 44. 7. 5. 4; D 50. 13. 6.

praetorian *actio in factum* by passers-by who suffered damage to person or property. It was unimportant whether the damage was caused intentionally, negligently or by accident. If property was damaged, the action pursued twice the amount of damage caused. If a free person was killed, there was a fixed penalty of 50 *aurei*; [(78)] if he suffered bodily harm, the penalty was determined by the judge by taking into consideration medical costs and other financial losses. [(79)]

Res suspensae vel positae

An action could be instituted against the occupier of a building when an object was suspended or placed in such a way as to pose a danger to passers-by (e.g., a plant-pot placed on a windowsill). In this case, it also made no difference whether the object was placed in the dangerous position by the occupier or some other person, nor did it matter whether intent or negligence or neither was present. The relevant action was an *actio popularis*, i.e., it could be brought by any member of the community in the interest of public order and was for a fixed penalty of ten *solidi*. If the object fell, it was held to have been thrown down and so the *res deiectae* action mentioned above applied. [(80)]

Nauta, caupo, stabularius

The master of a ship (*nauta* or *exercitor navis*), innkeeper (*caupo*) and stable-keeper (*stabularius*) incurred vicarious liability for theft of and damage to the

(78)　Any member of the public could institute the relevant action within a year (i.e. such action was an *actio popularis*), but preference was usually given to close relatives. D 9. 3. 5. 5.

(79)　See *Inst* 4. 5. 1; D 9. 3; D 44. 7. 5. 5.

(80)　*Inst* 4. 5. 1-2; D 9. 3. 5. 6-13; D 44. 7. 5. 5.

property of their clients (passengers or guests) committed by their slaves or employees on board the ship or on the premises in question. Innkeepers were moreover liable for the same wrongful acts of permanent residents. A praetorian *actio in factum*, penal in character, lay for twice the value of the property concerned. In this context, liability was sometimes understood to arise from the negligence of the person in charge of the relevant activity in the choice of his employees. (81)

Praetorian delicts

In addition to the delicts deriving from the *ius civile*, the praetor created a number of penal actions in respect of certain forms of misconduct for which the civil law made no provision. The wrongdoings to which these actions applied are commonly referred to as praetorian delicts. (82) There were numerous such delicts, but we need only consider the two most important of them, namely duress or compulsion (*metus*) and fraud (*dolus*).

Metus

Metus came to the fore when a person was induced by threats of violence to enter into a legal act to his own detriment. If the legal act originated in the *ius civile*, the duress had no effect on it and the act remained perfectly valid in all respects. To rectify this unsatisfactory situation, the praetor intervened, and a number of legal remedies were made available to persons subjected to duress, provided the force or threat of force used was of such nature that a reasonable person would have feared

(81) *Inst* 4. 5. 3; D 44. 7. 5. 6; D 47. 5.

(82) The term is not of Roman origin.

imminent danger to his person, property or family. Threats capable of supporting a claim of duress included physical injury, death, enslavement, an accusation on a capital charge, or an attack upon the chastity of the person threatened or a member of his family. (83)

From an early age in legal history, the person forced by duress to conclude a legal transaction arising from the *ius civile* was granted the *exceptio metus* (or *exceptio quod metus causa*) by the praetor as a defence against any person seeking to profit by the transaction in question. (84) However, if the transaction was based on *bona fides*, raising the *exceptio metus* was superfluous as good faith did not require performance of an obligation arising from a transaction concluded under duress. (85)

Where the legal act entered into under duress had already been executed and financial loss had been suffered as a result, the praetor made available to the aggrieved person a *restitutio in integrum* whereby the latter could request the restoration of the legal situation that existed prior to the conclusion of such act. This meant that the relevant legal act was annulled, and the payment or other performance already made had to be restored. (86)

A much stronger remedy was the *actio quod metus causa* (also referred to simply as *actio metus causa*), a penal action applicable whenever someone incurred financial loss as a result of duress and that pursued a payment of four times the value of such loss. With the introduction of this action towards the end of the republican age, *metus* was granted recognition as an independent delict. The action was

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(83)　See D 4. 2. 1. A threat to do something lawful or the existence of a vague fear were not sufficient to establish duress. See D 4. 2. 3. 1; D 4. 2. 5; D 4. 2. 6. And see D 4. 2. 4; D 4. 2. 7-9.

(84)　D 44. 4. 4. 33. And see G 4. 117; D 4. 2. 9. 3; D 4. 2. 14. 9; C 8. 37. 9 pr. It should be noted that the *exceptio metus* was granted also against a plaintiff who did not himself use duress.

(85)　It may be said that the *exceptio metus* was inherent in all *actiones bonae fidei*, i.e. actions with respect to which good faith was explicitly taken into consideration. See C 4. 44. 1.

(86)　D 4. 2. 3 pr.

instituted by the party who suffered loss against any person (even if he were *bona fide*) who profited from the act performed under duress and not necessarily against the wrongdoer. If, for instance, someone compelled another by duress to transfer property to a third party, the person incurring the loss could institute the action against the third party. [87] Furthermore, the action had to be instigated within a year after the legal act in question otherwise the prejudiced party's claim was only for simple damages. [88] It is interesting to note that when this action came to the fore the defendant was given the choice to avoid condemnation by restoring the property he had obtained through duress or, if such property was not restored, to be sentenced to pay four times the value of the plaintiff's loss. [89]

Dolus

Dolus (or *dolus malus*) denoted any fraud, deceit or contrivance employed to induce a person to enter into a legal transaction to his own detriment. [90] Just as in the case of duress, *dolus* did not invalidate a transaction that arose from the *ius civile* and the victim had no remedy against the defrauder, except perhaps on the ground that the fraud had induced an error on his part. However, in the first century BC the praetor intervened and granted the *exceptio doli* to the person who had been conned into concluding a legal transaction as a defence against an action aimed at enforcing such transaction. [91] As in the case of duress, raising this defence was not necessary where

(87) D 4. 2. 9. 8; D 4. 2. 14. 3; D 4. 2. 14. 5.

(88) D 4. 2. 14. 1; D 4. 2. 14. 7; D 4. 2. 14. 2.

(89) D 4. 2. 14. 1; D 4. 2. 14. 3-4; *Inst* 4. 6. 31. It should be noted that condemnation in terms of the *actio quod metus causa* did not give rise to *infamia*.

(90) Consider D 4. 3. 1. 2.

(91) D 4. 3. 40; G 4. 117; G 4. 119; G 4. 121; D 44. 4. 2. 3; D 44. 4. 4. 33.

the legal transaction in question was based on *bona fides*. When the transaction had been executed and loss had already been suffered, the praetor granted *restitutio in integrum* to the defrauded party. This remedy was apparently assimilated at an early stage by the *actio doli* and *dolus* was elevated to the status of an independent delict.

The *actio doli* was a penal action applicable where a person incurred financial loss as a result of fraud and was directed at compensation for the actual loss suffered. (92) This action differed from the *actio quod metus causa* in that it could be brought only against the actual defrauder and not against third parties, probably because it entailed *infamia*. (93) On the other hand, as in the case of the action arising from duress, the *actio doli* had to be instituted within a year and the defendant could avoid condemnation by restoring what he had fraudulently obtained (if he could do so). (94) Finally, it is important to note that the *actio doli* was a subsidiary action (*actio subsidiaria*) since it could be employed only if no other remedy of any kind was available. (95) For example, a person who was induced by fraud to purchase an object could not use this action against the seller, because his action in respect of the sale (*actio empti*) would address the matter.

Noxal liability

The Roman law of delicts proceeded from the principle that the wrongdoer was personally liable and, accordingly, it was against him that the injured person was entitled to take revenge. The personal nature of delictual liability is reflected in the

(92) D 4. 3. 1. 1. The *actio doli* was introduced by the praetor and jurist Aquilius Gallus in ca 66 BC.

(93) D 4. 3. 15. 3; D 3. 2. 1.

(94) D 4. 3. 18 pr; *Inst* 4. 6. 31.

(95) D 4. 3. 1. 1; D 4. 3. 1. 4.

way Roman law dealt with cases involving wrongful acts committed by persons *in potestate* or slaves. Since no claim in law could be laid against such persons, the claim was laid against the *paterfamilias* or master of the slave (*dominus*) in the form of an *actio noxalis*. If, for example, a slave committed theft, the *actio furti* could be instituted as an *actio noxalis* against the slave's master. Originally, the purpose of the *actio noxalis* was to demand that the *paterfamilias* or *dominus* should surrender the wrongdoer (*noxae deditio*) to the injured person so that vengeance could be taken on him. This entailed a conflict between the injured person's right of revenge and the *potestas* of the father or master, which was in later times resolved by allowing the latter to 'buy off' the injured person by paying a penalty. (96) An important principle in this regard was that noxal liability followed the wrongdoer (*noxa caput sequitur*). This meant that if the dependant person was emancipated or the slave freed before the action was brought, such dependant or slave became personally liable by means of an ordinary action; if the slave was sold, the *actio noxalis* had to be instituted against the person who was his owner at the time of the joinder of issue (*litis contestatio*). (97)

During the late imperial age noxal liability in respect of free-born persons *in potestate* fell into disuse and, accordingly, the *actio noxalis* was retained only in respect of wrongful deeds committed by slaves. (98)

Actio de pauperie

Roman law recognized a special form of noxal liability in cases where a four-footed animal caused damage in circumstances in which its owner could not be held at fault. Such damage was known as *pauperies* and gave rise to an *actio de pauperie* –

(96) D 9. 4. 1. And see *Inst* 4. 8 pr. The term *noxa* denoted both the 'body which inflicted the damage' (*Inst* 4. 8. 1) and the indemnification itself.

(97) D 47. 2. 18; D 47. 2. 41. 2; G 4. 77; *Inst* 4. 8. 5.

a remedy deriving from the Law of the Twelve Tables – by means of which the owner of the animal could be compelled either to compensate the wronged party or to surrender the animal. (99) Originally the *actio de pauperie* applied to all four-footed animals but was later extended to other animals in the form of an *actio utilis*. (100) At the same time, however, the jurists limited the class of animals covered to domestic animals (such as horses, sheep, oxen and dogs). (101) For the plaintiff to succeed, he had to show that the animal had caused the damage by acting 'contrary to its nature' (*contra suam naturam*). (102) This somewhat obscure phrase means that the animal must have behaved in a manner contrary to what the aggrieved person could reasonably have expected of it, if all circumstances were taken into consideration. (103) If the damage was caused by a wild animal, the *actio de pauperie* did not apply as it

(98) *Inst* 4. 8. 7. This development was connected with the fact that the *filiusfamilias* acquired sufficient independence and means (*peculium castrense*) to be able to satisfy claims arising from their own delicts. Moreover, as Roman society evolved, revenge played a lesser part than the payment of money as a means of satisfying an obligation arising from delict. Thus, even with respect to slaves, the whole idea behind noxal liability was no longer revenge, but the need to provide pecuniary satisfaction for the injury caused. Thus, a slave who could find sufficient money to make good the damage he had caused was entitled to be liberated.

(99) D 9. 1. 1 pr; D 9. 1. 1. 11. It should be noted that if the animal died before the joinder of issue (*litis contestatio*), the owner of the animal was not liable at all. But if it died after the *litis contestatio*, the liability to compensate remained intact and the owner, in case of condemnation, had to satisfy the victim's claim. See D 9. 1. 1. 12 -14.

(100) The term *actio utilis* denotes an action developed through an extension or modification of an already existing action to address a situation not covered by the present law.

(101) Consider D 9. 1. 1. 2; D 9. 1. 4.

(102) D 9. 1. 1. 7.

(103) Thus, if an animal behaved in a dangerous manner by nature (e.g. a dog that was inclined to bite), the action still applied. On the other hand, a person who was bitten by a another's dog in the street would not have expected to be attacked in such a manner. Moreover, the action would fail if the damage was caused by an animal that had been provoked by the person attacked or had kicked out because it was excited by pain. *Inst* 4. 9 pr; D 9. 1. 5; D 9. 1. 1. 7; D 9. 1. 1. 10.

was considered to be in the nature of such an animal to cause damage. [104]

Concluding Remarks

As the above discussion has demonstrated, Roman law, which formed the basis of modern civil law systems, developed delictual liability in a piecemeal fashion. When the medieval Commentators [105] examined the Roman law of delicts, they observed that it possessed two peculiarities: first, delictual liability was incurred only where *dolus* or *culpa* could be attributed to the defendant – i.e., where he caused an injury to person or property either intentionally or negligently; secondly, the law of delicts had evolved around a number of nominate delicts, namely *iniuria, furtum, rapina* and *damnum iniuria datum*. The existence of such a scheme indicated that there was no basis in Roman law for a general concept of delictual liability. Thus, the *actio legis Aquiliae*, mentioned earlier, though extended by juristic interpretation and praetorian initiatives, retained its character as an action for unjustified damage to property; it never became a general remedy for those who had suffered loss by the negligence or wilful actions of others. Nevertheless, the result of these extensions was, in the words of Jolowicz, "something approaching the position according to which any damage culpably inflicted gives rise to an action for compensation." [106] That position was eventually reached partly as a result of pressure by legal

(104) If a wild animal escaped from captivity and attacked a person, the victim had no claim since such animal became a *res nullius* when it escaped and thus there was no master to sue. It should be noted, however, that the aedilician edict gave an action for damages against any person who kept wild animals near a public road. Furthermore, Justinian extended the scope of application of the *actio de pauperie* to include damage caused even by wild animals. See D 9. 1. 4; *Inst* 4. 9. 1; D 21. 1. 40-42.

(105) On the work of these jurists see G Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Springer, Heidelberg, 2015) 250 ff.

practitioners and partly through the influence of the natural lawyers of the seventeenth and eighteenth centuries who believed that law should be developed on the basis of reason rather than history. At the time of Napoleon's codification, it was considered axiomatic that any person who by his conduct caused damage to another was obliged to compensate him, if the damage was caused wilfully or negligently. (107) It is thus now generally recognized that the function of the law of delicts is to compensate a person who has suffered damage trough certain acts or omissions of others. In the eyes of modern civil lawyers, compensation is the means by which the dictate of justice that one who has wrongfully caused harm to another ought to repair it, is satisfied. Another view that has gained ground in modern law is that a person who causes injury to another must compensate him for it, whether he was at fault or not. Adherents of this approach advocate liability even without fault, at least for damage done in the course of hazardous occupations. In general, the basic rules of delictual liability in contemporary civil law systems are described in statutory enactments and these rules are relatively uniform. These statutory rules are complemented by case law. The following conditions hold for the existence of fault liability in civil law jurisdictions: (a) there must be an act or omission that unlawfully violated a legally protected interest; and (b) such act or omission must have caused harm of a type that qualifies for compensation. In theory there is still a third

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(106) HF Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law*, (3rd ed, Cambridge University Press, Cambridge, 1972) 513.

(107) The delict provisions in the French Civil Code are largely attributed to the French jurist Jean Domat, who, in te seventeenth century, distinguished between intentional breaches of the law, breaches of contract and negligence. Fault was regarded as the principal criterion of liability. In addressing the question of what conduct should be deemed wrongful, the French jurists adopted the approach adopted by the Roman jurists and used the criterion of conduct that fell short of the standard of the reasonable person (*bonus paterfamilas*). Domat's work inspired the jurist Robert Joseph Pothier, who divided conduct giving rise to liability into delicts and quasi-delicts.

requirement for liability, namely that the person who caused the damage is blameworthy. However, the practical relevance of this third requirement is rather limited because blameworthiness is usually assumed if the behaviour fell short of the standard of a reasonable person. Although the various civil law jurisdictions differ in the way in which they prescribe what counts as an unlawful violation of a legally protected interest, they have in common the fact that they provide for the protection of both individual rights and written and unwritten legal norms against both intentional and merely negligent violations.

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