

I. THE *LEX AQUILIA*

1. The lex Aquilia as an exercise in juristic method. I would like to take two cracks at it. Both cracks can be supported by texts. The question I want to leave you with is which is truer to the texts. The first approach is what I will call pandectist. It assumes that the jurists, at least in the Classical period, were dealing with a conceptual scheme that can be pieced together from the texts. That scheme turns out to be not unlike the modern Continental one and not too far different from our own. (Both of our papers [BS04_dr1, KC04_dr1] take this approach, and both do a very good job at it.) The second approach is historical. It argues that we cannot assume that there is a conceptual scheme to be found there, nor that the jurists of one period thought the same way as the jurists of another.
2. Both approaches agree on the following:
 - a. We begin with a statute (287 B.C. X 142 B.C., D.9.2.27.22 (on a mare miscarrying Brutus says you're liable for *rumpere*) tells us that M. Junius Brutus who was praetor in 142 commented on the statute; it was a plebiscite and hence must be later than the *lex Hortensia* of 287) which says: "If anyone wrongfully kills another's slave of either sex or his four-footed beast that lives in herd, let him be compelled to pay whatever was its greatest value in the past year." D.9.2.2.1. p. VI.A.5. "Regarding all other things except a human or a herd-animal killed, if anyone does damage to another by wrongfully burning, breaking or maiming, whatever the value of it in the last 30 days let him be condemned to pay to the owner." D.9.2.27.5. p. VI.A.10. Daube's chariot.
 - b. Whatever the statute originally applied to, by the time we see it all corporeal things are covered, and *rumpum* means any physical damage. G.3.217, p. II.A.64.
 - c. Whatever the statute originally applied to circumstances were considered in assessing damages. G.3.212, p. II.A.63 "In an action under this statute it is not only the value of the thing damaged in itself that is assessed, but also if by the killing of his slave an owner suffers loss exceeding the value of the slave, this too is assessed." He offers the example of a slave that had been instituted heir but had not entered into the inheritance, and the example of slave twins, or a member of a troupe of actors or musicians. *Damnum emergens* and *lucrum cessans*. (Schulz considers this a bad text.) But not speculative damages. D.9.2.29.3 (value of the fish that weren't caught when the nets are damaged, p. VI.A.13, Ulpian). Or affection. D.9.2.33pr (the slave who is your natural son, p. VI.A.14, Paul).
 - d. The praetor granted some extensions under the name of *actio utilis* or *actio in factum* [Skip: Schulz, p. 32: both terms classical but the latter not used where the analogous *actio* is praetorian (because both actions would be *in factum concepta*. This is interp where found. Later Schulz doubts whether the *actio in factum* that we sometimes find in the *lex Aquilia* texts is interpolated, but it needn't be because the underlying action was *in ius concepta*.)]:
 - i. to the non-owner usufructuary or *bona fide possessor* D.9.2.11.8, 10, p. VI.A.7–8. But not the non-possessor. D. 9.2.11.9, the borrower, p. VI.A.8.
 - ii. To situations where the action was not direct. D.9.2.7.6 (poison in the guise of medicine or a sword to a lunatic, p. VI.A.6), D.9.2.9.3, p. VI.A.7 A frightened horse. Luring into an ambush. G.3.219: "It has been decided that there is an action

under the statute only where a man has done damage with his own body; consequently actions on the case are granted if the damage has been caused in some other way, for example, if one shuts up and starves to death another man's slave or cattle, or drives his beast so hard that it founders, or if one persuades another's slave to climb a tree or go down a well and he falls and is killed or physically injured in climbing up or down, or if one throws another's slave into a river from a bridge or a bank and he is drowned, though in this case there would be no difficulty in seeing an infliction of damage with the defendant's body in the act of throwing." (This is one where the river god does the killing, quoted in full below in no. 4.) The material here is something of a mess. Gaius's version of the story is clear enough, but his confusion is probably based on the fact that the Republican jurists had a more direct notion of causation and hence may not have gone as far.

3. The difficulty comes when we try to go beyond this. To characterize the principles of liability with which the jurists were working. Here's what we might call a pandectist view. It operates ahistorically. By doing that we ended up with a summary something like this: The basic principles were really quite simple: a person should be liable to compensate another for injury which he has caused him by his fault. That fault can be the fault of failing to take care where a reasonably prudent man would have taken care or it can be where the injury was intended. These words are, of course, full of pitfalls. The injury may be deemed not to have been caused by the defendant's conduct if there was some intervening cause or if the plaintiff's negligent actions contributed to the injury or if the plaintiff assumed the risk. On the other hand, where the act was intentional we won't go into the causation problem that deeply. Like all liabilities this one must have limits in the interests of freedom. The law does not consider negligently caused non-physical damage. There is no general duty to act. Only where you've undertaken something are you liable for the consequences. The action does not lie against the defendant's heirs except where they have been enriched. There is no action for the negligent slaying of a free man. Contract trumps liability under the *lex*. In the case of intentional acts necessity, self-defense, protection of rights, and consent of the plaintiff may all be defenses.
4. Now texts can be found to support all of these proposition. The best of the pandectists were no fools. There may be args about some of the texts, but texts can be found. What can't be found is a statement like the one I made above. The closest we come is in the institutional treatises, and I think we should be careful about Emmanuel's outlines. The key passages in Gaius are 3.211 and 3.219 [pp. II.A.63, (quote continued above)] ("He is deemed to kill wrongfully by whose malice or negligence the death is caused. There being no other statute which visits damage caused without fault, it follows that a man who, without negligence or malice, but by some accident, causes damage, goes unpunished." For the rest we have to abstract from the jurists solution to particular problems:

D.9.2.8.1 (p. VI.A.7 (Gaius 7 Provincial Edict)): "If a mule-driver through inexperience is unable to hold in his mules so that they run over another's slave, he is usually held on the ground of negligence. This is true even if he could not prevent the advance of the mules on account of weakness; and it is not inequitable that weakness should be counted a fault since one ought not to embark on an enterprise in which one knows or ought to know that his weakness will be dangerous to others." Gaius on the mule-driver, standard of care.

D.9.2.9.4, p. VI.A.7: “If a slave is killed by those who are throwing javelins for sport, the Lex Aquilia applies, but if men are throwing javelins in a field and the slave crosses it, there is no action, because he ought not unseasonably to make his way over the playing field. Nevertheless, one who hit the slave on purpose would be liable under this statute.” Ulpian on the javelin throwers, contrib. neg. and assumption of risk.

D.9.2.11.pr, p. VI.A.7: “Mela gives another case: if a ball game was going on and a player hitting the ball knocked it against the hand of a barber so that the throat of the slave being shaved by the barber was cut by the razor, whoever of them was negligent will be held under the Lex Aquilia. Proculus holds that the barber was at fault; and truly, if he was doing business near a place usually devoted to sport or where there was heavy traffic, he is partly responsible; but there is much to be said for the view that he who engages a barber who has set up his stool in a dangerous place has only himself to blame.” Ulpian (Mela, Augustan jurist, and Proculus) on the barber, same.

D.9.2.11.1,2,3, p. VI.A.7: “If one holds a slave and another kills him, the former is liable *in factum* for having furnished the cause of death. 2. But if several strike a slave, let us consider whether all are held for killing. If it can shown who gave the mortal wound, he will be liable for killing; if not, Julian says that all are liable for killing: and if one has been sued, the others are not released, for what one pays under the Lex Aquilia does not relieve another, as a penalty is involved. 3. Celsus writes that if one gives a slave a mortal wound and another later kills him, the former will not be held for killing but for wounding, since the slave died from another wound; the latter the will be held for killing; Marcellus agrees and it is the better view.” In order for him to be making this distinction, there must have been a difference. That difference can only be in the damages. Further support for Daube. Ulpian joint liability and causation

D.9.2.27.9, p. VI.A.10: “If the tenant’s slave is detailed to look after a furnace but goes to sleep and the house burns down, Neratius writes that the tenant is liable for damages under the contract, providing he was negligent in choosing his laborer; however, if one lights a fire in a furnace, and another negligently watches it, will the former be held? for he who watched it did nothing and he who correctly lit the fire was not at fault. What is the conclusion? I should say that there is an *actio utilis* both against him who went to sleep at the furnace and him who carelessly watched the fire; nor can anyone claim as to the former that he underwent a natural experience common to all mankind, because his duty was either to extinguish the fire or prevent it from escaping.” Ulpian, the slave watching the fire. Neratius, a member of Trajan and Hadrian’s council, seems concerned only with *locatio/conductio* liability. It is Ulpian who raises the question of not doing is no trespass.

5. The argument for a more developmental approach rests on what happens when we rearrange the texts in historical order. (It also depends on some propositions I can’t fully go into here, principal among these is the penal nature of the action. (Gaius 4.9 says that the action is mixed penal and reipersecutory. This is another place where Schulz says that Gaius is interpolated.) The non-compensatory element, the joint liability, lack of passive transmissibility and the cumulation of actions (in the case of joint tort-feasors and in the case of a concurrent contractual action, e.g. *actio commodati*), double damages for denial, being the principal ones. And the fact that it is not available for free persons *sui juris*. By the best estimate all texts to the contrary are interpolated. This shows that the insurance idea is not Roman and that they’re extraordinarily individualist.) I can only give you a feels for the flavor of the argument. (Whether the full value of the thing that is only damaged is another example is hard to figure

out. Schulz is sure that it is; Daube has substantial doubts. His argument is based on the statute's only originally applying to the same class of things as the 1st chapter.)

- a. D.9.2.39pr (p. VI.A.15 [126]) and D.9.2.31 (p. VI.A.14 [125]). "Quintus Mucius writes: A mare was grazing in another's field, and being pregnant, miscarried while being driven off; it was asked if her owner could bring an Aquilian action against the man who drove her away for damage caused thereby. It was held that an action would lie if he struck her or intentionally [*consulto*] drove her too violently." "If a pruner throws a branch down from a tree, or a laborer throws something from a scaffolding, killing a passing slave, they are held if they threw the thing on to a public place without shouting so that the victim might avoid the accident. Mucius even holds that there may be an action for negligence [*culpa*] if the same thing happens of private property, as it is negligent not to foresee what could have been foreseen by a careful person, or to give warning when it was too late to avoid the danger. On this view [this is now Paul speaking] it makes little difference whether the victim was crossing public or private land, as there is often a public way over private property. But if there was no path, there will be liability only for malice, so that one may not aim at one whom he sees crossing; for no care should be required from one who could not foresee that anyone would pass his way." Quintus Mucius, the pregnant mare and the tree trimmer. The use of the conclusive term *culpa* in context. Extension of liability to an area that was traditionally privileged. New rule is that it is privileged only so long as it is not done *culpa*. What is *culpa*? (i) direct forcible injury in the case of the mare or (ii) *consulto* (note not *dolus*) or *quod a diligente provideri poterit*. The idea may not be duty of care. The notion of *consulto* and *provideri* can lead you as much to the notion of willfully caused.
- b. D.9.2.52.2 (p VI.A.18 [p.129]). "Mules were dragging two loaded carts up the Capitoline hill; the drivers of the front cart, which had got tilted back, were holding it up to make it easier for the mules; meanwhile the team began to move backward so that when the drivers, who were between the two carts, jumped out from their position, the rear cart was hit by the other and rolled down and ran over someone's slave boy. The boy's owner consulted me against whom to bring action. I answered that the rule of law depended upon the facts; assuming that the drivers who were holding up the front cart got out of the way of their own accord, thus rendering the mules unable to support the cart, which dragged them back by its own weight, then there would be no action against the owner of the mules, but an Aquilian action could be brought against those who were upholding the tilted cart, for one has none the less inflicted direct damage who voluntarily lets go something which he is supporting so that it strikes another, as where one does not hold in an ass which one is driving, just as one commits wrongful damage who allows a weapon or anything else to escape him. Assuming, however, that the mules shied at something and the drivers, fearing to be crushed, left the cart, there would be no action against the men, but one against the owner of the mules. But if neither the mules nor the men were responsible, but the mules could not sustain the weight or in straining slipped and fell, whereupon the cart began to go back, and because it was tilted the drivers could not sustain its weight, then there could be an action neither against the owner of the mules nor against the men. At least it was certain whatever the facts, that there could be no action against the owner of the other mules, who had gone backward involuntarily because they were hit." Alfenus and the muleteers. Here there is clearly no notion of a

duty of care. Rather the focus is entirely on what was willed and what was forced. Notice that the direct forcible injury by the second set of mules is excused. The liability of the first set is dependent on avoidability. Apparently the avoidability of the situation is too far removed in the causal chain.

- c. D.43.2.4.7.4 (p VI.A.3 [p. 114], Watson trans. here fixed up, Scott in Mats). “There is another defense of which Gallus [probably the praetor of that name 66 B.C.] doubts whether it should be advanced [to the interdict *quod vi et clam*]. Take the case of my having pulled down my neighbor’s house to ward off fire, as a result of which an action against force and stealth (*Quod vi aut clam*), or for unlawful damage is being brought. Would it be proper to bring the defense “what was not done for the purpose of defense against fire”? Servius says that if the magistrates did this, the defense should be granted, but that the same concession should not be made to a private person; but if it was done by force or stealth, and the fire did not reach that far, damages for simple value should be awarded; if it did, the doer should be released. He says the same applies if there should be an action for unlawful damage, because it is held that no injury or damage can be done to a house about to perish anyway. However, if this was done in no fire, and the fire started subsequently, the same should not be said; because Labeo says that it should not be from a later event, but from what happened at the time, that assessment is made on whether or not damage was inflicted.” Servius Sulpicius and Labeo on the fire. We’re back again to the traditional privileges problem. Here the act is intentional. The intention is saved by being a magistrate. Absent that you’re liable if you caused the damage. Labeo adds the notion of proximate cause. Neither trans is very good.
- d. G.3.202; 3.211. [p.106] “Sometimes a man is liable for theft of which he is not the actual perpetrator; we refer to one by whose aid and counsel the theft has been carried out, for instance a man who knocks coins out of your hands, or obstructs you, for another to make off with them. So the old lawyers wrote of one who stampeded a herd with a red rag. But if it is a mere prank, without intention of furthering a theft, the question will be whether an *actio utilis* ought not to be given, since even negligence is punished by the L. Aquilia, which governs damage to property.” Gaius referring everything to *dolus* or *culpa*. This is new. *Culpa* has taken on the notion of negligence. See also the duty of care in the muleteer case. Now that the intentional injury has been sharply separated out. Q.M.’s objective standard may return in a different guise — to get a standard of care rather than to test the will of the actor.
- e. The structure of the Ulpianic commentary shows the classical synthesis. He goes word by word but in each case he gets to *iniuria* he bifurcates it and that informs his discussion of the reprobable acts. Thus it is critical in the classic cases (barber, etc) the act is not intentional injury, therefore causation must be closely looked at. Objective standards for barbers, etc.
- f. Paul as we can see in the tree-trimmer case is already going off in another direction — toward a subjective standard of culpability and some of that can be seen in some of Ulpian too.
- g. The pandectist view reflects a somewhat distorted version of the intersection of 2 currents running in opposite directions:
objective standard Q.M Gaius->?Ulpian, Paul—subjective

direct absolute Q.M.->Alfenus Gaius Ulpian indirect if willed, direct if not willed (easiest to see in Alfenus)

Another way to look at the dichotomies: (a) traditional standards of liability generalized to objective standards in the juristic period, generalized to subjective in Paul and (b) absolute liability for direct or willed injuries transmuted to an analysis of causation in the case of unwilled injuries whether direct or indirect. The second is harder to see in the texts given.

Later imperial developments may pay less attention to causation.