

D.9.2.51 (Watson, Evolution of Private Law) [A slave who had been wounded so gravely that he was certain to die of the injury was appointed someone's heir and was subsequently killed by a further blow from another assailant. The question is whether an action under the *lex Aquilia* lies against both assailants for killing him. The

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answer was given as follows: A person is generally said to have killed if he furnished a cause of death in any way whatever, but so far as the *lex Aquilia* is concerned, there will be liability only if the death resulted from some application of force, done as it were by one's own hand, for the law depends on the interpretation of the words *caedere* and *caedes*. Furthermore, it is not only those who wound so as to deprive at once of life who will be liable for a killing in accordance with the *lex* but also those who inflict an injury that is certain to prove fatal. Accordingly, if someone wounds a slave mortally and then after a while someone else inflicts a further injury, as a result of which he dies sooner than would otherwise have been the case, it is clear that both assailants are liable for killing. □. This rule has the authority of the ancient jurists, who decided that, if a slave were injured by several persons but it was not clear which blow actually killed him, they would all be liable under the *lex Aquilia*. □. But in the case that we are considering, the dead slave will not be valued in the same way in assessing the penalty to be paid for each wound. The person who struck him first will have to pay the highest value of the slave in the preceding year, counting back three hundred and sixty-five days from the day of the wounding; but the second assailant will be liable to pay the highest price that the slave would have fetched had he been sold during the year before he departed this life, and, of course, in this figure the value of the inheritance will be included. Therefore, for the killing of this slave, one assailant will pay more and the other less, but this is not to be wondered at because each is deemed to have killed him in different circumstances and at a different time. But in case anyone might think that we have reached an absurd conclusion, let him ponder carefully how much more absurd it would be to hold that neither should be liable under the *lex Aquilia* or that one should be held to blame rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide if one is more blameworthy than the other. Indeed, it can be proved by innumerable examples that the civil law has accepted things for the general good that do not accord with pure logic. Let us content ourselves for the time being with just one instance: When several people, with intent to steal, carry off a beam which no single one of them could have carried alone, they are all liable to an action for theft, although by subtle reasoning one could make the point that no single one of them could be liable because in literal truth he could not have moved it unaided.

cf. D. 9/2/11/3. D. □. □. □□. □. Celsus writes that if one man gave a slave a mortal wound, and another afterward deprives him of life, the former is not liable as if he had killed but as if he had wounded because he perished from another wound: the latter is liable because he killed. This is also the view of Marcellus, and it is the better view.

Julian's difficulty is made even clearer by another text of Ulpian.

D. 9.2.15.1.. If a slave who has been mortally wounded has his death accelerated subsequently by the collapse of a house or by shipwreck or by some other sort of blow, no action can be brought for killing, but only as if he were wounded; but if he dies from a wound after he has been freed or alienated, Julian says an action can be brought for killing. These situations are so different for this reason: because the truth is that in the latter case he was killed by you when you were wounding him, which only became apparent later by his death; but in the former case the collapse of the house did not allow it to emerge whether or not he was killed.

The stolen marble

• Titius is having a luxurious villa built at his property in Baiae. One night, a thief enters the property, and takes the most valuable materials - marble, precious wood, semiprecious stones-. When he has already loaded his wagon and is about to leave, he is discovered. In the chase that follows, seeing that his speed is dramatically diminished by his charge, he leaves part of the materials at Caius' property, where a house is also being built. The next day, the constructor of Caius' house, assuming that the materials have been provided by Caius, uses them, in such a way that they cannot be separated any more from the building. Quid iuris?



A DEFICIENT STATUTE AND HOW TO MEND IT?



LIABILITY FOR DAMAGE IN OTHERS' PROPERTY

INTRODUCTION

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◆ What is a delict?

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 - ❖ Damage (damnum)
 - ❖ Injury/insult/offence (iniuria)

THE ARCHAIC LAW: DAMAGE
LEX DUODECIM TABULARUM

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STATUTORY LIABILITY
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- ❖ the content: three simple chapters

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- ❖ II chapter: liability of the accessory creditor (adstipulator) for liberating of the debtor (acceptilatio) to the detriment of the principal creditor
- ❖ III chapter: killing/damaging of any other animal/thing (and also, later?, partial damage of a slave/animal belonging to pecus)

THE CONTENT OF LEX AQUILIA: 1ST CHAPTER

- ❖ D. 9.2.2 pr.-1 Gaius, On the Provincial Edict, Book VII
- ❖ It is provided by the first section of the Lex Aquilia that, “Where anyone unlawfully kills a male or female slave belonging to another, or a quadruped included in the class of cattle, he shall be condemned to pay a sum equal to the greatest value that the same was worth during the past year”. (1) And then the statute further provides that, “An action for double damages may be brought against a person who makes a denial”.

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- ❖ B: Quod ego tibi promisi habesne acceptum? C: Habeo!

THE CONTENT OF LEX AQUILIA: 3RD CHAPTER

- ❖ D. 9.2.27.5 (Ulpian, on Edict, book 18) In the third Section the Lex Aquilia says, “If anyone damages the property of another except by killing slaves or cattle, whatever the value of the property burned, broken to pieces, or torn, was, within the next(?) thirty days; he shall be condemned to pay the amount to the owner of the same”.

REQUISITES

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Ch. 3, “If anyone damages the property of another except by killing slaves or herd animal, whatever the value of the property burned, broken to pieces, or torn (*usserit, fregerit, ruperit*), was, within the next thirty days; the party shall be condemned to pay the amount to the owner of the same”.

HOW TO CONSTRUE DAMNUM?

- ❖ D. 9.2.7.1-2 Ulpianus, On the Edict, Book XVIII. (1) We must understand the term **'kill – occidere'** to mean where this was done either with a sword, a club, or some other weapon, or with the hands if strangulation was used, or with a kick, or by striking him on the head, or in any other way whatsoever. (2) The Lex Aquilia will apply where anyone who has been too heavily laden throws down his load and kills a slave; for it was in his power not to be overloaded in this manner. Pegasus says that if anyone should slip and crush with his load a slave belonging to another, he will be liable under the Lex Aquilia, if he loaded himself more heavily than he should have done, or walked carelessly over a slippery place.

DAMNUM UNDER CH. III

D. 9.2.27.13 Ulpianus, on Edict 18
book The law says “tear” (**rumpere**).
This word almost all ancient
authorities understood to mean the
same as “spoil” (**corrumpere**). (14)
Therefore, Celsus makes the inquiry,
if you sowed darnel or weeds in the
wheat-field of another, the owner of
the same can not only institute
proceedings under the interdict
Quod vi aut clam, (or if the land is
leased, the tenant can do so) but he
can also bring an *action in factum*; (...)



DAMNUM UNDER CH. III

D. 9.2.27.13 and another, when, without changing the substance of the article itself, you mingle something with it, the separation of which would be troublesome. (15) Celsus says, that it is evident that suit can be brought under the Aquilian Law where a party puts filth in wine, or spills it, or makes it sour, or spoils it in any other way; for both pouring it out and making it sour are embraced in the words “**spoil**”. (16) And he does not deny that “**break to pieces**”, and “**burn**” are also included in the word “**spoil**” (**corrumpere**); but that there is nothing new where certain things are especially enumerated in the law, for it usually adds a general term including those specific things. This opinion is correct.

DAMNUM UNDER CH. III

M. IUNIUS BRUTUS (ULP. 18 AD ED. D. 9.2.27.22)

- ❖ (22) If you strike a woman with your fist or a mare receives a blow from you, and a miscarriage results, Brutus says that you are liable under the Lex Aquilia for “tearing”, as it were. (23) And also, if anyone overloads a mule, and breaks one of its limbs, the Lex Aquilia will be available.

DAMNUM UNDER CH. III

THE WONDERS OF TEXTUAL INTERPRETATION

- ❖ G. 3.217fin: although the single word ‘torn’ (**ruptum**) will suffice to cover all these offences, for the word ‘broken’ is interpreted to mean spoiled in any way (**corruptum quoquo modo**); hence not only **burning, breaking, crushing**, but any **cutting, bruising, spilling, vitiating in any way, destroying, or deteriorating**, is hereby comprehended.

ACTUAL DAMAGE

- ❖ D. 9.2.27.25: Ulpianus, *on the Edict*, 18 book: If a party picks olives that are not ripe, or reaps grain that is not mature, or gathers grapes that are green, he will be liable under the Lex Aquilia; but if the crops have reached maturity, the Lex Aquilia will not apply; for no wrong is committed, as the party has presented you with the expenses which would have been incurred by harvesting crops of this kind; if, however, he removes what has been gathered he will be liable for theft. Octavenus says with reference to grapes, “Unless he throws the grapes on the ground, so that they are scattered”.

ACTUAL DAMAGE

- ❖ D. 9.2.27.28: Ulpianus, on the Edict, 18 book:
If anyone castrates a boy slave, and thereby renders him more valuable, Vivianus says that the Lex Aquilia does not apply, but that an action can be brought for offence (*iniuria*), or under the Edict of the aediles for fourfold damages.

ASSESSMENT OF DAMAGE

- ❖ D. 9.2.21. Ulpianus, On the Edict, Book XVIII. The law says: “The greatest value of the slave during that past year”. This clause refers to an assessment of the amount of the damage which was inflicted. (1) The year is to be calculated back from the day on which the slave was killed; but if he was only mortally wounded and died after a long interval had elapsed, then, according to Julianus, we must compute the year from the day on which he was wounded; although Celsus holds a different opinion. (2) Must we, however, only appraise the value of the body of the slave when he was killed, or shall we not rather estimate what our interest was in his not being killed? The present rule is that an estimate shall be made of what our interest was worth.

ASSESSMENT OF DAMAGE

- ❖ D. 9.2.33. Paulus, On Plautius, Book II. If you kill my slave, I do not think that my affection for him should be considered; as, for instance, if anyone should kill your natural son whom you would be willing to purchase at a high price if he belonged to someone else; but the question involved is what is he worth generally speaking? Sextus Pedius says that the price of property is not fixed by affection or by beneficial interest, but on general principles; so that a man who has possession of his natural son as a slave, is none the more wealthy because if someone else had possession of him he would be willing to purchase him for a considerable sum of money; and the party who has possession of the son of another has not property enough to be equal to what he could sell that son for to his father; for under the Lex Aquilia, we can recover damages, and we will be considered to have lost either what we could have obtained, or what we were compelled to pay out. (1) An action *in factum* is granted with reference to damages which are not included in the Lex Aquilia.

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– actio in factum

– actio utilis

– actio ad exemplum legis Aquiline

DATUM



CAUSATION

DAMNUM DATUM: DAMAGES DIRECTLY CAUSED

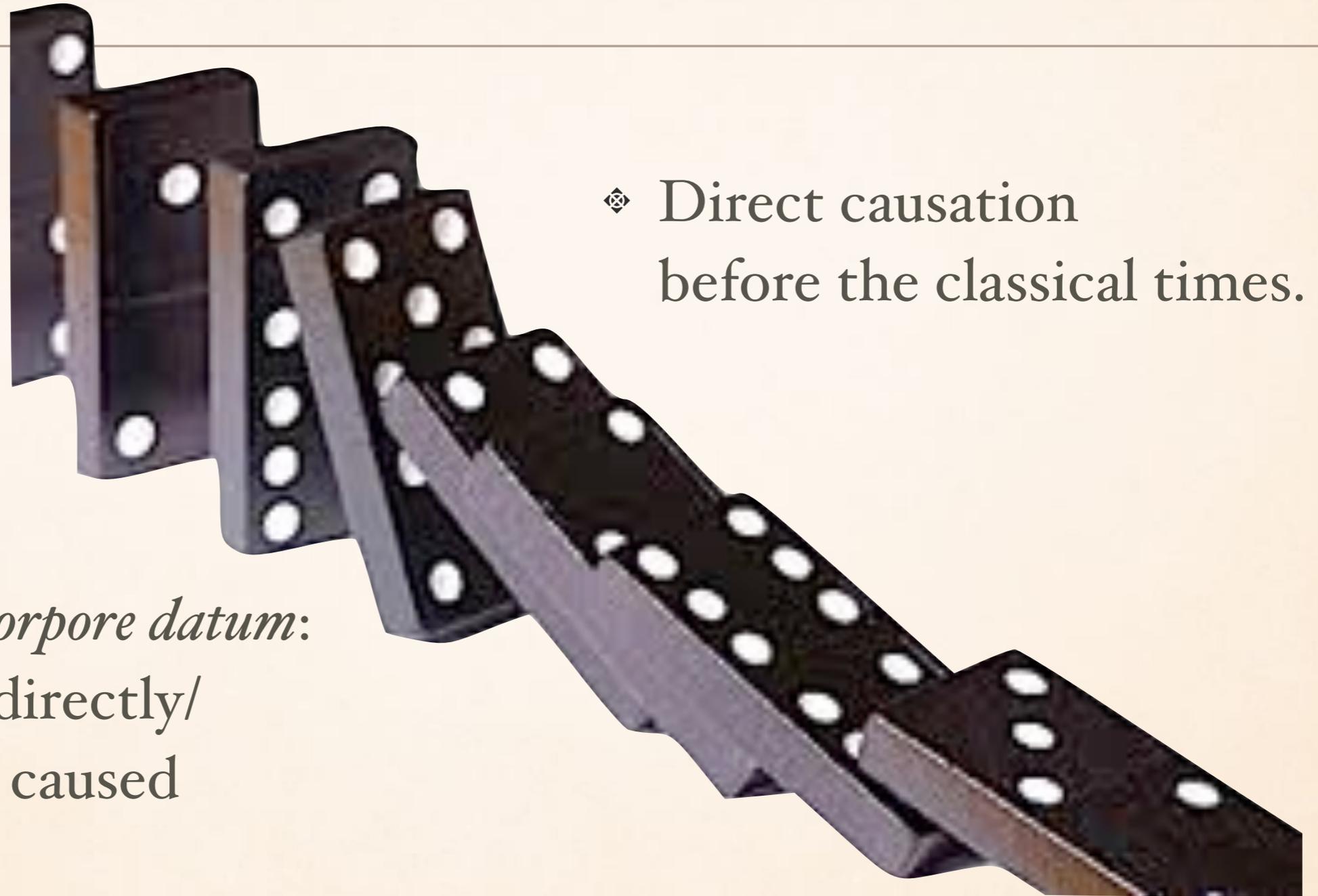
- ❖ G. 3. 219. Finally, it has been accepted that an action under this statute only lies when the body of the offender is the instrument of mischief; and therefore for any other mode of occasioning loss praetorian actions (*actiones utiles*) must be brought: for instance, if a slave or quadruped is shut up and starved to death, or a horse is foundered by hard driving, or a slave is persuaded to climb a tree or descend a well, and in climbing or descending falls and is killed or hurt. But if a slave is pushed off a bridge or bank into a river and there drowned, the body of the person by pushing him may fairly be held to have caused his death

THE PROBLEMS



- ◆ Direct causation
before the classical times.

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❖ Direct causation
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❖ *Damnum corpore datum*:
a damage directly/
corporally caused

DAMNUM DATUM: DAMAGES DIRECTLY CAUSED

- ❖ D 9.2.7. Ulpianus, On the Edict, Book XVIII. (6) Celsus says that it makes a great deal of difference whether the party actually kills, or provides the cause of death, as he who provides the cause of death is not liable under the Lex Aquilia, but is to an analogous action. With reference to this, he cites the case of a party who administered poison as medicine, and who he says provided the cause of death; just as one who places a sword in the hands of an insane person, for the latter would not be liable under the Lex Aquilia, but would be to an analogous action. (7) But where anyone throws another from a bridge, whether he is killed by the blow which he received, or is submerged and drowned, or, overcome by the force of the current, dies exhausted; the culprit, Celsus says, is liable under the Lex Aquilia, just as if he had dashed a boy against a rock. Proculus holds that if a physician should operate upon a slave unskillfully, an action will lie either on the contract, or under the Lex Aquilia.

DAMNUM DATUM: DAMAGES DIRECTLY CAUSED

- ❖ D. 9.2.9. Ulpianus, On the Edict, Book XVIII. pr. Moreover, where a midwife administers a drug to a woman and she dies in consequence, Labeo makes a distinction, namely: that if she administered it with her own hands she is held to have killed the woman, but if she gave it to the latter in order that she might take it, an action in factum should be granted, and this opinion is correct; for she rather provided the cause of death, than actually killed the woman. (1) Where anyone, either by force of persuasion, administers a drug to another, either by the mouth, or by injection, or anoints him with some poisonous substance; he will be liable under the Lex Aquilia, just as the midwife who administers a drug is liable. (2) Where anyone kills a slave by starvation, Neratius says he is liable to an analogous action.

CHANGES IN OTHER TORTS DUE TO HONORARY INTERPRETATION OF LEX AQUILIA.

- ❖ Aulus Gellius, Attic Nights 11.18.14: Sabinus says something very in-comprehensive, that is that we should consider as a thief a man who has hidden somebody's slave under his toga so that the owner wouldn't be able to see it.
- ❖ D. 47.2.67.2 Paulus, On Plautius, Book VII The ancient authorities gave it as their opinion that where anyone brings a muleteer into court for fraud, and his mules die in the meantime, he will be liable to theft.

CHANGES IN OTHER TORTS DUE TO HONORARY INTERPRETATION OF LEX AQUILIA.

- ❖ G. 3.202. In some cases theft may be chargeable on a person who is not the actual perpetrator, as on one, by whose aid and abetment a theft has been committed; to which class belongs the man who knocks out of your hand money for another to pick up, or stands in your way that another may snatch it, or scatters your sheep or oxen that another may steal them, like the man in the old books, who waved a red cloth to frighten a herd. But if the same thing were done as a frolic, without the intention of committing a theft, we will consider whether a praetorian form of action (in extension of the lex Aquilia) may not be maintainable, since the Aquilian statute relating to damage makes even negligence penal.