LIABILITY FOR OMISSION UNDER THE *LEX AQUILIA*

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The *lex Aquilia*, commonly thought to have been enacted in the year 287 BC and one of the most famous statutes of ancient times, provided the statutory basis of the Roman law delict *damnum iniuria datum* which covered the area of unlawful damage to property.[1] The aim of this article is to examine just how the thorny area of liability for omissions was dealt with under the *lex Aquilia*.

Prior to the *lex Aquilia*, the only definitive source of law governing damage to property was to be found in the Twelve Tables, dated to the years 451 and 450 BC.[2] Grueber says that in these early times the unlawful damage which the *lex Aquilia* would refer to as *damnum iniuria datum* was signified by the words *noxia nocita*, *noxiam nocere*, or simply *nocere*.[3] This notion of *nocere* within the Twelve Tables comprised not only the violation of another's property, by destroying or damaging a thing which is owned by him, but also the violation of another's body by wounding his person.[4] The *lex Aquilia*, however, was concerned

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1 Justinian lists four delicts in his Institutes: *furtum* (theft); *rapina* (robbery); *iniuria* (insult) and *damnum iniuria datum* (unlawful damage to property). For the purposes of this article, we are concerned only with this last mentioned delict.

2 Ten of the tables were enacted in 451 BC and the remaining two in the following year. (Grapel, *Sources of the Roman Civil Law* (1857), pp 17-18.)

3 Grueber, *The Lex Aquilia* (1886), p 186.

4 This can be ascertained from the seven cases outlined by Grueber (*op cit*, p 192) as encompassing the term *nocere*:

1. *Rumpere membrum ciui* (the breaking of another's limb);
2. *Frangere os ciui seruoue* (the breaking of another's head or trunk);
3. *Occidere seruum quadrupedemue pecudem* (the killing of another's four-footed beast or slave);
4. *Urere aedes aceruumue frumenti iuxta tugurium positum* (the setting on fire of a building or a stack of corn near another's dwelling place);
5. *Impescere in laetam segetem* (the grazing of animals upon another's crop);
6. *Succidere arborem* (the cutting down of another's tree); and

exclusively with damage to property and, as such, excluded injury to freemen not *in potestate* for, as Nicholas states, no one can be said to be the owner of his own limbs.[5]

The impact of the *lex Aquilia* on the law governing unlawful damage to property was significant. As Ulpian states in the Digest:

> "Lex Aquilia omnibus legibus, quae ante se de damno iniuria locutae sunt, derogauit: siue duodecim tabulis, siue alia quae fuit: quas leges nunc referre non est necesse." [6]

Ulpian here claims that the *lex Aquilia* superseded all previous laws dealing with damage to property, whether or not such laws were contained in the Twelve Tables.

The accuracy of Ulpian's statement has been debated. Grueber, for example, says that a primary reason to doubt the statement lies in the fact that the *lex Aquilia* does not give a definition of damage to property, *damnum iniuria datum*, but merely attaches liability to particular cases of such damage whereas one would expect that an important piece of legislation implemented in order to repeal a preceding law to newly assert or restate the subject of that law.[7] Furthermore, Daube asserts that certain earlier laws on damage to property remained in force side by side with the *lex Aquilia* for a time after its enactment and even permanently.[8] Ultimately, however, it is conceded that the *lex Aquilia* was of such overwhelming practical importance in the area of unlawful damage to property that it swamped most of the previous law on the subject.[9]

As has been said, the *lex Aquilia* provided the statutory basis of the delict *damnum iniuria datum*. As such, it has many inherently delictal characteristics. An illustration of this is its punitive rather than compensatory evaluation of damages, whereby the defendant had to pay the plaintiff the highest value which the property had had during the previous year[10] or thirty days[11] rather than the actual value of the loss incurred,[12] so that, as Schulz says, "the penalty was the same when a dog

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7. *Rumpere rem* (general liability for damaging another's property).

5 Nicholas, *Introduction to Roman Law* (1962), p 222. However, the *lex Aquilia* was extended in the time of Justinian to grant an *actio utilis* where a freeman was injured, but not where he was killed: Nicholas, *loc cit.*

6 D.9.2.1: "The *lex Aquilia* took away the force of all earlier laws which dealt with unlawful damage, the Twelve Tables and others alike, and it is no longer necessary to refer to them." (Translation by Mommsen, Krueger and Watson, *The Digest of Justinian*, Volume One (1985) (henceforth *Mommsen*), p 277.)

7 Grueber, *op cit* at note 3, p 185.

8 Daube, "On the Third Chapter of the Lex Aquilia" (1936) 52 LQR 253-268 at 253.

9 Buckland, *A Textbook of Roman Law from Augustus to Justinian*, (3rd Edition, 1963), p 585.

10 For loss incurred under Chapter One.

11 For loss incurred under Chapter Three.

12 For an interesting discussion on this see Daube, *op cit* at note 8, and compare it with Jolowicz, "The Original Scope of the Lex Aquilia and the Question of Damages" (1922) 52 LQR 220-230. These authors discuss the original meaning of the third chapter of the *lex* in order to explain the peculiar disposition of damages under the *lex*. The anomalies of this chapter are well illustrated by the fact that opinion as to this original meaning is very sorely divided, as evidenced by these two commentators.

was killed as when he was only wounded".[13] However, one characteristic of delictal liability is highly significant in the particular context of this article and this is that performance of a definite act by the defendant is normally required.[14] Buckland says that the delicts *furtum*, *rapina* and *iniuria* all involve "wrongful intent", so that the Aquilian action seems to be the only one in which negligence suffices to create delictal liability.[15] Nevertheless, he goes on to make the following assertion: "though negligence suffices, an act is in principle necessary. A mere omission standing alone could not create Aquilian liability."[16]

However, a number of the juristic texts do seem to indicate that liability could be incurred even for a mere omission to act. One example is D.9.2.8.pr., which is in the following terms:

> "Idem iuris est, si medicamento perperam usus fuerit. sed et qui bene seecuerit et dereliquit curationem, securus non erit, sed culpae reus intelligitur." [17]

Here Gaius states that a surgeon who has operated on a slave successfully, but has afterwards neglected to attend to his cure, is liable on account of the death of the slave. It has been said that in this case the damage complained of is due to an omission; the surgeon has omitted to attend to the necessary aftercare.

This brings us onto the main theme of this article, which is to examine the way in which the jurists approached the question of liability in cases of apparent omission to act. Did they seek to differentiate the positive act from the mere omission to act, proscribing only the former should it occasion loss, or did they, as D.9.2.8.pr. suggests, impose liability also for omissions occasioning loss? It is suggested that the jurists did not consider the matter in such distinct terms at all, but rather that they sought simply to identify a *blameworthy* source of the loss incurred, irrespective of whether that source strictly acted or omitted to act. That liability was determined primarily in this way is evident in many ways, and these will be discussed in the course of this article.

Only Chapters One and Three of the *lex* are relevant to this discussion, for Chapter Two deals with bad faith. The text of Chapter One is given to us by Gaius in D.9.2.2.pr.:

> "ut qui seruum seruamue alienum alienamue quadrupedem uel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto."[18]

Thus, anyone who unlawfully killed another's slave or beast (within the class of *pecus*[19]) was liable to pay the owner the highest value which the thing had had within the previous year.

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13 Schulz, *Classical Roman Law* (1951), p 590.

14 Thomas, *The Institutes of Justinian* (1975), p 273.

15 Buckland, *The Main Institutions of Roman Private Law* (1931), p 332.

16 *Op cit* , p 333.

17 "And the law is just the same if one misuses a drug, or if, having operated efficiently the aftercare is neglected; the wrongdoer will not go free, but is deemed to be guilty of negligence." (*Mommsen*, p 279.)

18 "If anyone kills unlawfully a slave or servant girl belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the preceding year." (*Mommsen*, p 277.)

The text of the third chapter is provided by Ulpian in D.9.2.27.5:

> "Ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit, fregerit, ruperit[20] iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto." [21]

The original meaning of the text of this Chapter has been the subject of much debate.[22] However, it is generally agreed that by the time of the late classical era, it had come to cover all damage not falling under Chapter One, hence the injuring (without killing) of a slave or *pecus* as well as the damaging of an inanimate object or an animal not *pecus*, for example, a dog, cat or chicken.

With regard to the quantum of damages, it is again generally accepted that, whatever complicated developments the third chapter underwent, the text came in the classical era to mean that the defendant must pay to the plaintiff the highest value which the property had had within the thirty days prior to the damage. This view is supported by the text D.9.2.29.8 in which Ulpian says:

> "quanti in triginta diebus proximis fuit, etsi non habent plurimi, sic tamen esse accipienda constat." [23]

This text requires that Chapter Three be interpreted, analogous with Chapter One, as referring to the damaged thing itself, so that damages were to be determined upon the basis of the highest value which the thing had had in the previous thirty days.

We see from these texts that their operative words are *occidere*, *urere*, *frangere* and *rumpere*. On their face these words do not permit other than positive action to incur liability. Thus Grueber denies that a mere omission can give rise to an action under the *lex* on the grounds that *occidere seruum quadrupedemue* and *urere*, *frangere*, *rumpere rem* are required.[24] These are words which, he says, even according to the extensive interpretation of the Roman Praetors, imply in every case a *damnum corpore corpori datum*.[25] By this is meant that for *direct* liability a person

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[19] Buckland treats the class of *pecus* as originally pertaining to such animals as feed in herds (*op cit* at note 9, p 585) whilst the Institutes provide that all ordinary domestic beasts were to be so treated. The Digest later incorporated tame elephants and camels.

[20] D.9.2.27.13 provides "*Inquit lex 'ruperit', rupisse uerbum fere omnes ueteres sic intellexerunt 'corruperit'.*" This has been translated to mean: "The statute actually says *'ruperit'* (break or rend asunder); but almost all the early jurists understood the word to mean *'corruperit'* (spoil)." (*Mommsen*, p 285.)

[21] "In the case of all other things apart from slaves or cattle that have been killed, if anyone does damage to another by wrongfully burning, breaking or spoiling , then he will be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days." (*Mommsen*, p 283.) This translation presupposes that the measure of damages originally referred to the *following* period of time rather than, as in the first chapter, the *preceding* period of time. Not all commentators agree with this view: see text at notes 22 and 23.

[22] Above at note 12.

[23] "It is settled that the words 'whatever was the value in the last 30 days', even though they do not include 'highest', must be accepted in that sense." (*Mommsen*, p 287.)

[24] Grueber, *op cit* at note 3, pp 208-209.

[25] *Loc cit*.

must cause by some *physical act* of his own an actual damage to the corporeal thing of another, as where a slave is strangled to death.

However, extensions of the *lex* enabled it to embrace a great many other types of damage to property which were not originally actionable. Justinian provides a simplistic division of the actions which came to be available for instances of *damnum iniuria datum*.[26] According to him, the main action, the *actio legis Aquiliae directa*, will lie *"si quis praecipue corpore suo damnum dederit"*, that is, in cases where a person causes loss immediately by his bodily force. On the other hand, he says that an *actio utilis* (an action based on the policy of the statute) can be brought if the damage is caused in any way other than *corpore suo*. This means that where damage is done to a thing (*corpori*) but not by the physical act of the delinquent (*corpore*) then the *actio utilis* applies. An example of this is cited as where one shuts up the slave or animal of another so that it dies of starvation. Finally, an *actio in factum* (an action on the case) can be brought where damage was done neither *corpore* nor *corpori*, that is, where there is neither bodily force by the delinquent nor actual damage done to a thing. Such an instance would be where someone out of pity frees another's slave from chains and lets him escape.

The accuracy of this tri-fold division has been debated.[27] Perhaps Ulpian's statement in D.9.2.7.6 is more helpful in elucidating the distinction between the classes of action available. It is said that he here attempted to formulate a clarifying principle:

> "Celsus autem multum interesse dicit, occiderit an mortis causam praestiterit, ut qui mortis causam praestitit, non Aquilia, sed in factum actione teneatur. Unde adfert eum qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium porrexit: nam nec hunc lege Aquilia teneri, sed in factum." [28]

The basis of the *actio directa* is thus *occidere*,[29] whilst the basis of the *actio in factum* is *causam mortis praestare* - indirect killing or the

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[26] *Institutes* 4.3.16.

[27] Justinian founds his classification on a passage given by Gaius in his *Institutes* (3.219). In this passage Gaius expressly says that the direct action is applicable only *"si quis corpore suo damnum dederit",* and that if the damage was done in any other way (*alio modo*), then *actiones utiles* should be employed. Accordingly, Gaius makes only two divisions. On the other hand, some fragments of the Digest distinguish only between the direct action and the *actiones in factum*. For example, Paul clearly says that in the case of damage not coming under the statute itself, an *actio in factum* is applicable: "*in damnis, quae lege Aquilia non tenentur, in factum datur actio*" (D.9.2.33).

[28] "Celsus says that it matters a great deal whether one kills directly or brings about a cause of death, because he who furnishes an indirect cause of death is not liable to an Aquilian action, but to an *actio in factum*, wherefore he refers to a man who administered poison instead of medicine and says that he thereby brought about a cause of death in the same way as one who holds out a sword to a madman; and such a man is not liable under the *lex Aquilia* but to an *action in factum*." (*Mommsen*, p 279.)

[29] This originally meant "beating to death" in the strictest sense of the word, either by one's hand or by a weapon. Gradually the jurists went beyond this original notion of *occidere*, and thus Labeo grants the *actio directa* in the case of poisoning a slave, provided that the wrongdoer actually administered the poison himself (D.9.2.9). Beyond this point the jurists speak not of *occidere* but of *mortis causam praestare*.

furnishing of a cause of death. The passage just quoted illustrates the latter with two examples: first, where someone hands over poison to a slave pretending that it is medicine and the slave himself takes it and dies; and in the second case, the culprit passes a sword to a slave who is in a bout of insanity and uses the sword to kill himself (or the slave of a third party).

Grueber says that the interpretation of the third chapter proceeded in a way analogous to that of the first.[30] In the third chapter there were certain concrete cases which formed the basis of the interpretation, that is, *urere, frangere, rumpere rem*. Very old juristical interpretation brought *rumpere* to mean *corrumpere* (to spoil) and, therefore, every act of a person by which a corporeal thing of another had been injured came within the operation of the *lex*. But for the direct action the damage must necessarily be done *corpore corpori*. Analogous to Chapter One is the redress given under Chapter Three where a person creates a situation from which, in conjunction with other circumstances, damage is an indirect result - *causam damni praestat.*[31] In such cases an *actio in factum* lies as where, for example, weeds are sown into another's field and the crop is thus spoilt.[32] Or, further, where there is no damage done to a thing, neither *corpore* nor *corpori*, as where the culprit knocks coins out of the plaintiff's hand and they roll into the sea where they are lost forever but are not strictly damaged.[33]

The purpose of this previous brief chronicle of the activities which came to be actionable under the *lex Aquilia*, whether directly or indirectly, is to show that the development of this area of the law was neither typically rigid nor exclusionary, and that once the requirement that loss be caused directly was relaxed, then a certain degree of flexibility was attained whereby, Lawson says:

> "one should think, not of a single action applicable to a large number of cases, but of as many actions as there were cases in which the praetor was prepared to give a remedy".[34]

One assumes that Lawson here means that, provided the broad requirements for liability[35] were met, then the cases would be decided on a largely ad hoc basis, so that potentially all grievances were actionable. The benefits of such a pliable system were that, where one found there to be culpability, liability was not prevented simply because a rigid formula could not be made to fit.

The development of the *lex Aquilia* in this way strongly supports the theory presently advanced. That is, because liability was determined by considering the particular facts of each individual case, it is less likely that formulaic proscriptions of certain *acts* formed the entire basis of liability. Rather, liability would have been analysed in simple terms of whether the specific defendant was indeed to *blame* for the loss incurred and, as such, whether liability was *deserved*. Liability could thus be imputed for

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30 Grueber, *op cit* at note 3, p 204.
31 *Ibid*.
32 D.9.2.27.14.
33 D.9.2.27.21.
34 Lawson, *Negligence in the Civil Law* (1950), p 25.
35 Broadly speaking, these are: (1) a *damnum* - the plaintiff must have suffered a loss; (2) some act or conduct by the defendant; (3) the defendant's conduct must have caused the loss complained of; and (4) the act must have been done *iniuria*, which originally meant "without right", but which came to be explained in terms of *dolus* and *culpa* (see below).

damage arising out of even an apparent omission to act, for it is possible to apportion blame even where no discernible act is performed.[36]

The nature of the development of the term *iniuria* also supports the theory that, in determining liability, the jurists were principally concerned to establish blame rather than to identify a specific act or omission. To incur Aquilian liability it is said that the act which causes the *damnum* (accepted as meaning "loss") must be committed *iniuria*. That is, there must be *occidere iniuria* according to the first chapter and *urere, frangere, rumpere iniuria* according to the third. Discussing Justinian's conception of the meaning of the word *iniuria*[37] Evans-Jones and MacCormack conclude that "at this level it simply expresses the fact that for there to be an Aquilian action the defender must have acted wrongfully".[38] For Lawson, the effect of the word *iniuria* was that in order to incur liability the defendant "must not have acted *iure*, i.e. in pursuance of some right".[39] MacCormack concurs with this, saying:

> "at the time of the enactment of the chapters, *iniuria* was understood in the sense of *non iure*, without right. Where *damnum* had been caused, then either the plaintiff had to show that the defendant had not acted in pursuance of a right, or the defendant had to show that he had a right which justified the infliction of the *damnum*."[40]

However, most scholars agree that by the time of the Principate this regime of strict liability had been replaced by one based on deliberate (dolus) or non-deliberate fault (culpa).41 Indeed, MacCormack tells us that:

> "in developed classical law the stage had been reached in which *iniuria* itself could be explained in terms of *dolus* and *culpa*. Ulpian and Paul explain that *damnum iniuria datum* is to be taken as that which happens *dolo* or *culpa*."[42]

So we see that where the determination of *iniuria* was once objectively based, its interpretation in the classical era in terms of *dolus* and *culpa* injected a subjective element. This is because the words *dolus* and *culpa* would have had a moral connotation in ordinary Roman usage, and therefore to use such criteria in determining liability suggests that the accused's role was evaluated in moral terms. Again, this points away from a concern specifically with acts or omissions in imputing liability, revealing instead a preference simply to identify blameworthiness. This is supported by Lawson who suggests that the actual reason for the shift in emphasis from *iniuria* to *culpa* and *dolus* may have been "simply as an

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[36] This approach can be seen also from the practices of modern English criminal courts whereby a "stretched *actus reus* doctrine" enables the conviction of a defendant whom the courts consider to be undeserving, but who, because he did not strictly perform an act, technically should not incur liability. Such relaxation of the rules similarly enables the acquittal of a deserving defendant in appropriate circumstances: see Stannard, "Stretching the Actus Reus" (1995) 30 Irish Jurist 200-220. The modern English law in this respect will be considered more fully at a later stage in this paper.

[37] Justinian, *Institutes* 4.3.2-8.

[38] Evans-Jones and MacCormack, *The Aquilian Act*, p 4.

[39] Lawson, *op cit* at note 34, p 15.

[40] MacCormack, "Aquilian Culpa" in *Daube Noster: Essays in Legal History for David Daube* (1974) 201-224 at 201.

[41] Evans-Jones and MacCormack, *op cit* at note 38, p 4.

[42] MacCormack, *op cit* at note 40, p 201.

answer to the question whether the defendant was 'to blame' for the death or damage."[43]

That the jurists came in the classical era to be concerned primarily with the location of blameworthiness finds support also from the evaluation of damages under the third chapter of the *lex*. As Jolowicz says:

> "It has always been a stumbling block to commentators that, according to the literal interpretation of the text, even where an object is only injured, not destroyed, the highest value it bore during the preceding thirty days must be paid by way of compensation to the owner."[44]

However, Daube argues that damages under the third chapter of the *lex Aquilia* were originally assessed upon the *interesse* principle, with the return to the arbitrary method of fixed damages only taking place in the classical era.[45] This development supports the present contention that the concern of the classical jurists was to locate blameworthiness, for a punitive rather than compensatory assessment of damages would have created a greater concern to penalise only genuinely reprehensible persons.

The criterion of *culpa* illustrates this emphasis on blameworthiness particularly well. MacCormack says that three main approaches have been taken with regard to the interpretation of *culpa* in the context of the *Lex Aquilia*, namely: (1) that *culpa* is *negligence*, the failure to exercise the care of a *bonus paterfamilias*, and that it had this meaning both in classical and in later law; (2) that *culpa* in classical law expresses *imputability*, that is to say the causal connection between the act of damage and the person who committed it; and (3) that, at any rate in classical and in later law, *culpa* expresses *fault*, conduct which can be considered as a matter of reproach on the part of the defendant.[46]

Writers on the subject find themselves on either side of the great divide between *culpa* as negligence and *culpa* as fault. MacCormack discusses in his various studies the meaning of *culpa* and states that it is to be treated as fault not negligence.[47] He says that to translate *culpa* as negligence suggests that a principle of foreseeability operated in Roman law as much as it did in English law, and that the jurists asked in each case ought the defendant to have foreseen that his act or omission would cause damage.[48] This position, he states, could only be maintained through a distortion of the way in which the jurists actually operated. His conclusion is not that *culpa* is negligence, but that carelessness is a species of *culpa* so that "among the state of affairs which constitute *culpa* are lack of skill (*imperitia*) and carelessness (*neglegentia*)."[49] Texts taken by other commentators to evince *culpa* generally as negligence, for example

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43 Lawson, *op cit* at note 34, p 37.

44 Jolowicz, *op cit* at note 12, p 224.

45 According to Daube, the compilers of the *lex Aquilia* wanted to revolutionise the compensation system by aiming to restore only the actual damage sustained in any particular case. This is the *interesse* principle of compensation. However, when liability under the third chapter came to encompass inanimate objects it became necessary to return to the more rigid evaluation of damages. For a full discussion on this development see Daube, *op cit* at note 8.

46 MacCormack, *op cit* at note 40, p 202.

47 See particularly: "Aquilian Culpa", *op cit* at note 40*;* "Aquilian Studies", *Studia et Documenta* (1975)*;* and *Culpa* (1971).

48 MacCormack, *op cit* at note 40, p 202.

49 *Ibid*.

D.9.2.31.pr.,[50] are not indicative of anything other than that the jurists considered that particular scenario to involve negligence. MacCormack concludes that *culpa* both expressly and generally represents fault.[51] Frier agrees, saying that the central principle of Aquilian liability was that "no one can be held liable for loss not demonstrably caused by his or her own fault (however 'loss', 'caused', and 'fault' may be defined)".[52]

MacCormack concedes that there seems indeed to be no general rule allowing one to determine how *culpa* is to be taken in all situations. However, he insists that we can conclude this much: that implicit in the notion of *culpa* is some personal failure on the part of the individual, a failure to exercise in some respect his or her intellectual capacity.[53] In reaching this conclusion he draws support from D.9.2.5.2 which says that the *furiosus* (insane) and the *infans* (young child) are not capable of *culpa*. Their incapacity in this regard derives from their lacking the particular mental capacity illustrated by the word *mens*. MacCormack says that we may therefore infer that a person was regarded as being in *culpa* where he had failed to exercise, or had exercised defectively, his mental ability to appreciate the consequences of his actions, or to see what was right or wrong.[54]

MacCormack's conclusion that *culpa* was treated by the classical jurists as fault accords well with the present suggestion that their primary concern in determining liability was to establish who was to *blame* for the particular damage. That is, by translating *iniuria* to mean *culpa* (and *dolus*), *culpa* (fault or blameworthiness) is made a *necessary* ingredient of the offence so that it *must* be shown before liability is imposed.

That the classical jurists sought more to equate liability with blameworthiness would have produced a dual effect, serving either to restrict or to broaden the earlier scope of liability by enabling a defendant who had acted without a right to show that he was not to blame for the loss, or alternatively, where he was to blame, by treating what was previously lawful as actionable. This broadening of the scope of the action could well produce liability for an apparent omission, for a failure to act may nevertheless be blameworthy.

There are a number of texts specifically relevant to the subject of liability for omission under the *lex Aquilia*. These will now be shown to support the contention that liability was decided upon the basis of blame-worthiness, rather than upon a specific analysis of act or omission.

This proposition is supported initially from the basic fact that it is difficult to distinguish the criteria which create liability in these texts. Consequently, it is unclear what differentiates the texts wherein liability is imposed from those which do not give rise to liability. Many theories are advanced as to why liability is incurred in the hope of determining clear and distinct rules of thumb, but it is suggested that, as with the cases already mentioned involving unlawful damage to property, liability was decided on a largely empirical and casuistic manner.[55] However, where

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[50] See text below at notes 108-109.

[51] *Op cit* at note 40, pp 207-216.

[52] Frier, *Roman Law of Delict* (1989), p 29. This is the principle of "no liability without fault" which, Frier says, "ranks among the greatest intellectual achievements of Roman jurists": *loc cit*.

[53] MacCormack, *op cit* at note 40, p 219.

[54] *Ibid*.

[55] However, MacCormack warns us that any description of the classical approach as empirical or casuistic should not be taken as implying that the jurists did not

the jurists do give an action it is on the grounds that the defendant has been at fault or has behaved reproachfully, and this is the only truly common thread running through the texts, to which we must now turn.

First of all, we must refer again to the text D.9.2.8.pr.,[56] in which Gaius says that a surgeon who has operated on a slave successfully, but has afterwards failed to attend to his care, is liable on account of the death of the slave. The compilers of the Digest link this statement with D.9.2.7.8, in which Proculus says that a doctor who operates negligently on a slave will be liable under either the contract for services or under the *lex Aquilia*. The text D.9.2.8.pr. has been taken to suggest that liability was imputed in cases of pure omission, for in this text the surgeon has omitted to attend to the necessary aftercare and is held liable for the death of the slave.

However, it is sometimes sought to explain liability in this text in terms other than omission. For example, Grueber argues that

> "the omission is doubtless preceded by a commission, that is, the act of incision, which is closely connected with it. We even say: incision and the following non-attendance form together only one whole, namely, the operation upon the slave, and this operation has not been performed as it ought to have been. Accordingly, it is the improper performance of an act to which the death of the slave is due."[57]

The real cause of the death is not merely the non-attendance to the incision, but also includes the incision itself, a positive act to which the damage complained of is partly due. There is also Buckland's argument that "one who sets a state of things going must take the further steps which it renders necessary". [58] Buckland and McNair would even say that "in Roman law a surgeon who had operated at once came under an obligation to give or arrange for after-treatment".[59] The surgeon is placed under a duty to perform the aftercare since he has necessitated this by operating upon the slave.

The theories of Grueber on the one hand, and of Buckland and McNair on the other, are comparable with the different judicial approaches taken in the modern English criminal law case of *R* v *Miller*.[60] In this case the defendant fell asleep in a derelict house in which he was squatting. He woke up to find that he had accidentally set fire to his mattress with a cigarette, but decided, since he had nothing to put the fire out with, to leave it burning and move to a different room. The fire subsequently spread and caused damage to the house. Miller was charged with arson

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apply rules or make use of generalisations in their reasoning on *culpa*. This is because some degree of generality was attained in their treatment of the facts of a case; for example, it came to be established that facts of a certain type always constituted *culpa*, such as *imperitia* (lack of skill), *infirmitas* (lack of strength), *nimia saevitia* (excessive brutality), and *neglegentia* (carelessness). Accordingly, "the jurists did not ask, were the particular facts which disclosed some element of lack of skill or carelessness sufficient to constitute *culpa*? They asked, did the facts constitute lack of skill (*imperitia*) or carelessness (*neglegentia*); if so it followed that *culpa* was present." (*Culpa*, *op cit* at note 47, p 128.)

56 Above at note 17.

57 Grueber, *op cit* at note 3, p 210.

58 Buckland, *op cit* at note 15, p 333.

59 Buckland and McNair, *Roman Law and Common Law* (1952), pp 374, 375.

60 [1982] QB 532 (CA); [1983] 2 AC 161 (HL).

contrary to section 1(1) and (3) of the Criminal Damage Act 1971. His defence was that at the time he started the fire he lacked the necessary *mens rea*, since he was asleep. The court at first instance, the Court of Appeal, and the House of Lords were all unanimous in rejecting this argument, but their lines of reasoning differed.

At Leicester Crown Court, the Recorder analysed Miller's conduct in terms of a culpable omission to act.[61] The criminal law normally does not impose liability for omissions, but the situation may differ where the defendant was under a duty to act. In this case, it was held that the accused, having by his own act started a fire on the mattress which, when he became aware of its existence, presented an obvious risk of damaging the house, came under a duty to take some action to put it out. A distinction had to be drawn here between the case of someone coming across an already existing dangerous state of affairs and doing nothing, in which case the law would not impose any duty to act, and the very different case of someone who, either accidentally or deliberately, was responsible for the dangerous state of affairs yet failed to take steps to deal with it.[62] In the latter case, the court ruled, the criminal law would impose on the person involved a duty to take action. Miller was duly convicted on the basis of this "duty" theory.

However, the approach taken by the Court of Appeal[63] in upholding the guilty verdict was different. May LJ held that "an unintentional act followed by an intentional omission to rectify that act or its consequences can be regarded in toto as an intentional act".[64] Thus, May LJ treated the whole course of conduct of the accused, from the moment of the unintentional commission through the intentional omission until the time the damage was complete, as a single continuous act. This is similar to Grueber's theory, in that it does not separate the omission from the previous commission but instead states the damage to be the result of the improper performance of an act.

Buckland and McNair's theory that the omission incurred liability because it was preceded by an assumption of responsibility is precisely the approach taken by Lord Diplock when the case reached the House of Lords.[65] Lord Diplock referred to the first instance judgment on the case and gave preference to this "duty" theory (which he modified to "responsibility") over that of the "continuing act".[66] This is similar to Buckland and McNair's expression of the approach taken by the Roman jurists, in that Lord Diplock is saying in effect that where someone has by his own act set, as it were, the wheels of damage in motion, upon becoming aware of the potential damage that person has a responsibility to the person to whom the endangered property belongs.

Returning to D.9.2.8.pr., which of the suggested theories is to be preferred - Grueber's theory of improper performance of a positive act or Buckland and McNair's duty theory? It is submitted that, although both of these theories are perfectly workable, they involve essentially groundless and basically unnecessary presumptions. It is suggested that MacCormack's interpretation is the better one. He says that Gaius takes the surgeon's neglect to be *culpa* on his part and, although failure to carry out the

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61 [1982] QB 532 at 534, 535.
62 Stannard, *op cit* at note 36, p 206.
63 [1982] QB 532.
64 *Ibid* at 540.
65 [1983] 2 AC 161.
66 *Ibid* at 179.

treatment necessitated by an operation may be a case of negligence on the part of the defendant, he says that this is not Gaius's point of view:

> "[H]e does not go into the question whether the doctor was careless in omitting to look after the patient. The mere omission itself, he holds, constitutes *culpa*". [67]

MacCormack's argument recognises that there is no indication that the jurists analysed the death of the slave in terms of the surgeon being careless or of his owing a duty to the owner of the slave. Further, whether or not the death was strictly caused by an act or an omission is not dwelt upon. Simply, the failure to provide the aftercare is identified as the cause of death, and this failure is attributed to the surgeon who is then held to be in *culpa* - at fault.

The text D.9.2.27.9[68] can be used to further illustrate the point that in interpreting Roman texts, modern theorists attribute to the Roman jurists lines of reasoning that they did not necessarily follow. In D.9.2.27.9 Ulpian considers the case where a man lit a furnace but another took over the actual watching of it and then fell asleep so that the fire spread. Ulpian gave an *actio utilis* against the man who fell asleep. This case may again be interpreted to mean that liability existed for pure omission, for the man who fell asleep literally did nothing. However, Grueber again presents the argument that a *positive act* occasioned the harm in that the second person approached the fire, apparently with the intention of taking care of it, and thus induced the first person to leave his place. It is, therefore, due to the second person's *act* that the fire has assumed such dimensions as to cause damage, and so it is not a question of omission.[69]

Referring to this text, Buckland and McNair state that a mere passer-by who, noticing that a fire was reaching dangerous dimensions, watched it for a while and then went on his way could not be held liable for damage caused by that fire.[70] However, the defendant in D.9.2.27.9 is obviously more than a passive bystander, even though he has literally done nothing. *Something*, common sense dictates, distinguishes him from being simply an uninvolved viewer, and thereby renders him liable. Buckland and McNair suggest that this 'something' may be that he may have been under a duty or obligation of some sort, for example, as a slave or as a mandatary.[71] Buckland proposes that the most probable solution is that the omission was preceded by an assumption of responsibility, and this assumption would be voluntary in the case of a freeman but would be unavoidable and automatic in the case of a slave.[72]

While these suggestions are perhaps workable, it is not clear from the text that they reflect the actual reasoning of the jurists. That is, while it is possible to interpret D.9.2.27.9 in terms of a duty, the text does not do so, or at least it is not recorded as doing so. As for Grueber's argument, in its concern to dispel the possibility of liability for omissions, it seems to unrealistically stretch the notion of an act in order to impute liability. There is, however, no indication in the text that the jurists restricted themselves so unnecessarily by insisting on evaluating liability only in terms of a positive act or commission.

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[67] MacCormack, *op cit* at note 40, p 211.
[68] Also in Collatio 12.7.7.
[69] Grueber, *op cit* at note 3, pp 211, 212.
[70] Buckland and McNair, *op cit* at note 59, p 375.
[71] *Ibid*, p 376.
[72] Buckland, *op cit* at note 15, p 333.

It is suggested that the only conclusion which the text D.9.2.27.9 does permit us to make as to why liability was incurred is that the defendant was considered to be blameworthy. In this connection it is worth referring again to Buckland and McNair's comparison between the defendant in D.9.2.27.9 and the uninvolved passer-by.[73] The obvious distinction between the two is that the passive bystander is *blameless*, whilst the person who falls asleep whilst supervising a fire clearly is not. And this conclusion may have been no more than a simple matter of common sense.

D.9.2.27.9 raises a question commonly asked by modern lawyers: where the definition of a crime requires proof that the defendant caused a certain result, can D be said to have caused that result by doing nothing? Hogan argues that results cannot be "caused" by omission, and that it therefore ought to follow that no one should be liable for a "result" crime because of a mere omission, for, "if any proposition is self-evident (and, arguably, none is) it is that a person cannot be held to have caused an event which he did not cause".[74] Given that arson is a result crime, that is, a crime which is not complete until certain consequences take place, Hogan would presumably have denied liability in D.9.2.27.9. However, whilst Hogan concludes that results may never be caused by inaction, he does say that:

> "On the other hand, a result may be caused by the defendant's conduct and the *totality of the defendant's conduct* causing a result may properly include what he has not done as well as done. In such cases I doubt whether it is very, or at all, helpful to analyse each phase of the defendant's conduct as one of omission or commission. The question is simply did the defendant's conduct cause the result?"[75]

This approach is certainly more practical than being unduly preoccupied with questions purely of act or omission. This is because analysing a particular defendant's actions in isolation may conceal their blameworthiness, for an act or omission taken on its own may well be benign, for example, it can hardly be said to be reprehensible to fall asleep, as the defendant did in D.9.2.27.9. However, to do so whilst ostensibly supervising a fire is indeed blameworthy. Therefore, by analysing the defendant's conduct in its entirety it is possible to locate blameworthiness and hence to impute liability. On this reasoning Hogan too would have found the defendant in D.9.2.27.9 liable.

Analysing the defendant's guilt in terms of his entire conduct presents problems in modern law from the point of view of the requirement of coincidence of *actus reus* and *mens rea*. This was a problem which had to be addressed in *Miller*, for arson being a "result" crime, the conduct which brought about the relevant result could well have consisted of a wide variety of acts and even omissions taking place over a period of time.[76] This meant that the defendant's state of mind may have varied during the relevant period making it difficult to find any point of coincidence of *actus reus* and *mens rea*. However, as Stannard points out, the courts have been able to circumvent the coincidence problem in this sort of case too, either by adopting the notion of a continuing act, or by analysing the case as one

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[73] See text above at note 70.

[74] Hogan, "Omissions and the Duty Myth" in *Criminal Law Essays in Honour of J. C. Smith* (1987) 85-91 at 85.

[75] *Ibid* at 88. (Emphasis added.)

[76] Stannard, *op cit* at note 36, p 205.

where liability for omission may be imposed.[77] Lord Diplock's handling of the *Miller* case illustrates the flexibility of the courts in this regard:

> "if at the time of any particular piece of conduct by the accused that is causative of the result, the state of mind that actuates his conduct falls within the description of one or other of the states of mind that are made a necessary ingredient of the offence of arson by section 1(1) of the Criminal Damage Act 1971... I know of no principle of English criminal law that would prevent his being guilty of the offence created by that subsection. Likewise I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures which lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence."[78]

So the problem of coincidence is solved by looking not merely at the result, but at the conduct which led to that result, which may consist of a variety of elements in conjunction.[79] This is Hogan's point exactly.

The *Miller* case exhibits a certain willingness by the courts to find the particular defendant guilty even though strict application of the law would not have permitted this. That case does not, however, reveal a *policy* of liability in cases involving omission to act. Rather, it reveals that where common sense, if not technically the law, dictates that the defendant is to blame for the damage incurred and that defendant is held to be undeserving, then liability will result.

The case *R* v *Gibbins and Proctor*[80] further illustrates the modern court's willingness to stretch the law to find an undeserving defendant guilty even though liability could well have been avoided. This case again involved an apparent omission to act, this time in circumstances giving rise to death or bodily injury. Stephen viewed the occasions where one is held liable for failing to act in this context as very limited, saying that, "it is not a crime to cause death or bodily injury even intentionally, by any omission."[81] He provides the following illustration: A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.[82] However, Stephen does say that an exception to this would be where A is B's parent. A would be guilty of murder for he has a duty to act here.[83]

The facts of *R* v *Gibbins and Proctor* were as follows. Walter Gibbins and Edith Proctor were living together. Also living with them were Gibbins' daughter Nelly who was seven, and other children. These other children were healthy, but Nelly was kept upstairs apart from the others and was starved to death. There was evidence that Proctor hated Nelly; she cursed and hit her. It was said that she had a strong interest in Nelly's death. Gibbins was earning good and regular wages, all of which he gave to Proctor. When the child, Nelly died, Proctor told Gibbins to bury her out of sight, which he did.

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77 *Ibid*.
78 [1983] 2 AC 161 (HL) at 175, 176.
79 Stannard, *op cit* at note 36, p 207.
80 (1918) 13 Cr App R 134 (CCA).
81 Stephen, *A Digest of the Criminal Law*, (4th Edition, 1887), p 154.
82 *Ibid*.
83 *Ibid*.

Gibbins and Proctor were subsequently brought to trial and charged with Nelly's murder. Now there was no problem about imputing liability for the death to Gibbins, for he was the child's father and his duty to act was clear. But what about Proctor? She was not the child's natural mother, nor was she married to the child's father which would have legally conferred parental duties upon her. Accordingly, upon strict application of Stephen's reasoning Proctor could not be held responsible for the child's death. However, Darling J felt differently:

> "She had charge of the child. She was under no obligation to do so or to live with Gibbins, but she did so, and receiving money... for the purpose of supplying food, her duty was to see that the child was properly fed and looked after, and to see that she had medical attention if necessary."[84]

There is a strong sense of moral outrage in this summation, illustrated more clearly by his further comments:

> "There is no case directly in point, but it would be a slur upon, and a discredit to the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her, that legal duty the prisoner has wilfully and deliberately left unperformed with the result that there has been an acceleration of the death of the deceased owing to the non-performance of that legal duty. Here Proctor took upon herself the moral obligation of looking after the children; she was de facto, though not de jure, the wife of Gibbins and had excluded the child's own mother. She neglected the child undoubtedly, and the evidence shows that as a result the child died."[85]

Darling J here acknowledged that Proctor acted as more than a mere bystander; she directly contributed to the state of affairs which led to the child's death. That is, she failed to provide food for the child to the extent that the child died of starvation. To allow Proctor to escape liability on the grounds provided by Stephen would have been morally reprehensible, and so liability was framed on the basis that she became automatically responsible for the child upon moving in with the child's father. Proctor was in a position quite different to that of, for example, a hypothetical next-door neighbour who knew what was going on but did not take action. Such a neighbour could not be held liable for any crime.

The decision against Proctor evidences again the suggestion that modern English courts are willing to impose liability where morality and common sense require it even if strict application of the law would not; liability is sought to be imposed on the *blameworthy* defendant. This is also illustrated by the application of the law in the reverse situation whereby a *deserving* defendant can be got off the hook, as it were.[86] In *Airedale NHS Trust v Bland*[87] the facts were that B, a victim of the Hillsborough football disaster, had been diagnosed as suffering from a Persistent Vegetative State (PVS). Though alive in the legal sense - he had not undergone death of the brain stem - he was unable to respond to stimuli and could only be kept alive by means of artificial feeding. The question for the courts was whether it would be lawful for the medical team to discontinue the artificial feeding so as to bring about B's death, this being the stated wish of his family. This in turn involved the courts in having to decide whether

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84 (1918) 13 Cr App R 134.
85 *Ibid.*
86 Stannard, *op cit* at note 36, p 213.
87 [1993] AC 789.

such conduct would amount to a positive act or a mere omission. Stannard clarifies the importance of the distinction in this instance, saying:

> "if it was an act, the legal position was clear: neither the medical team nor anybody else was entitled to take active steps to shorten B's life. But if it was an omission, the question became a much wider one, namely, whether the doctors were under a duty to continue the treatment despite being of the view that this was neither worthwhile nor in B's best interests."[88]

The traditional distinction between acts and omissions is based on Austin's conception of a "willed muscular movement" whereby acts "properly so called" are movements of the muscles accompanied by some degree of volition on the part of the actor.[89] Stannard points out that on this traditional analysis there seems to be

> "no escaping the conclusion that the proposed course of conduct, insofar as it involved the movement of the muscles in the course of removing B's feeding tubes, was a positive act, and therefore no more permissible in the circumstances than a lethal injection would have been."[90]

However, in the House of Lords Lord Goff endorsed the view taken by Glanville Williams that what the doctor does when he switches off a life support machine "is in substance not an act but an omission to struggle",[91] and that this omission "is not a breach of duty by the doctor, because he is not obliged to continue in a hopeless case".[92] Lord Goff explained his reasoning in the following terms:

> "I agree that the doctor's conduct in discontinuing life support can properly be categorised as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example, where he takes some positive step to bring the life support to an end. But discontinuation of life support is, for present purposes, no different from not initiating life support in the first place..."[93]

Stannard argues that the court here is applying the "stretched *actus reus* doctrine" to convert what would otherwise be classified as a positive act into a mere omission, so that in this way the doctrine can be used to exculpate as well as to condemn.[94] This is done because it would hardly be a reasonable and just usage of the law to convict a doctor in such circumstances even though it would legally be possible to do so. The doctor is not blameable, not undeserving, and so we feel that liability should not be visited upon him.

It is, therefore, possible to identify a common theme running through the modern cases which involve apparent omissions to act, and this theme is similar to that presently advanced with regard to the Roman texts. That is, English law in general is not

> "in fact, ...particularly interested in whether an act is primarily positive or negative: its attention is focused rather on the question whether the conduct of the defendant is legally blameworthy. All that can be said

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88 Stannard, *op cit* at note 36, p 213.
89 Austin, *Lectures on Jurisprudence*, (5th edition, 1885), pp 411-412.
90 Stannard, *op cit* at note 36, p 214.
91 [1993] AC 789 at 814.
92 *Ibid*.
93 *Ibid*.
94 Stannard, *op cit* at note 36, p 215.

> regarding a differentiation between 'commission' and 'omission' is that there will be no liability for failing to act in circumstances where it is considered that a reasonable man would not have acted."[95]

With this in mind, we may return to the Roman texts. The proposition presently advanced, namely, that the Roman jurists assessed liability in terms of blameworthiness, thereby readily allowing liability for omissions, is revealed also by their apparent tendency to impute liability only *insofar* as the defendant was actually culpable. A number of texts are relevant here. For instance, in D.9.2.30.4 Paul says that if a slave is wounded, but not mortally, and he dies of neglect, the action will be for wounding, not for killing.[96] The culprit's actual act of wounding is taken to be a completed act, for he is not considered to be liable for anything other than wounding. But the slave has died and who is responsible for his death if not the person who inflicted the wound, for presumably if he had not been wounded he would have lived until his life ended naturally? However, the jurists did not treat the case in this way and the obvious inference to draw from their handling of D.9.2.30.4 is that the owner was considered to have been responsible for the death of his slave by failing to attend to him. Of course, this is not to say that the owner is *liable* for the death since one cannot be held liable for damaging one's own property. However, if we imagine that the wounded slave had fallen into the hands of someone other than his owner, who then neglected him so that he died, then we can presume from D.9.2.30.4 that this person is liable for the death of the slave. In this way, there does seem to be liability for pure omission to act for the *neglect* itself is seen as causing the death? At any rate, the party who wounded the slave is held liable only for injuring him and not for killing him.

D.9.2.30.4 is comparable to the case of the doctor who omits the aftercare of the slave on whom he has successfully operated, so that the slave dies.[97] However, there the surgeon is made liable for the death of the slave. What is the difference? The surgeon has made the incision and strictly speaking it is this which lets in the operation of natural forces. This seems analogous to the wound inflicted by the defendant in D.9.2.30.4 for which liability was only for wounding.

Grueber proffers that the difference lies in the fact that in D.9.2.30.4 the wound is not mortal:

> "[S]trictly speaking, an *actio de occiso seruo* seems to be excluded, not because there is contributory negligence of the injured party but because the act of damage does not constitute an *occidere* in the eye of the law, for this notion implies that death necessarily results from a certain act, whether at once or not till after some time; it is accordingly only a mortal wound which can entail liability under the first chapter of the *Lex Aquilia*."[98]

We are not told of the nature of the wound created by the surgeon in the course of the operation, but evidently it was capable of leading to death. Is this the sense in which the word "mortal" is used by Grueber? If this is

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[95] Price, "Aquilian Liability for Acts of Omission", *Acta Juridica* (1962), p 77.

[96] On the other hand, Alfenus says that if a slave were to die as the result of an assault and without any contributory factor like neglect on the part of his owner or lack of professional skill in a doctor, an action may properly be brought for killing him wrongfully (D.9.2.52).

[97] D.9.2.7.8 (above at note 17).

[98] Grueber, *op cit* at note 3, p 230.

the case, then the wound in D.9.2.30.4 was also mortal in nature, and so liability should have been for killing.

Perhaps a more convincing explanation is that the jurists were concerned to condemn the culprit only to the extent of his actual wrongdoing. Therefore, a person who wounds a slave should not be held liable for the death of that slave if that slave would not have died but for his master's neglect (D.9.2.30.4) - to wound is not always to kill. On the other hand, a surgeon who has operated on a slave and then neglects his aftercare (D.9.2.7.8) can easily be seen as being solely to blame for the slave's death. Presumably the disposition of liability would have been different here if the doctor had entrusted the aftercare of the slave to another doctor who had then failed to provide it so that the slave died. The doctor who had performed the operation successfully would surely incur no liability - he has behaved in no way reprehensibly. The second doctor, however, would presumably be liable under Chapter One.[99] Analysis of the texts D.9.2.30.4 and D.9.2.7.8 in this way supports the theory here advanced that blameworthiness was the principal criterion of liability.

A further difference could lie in the *nature* of the defending parties involved. Lawson makes the interesting suggestion that in some situations a form of strict liability may have operated.[100] He here refers to the treatment of "persons assuming to possess special qualifications", and adds:

> "if when undertaking a dangerous process such as a surgical operation I am held to an exceptionally high standard of care and skill, so in the use or custody of peculiarly dangerous things I can be held to a correspondingly high standard so that I shall in fact find it difficult to explain away any damage due to their escape."[101]

It is presumed that Lawson here envisaged it to be similarly difficult for a surgeon to excuse a death which resulted from his failure to provide necessary aftercare to the point that liability would be almost absolute. Lawson says that this type of strict liability may have existed *despite* the jurists' "preoccupation with moral blameworthiness"[102]and this suggestion may indeed be a plausible exception to the present argument that liability was imputed only upon the party identified as blameworthy. However, Lawson's suggestion could serve equally well to fully support this theory rather than operating as an exception to it, for it may have been that the surgeon in D.9.2.7.8 was seen to have been even more morally errant than another type of defendant, given that as a doctor he was required to discharge his duties flawlessly. There would have been a greater sense of moral outrage in such a case and the desire to penalise would have been stronger, resulting in a form of strict liability. Liability may, then, have been a virtually automatic consequence in these circumstances precisely *because* of the preoccupation with moral blameworthiness.

In this connection it is worth referring to D.9.2.52. Here Alfenus says that if a slave were to die as the result of an assault and without any contributing factor like neglect on the part of the owner or lack of professional skill in a doctor, an action may properly be brought for killing him wrongfully. We are not told that the wounds are mortal, but this is

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[99] In which case liability must be purely for the neglect, for he has performed no positive act; he has done nothing whatever. Liability here may be compared to liability in the text D.9.2.27.9 (above at notes 68-75).

[100] Lawson, *op cit* at note 34, p 43.

[101] *Ibid.*

[102] *Ibid.*

implied since we are told that there were no other factors contributing to the slave's death. This text implies that negligence on the part of the owner or lack of professional skill in a doctor could have an impact on the disposition of liability. Buckland explains this by saying that if I wound a slave and he is treated by a doctor who treats him unskilfully so that he dies, I have not killed; no doubt the wounding caused the doctor's intervention, but it did not cause his negligence.[103] He adds that where this might today be thought of as a question of remoteness of damage, the Romans thought of it in terms of an intervening independent cause. The notion seems to be that one is not responsible for the harm if it would not have occurred but for someone else's contemporary or supervening negligence.[104] Similarly, a master's failure to attend to his slave is to be treated as an intervening independent cause. However, in order to accord with this article's suggestion that liability is for blameworthiness and only insofar as one is blameable, these intervening occurrences or non-occurrences could only be considered to be independent causes if the wound inflicted was not of a mortal nature. This is because if the wound was mortal in nature the slave would have died whether or not his master enlisted the help of a surgeon and the owner should not be considered to have contributed to his slave's death, thereby enabling the culprit to escape with reduced liability, for having failed to attend to his slave in a situation where that attention would have been in vain.

These last mentioned texts are indeed difficult and lead to much complexity, but a significant feature is that the jurists seemed concerned to impose liability only insofar as the defendant was actually culpable. This is illustrated by the textual references to whether or not the particular wound was mortal in nature,[105] and also by the inferences that an apparent omission to act, for example neglect of a wounded slave, could prevent an action for killing, thus attributing to that omission a degree of culpability[106] and simultaneously restricting the liability of the defendant.

Significantly, the question of whether to impose liability for killing or for mere wounding bore little practical value since determining which chapter of the *lex* the loss in question came under was relevant only to the calculation of damages, and an inherent anomaly of Aquilian liability was that full damages were generally possible even for mere wounding.[107] However, this concern to correctly classify an offence as coming under either chapter one or two despite the lack of practical value of this, illustrates precisely the point that blameworthiness was the primary concern. That is, the jurists were reluctant to impose greater moral blame than was actually merited, whether or not the amount of damages was affected.

It remains to consider texts D.9.2.28.pr. and D.9.2.31.pr. In D.9.2.28.pr., Paul says that people who dig pits to catch bears and deer are liable under the *lex Aquilia* if they dig pits in a public place and something falls in and is damaged, but there is no such liability for pits made elsewhere, where it is usual to make them. D.9.2.28.1 says that this action is only allowed if

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103 Buckland, *op cit* at note 15, p 334. Compare *Jordan* (1956) 40 Cr App R 152.

104 *Ibid.*

105 However, it does not seem unreasonable to consider all wounds which result in death (whether or not death could have been avoided thereafter, for example, by providing medical care) as mortal in nature for presumably the life in question would not have ended when it did had it not been interfered with.

106 This is not, of course, to say that such an omission by an owner could incur liability, for no one could be held liable under the *Lex Aquilia* for damaging his own property.

107 See text above at note 23.

no warning was given and the plaintiff did not know of the danger, nor could have foreseen it. This may be taken with D.9.2.31.pr. where Paul says that if a pruner throws down a branch from a tree and kills someone passing underneath, he is liable only if it falls down in a public place and he had failed to shout a warning so that the accident could have been avoided. There will be similar liability if the pruner was working on private land which had a pathway. Common to both cases is that liability ensues if no warning of the imminent danger is given. Do these cases therefore involve liability for omission?

Smith and Hogan discuss a similar scenario in which D, a cleaner, puts polish on a floor and then, in breach of his duty, omits to display the notice with which he has been provided warning users of the building of the dangerous state of the floor. P slips on the polish and falls. Smith and Hogan ask whether this is a mere omission.[108] They note that the Criminal Law Revision Committee treated it as such. But one member of that Committee, Glanville Williams, said that:

> "in such circumstances of act/omission the total conduct could and should be regarded as an act, so the cleaner could be guilty of the offence of causing injury recklessly..."

Smith and Hogan discuss an alternative scenario where it was the duty, not of the cleaner, but of the janitor, to place the notice on polishing day.[109] Here it could not be said that the janitor had caused the injury by an act, for he did no act whatever. Williams would presumably hold the cleaner liable in the original case, but not the janitor in the alternative version. Smith and Hogan ask if there is a causation problem in this case: spreading the polish was a cause, but the janitor did not spread the polish and the question is whether the omission to display the notice was also a cause. Would the injury not have occurred but for that failure? If the person who fell was blind and would not have seen the notice anyway, the omission to display it was not a cause. The answer could depend on the presence or absence of a duty. The janitor would not be responsible for the blind plaintiff who slipped and was injured, so long as he had put out a sign and provided that this was all that was required of him.

With regard to the Roman law texts, Grueber says that:

> "such an act as throwing down branches or anything else in a place of public resort requires that precautionary measures be previously taken in order to avoid damage to others; otherwise such acts are not performed as they ought to be, and therefore the doer is in *culpa*."[110]

According to Grueber then, the pruner had a duty to call out a warning, and this duty was brought about by the nature of the task he undertook. So according to him the case does not involve a bare omission. Grueber says that it is evident that the damage is not due to the omission of the warning, but to the subsequent act of throwing down the branch, for even if the warning had been given, the damage might have happened anyway, for example, if the passer-by had been deaf.[111] However, here no liability would attach to the act of throwing down the branch, for the man who threw it down would have done what a careful man - a *diligens*

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[108] Smith and Hogan, *Criminal Law Cases and Materials*, (6th edition, 1996), p 62.
[109] *Ibid*.
[110] Grueber, *op cit* at note 3, p 212.
[111] *Ibid*.

paterfamilias - would have done under the circumstances.[112] In this way, Grueber attributes the liability to a positive act improperly performed. He would presumably apply this reasoning to the text concerning the digging of pits.

But did the jurists consider these texts generally in terms of the *diligens paterfamilias*? MacCormack says that:

> "when discussing the case of the pruner Quintus Mucius held that the pruner was liable if as a diligent man he should have foreseen that someone might have come by and yet did not give a warning, or if he did give a warning but gave it too late."[113]

However, MacCormack says that this is not to be taken as representative of that jurist's approach in *all* such cases involving failure to provide adequate warning but, rather as referring particularly to the case of the pruner. He says that what Mucius said was probably not:

> "there is *culpa* where a person does not foresee what a diligent man would have foreseen, but something like, there is *culpa* on the part of the pruner if he did not foresee, as a diligent man would have foreseen, that people were likely to be passing and so failed to shout a warning or shouted one too late".[114]

MacCormack supports his theory that the reference in D.9.2.31.pr. to the *diligens paterfamilias* was peculiar to that particular text by saying that there is no other text which can be construed as stating that *culpa* is the failure to foresee what a diligent man would have foreseen.[115]

So what is the common theme underpinning these texts? Referring to D.9.2.31.pr., Grueber acknowledges that there would no liability if the pruner shouted out a warning but the passer-by was deaf and as such was killed. There would be no liability here, for the pruner had actively provided a warning. The distinction is that although the pruner's action of throwing down the branch still caused the death, he is not *to blame*. Had he not called out a warning and a passer-by, not deaf, was killed then he would be blameworthy and thus liable. In this way, liability is readily imputed for omission - the failure to call out a warning.

There are other Roman law texts which give rise to the inference that liability existed on account of omission,[116] but the texts here discussed are sufficient to illustrate the point raised in this study. That is, although it is not easy to determine any consistent formula in these cases which could enable one to define why liability is imposed - and this is true not only with regard to cases of apparent omission but to the juristic texts in general - the presence of *culpa* is a common certainty. And although the jurists did not operate with a strict classification of *culpa* - its meaning can only be gathered from the states of affairs in which it was held to be present or absent[117]- it is here suggested that *culpa* may be translated

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[112] *Ibid*.
[113] MacCormack, *op cit* at note 40, p 203.
[114] *Ibid*.
[115] *Op cit*, p 204.
[116] For example, D.9.2.29.2, D.9.2.30.3, D.9.2.44.1, D.9.2.45, D.9.4.2 and D.9.4.3.
[117] MacCormack, *Culpa*, *op cit* at note 47, p 125.

generally as fault. This leads to the general proposition that where liability was imposed it was because the defendant could be shown to be blameworthy. Further, this element of blameworthiness could be produced equally by a commission or an omission, for a rigid formula of *culpa* which prohibited or, indeed, permitted liability for omissions simply did not exist. Whilst theories suggesting that liability was based upon duties to act or upon badly performed commissions (to the exclusion of omissions) are certainly plausible, there is generally nothing in the texts to support them. In fact, they seem to be largely the product of supplanting modern legal reasoning onto that of the Roman jurists. The theory advanced in the present study, on the other hand, is far more in keeping with the texts as they stand.