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# KILLING AND CAUSING DEATH IN ROMAN LAW

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## 1. Introduction

The facts of *Fairchild v Glenhaven Funeral Services Ltd*<sup>1</sup> are well known. The three claimants had been negligently exposed to asbestos during their working lives by several employers. All had developed mesothelioma, a cancer of the lungs which is known to be caused exclusively by the inhalation of asbestos fibres. However, the claimants were unable to demonstrate on the balance of probabilities that any one of their employers had caused their illness. This was due to general scientific uncertainty about the way in which mesothelioma is caused. It was clear that the greater the exposure to asbestos, the greater the likelihood of developing mesothelioma. However, it was unclear whether the disease could be triggered by one fibre or whether it was necessary to breathe in a certain number of fibres, and if so, what the threshold amount necessary to trigger mesothelioma might be. Thus there was no way of knowing which particular fibre or fibres had caused the disease. If each claimant had had only one employer during the course of his working life, he would have been able to show that that employer's breach of duty had probably caused his illness. But because each claimant had been employed by multiple employers, they could not say that any one of those employers was more likely than not to have caused their employee's disease. Thus, according to the ordinary sine qua non or but-for test for causation in the tort of negligence, the claimants were bound to fail.

However, the House of Lords came to the claimants' assistance. It was decided that in cases of this kind—and it was left open what exactly it was that distinguished the *Fairchild* case from other cases of negligently inflicted injury—claimants did not have to satisfy the but-for test. Rather, it was enough to establish causation for the purposes of the tort of negligence that they could show that the defendants in each case had materially contributed to the risk that their employees might develop mesothelioma. This the claimants could do merely by showing that each defendant had negligently exposed their employees to asbestos. Thus the claimants in the *Fairchild* case were permitted to “leap the evidentiary gap”. In each case the

\* I am indebted to many for help with this article. In particular, to Professor Reinhard Zimmermann, Professor Robin Evans Jones and Professor Anton Fagan for their comments on the draft, and to Dr Sandy Steel for extensive help with causation in particular; to Dr Paschalis Paschalidis for assistance in researching the Roman law literature; and to several generations of students at both Oxford and Cape Town for helping to test my ideas and also for a number of original contributions (these are referenced individually). It is humbly dedicated to the memory of Alan Rodger, in the almost certain knowledge that he did not agree with its central argument. Since this piece was submitted for publication, an article by Bastian Zahn which takes a similar approach to the problem of D 9.2.51 has appeared in the *Edinburgh Law Review*: “Harmful Conduct as the Touchstone of Causation: an Analytical Comparison of *Barker v Corus* and *Julian*” (2011) 15 *Edinburgh Law Review* 197. Both articles grew out of a conversation which took place during an Oxford tutorial in Trinity Term 2008. References to specific portions of Mr Zahn's article are given at the appropriate points below.

<sup>1</sup> [2002] UKHL 22; [2003] 1 A.C. 32.

defendants were held to be jointly and severally liable for the damages arising from the illness or death of their employees. It was made explicit in the Lords' speeches in the *Fairchild* case that this exception to the ordinary rules of causation was motivated by considerations of policy and fairness.<sup>2</sup> According to Lord Rodger in particular, if the law were to impose a standard of proof that no claimant could ever satisfy, then, so far as the civil law was concerned, employers could with impunity negligently expose their workmen to the risk of mesothelioma, and the substantive duty of care would be emptied of all practical content so far as victims were concerned.<sup>3</sup>

In support of this view Lord Rodger relied on certain ancient Roman authorities preserved in the Digest of Justinian.<sup>4</sup> He examined the way in which the classical Roman jurists, in particular the jurist Julian, dealt with problems of causation in the context the *lex Aquilia*, a statute dating (probably) from the 3rd century BC which created a delict of damage to property. In the classical period two central provisions of the *lex* remained in use. The first, Ch.1, prescribed that anyone who killed (*occiderit*) a slave or four-footed animal belonging to another should be condemned to pay to the owner the highest value of the slave or animal in the previous year.<sup>5</sup> As for the second, Ch.3:

“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 bursting his property, let him be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days.”<sup>6</sup>

In an excerpt from Book 86 of his *Digesta* which appears in Justinian's Digest at 9.2.51 pr, Julian sets out the following Ch.1 case. A wounds a slave in such a way that it is certain that he will die; the slave is then instituted heir; after that someone else, B, assaults the slave a second time; he then dies more quickly than he would have done as a result of the first blow. Famously, Julian took the view that both A and B should be liable for killing under Ch.1. In support of this view he raises a second case in which a slave is hit and wounded by several assailants but it is unknown which blow proved fatal.<sup>7</sup> Julian does not explain the precise circumstances of the case, but it appears that the blows were inflicted during the course of an attack on the slave by several people at once, i.e. in the context of a meleé. The ancient jurists, he says—i.e. the jurists of the late Republic—took the view that all the assailants in a case of this kind ought to be held liable for killing. The same point is spelt out in more detail in the other text referred to by Lord Rodger, a passage from Book 18 of Ulpian's *Edictal Commentary* excerpted at D 9.2.11.2, in which the later jurist quotes Julian. Here, Julian says that if an action

<sup>2</sup> *Fairchild* [2002] UKHL 22; [2003] 1 A.C. 32, Lord Bingham of Cornhill at [33]; Lord Hoffmann at [56]; Lord Rodger of Earlsferry at [155].

<sup>3</sup> *Fairchild* [2002] UKHL 22; [2003] 1 A.C. 32, Lord Rodger at [155]. See now also *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 A.C. 299.

<sup>4</sup> *Fairchild* [2002] UKHL 22; [2003] 1 A.C. 32 at [157]–[160]. D 9.2.51 and D 9.2.11.2 were cited to the court by Sir Sydney Kentridge.

<sup>5</sup> D 9.2.2 pr (Gaius Book 7 *Ad Edictum Provinciale*).

<sup>6</sup> D 9.2.27.5 (Ulpian Book 18 *Ad Edictum*). The translation is that given in Theodor Mommsen, Paul Krueger (Latin text) and Alan Watson (English translation), *The Digest of Justinian* (1985), but I have amended “spoiling” (for *ruperit*) to “bursting”. All translations given below are Watson's unless otherwise specified.

<sup>7</sup> D 9.2.51.1.

under Ch.1 is brought against one of the assailants, the others are not released from liability.

Lord Rodger relied on Julian's approach to this second case, the case discussed in D 9.2.51.1 and D 9.2.11.2, to show that even the Roman jurists thought that sometimes the rules of causation ought to be relaxed:

"I would take from these passages the clear implication that classical Roman jurists of the greatest distinction saw the need for the law to deal specially with the situation where it was impossible to ascertain the identity of the actual killer among a number of wrongdoers. If strict proof of causation were required, the plaintiff would be deprived of his remedy in damages for the death of his slave. In that situation, some jurists at least were prepared, exceptionally, to hold all of the wrongdoers liable and so afford a remedy to the owner whose slave had been killed."<sup>8</sup>

Furthermore, in the course of his analysis Lord Rodger cited an article by Jeroen Kortmann in which a novel interpretation of the first case, the case of A and B discussed in D 9.2.51 pr, is proposed.<sup>9</sup> Dr Kortmann argues that the case that Julian had in mind in D 9.2.51 pr was, like that discussed in D 9.2.51.1, an evidentiary gap case, one in which it is impossible to know how the death of the claimant's slave had been brought about, and in particular, who had brought it about. This reading of the first case brings both the cases discussed by Julian in D 9.2.51 closely into alignment with the facts of *Fairchild* itself. In both cases, it seems, Julian was grappling with whether to depart from the ordinary rules of causation where it was impossible to tell who among a number of assailants had caused the victim's death.<sup>10</sup> In both cases, it seems, he concluded that the ordinary rule ought to be waived and all assailants held liable for killing.

It is clear that the second case discussed by Julian in D 9.2.51 is indeed one which the jurist regarded as raising the problem of an evidentiary gap. Julian's solution to that problem—to hold all the assailants liable for killing—is indeed rather close to that adopted by the House of Lords in the *Fairchild* case. However, this article seeks to present a different view of the first case, the case of A and B. In fact, it seeks to challenge both the interpretation proposed by Dr Kortmann and the orthodox view of D 9.2.51 pr, that Julian was discussing a problem of what we would now call over-determined causation, specifically pre-emptive causation.<sup>11</sup> Julian did not believe that both A and B ought to be liable for killing because he believed that the rules of causation should occasionally be relaxed in the interests of legal policy and fairness. Rather, he thought this because he did not regard the causation of the slave's death as an element of liability for killing under Ch.1 of the *lex Aquilia* at all. Properly understood, the case of A and B discussed by Julian in D 9.2.51 pr reveals something fundamental about the nature of the delict

<sup>8</sup> *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32 at [160].

<sup>9</sup> Jeroen S. Kortmann, "Ab alio ictu(s): Misconceptions about Julian's View on Causation" (1999) 20 *Journal of Legal History* 95.

<sup>10</sup> In Lord Rodger's view, the texts discussed by Dr Kortmann show at least that, "in a certain form, problems with unidentifiable wrongdoers had begun to exercise the minds of Roman jurists not later than the first century BC": *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 A.C. 32 at [157].

<sup>11</sup> Hart and Honoré, *Causation in the Law* (Oxford: Oxford University Press, 1985), at pp.239–245; Richard W. Wright, "Causation in tort law" (1985) 73 *California Law Review* 1735 at 1794–1798; Michael S. Moore, *Causation and Responsibility: an Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009), at pp.247–249.

established by Ch.1 of the *lex Aquilia*, or at least about Julian's view of the nature of that delict. Thus it provides a useful counterpoint to contemporary views on the analytical structure of the English tort of negligence.

## 2. The Text: D 9.2.51

It is necessary to begin by examining in more detail what Julian actually said in D 9.2.51:

“A slave was wounded so gravely that it was certain that he would die of the blow [*eo ictu*]. Then he was instituted heir and subsequently, having been hit by another [*ab alio ictus*], died. My question is whether an action under the *lex Aquilia* lies against both assailants for killing. The answer is as follows: in ordinary speech a person is said to have killed [*occidere*] if he furnished a cause of death [*mortis causam praebere*] in any way whatsoever, but so far as the *lex Aquilia* is concerned, only he is held liable who provided a cause of death by the direct application of force, as if with his own hand, this interpretation being derived from the word *caedere*, to strike, and from *caedes*, manslaughter. Furthermore, not only those who wound so as to deprive at once of life are considered to be liable under the *lex Aquilia*, but also those as a result of whose wounding it is certain that someone will die. Accordingly, if someone inflicts a mortal wound on a slave and then after a while someone else hits him so that he is dispatched [*interficetur*] sooner than he would have died as a result of the previous wound, the correct view is that both assailants are liable under the *lex Aquilia*.

1. This is in keeping with the view of the ancient jurists, who decided that, if a slave is wounded by several persons but it is not clear by which blow he actually died, they will all be liable under the *lex Aquilia*.

2. But the dead slave will not be valued in the same way for both people. For the person who struck him first will 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 for the highest price that the slave would have fetched had he been sold during the year before he departed this life, and in this figure the value of the inheritance will also be included. Therefore, on account of the killing of the same slave one assailant will pay a higher valuation and the other a lesser, but this is not to be wondered at because each is understood to have killed him in different circumstances and at a different time. But in case anyone thinks 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 liable rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide which one should rather be held liable under the *lex*. Indeed, it can be proved with reference to innumerable cases 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.”<sup>12</sup>

There appear to be four parts to Julian’s argument, assuming it is legitimate to treat it as a sustained argument.<sup>13</sup> First, in the *principium*, Julian sets out the central case of A and B. Next, he defines what it means to kill for the purposes of Ch.I of the *lex Aquilia*: it means to provide a cause of death by the application of force, as if with the hands. However, it does not require that the victim die at once. It is enough if the defendant inflicts a wound that is certain to prove fatal in time. Thus in the case of A and B not only the second assailant but also the first ought to be held liable under the *lex* (for killing we assume). Secondly, he discusses the case set out in D 9.2.51.1, where a slave is hit and wounded by several people, but it is unknown which blow proved fatal. Here too, Julian takes the view that all who hit should be liable under the *lex*; again, we assume for killing, although Julian does not specify. Thirdly, in the first half of D 9.2.51.2, Julian considers the implications of his conclusion in respect of the first and central case for the damages payable by the two assailants. These are to be calculated according to the highest value that the slave would have fetched had he been sold within the previous year. In the case of the first assailant, this amount will be reckoned backwards from the date on which the fatal wound was inflicted, this being the date of the “killing”; in the case of the second, from the date on which the slave actually died. The result is that the second assailant is liable for the value of the inheritance to which the slave was instituted heir during the period between the two assaults, whereas the first is not. Finally, in the second half of 51.2 (“But in case anyone might think we have reached an absurd conclusion ...”) Julian justifies his conclusion that both assailants be held liable for killing with reference to legal policy. If you think it is absurd to hold both assailants liable, he says, just think how much more absurd it would be to hold neither liable, or to hold one liable but not the other. “Misdeeds should not escape unpunished, and it is not easy to decide which one should rather be held liable under the *lex*.”

### 3. The Problem

As we have seen, the traditional understanding of this text is that Julian is talking here of over-determined causation: there are multiple sufficient causes of the slave’s death in play. Thus Julian appears to take the position that even under these circumstances, where each assailant has landed a mortal blow, causation is satisfied in respect of both wrongdoers: this is the reason why both are liable for killing. However, from a purely causal perspective Julian’s conclusion is flawed.<sup>14</sup>

<sup>12</sup>This is essentially the translation of D 9.2.51 given in Mommsen, Krueger (Latin text) and Alan Watson (English translation), *The Digest of Justinian* (Philadelphia, PA: University of Pennsylvania Press, 1985). I have, however, made several alterations to Watson’s translation in order to bring it closer to the literal meaning of the Latin.

<sup>13</sup>It is not impossible that D 9.2.51.1 was inserted by the compilers of the Digest under Justinian, perhaps from elsewhere in Julian’s work. However, the fact that Julian is reported as saying something very similar by Ulpian in D 9.2.11.2 suggests that the view expressed in D 9.2.51.1 is at least authentic. On the other hand, there is a marked change in the writing style and in the content of the argument at, “But in case anyone might think that we have reached an absurd conclusion ...” (*quod si quis absurde a nobis haec constitui putaverit*). This might be taken to indicate the interpolation by the Compilers of Julian’s original text. Otto Lenel, however, in his reconstruction of Julian’s *Digesta* treats D 9.2.51 as genuine in its entirety: see *Palingenesia Iuris Civilis*, Vol.1 (1889), at pp.480–481.

<sup>14</sup>As remarked by e.g. Geoffrey MacCormack, “Aquilian Studies” (1975) 41 *Studia et Documenta Historiae et Iuris* 1 at 29–30; Hans Ankum, “Das Problem der ‘überholenden Kausalität’ bei der Anwendung der *lex Aquilia* im

The difficulty posed by over-determination cases is that they appear to frustrate the operation of the standard test for factual causation, the sine qua non or but-for test. In cases of this kind the but-for test appears to give a false negative: but for A's conduct, the blow landed by B would still have caused the slave's death; A's blow would have caused his death even if B had not intervened. Of course this difficulty can be overcome. The answer lies in adopting the modified version of the but-for test first pioneered by Herbert Hart and Tony Honoré, the so-called NESS test, according to which the defendant's conduct must constitute a necessary element of a set of conditions sufficient to produce the harm in question.<sup>15</sup> Applying this version of the test, we are able to avoid the absurd result that neither wrongdoer caused the slave's death. Yet the NESS test cannot vindicate the view that both have done so. The NESS test requires that the defendant's tortious conduct was a necessary element of a set of actual antecedent conditions sufficient to produce the result in question.<sup>16</sup> In a case of multiple, sufficient, simultaneous causes the NESS test is satisfied in respect of both assailants, since both blows form a necessary part of an actual sufficient set.<sup>17</sup> But our case is a case of pre-emptive over-determination. B's action in our case pre-empted the ability of A's action to produce the harm it would otherwise have been sufficient to cause: the blow inflicted by B neutralised the effects of the blow inflicted by A.<sup>18</sup> Thus A's blow cannot be said to form a necessary part of a set that was actually sufficient. In the circumstances discussed by Julian, it seems better to say that while A undoubtedly wounds the slave, it is only B who causes his death.

Moreover, this appears to be the view of the case taken by two other classical jurists, Celsus and Ulpian, in two other famous texts preserved in D 9.2, namely D 9.2.11.3 and D 9.2.15.1, both excerpted, like D 9.2.11.2, from Book 18 of Ulpian's *Edictal Commentary*:

D 9.2.11.3 "Celsus writes that if one attacker inflicts a mortal wound [*mortifero vulnere*] on a slave and another person later dispatches him [*exanimaverit*], he who struck the earlier blow is not liable for killing [*occiderit*], but for wounding [*vulneraverit*], because the slave actually perished as the result of another wound. He who struck the later blow is liable because he killed him [*occidit*]. This is Marcellus's view and it is preferable."

D 9.2.15.1 "If a slave who has been mortally wounded [*vulneratus mortifere*] later dies sooner than he would otherwise have done as a result of the collapse of a house or a shipwreck or some other sort of blow [*alio ictu*], no action can be brought for killing [*de occiso*], but only for his being wounded [*quasi de vulnerato*]; but if he dies from a wound after he has been freed or alienated, Julian says that an action can be brought for killing. These situations are so different for this reason: because he was actually killed by you when you

klassischen römischen Recht" in M. Harder and G. Thielmann (eds), *De Iustitia et Iure* (Festschrift Lübtow) (1980), 325, at p.349.

<sup>15</sup> Hart and Honoré, *Causation in the Law*, at pp.122–125, subject to Wright, "Causation in Tort Law" (1985) 73 *California Law Review* 1735 at 1788–1803.

<sup>16</sup> Wright, "Causation in Tort Law" (1985) 73 *California Law Review* 1735 at 1794–1798, especially 1795.

<sup>17</sup> See Hart and Honoré, *Causation in the Law* (1985), at p.235 and Honoré, "Necessary and Sufficient Conditions in Tort Law" in David G. Owen (ed.), *Philosophical Foundations of Tort Law* (US: Oxford University Press, 1995), at pp.365, 374–377.

<sup>18</sup> The case is specifically discussed by Hart and Honoré, *Causation in the Law* (1985) at p.245 under the heading "additional neutralising cause".

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 ... .”

According to Celsus, apparently describing a very similar case, it is only the second assailant who can be said to have “killed” (*occiderit*) for the purposes of Ch.1. The first must be said to have wounded instead. In other words, his liability arises under Ch.3 only. Ulpian and Marcellus agree. A similar conclusion is reached by Ulpian in 15.1 in respect of the case where a mortally wounded slave is killed by the collapse of a house or shipwreck or some other sort of blow. Here again, the slave’s assailant cannot be held liable for killing but only for wounding. The matter is further complicated by the fact that the first sentence of 15.1 is at best ambiguous. If the Latin text is given its strict meaning, Julian appears to endorse not only the second proposition, that an action can be brought for killing where a slave dies from a wound after he has been freed or alienated, but also the first, that where a mortally wounded slave is killed by the collapse of a house or shipwreck or some other sort of blow no action can be brought for killing.<sup>19</sup> This means that in D 9.2.51 pr Julian not only contradicts what Celsus, Ulpian and Marcellus say in D 9.2.11.3 but seems also to contradict his own view as recorded by Ulpian in D 9.2.15.1.

#### 4. The Existing Solutions

A number of solutions to these difficulties have been proposed. One attractively straightforward explanation is that what Julian had in mind in D 9.2.51 pr was not after all a case of over-determined causation; rather, it was a case of contributory causation.<sup>20</sup> According to this reading, while the blow inflicted by A was sufficient to produce death, the blow inflicted by B was not; it merely caused the slave to die sooner than he would otherwise have done. Indeed, there are certain features of Julian’s account which support this view, such as the use of the word “sooner” (*maturius*) in the last sentence of D 9.2.51 pr. If this was indeed the sort of case that Julian had in mind, then his conclusion is impeccable from a causal perspective.<sup>21</sup> It also eliminates the contradiction between D 9.2.51 pr and D 9.2.11.3, and between D 9.2.51 pr and Julian’s own view in D 9.2.15.1.

A second relatively simple explanation is that Julian’s position regarding the case of A and B is attributable to considerations of policy.<sup>22</sup> Thus Julian may in fact have appreciated the logical force of Celsus’s position in respect of D 9.2.11.3, but thought it undesirable to allow the first assailant to escape liability under Ch.1. Indeed, Julian himself appears to make this argument in D 9.2.51.2:

<sup>19</sup> *Si servus vulneratus mortifere postea ruina vel naufragio vel alio ictu maturius perierit, de occiso agi non posse, sed quasi de vulnerato, sed si manumissus vel alienatus ex vulnere perit, quasi de occiso agi posse Iulianus ait.*

<sup>20</sup> See e.g. Lawson, *Negligence in the Civil Law* (Oxford: Clarendon Press, 1950), at pp.50–53. A new version of this argument has recently been made by Boudewijn Sirks in “The Slave who was Slain Twice: Causality and the *lex Aquilia* (Julian. 86 dig. D. 9, 2, 51 pr)” (2011) 79 *Tijdschrift voor Rechtsgeschiedenis* 313.

<sup>21</sup> The difficulty with this reading, however, is that the same language—“dies sooner than he would otherwise have done”—is used in D 9.2.15.1 to describe the case in which the mortally wounded slave is dispatched by the collapse of a house or a shipwreck, a case in which contributory causation is of course ruled out. It also requires that much turns on the only slightly different wording of D 9.2.51 pr and D 9.2.11.3: “*interficeretur*” in the former must be understood to refer to a contributory blow, whereas “*exanimaverit*” in the latter must be taken to refer to a pre-emptive blow.

<sup>22</sup> E.g. Hans Ankum, “Das Problem der ‘überholenden Kausalität’” (1980), at p.325 and pp.349–350.

“But in case anyone thinks 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 liable rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide which one should rather be held liable under the *lex*.”

As Julian himself points out in D 9.2.11.2, damages awarded under the *lex Aquilia* constituted a penalty (*poena*). Thus where a slave had been struck by several assailants but it was unknown which blow proved fatal, all were liable for killing, and the bringing of an action against one assailant did not absolve the others.<sup>23</sup> It seems to follow from Julian’s reasoning in D 9.2.11.2 that there could be no objection in principle to holding two assailants liable for the killing of the same slave on the facts described in D 9.2.51 pr. As for the contrary view apparently expressed by Julian in D 9.2.15.1, this is often explained by changing the punctuation, breaking up the first sentence into two parts so that Julian is made to endorse only the second proposition stated by Ulpian, that “if he dies from a wound after he has been freed or alienated ... an action can be brought for killing.”<sup>24</sup>

Jean-Francois Gerkens finds yet another explanation for the apparent contradiction between Julian’s views in D 9.2.51 pr and D 9.2.15.1 in the different causal weight ascribed by the Roman lawyers to superior force as opposed to human action. Where a human action concurred with superior force, such as a flood or a fire, the damage suffered was routinely ascribed to the superior force alone.<sup>25</sup> This explains D 9.2.15.1. Conversely, in cases where two human actions concurred, whereas Celsus, Ulpian and Marcellus applied what looks like modern causal reasoning (i.e. in D 9.2.11.3), Julian at least saw no causal reason to favour one above the other. Of the possible outcomes which he reviews in D 9.2.51.2—impunity of both wrongdoers, impunity of either or liability of both for killing—the last was clearly preferable as a matter of justice.<sup>26</sup> Indeed, it is widely argued that Roman jurists simply thought differently about causation, and that we should be cautious before attributing modern causal ideas to them, or taxing them for failing to observe what appear to us to be universal causal propositions.<sup>27</sup>

<sup>23</sup> D 9.2.11.2. In fact the action on the *lex Aquilia* was a so-called mixed action: Gaius *Institutes* IV.9. Although its aim was broadly reipersecutory, it also served to penalise the defendant. One feature typical of penal actions was the possibility of cumulative liability on the part of joint wrongdoers. Julian’s view of the case described in D 9.2.11.2—that all the assailants could be held liable for killing even where it was unknown who had inflicted the fatal blow—constitutes a relatively minor extension of this feature. See further B. Sirks, “The delictual origin, penal nature and reipersecutory object of the actio damni iniuriae legis Aquiliae” (2009) 77 *Tijdschrift voor Rechtsgeschiedenis* 303.

<sup>24</sup> This is the view taken by Ankum, “Das Problem der ‘überholenden Kausalität’” (1980), at pp.352–354. Indeed, all editions of the Digest before Mommsen’s punctuated the text in this way. See also the meticulous analysis of this text by Zahn, “Harmful Conduct as the Touchstone of Causation: an Analytical Comparison of *Barker v Corus* and Julian” (2011) 15 *Edinburgh Law Review* 197 at 206–213.

<sup>25</sup> For an overview in English see “‘Vis maior’ and ‘vis cui resisti non potest’” in Rena van den Bergh and Gardiol van Niekerk (eds), *Ex iusta causa traditum: essays in honour of Eric H. Pool* (University of South Africa, 2005), at pp.109–120.

<sup>26</sup> Jean-Francois Gerkens, “*Aequae Perituris...*”: *Une approche de la causalité dépassante en droit romain classique* (Liège: Collection Scientifique de la Faculté de Droit, 1997), at pp.163–184, 184–197 and “‘Vis maior’ and ‘vis cui resisti non potest’” in Rena van den Bergh and Gardiol van Niekerk (eds), *Ex iusta causa traditum: essays in honour of Eric H. Pool* (2005), at pp.117–120.

<sup>27</sup> See e.g. Geoffrey MacCormack, “Aquilian Studies” (1975) 41 *Studia et Documenta Historiae et Iuris* 1 at 29–30; Gerkens, “*Aequae Perituris...*”: *Une approche de la causalité dépassante en droit romain classique* (1997), at pp.199–200. In “The Slave who was Slain Twice: Causality and the *lex Aquilia* (Julian. 86 dig. D. 9, 2, 51 pr)”, Boudewijn Sirks develops the idea that Julian’s understanding of causation was simply different to the modern one, being grounded in Stoic ideas.

Finally, as we have already seen, Jeroen Kortmann has suggested yet another alternative reading of D 9.2.51 pr.<sup>28</sup> His original contribution to the debate is to draw closer attention to the link between this case and the case discussed by Julian in D 9.2.51.1. He argues that in 51 pr, like 51.1, what Julian had in mind was an evidentiary gap case. In particular, he argues, the phrase “*ab alio ictus*”—“having been hit by another”—in the *principium* of 51 is significant. If Julian had said *ab alio ictu*—“as a result of another blow”—this would have made it clear that it was the second blow, the blow inflicted by B, that actually brought about the slave’s death. This is the phrase used by Ulpian in 15.1, where he describes the case of a slave killed by the collapse of a house or a shipwreck or some other sort of blow [*alio ictu*]. But what Julian actually says in D 9.2.51 pr—“having been hit by another, he died”—leaves the precise causal significance of the second blow open. In fact, because of the absence of forensic pathology in ancient Rome, in a case like this one it would often have been difficult to tell whether the second blow had entirely pre-empted the first (mortal) blow or whether B’s blow was not a mortal blow at all, its effect being merely to accelerate the effect of the first.<sup>29</sup> Like the first and third explanations, this one has the advantage of eliminating the apparent contradiction between what Julian says in D 9.2.51 pr and the view that Ulpian attributed to him in D 9.2.15.1, i.e. that the slave’s initial assailant should be liable only for wounding. Moreover, it makes good sense of the policy arguments set out in the second half of 51.2: if it were really impossible to know who caused the death of the slave, to hold either A or B (but not both A and B) liable would indeed be an absurd result, especially since we can be sure that both have perpetrated a wrongful assault.<sup>30</sup>

Each of the explanations set out above is plausible. Dr Kortmann’s in particular is compelling. Yet it will be argued in the next section that the key to unlocking Julian’s argument in D 9.2.51 pr is to be found elsewhere. As the solutions set out above suggest, D 9.2.51 pr has generally been understood as a puzzle about causation: either Julian failed to understand causation correctly, he had a different understanding of causation to the modern one, or he had a different sort of case in mind, not a case of over-determined causation at all. But in fact it is necessary to reframe the question. Rather than asking what Julian was saying about causation, we ought to ask instead what Julian meant by killing.

## 5. A Different Approach: Killing Versus Causing Death

### a. The meaning of “killing” in classical Roman law

As we have seen, Julian’s definition of “killing”, *occidere*, was as follows:

“in ordinary speech a person is said to have killed [*occidere*] if he furnished a cause of death [*mortis causam praeberere*] in any way whatsoever, but so far

<sup>28</sup> Jeroen S Kortmann, “*Ab alio ictu(s)*: Misconceptions about Julian’s View on Causation” (1999) 20 *Journal of Legal History* 95.

<sup>29</sup> We cannot say that the second blow, delivered by B, had no causal significance, because we are explicitly told by Julian that it hastened the slave’s death.

<sup>30</sup> Indeed, it is only if Dr Kortmann is right about the facts of the case that holding neither A nor B liable becomes a really plausible alternative: see Kortmann, “*Ab alio ictu(s)*: Misconceptions about Julian’s View on Causation” (1999) 20 *Journal of Legal History* 95 at 99.

as the *lex Aquilia* is concerned, only he is held liable who provided a cause of death by the direct application of force, as if with his own hand [*quasi manu*], this interpretation being derived from the word *caedere*, to strike, and from *caedes*, manslaughter” (D 9.2.51 pr).

According to Ulpian,

“we must accept ‘killing’ to include the cases where the assailant hit his victim with a sword or a stick or other weapon or did him to death with his hands (if, for example, he strangled him) or kicked him with his foot or butted him or any other such ways” (D 9.2.7.1, excerpted from Book 18 *Ad Edictum*).

Thus both jurists appear to require some form of violent attack in order to constitute *occidere*.

When we turn to the *Institutes* of Gaius, however, we encounter a different approach. Unlike Julian and Ulpian, Gaius attempted a general definition of the conduct proscribed by the *lex Aquilia*, valid not only for Ch.1 but also for its other main provision, Ch.3.<sup>31</sup> According to this third chapter,

“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 [*usserit*], breaking [*fregerit*] or bursting [*ruperit*] his property, let him be condemned to pay to the owner whatever the damage shall prove to be worth in the next thirty days.”<sup>32</sup>

Thus Ch.3 appears to have had a residual character, at least in classical law, as against the relatively precise focus of Ch.1. For Gaius, generalising about both Ch.1 (“killing”) and Ch.3 (“burning”, “breaking” or “bursting”), “the action resulting from the *lex* lay only if a person caused damage to the thing itself by his own bodily act [*corpore corpori*]” (G III.219). All that was required in order to bring wrongful conduct within the scope of the *lex* was some direct physical contact between the body of the wrongdoer and the body of the victim. This was true regardless of the precise nature of the conduct in question.

Definitions aside, we find conflicting ideas at work in the jurists’ discussion of specific cases also. According to Pegasus, “if one who is unreasonably overloaded throws down his burden and kills a slave, the Aquilian action lies” (D 9.2.7.2). For Proculus, if someone did damage through being pushed by somebody else, neither was liable under the *lex*: the one who pushed was not liable because he did not kill (*occidit*), nor was the one who was pushed because he did not do the damage unlawfully (*damnum iniuria*) (D 9.2.7.3). Celsus thought that the *lex Aquilia* applied if a man threw another off a bridge, “regardless of whether he dies as a result of the impact or drowns at once or whether he dies after having been tired out and overcome by the force of the water” (D 9.2.7.7).<sup>33</sup> Gaius may or may not have agreed (G III.219).<sup>34</sup> Labeo, discussing the case of a midwife administering

<sup>31</sup> As we are told by Ulpian in D 9.2.27.4, by the classical period the second chapter of the *lex Aquilia* had fallen into disuse.

<sup>32</sup> D 9.2.27.5 (Ulpian Book 18 *Ad Edictum*). See above, fn.6.

<sup>33</sup> My translation.

<sup>34</sup> The controversy turns on the deciphering of the Veronese manuscript. The original Krüger edition has, “*sed si quis alienum seruum de ponte aut ripa in flumen proiecerit et is suffocatus fuerit, corpore suo damnum dedisse eo quod proiecerit non difficiliter intellegi potest*” which makes Gaius agreed with Celsus. Kübler has the slightly different, “*item contra si quis alienum seruum de ponte aut ripa in flumen proiecerit et is suffocatus fuerit, hic quoque*

poison as medicine, thought that it was vital that the wrongdoer had administered it “with her own hands” (*suis manibus supposuit*) rather than simply giving it to the victim for her to take (D 9.2.9 pr, Ulpian Book 18 *Ad Edictum*). Ulpian, perhaps puzzlingly given his definition of “*occidere*” above, agreed, taking the matter further:

“If someone administers [*infundit*] a drug to anyone by force or persuasion, either by mouth or by injection, or rubs him [*unxit*] with poison, he is liable under the *lex Aquilia*, just as the midwife administering [a drug] [*supponens*] is liable”<sup>35</sup> (D 9.2.9.1).

Piercing someone with a javelin seems to have been generally agreed to be killing (Ulpian in D 9.2.9.4, echoed in Justinian’s *Institutes* IV.3.4), as apparently was throwing a ball so that it hit the hand of a barber who was shaving a slave (Mela and Ulpian, D 9.2.11 pr, from Ulpian Book 18 *Ad Edictum*). Proculus thought that it was killing if the wrongdoer so riled a dog that it bit someone. For Julian (and Ulpian) this was going too far: the *lex* would lie only where someone had had the dog on a lead (D 9.2.11.5).

It is difficult to make these decisions respond to any unitary test for “killing”. This is the case whether one adopts one of the definitions proposed by the jurists themselves or some more modern idea, such as a causal analysis which takes account of the possibility of an intervening act or event. The potential for an intervening act as a test for remoteness works for Labeo and Ulpian’s midwife case—the slave woman, if merely handed the poison, might refuse to drink it—but not for Celsus’s bridge case, where even rather remote causation of death (the slave drowns eventually after a long struggle) is included in “killing”. Not all the cases identified as falling under the *lex Aquilia* are cases involving violence, the criterion suggested by Julian and implicit in Ulpian’s definition: neither Labeo’s midwife or Ulpian’s poisoner necessarily use force. The closest we come to a unitary criterion is that the killer must apply some part of his body to the victim: this is the force of “*manibus suis*” (Labeo), *quasi manu* (Julian) and *corpore corpori* (Gaius): either hands or feet or at least a hand-held weapon (which could include a dog on a lead). But it does not seem that any of these tests can explain Proculus’s views.

In fact, the quest for a stable definition may be misconceived. It appears that the narrow meaning given to “killing” by the classical jurists derived from the original meaning of *occidere* at the time when the *lex* was passed: indeed, in D 9.2.51 pr Julian specifically explains the legal meaning of *occidere* in terms of its etymology.<sup>36</sup> Yet it seems that the true explanation for the narrow and somewhat

*corpore suo damnum dedisse eo quod proiecerit non difficiliter intellegi potest*” which gives the same meaning. However, Zulueta has, “*item si quis alienum serum de ponte aut ripa in flumen proiecerit et is suffocatus fuerit; quamquam hic corpore suo damnum dedisse eo quod proiecerit non difficiliter intellegi potest*” which gives the opposite meaning. See de Zulueta, *The Institutes of Gaius*, Part I (Oxford: Clarendon Press, 1946), at p.226.

<sup>35</sup> The final clause—“*quemadmodum obstetrix supponens tenetur*”—is left untranslated in the *Watson Digest*.

<sup>36</sup> See e.g. N. Andrews, “*Occidere* and the *lex Aquilia*” [1987] 46 C.L.J. 315, especially at 324–327. On the other hand, Watson and Barton argue that *occidere* became narrower during the classical period: see W.A.J. Watson, “D.7.1.13.2 (Ulpian 18 ad Sab): the *Lex Aquilia* and decretal actions” (1966) 17 *Iura* 174 and J. Barton, “The *Lex Aquilia* and Decretal Actions” in W.A.J. Watson (ed.), *Daube Noster: Essays in Legal History for David Daube* (Edinburgh: Scottish Academic Press, 1974), at p.15. Certainly the famous case set out in D 9.2.52.2 (Alfenus Book 2 *Digesta*) is hard to reconcile with the meaning of *occidere* given elsewhere. According to Alfenus, the failure of certain muleteers to hold up a cart which then rolled backwards into another cart which in turn ran over a slave boy is said to be actionable “*lege Aquiliae*” (under the *lex Aquilia*). A wholly different explanation for the narrow meaning

arbitrary range of *occidere* in the classical law is not a semantic one. The question the jurists, including Julian, appear to be asking themselves is not, “what does ‘killing’ mean in the context of Ch.1 of the *lex Aquilia*?” but rather whether the conduct in question amounted to what we might call a typical killing act.<sup>37</sup> The answer to this question would not have been deduced from abstract criteria—violence, *manibus suis* etc.—but rather determined according to a conventional list of killing acts, dictated by received ideas about what killing was. Thus throwing a javelin at someone was killing, as was rubbing poison on to their skin or pouring it down their throat. Attacking someone with a dog was killing; the case was easier where you had the dog under your immediate control. Throwing someone off a bridge into a river was killing. But using a third person’s body as a missile was not: it was not a typical killing act. This simple insight may offer the best explanation for the casuistry we observe in the texts.

Of course, one who had not “killed” for the purposes of the *lex* did not necessarily escape liability. Ulpian records some early decisions to that effect:

“Neratius says that if a man starves a slave to death he is liable to an *actio in factum* [action on the facts]. If when my slave is out riding you scare his horse so that he is thrown into a river and dies as a result, Ofilius writes that an *actio in factum* must be given in just the same way as when my slave is lured into an ambush by one man and killed by another.”<sup>38</sup>

For Gaius,

“*actiones utiles* [actions on the case] were granted if the damage has been caused in some other way, for example, if someone 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 to go down a well and he falls and is killed . . . .”<sup>39</sup>

Thus the statutory action available under Ch.1 of the *lex* was bolstered by analogous actions, *actiones utilis* or *in factum*, granted by the Praetor in order to “supplement” the civil law.<sup>40</sup> Moreover, just as “killing” was the substantive concept directly linked to the procedural question of the availability of the *actio legis Aquiliae*, so “*mortis causam praestare*”, “providing a cause of death”, was drafted in by the jurist Celsus as the substantive idea which could be used to denote all those instances where analogous actions—*actiones in factum* or *utiles*—had been granted by the Praetor. Thus according to Ulpian in D 9.2.7.6:

“Celsus thinks that it makes a big difference whether he [the defendant] killed [*occidere*] or provided a cause of death [*mortis causam praestare*], because

given to *occidere* (as well as *urere*, *frangere* and *rumpere*) in classical law is proposed by Peter Birks in, “Doing and Causing to be Done” in A. Lewis and D. Ibbetson (eds), *The Roman Law Tradition* (Cambridge: Cambridge University Press, 1994), at p.32.

<sup>37</sup> I owe this terminology, and the insight behind it, to Timothy Fish Hodgson, a member of the Selected Studies in Roman Law class at the University of Cape Town in 2010.

<sup>38</sup> D 9.2.9.2–3 (Book 18 *Ad Edictum*). Ofilius was a friend of Julius Caesar, which means that this case could not have occurred much after the middle of the first century BC: Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd edn (Cambridge: Cambridge University Press, 1972), at p.94.

<sup>39</sup> G III.219. The translation is de Zulueta’s: see *The Institutes of Gaius*, Part I (1946), at p.227.

<sup>40</sup> D 1.1.7.1 (Papinian Book 2 *Definitiones*).

he who merely provides a cause of death is liable not under the *lex Aquilia* but only to an *actio in factum*.”

This terminology holds out the promise of a sophisticated causal analysis of liability, or at least a more sophisticated concept than the *occidere* proposed above. However, as Dieter Nörr has shown, the term *mortis causam praestare* appears to have been borrowed from non-legal or indeed even non-Roman sources, and reflects no consistent causal reasoning.<sup>41</sup> There are some cases in which the term *mortis causam praestare* appears to have been used entirely literally: handing somebody poison or (in the case of a madman) a sword is literally providing them with a cause of death. The same could be said, with only a small metaphorical extension, of luring someone into an ambush or agitating a dog so that it attacks.<sup>42</sup> Nevertheless, it appears that the phrase was a label applied to the miscellaneous group of cases in which praetorian equitable actions had been granted. Cases of *mortis causam praestare* were generally characterised by nothing more than a relatively indirect relationship between wrongdoer’s conduct and the harm suffered by the claimant.

### *b. D 9.2.51 pr*

Having examined in detail the meaning of *occidere* in the context of Ch.1 of the *lex Aquilia* generally, we are now in a position to grapple with the meaning of D 9.2.51 pr itself.<sup>43</sup> As we have seen, Julian differed from Celsus (and Ulpian and Marcellus) regarding the liability of the first assailant in the apparently identical cases described in D 9.2.11.3 and D 9.2.51 pr. Whereas Julian thought that the first assailant killed (giving rise to liability under Ch.1), Celsus thought that he merely wounded (liability under Ch.3 only) However, setting that point aside for the moment, there is a further important respect in which Julian and Celsus differed. This is in their views as to the calculation of damages under Ch.1.

According to Ulpian, Book 18 of whose *Edictal Commentary* is once again excerpted in D 9.2.21.1:

“Now the year is reckoned backwards from the time when the slave was killed; but if he was mortally wounded, and later died after a long interval, we shall reckon the year, according to Julian, from the time he was wounded, though Celsus writes to the contrary.”

Julian took the view that damages under Ch.1 were reckoned back from the time at which the mortal wound was inflicted. This was the case even if the victim died only much later, after a long interval. Again, in D 9.2.51.2 he points out that,

“the person who struck him first will 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; [while] the second assailant will be liable for the highest

<sup>41</sup> Professor Nörr’s arguments are summarised in English in “*Causam Mortis Praebere*” in McCormick and Birks, *The Legal Mind: Essays for Tony Honoré* (Oxford: Clarendon Press, 1986), at p.203. The full account can be found in *Causa Mortis*, Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte (1986)

<sup>42</sup> I am indebted for this insight to Catharine Thorpe, formerly a teaching and research assistant in the Department of Private Law at the University of Cape Town.

<sup>43</sup> cf. Zahn, “Harmful Conduct as the Touchstone of Causation: an Analytical Comparison of *Barker v Corus* and Julian” (2011) 15 *Edinburgh Law Review* 197 at 202–206.

price that the slave would have fetched had he been sold during the year before he departed this life.”

For Celsus, on the other hand, the crucial date for the calculation of damages was the only other possible moment, i.e. the moment at which the victim’s death occurred. It was only at that moment that the slave could be said to have been “killed” for the purposes of the *lex*, and so it was from that moment—the moment of death—that the damages were to be reckoned back.

Thus it appears that Celsus thought that the delict enshrined in Ch.1 of the *lex* was the delict of killing in the sense of bringing about the death of the victim. Admittedly Celsus accepted, along with the other classical jurists, that there could be liability under the *lex* itself only if death was caused immediately or directly, i.e. if this was a case of *occidere*. But it seems that for Celsus this was essentially an artificial limitation on the scope of Ch.1. Rather than seeing *occidere*—the original subject-matter of the *lex*—as the gist of the delict, Celsus appears to have seen it merely as a sub-set of a wider delict: for Celsus, it was the wrongful causing of death by which the delict was constituted. Here we must remind ourselves that it was Celsus who adopted “*mortis causam praestare*”, “providing a cause of death”, as the substantive idea which could be used to denote all those instances where analogous actions modelled on Ch.1 had been granted by the Praetor. Whether or not this phrase implies a sophisticated theory of causation, it is clear that it places the emphasis of the delict on the consequence suffered by the victim—death—rather than on the killing act itself. Thus it is obvious why Celsus thought that in a case like that discussed in D 9.2.11.3 the author of the first blow could only ever be liable for wounding under Ch.3. The first assailant could never be liable under Ch.1 as Celsus defined it because he had never done what the delict required: he had not brought about the slave’s death. This is of course the standard view that a modern English (or South African) lawyer would take of a claim in negligence: the causation of damage or loss is generally regarded as a necessary ingredient in the claimant’s cause of action.

Julian, however, had an entirely different conception of the delict enshrined in Ch.1 of the *lex Aquilia*. In fact, this is obvious if we pay attention to what he actually says in D 9.2.51 pr. Regarding the question whether both A and B should be held liable for killing,

“the answer is as follows: in ordinary speech a person is said to have killed [*occidere*] if he furnished a cause of death [*mortis causam praebere*] in any way whatsoever, but so far as the *lex Aquilia* is concerned, only he is held liable who provided a cause of death by the direct application of force, as if with his own hand, this interpretation being derived from the word *caedere*, to strike, and from *caedes*, manslaughter.”

Paraphrased, his point is this: while ordinary people think that killing is causing death in any way at all, in fact the gist of Ch.1 is slaying, *caedere*. Julian is not simply making the point that death which is caused indirectly is actionable only by means of an analogous action modelled on the Aquilian action. Nor is he interested in contrasting liability for killing with liability for wounding under Ch.3, as Celsus and Ulpian do in D 9.2.11.3. Indeed, it is significant that he does not mention the possibility of liability for wounding at all, or indeed the *actio in factum*.

The contrast he is drawing is a contrast between what the delict is and what it is not.<sup>44</sup> Julian is making the point that the gist of the Ch.1 delict is not the wrongfully caused death of the slave belonging to the claimant, but rather a wrongful killing act. Once this is appreciated, it becomes obvious why Julian believed that both assailants in D 9.2.51 pr ought to be held liable under the *lex Aquilia* for killing. In Julian's view the cause of action under Ch.1 accrued as soon as the killing act which constituted *occidere* was committed, regardless of whether it actually caused the slave's death. Turning again to Julian's ongoing discussion of the case of A and B in D 9.2.51.2,

“therefore, on account of the killing of the same slave one assailant will pay a higher valuation and the other a lesser, but this is not to be wondered at because each is understood to have killed him in different circumstances and at a different time.”

Since both assailants had committed such a killing act, both ought to be liable under Ch.1.

Of course, killing/*occidere* in Julian's sense was in truth a compendious concept. It comprised both a certain type of conduct on the part of the defendant—a killing act properly so called—and an injury to the victim capable of producing his death. If this had not been the case—if *occidere* had not implied such an injury as well as a particular kind of assault—it would have been nonsensical to describe the delict as a delict of killing.<sup>45</sup> We can assume that this was not an issue which frequently arose in practice. In most cases the defendant's killing act would have immediately produced the victim's death, obviating the need to distinguish the conduct of the defendant from the injury to the victim or to specify what sort of injury was required. But in those cases in which death occurred only some time afterwards, it would have been necessary to specify exactly what sort of injury the victim was required to have suffered in order to constitute the delict. Indeed, this appears to be the significance of the term “mortal wound” (*vulnus mortifere*), used not only by Julian in D 9.2.51 but also in D 9.2.11.3 and D 9.2.15.1: a mortal wound is a wound capable of constituting “killing” in that it is highly likely to produce the victim's death.<sup>46</sup> Nevertheless, to reiterate, in order to count as killing the defendant's conduct did not need to be a cause of the slave's death, in the sense of a necessary element in an actual and sufficient set. It was enough that it resulted in a particular kind of injury to the victim.

It follows, finally, that the measure of damages (*aestimatio*) under Ch.1 remained for Julian objective market value or *pretium*, i.e. the highest price for which the slave could have been sold in the year leading up to the defendant's killing act, as

<sup>44</sup> It is perhaps significant that this text—D 9.2.51 pr—stands first in Lenel's reconstruction of Book 86 of Julian's *Digesta, Ad legem Aquiliam*, as fragment 821. See Lenel, *Palingenesia Iuris Civilis*, Vol.I (1889), at pp.480–481.

<sup>45</sup> Logically it would have included also acts which had produced no injury to the victim at all—in modern law we would describe this as attempted murder.

<sup>46</sup> Hart and Honoré distinguish three senses of “mortal”: “(i) the word may simply refer to a type of injurious occurrence ... which is sufficient to cause the death of a person of average constitution under normal circumstances: here there is no necessary reference to any particular case ...; (ii) a wound inflicted on a particular occasion may be called mortal if, given the circumstances including the constitution of the victim and likelihood of medical assistance, it is highly probable that it will cause his death; (iii) a wound inflicted on a particular occasion may be said to be mortal if in fact it causes the victim's death even though it was not mortal in either of the two preceding senses.” Hart and Honoré use the term in the second sense. That appears to be the sense in which the term is used by Julian and Ulpian also. See Hart and Honoré, *Causation in the Law* (1985), at pp.241–242.

required by the original wording of Ch.1.<sup>47</sup> Ulpian, having accepted Julian's view that damages were to be calculated from the date of wounding rather than the date of death, says the following in D 9.2.21.2:

“But are we valuing only his body, how much it was worth when he was killed, or rather how much it was worth to us that he should not be killed? We use this rule, that the valuation should be what he was worth to the plaintiff.”<sup>48</sup>

Ulpian's view reflects what appears to have been a shift in the calculation of damages in the context of Ch.1 away from objective *pretium* and towards *quod interest*, the value of the slave to the claimant. Admittedly, by the classical period a slave's *pretium* was understood to include benefits such as an inheritance to which he had been instituted heir.<sup>49</sup> This is clear from Julian's analysis in D 9.2.51. In this case it is not difficult to see the inheritance as part of the slave's objective market value. But a wider range of “heads of damage necessarily connected to the body” (*causae corpori cohaerentes*) were taken into account by other jurists: where the dead slave had been a member of a troupe of actors or musicians or one of a pair of twins belonging to the claimant (Gaius and Paul),<sup>50</sup> or where the defendant killed a slave whom the claimant had promised to hand over under a penalty (Paul).<sup>51</sup> These heads of damages—the degree to which the value of the troupe etc was diminished by the slave's death, the penalty payable because the dead slave could no longer be delivered—were effectively loss-based. Indeed, Celsus referred simply to *damnum*, loss, in calculating the *aestimatio* under Ch.1, for example in D 9.2.13.2.<sup>52</sup> But Julian does not appear to have embraced this loss-based measure.<sup>53</sup> Indeed, he emphasised that *pretium* was capable on occasion of exceeding the loss suffered by the claimant as a result of the slave's death: for example, if the thumb of a valuable painter had been cut off and within a year of that event he was killed in a separate incident, he had to be valued at his price before he lost his skill together with his thumb.<sup>54</sup> *Pretium* as a measure of damages closely matched Julian's conception of the Ch.1 delict itself. Since there did not need to be any causal link between the defendant's killing act and the victim's death for the action

<sup>47</sup> In the context of D 9.2.51 Julian refers only to *pretium* in calculating the *aestimatio* under Ch.1. Moreover, his preference for *pretium* over *damnum* appears also from Julian's view of the case discussed by Ulpian in D 9.2.23.1. According to Julian, where a slave was killed when it had been ordered that he should go free and become an heir, neither the substitute nor the statutory heir would secure by an action under the *lex Aquilia* the value of the inheritance, since this was not yet due to the slave himself. The substitute would, however, be able to recover the slave's market value (*pretium*). But Ulpian disputed that even the *pretium* would be recoverable, because had the slave become heir he would also have been free. In other words, because the slave could logically never have come into the substitute's property, therefore the substitute could not claim to have suffered any loss as a result of the slave's death. It is clear from their views on this case that while Ulpian required that the death of the slave had caused loss to the claimant, Julian did not.

<sup>48</sup> D 9.2.21.2 (Ulpian Book 18 *Ad Edictum*).

<sup>49</sup> Gaius *Institutes* III.212.

<sup>50</sup> Gaius *Institutes* III.212; D 9.2.22.1 (Paul Book 22 *Ad Edictum*).

<sup>51</sup> D 9.2.22 pr (Paul Book 22 *Ad Edictum*).

<sup>52</sup> D 9.2.13.2 (Ulpian Book 18 *Ad Edictum*): “If a slave who is part of an unclaimed inheritance is killed, it is debated who can bring the Aquilian action, since no one is the owner of such a slave. Celsus says that the law meant any loss [*damnum*] to be made good to the owner and that the inheritance is therefore deemed to be the owner.”

<sup>53</sup> But cf. D 9.2.23.2 (Ulpian Book 18 *Ad Edictum*): “The same Julian writes further that if I should be instituted heir on the condition of freeing the slave Stichus and Stichus is killed after the testator's death, I can claim for the value of the inheritance in the assessment; for the condition failed because of the killing. But if he is killed in the testator's lifetime, an assessment of the inheritance is not made, because the highest valuation is calculated retrospectively.”

<sup>54</sup> D 9.2.23.3 (Ulpian Book 18 *Ad Edictum*).

to lie, there was also no logical necessity to calculate the claimant's damages according to the loss he had actually suffered as a consequence of that death. Indeed, *pretium* was preferable: if the wrong committed was a typical killing act, an award of damages calculated according to the value of the victim of that act was an appropriate response. Thus it appears that Julian preferred to retain the older, objectively determined *pretium*, while regarding the original statutory *occidere* as the conceptual centre of the delict.

### *c. An evidentiary difficulty*

There is, however, one central difficulty with Julian's approach to cases involving over-determined causation. As we have seen, for Julian liability depended on inflicting a killing act, an assault resulting in a mortal wound, where "mortal" was understood to refer to a wound highly likely to produce the slave's death. Propositionally, liability arose as soon as such a wound was inflicted. However, in practice it would often have been possible to know whether the wound inflicted was a mortal one in this sense only once death had actually resulted. Where the death of the slave was merely protracted, as in D 9.2.15.1 or D 9.2.51 pr—for example, where he died only after a long interval, and was freed or instituted heir in the interim—there was no difficulty in labelling the initial wound a mortal one, a wound very likely to produce death, since it had in fact caused the death of the slave. If, on the other hand, the wound did not after all prove fatal—if it did not actually cause the slave's death—then it could not be proved to have been an instance of *occidere*, an attack resulting in a mortal wound. Thus although it might have been coherent in principle to say, as Julian did, that the cause of action in killing cases accrued at the time at which a mortal wound was inflicted, an evidentiary difficulty arose if the wound was not permitted to take effect.

Ulpian makes this evidentiary difficulty explicit in 15.1: "the collapse of the house did not allow it to emerge whether or not he was killed [*occisus*]." In this case it is not possible to say whether the defendant committed an *occidere*, because it is not possible to prove that the wound inflicted was very likely to have produced the slave's death. It is precisely because of this evidentiary difficulty that Ulpian concluded that there was no killing but only wounding in the shipwreck/house-collapse case described in D 9.2.15.1, despite agreeing with Julian in D 9.2.21.1 and indeed in D 9.2.15.1 itself that the cause of action under Ch.1 accrued at the date of the assault. We may perhaps hypothesise that it was for this reason, too, that Ulpian agreed with Celsus about the double-hit case described in D 9.2.11.3, although he does not make this explicit. This is especially so since he refers in D 9.2.11.2 to Julian's discussion of the case where several people beat a slave to death and it is unclear from whose blow he died (here, as in D 9.2.51.1, Julian says that all are liable for killing). This suggests that Ulpian construed the outcome in D 9.2.11.3 as the result of an evidentiary problem.

Julian tried to overcome this difficulty by specifying that the wound inflicted by the first assailant in the case described in D 9.2.51 pr was not only mortal in the sense used above but actually rendered it *certain* that the slave would die: indeed, he specifies on two occasions in D 9.2.51 pr that the wound inflicted by A was of this kind. If, *ex hypothesi*, the wound inflicted by A made it certain that the slave would die, then the evidentiary difficulty outlined above did not arise,

because the effect of the wound was beyond doubt.<sup>55</sup> This made the case different from those described in D 9.2.11.3 and D 9.2.15.1, where the wound inflicted by the first assailant was merely said to be mortal. For all we know, Ulpian might have thought differently about the case described by Julian in D 9.2.51 pr, in which it was somehow possible to be certain that the first blow would have produced the slave's death. Yet such a case exists only in the minds of jurists: in the real world, Ulpian's evidentiary problem would always arise. This was particularly true in the context of a legal system, such as the Roman one, which lacked sophisticated methods of proof. Julian's attempt to circumvent this difficulty by asking his reader to imagine a wound from which the slave was certain to die was therefore not a permissible move.

## 6. The Wider Implications of Julian's View

It appears that Julian's analysis of the double-hit case in D 9.2.51 pr may be flawed after all. Nevertheless, if the reading of D 9.2.51 pr and D 9.2.15.1 given above is right, it seems that his analysis was informed not by his faulty understanding of causation but rather by his conception of the Ch.1 delict itself. For Julian, the delict created by Ch.1 of the *lex Aquilia* was a delict organised around the idea of *occidere*, killing acts. Julian's purpose in D 9.2.51 was to defend his conception of the Ch.1 delict against a rival conception, advanced in particular by Celsus, according to which it was the wrongful causing of death—*mortis causam praestare*—by which the delict was constituted.

Julian took this view despite the fact that the Praetor had for two centuries been extending liability under Ch.1 to include cases where death was produced remotely rather than immediately. In this respect, his position was irrational. First, the decline of the formulary system under the Empire—Julian himself presided over the consolidation of the Praetor's Edict during the reign of the Emperor Hadrian<sup>56</sup>—meant that the distinction between the statutory action and analogous actions introduced by the Praetor was now conceptual rather than procedural. Indeed, the decline of the formulary system tended to erode the distinction entirely. It follows that any definition of the Ch.1 delict had to encompass both *occidere* and *mortis causam praebere*, the substantive counterparts of the old actional categories.<sup>57</sup> Secondly, since liability could now be imposed in respect of remotely inflicted death, or even death arising from a failure to act, it was obvious that the wider delict so created could not be one constituted by wrongful conduct. This was because there was no specifically proscribed wrongful conduct—such as *occidere*—which could form the gist of such a delict; it was enough that the defendant had wrongfully caused someone or some (four-footed) animal to die, however he had done it. Moreover, whereas killing could almost always be comprised within providing a cause of death, the reverse was of course not true. Thus it was inevitable that the conception of delict implied by the extended

<sup>55</sup> This is the solution proposed in a scholion to the *Basilica* 50.3.50, 51. See Gustav Heimbach, *Basilicorum Libri LX* (1850), Vol.V at p.319, Sch.7; H.J. Scheltema et al., *Basilicorum Libri LX* Series B Vol.VIII (1983), at p.3161, Sch.10; F.H. Lawson, *Negligence in the Civil Law* (1950), at p.51.

<sup>56</sup> Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law* (1972), at pp.356–359.

<sup>57</sup> On the advantages of pleading one's case in terms of the praetorian rather than the statutory action under the formulary system, and for parallels in 19th century English law, see Birks, "Doing and Causing to be Done" in A. Lewis and D. Ibbetson (eds), *The Roman Law Tradition* (1994), at p.32.

praetorian actions—that of death wrongfully caused—would in time overwhelm the analysis advanced by Julian, an analysis more closely linked to *occidere* in the context of the *lex*.

Not only was this shift in the analysis of the Ch.1 delict inevitable in itself; it also served to bring the analytical structure of the Ch.1 delict into line with the position under Ch.3. Whereas it was at least coherent for classical jurists such as Julian to continue to insist on a typical killing act in the context of Ch.1, the harm verbs in Ch.3—burning, breaking and bursting—could not be treated in the same way. There were of course such things as “typical burning acts” or “typical breaking acts”: indeed we see examples of such acts in D 9.2.27.6 (Ulpian Book 18 *Ad Edictum*)—a lighted torch is thrown at a slave—and 31—someone breaks down or staves in the doors of my house. But after the expansion of the interpretation of the verb *rumpere* (bursting) to *corrumpere* (spoiling), for which Celsus again appears to have been primarily responsible, it no longer made sense for the jurists to insist on such acts.<sup>58</sup> Given the wide range of harm now comprised within the term *corrumpere*, it was impossible to say what a “typical spoiling act” might look like.<sup>59</sup> Even cases of burning and breaking were now covered by that general term.<sup>60</sup> It followed that there was no longer a closed list of typical conduct which could be treated as the analytical heart of the delict.<sup>61</sup> The effect of this development must inevitably have been to shift the focus of the Ch.3 delict away from wrongful conduct on the part of the defendant towards the causing of harm: not “burning” but “causing to be burnt”.

In the mature classical law the gist of the *lex Aquilia* delict—comprising both Ch.1 and Ch.3—was *damnum iniuria*, “loss injury”.<sup>62</sup> In the context of Ch.1 in particular, a causal link between the culpable conduct of the defendant—whatever that was—and the death of the slave or animal—the loss-causing harm suffered by the claimant—was indeed crucial. But as I have tried to show, in searching for that link in Julian’s account of the case of A and B in D 9.2.51 pr modern jurists may have missed the fact that for Julian, a causal relationship between the defendant’s *occidere* and the death of the slave was not required. This was because his conception of the Ch.1 delict turned not on wrongfully caused death but on a wrongful killing act, specifically an assault by the defendant on the claimant’s human property resulting in a mortal injury.

<sup>58</sup> See e.g. D 9.2.27.15–16, from Ulpian Book 18 *Ad Edictum*.

<sup>59</sup> According to Celsus, cited by Ulpian, “clearly the Aquilian action can be brought against someone who adulterates wine or pours it away or makes it sour or spoils it in any other way, because even pouring it away or making it sour are comprised within the term ‘spoil’ [*corrumpere*].” (D 9.2.27.15).

<sup>60</sup> D 9.2.27.16.

<sup>61</sup> This explains in turn the brevity of Ulpian’s treatment of this question in the portion of his Edictal Commentary excerpted in D 9.2.27, as opposed to the sustained examination of the “killing” question preserved in D 9.2.7.1 to D 9.2.11.5.

<sup>62</sup> The concept is explained by Rodger, “What did *Damnum Iniuria* Actually Mean?” in Burrows and Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006), at p.421. See also the concept of a “loss-wrong” identified by Birks in “The Edictal Rubric ‘*ad legem Aquilianam*’” in R Perez-Bustamenté (ed.), *Estudios de Historia del Derecho Europeo: Homenaje al Professor G Martínez Díez*, Vol.1 (Madrid: Edit. Universidad Complutense, 1994), at pp.81 and 83. The calculation of damages under Ch.3 of the *lex Aquilia* as originally enacted has of course been the subject of great controversy. The debate is summarised by Reinhard Zimmermann in *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1990), at pp.962–969.

## 7. Julian and Contemporary Tort Theory

What light does this analysis shed on English tort law, and the decision in *Fairchild v Glenhaven Funeral Services Ltd* in particular? First, I have argued that the case which Julian had in mind in D 9.2.51 pr was after all quite different from the facts of the *Fairchild* case, in that it was a case of over-determined causation, specifically pre-emptive causation, not a case involving an evidentiary gap. But on a more fundamental level, my analysis shows that Julian's conception of liability for killing under the *lex Aquilia* was very different from the orthodox analysis of negligence in modern English tort law. Julian did not regard the causation of damage or loss as an element of liability under Ch.1 of the *lex Aquilia* at all. This makes Julian's ideas about killing a rather unreliable guide to the English tort of negligence.

On its face, Julian's conception of the delict established by Ch.1 of the *lex Aquilia* seems to evoke more closely the novel conception of the mesothelioma claims adopted by Lord Hoffmann in *Barker v Corus UK Ltd*<sup>63</sup> in 2006.<sup>64</sup> In the *Barker* case, Lord Hoffmann held that the damage suffered by the defendants' employees consisted in their exposure to the risk of mesothelioma at the hands of the defendants.<sup>65</sup> This reframing of the claimants' damage liberated them from the necessity of having to prove that any one of the defendants had actually caused their employees' mesothelioma. In theory, this manoeuvre involved only the reformulation of the damage suffered; the requirement of causation remained intact. But in reality, in reframing the damage inflicted in this way, Lord Hoffmann converted the tort of negligence from a bipolar one, requiring proof of both negligent conduct on the part of the defendant and damage to the claimant, to a monopolar one, in terms of which the first element, negligent conduct, was sufficient in itself to attract liability. Thus Lord Hoffmann and Julian appear to be on the same side. However, the similarities between Julian's conception of Ch.1 of the *lex Aquilia* and the reframing of the negligence claim by Lord Hoffmann in the *Barker* case are more apparent than real. Julian was not prepared to dispense with the requirement that the defendant had actually injured the claimant's slave. He simply rejected the idea that the defendant must have caused the slave's death in order to be liable under the *lex*.

There does, however, appear to be some coincidence between Julian's analysis of the delict established by Ch.1 of the *lex Aquilia* and the analysis of English torts, including the tort of negligence, proposed by Robert Stevens in his account of English tort law, *Torts and Rights*. Professor Stevens' thesis is that liability arises from the defendant's infringement of the claimant's right, for example a property right, not from the loss suffered by the claimant. Of course the defendant must be shown on the balance of probabilities to have injured the claimant. On the other hand, it is unnecessary in order to constitute the tort that his actions be proved to be the cause of loss suffered by the claimant.<sup>66</sup> Accordingly, in the assessment of damages it is necessary to distinguish between damages awarded as a substitute

<sup>63</sup> [2006] UKHL 20; [2006] 2 A.C. 572.

<sup>64</sup> cf. Zahn, "Harmful Conduct as the Touchstone of Causation: an Analytical Comparison of *Barker v Corus* and *Julian*" (2011) 15 *Edinburgh Law Review* 197 at 215–217.

<sup>65</sup> *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 A.C. 572, esp. at [35] and [36].

<sup>66</sup> Stevens, *Torts and Rights* (2007), at p.72.

for the right infringed and damages designed to compensate the claimant for loss consequent upon that infringement.

Damages which are substitutive for the right infringed are assessed objectively. The time for the assessment of the value of the right is the moment of infringement, and the cause of action accrues at that point. These damages are awarded even if there is no loss to the claimant consequent upon the infringement of the right.<sup>67</sup> Compensatory damages, on the other hand, are contingent upon proof of such consequential loss, and so may not be awarded in every case. Such loss is specific to the particular claimant and must be proven. It is assessed at the time of judgment.<sup>68</sup> The distinction between the two types of damages can be obscured because in most cases the value attached to the right is precisely the same as the loss suffered by the claimant. But it is a mistake to think that where no consequential loss is suffered as a result of the infringement of the claimant's right, no claim for damages is available.<sup>69</sup>

This theory has important implications for cases of over-determined causation. Professor Stevens discusses the hypothetical case of a dog which is stabbed twice by two assailants.<sup>70</sup> Where two or more people infringe the same right simultaneously, they are concurrent wrongdoers, and all are liable for the value of the right infringed. Thus simultaneous fatal stabbing of the claimant's dog would lead to the conclusion that both assailants infringed the same right (a property right) simultaneously, and both would be liable for the value of the dog. Both would also be liable for any consequential loss flowing from the right's infringement, although of course double recovery would not be permitted. And indeed both would have caused the dog's death according to the NESS test. On the other hand, if the stabbings were successive, then only the first stabber would be liable for consequential losses flowing from the stabbing of a healthy dog. Moreover, the substitutive damages payable by the second stabber would be nominal: the value of the right infringed would be low, because the subject matter of the right infringed was a dead or dying dog. But both assailants would nevertheless be wrongdoers for the purposes of the law of tort, because both would have infringed the claimant's property right. This is despite the fact that the second stabber could not be said to have caused the dog's death, nor the loss flowing from it. In Professor Stevens' words, "the correct question to ask [in respect to either wrongdoer] is not 'but for the defendant's action would the dog not have died?' nor is it 'but for the defendant's action, what loss would the claimant not have suffered?'"<sup>71</sup>

It seems that Julian would have found nothing to disagree with here, either in Professor Stevens' general account of tort or in his account of cases involving over-determined causation in particular. In his analysis of the Ch.1 delict Julian explicitly rejected the idea that the delict was constituted by the defendant's causing (in the but-for sense) the slave's death; he required only that the defendant had "killed" the claimant's slave. As we have seen, "killing" for Julian comprised both a particular species of conduct—a typical killing act—and a particular injury to

<sup>67</sup> Stevens, *Torts and Rights* (2007), at p.60.

<sup>68</sup> Stevens, *Torts and Rights* (2007), at p.60.

<sup>69</sup> Stevens, *Torts and Rights* (2007), at p.60.

<sup>70</sup> Stevens, *Torts and Rights* (2007), at pp.133–134. This is of course a case of trespass rather than negligence.

<sup>71</sup> Stevens, *Torts and Rights* (2007), at p.134.

the victim—a mortal wound. Obviously the first of these elements is alien to Professor Stevens' analysis. However, the second element can be regarded as a particular species of infringement of the claimant's property right. Just as Professor Stevens treats it as irrelevant whether each defendant in the example in the previous paragraph can be said to have caused the dog's death, so Julian treated it as irrelevant whether the assailants in the case described in D 9.2.51 pr could be said to have caused the slave's death. Julian's view, brought up to date, was that the right of the owner was infringed as soon as the mortal wound was inflicted; the slave's death was merely a consequence of that infringement.

Furthermore, Julian's approach to the calculation of damages under Ch.1 appears to have much in common with the substitutive damages identified by Professor Stevens. As we have seen, Julian took an objective approach to the calculation of damages under Ch.1, assessing them at the moment at which the typical killing act was committed by the defendant. These damages were to be awarded even if there was no loss to the claimant consequent upon the infringement of his right by the defendant; that is, even if the slave's death had in fact been caused by a subsequent assault by a second wrongdoer. Thus Julian implicitly rejected loss (*damnum*) as the appropriate quantum of damages in Ch.1 cases, preferring to calculate damages according to the original measure of damages under Ch.1 of the *lex*, namely the highest value of the slave in the year prior to the assault (*pretium*). This second proposition is of course unique to the Roman law of delict. Nevertheless, the highest value of the slave during the previous year was not an irrational or even disproportionate measure for calculating the value of the claimant's property right. Indeed, as Professor Stevens says, in theory the law can adopt almost any secondary obligation as a response to a wrong.<sup>72</sup>

In conclusion, however repellent the institution of human property from which his analysis proceeds, there is nothing alien to modern English tort law in Julian's conviction that it was irrelevant to the claimant's cause of action whether or not the wound inflicted had actually caused the slave's death and thence any loss suffered by the claimant. Even the tort of negligence as analysed by Professor Stevens rests on precisely the same distinction between a wrongful infringement of the claimant's right to property and the consequences attendant on that violation. Orthodoxy may still analyse negligence claims in modern English law in terms of the wrongful causation of loss, a view close to the one Celsus took of the Ch.1 delict, or indeed to the *damnum iniuria datum* of modern South African law. Nevertheless, seen in the light of modern tort theory, Julian's analysis of Ch.1 of the *lex Aquilia* seems, if not prescient, then at least not unsophisticated. ☞

<sup>72</sup> Stevens, *Torts and Rights* (2007), at p.59.

☞ Asbestos; Causation; Employers' liability; Homicide; Negligence; Personal injury; Roman law