The Development of *Culpa* Under the Lex Aquilia

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The Lex Aquilia, likely passed by the jurist Aquilius around the year 287 BCE , superseded all previous laws of its kind under the Roman Republic. With an emphasis on the civil liability of damage to property, the Lex Aquilia represented the culmination of the rapid development of Roman law at the hands of the jurists. The notion of culpa as fault , from which the Roman jurists articulated an understanding of wrongfulness, is one such proof of this development. By defining culpa as a tool used by the jurists to expand their notions of liability, the jurists could conceive of a foundation of wrongfulness that was wide enough to support a variety of cases under the law. By tracing a brief history of the jurists' changing conceptions of culpa, and highlighting some of the major issues that they dealt with, it is possible to better understand the nature of the jurists' reasoning under the Lex Aquilia. This paper will argue that the development of the legal doctrine of culpa reveals the Roman jurists' insistence to articulate a more comprehensive classification of human behaviour before the law.

The enduring legacy of the Roman legal system in current models of law is a testament to the importance of an institution worthy of much consideration. The Lex Aquilia is one such gift. The Lex Aquilia, likely passed by the tribune Aquilius around the year 287 BCE, was said by the jurist Ulpian to have "completely superseded all previous leges, including the Twelve Tables, in so far as they dealt with damage to movable property; for there is no evidence that any other rules survived."[1] Upon closer examination, this did not expressly mean that the Lex repealed earlier laws, but rather superseded them through the provision of better remedies.[2] With an emphasis on the civil liability of damage to property, the Lex Aquilia serves a broader purpose of indicating how the Roman legal system was anything but static in character. In addition, the Lex Aquilia (hereafter the Lex or Lex Aquilia) suggests that the development of the law was not defined by a mere historical shift, but rather progressed through the reasoned construction of the jurists. In this respect, the Lex Aquilia reveals the attempt of the jurists to move from a simple body of laws to the expansion of a complex and intelligently conceived legal system.

[1] F. H. Lawson, *Negligence in the Civil Law* (Oxford: University Press, 1950), 4.
[2] Lawson, 4.

One such evidence of the progressive nature of the Lex can be found in the emergence of the principle of *culpa.* In order for there to be civil liability, the jurists had to conceive of a foundation of 'wrongfulness' that could be wide enough to support a variety of cases under the law. This paper will argue that the development of the legal doctrine of *culpa* reveals the Roman jurists' insistence to articulate a precise classification of human behaviour before the law. In an attempt to better understand the nature of the jurists' reasoning under the Lex Aquilia, this paper will first trace a brief history of the developing notions of wrongfulness under the Lex. It will then proceed by defining *culpa* as a tool used by the jurists to expand notions of liability. Finally, this paper will look at the ways in which the emergence of *culpa* impacted the greater scope of the jurists' rationale with regard to their use of an objective versus subjective standard for establishing Aquilian liability.

As previously mentioned, in order for a discussion to be had regarding the jurists' understanding of *culpa* under the Lex Aquilia, an outline of the way in which the jurists arrived at such a principle is necessary. Since the Lex superseded all previous Roman legislations involving the law of delict,[3] including the codified laws of the Twelve Tables, the jurists were able to expand notions of liability that had previously remained fixed. For instance, Table Eight of the Twelve Tables particularly addresses torts[4] or delicts and imposes certain penalties for *iniuria*, the legal principle necessary for strict liability under Roman law.[5] For the Romans, a defendant was liable if he acted *iniuria* or *non iure,* meaning 'without right'.[6] With this in mind, upon the enactment of the Lex, the jurists understood that, "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

[3] Negligence or delinquency under an implicit, as opposed to explicit, contract.
[4] Remunerative seizure of goods or possessions.
[5] Lawson, 5.
[6] Lawson, 14.

damnum."[7] *Iniuria* not only provided a general principle for explaining liability, it also meant that Aquilian actions were restricted to those acts involving direct contact between the body of the wrongdoer and the thing that he killed or injured (*corpore corpari*).[8] Gaius, commenting on the first chapter of Lex, states:

> The First Section of the Lex Aquilia provides that: 'if anyone wrongfully [iniuria] slays a male or female slave belonging to another person, or a four-footed herd animal, let him be condemned to pay to the owner as much money as the maximum the property was worth in the year [previous to the slaying].' And it then provides that the action be for double against one who denies ability.[9]

As clarified in this first passage, the formula for Aquilian liability is *damnum iniuria datum* or 'loss wrongfully inflicted' where the presence of *iniuria* is necessary for establishing that the act is 'wrongful' and therefore 'without right.' Yet in the case of the First section where there is an assessment of 'wrongful slaying', it is clear that the issue of wrongfulness is restricted to a general principle, not grounded in specific circumstances. In Case 3 of Bruce Frier's *A Casebook on the Roman Law of Delict*, Ulpian introduces the need for a refined definition of the 'meaning of slaying'. He writes that

> if someone who is excessively loaded throws down his burden and slays a slave, the Aquilian action is pertinent; for it was in his discretion not to burden himself so. For even if someone slips and crushes a slave with his burden, Pegasus says that he is liable under the Lex Aquilia if he

[7] Geoffrey MacCormack, "Aquilian Culpa," in A. Watson, ed., *Daube Noster: Essays in Legal History for David Daube* (Edinburgh: Scottish Academic Press, 1974), 201.
[8] Lawson, 14.
[9] Ulpian, "The Edict," in *A Casebook on the Roman Law of Delict*, ed. Bruce W. Frier (Atlanta: Scholars Press, 1989), 4.

> either excessively loaded himself or walked carelessly on slippery ground.

Here there is the suggestion that both lack of discretion and carelessness are requirements for the presence of *iniuria*.

Nonetheless, the jurists soon determined that there were grounds for a defendant to plead that, "although he had killed or injured the thing in question, he had done so under circumstances which made it impossible to do otherwise and was therefore not to blame."[10] Here there is cause to reference the Lex itself. The jurist Alfenus wrote that:

> while several persons were playing ball, one of them pushed a slave boy when he tried to catch the ball; the slave fell and broke his leg. Question was raised whether the slave boy's owner can bring suit under the Lex Aquilia against the person through whose push he fell. I responded that this is not possible, since the event is held to have occurred more by accident than by *culpa*.[11]

From a legal standpoint, there is a clear development when Alfenus makes the distinction between accident and *culpa*. He is asserting not only the exclusion of accident from the general principle of *iniuria* that determines liability, but he is also making use of *culpa* as a newfound justification for liability. At the same time, from a historical standpoint, Alfenus status as a late Republican jurist suggests that his use of *culpa* as an explanation for 'wrongfulness' under the Lex is an indicator of a progressive shift in the Roman legal scheme.[12] Geoffrey MacCormack writes that:

> by the late republic, interpretation of the [L]ex had produced a different result. A person was liable for *damnum* not just if he had acted *iniuria*

[10] Lawson, 15.
[11] Alfenus. "The Digests," in Frier, 89.
[12] Bruce W. Frier, *A Casebook on the Roman Law of Delict* (Atlanta: Scholars Press, 1989), xix.

> but if he had acted with *dolus* and *culpa*. It is possible that a change in the onus of proof also occurred and that the plaintiff had to show that the defendant had acted with *dolus* or *culpa*.[13]

It is clear that the task of facing circumstances which did not fit under the original principle of liability led the jurists to arrive at further distinctions regarding the application of the first section of the Lex Aquilia. This need for clarification in turn fueled their pursuit of a fuller conception of liability.

Frier explains that, "in interpreting the Lex Aquilia's requirement that loss be inflicted 'wrongfully' (*iniuria*), the jurists began requiring that a defendant's conduct be characterized by *culpa* (literally 'fault' or 'responsibility') or, in some cases, by dolus (literally 'malice')."[14] With this development, the jurists could characterize liability between intentional wrongfulness (*dolus*) and unintentional wrongfulness (*culpa*). The legal implications of this distinction are significant, since the jurists could now more easily account for an individual's state of mind, physical abilities, and circumstances than the doctrine of *iniuria* previously had permitted.[15]

This development within the Lex Aquilia gave the later jurists the flexibility to broaden their gaze on the instances that might indicate or refute the presence of liability. Cases 65 and 66 in Frier's Casebook exhibit this development with great clarity. In the case of demolishing a neighbour's house in order to ward off a fire, the pre-Classical jurist Servius reasons that if the action is for wrongful damage, "and the fire had not reached there, the recovery is for simple damages, but if it had reached there, he ought to be absolved."[16] According to the view of Servius, there is no wrongful loss if the building would be destroyed in any case. This view is strictly an argument of causation, suggesting that *damnum iniuria datum* is contingent upon circumstances not directly related to the mental state of the defendant. In contrast, Frier gives the later view of the High Classical jurist Celsus, who writes that, "the action under

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[13] MacCormack, 201.
[14] Frier, 40.
[15] MacCormack, 202.
[16] Ulpian, "The Edict," in Frier, 99.

the Lex Aquilia then fails; for, driven by legitimate fear, he demolishes the neighbour's house to prevent the fire reaching his own. Whether the fire reached there or was put out first, he thinks that the action under the Lex Aquilia fails."[17] In this light, it is clear that Celsus places much more emphasis on the newly emerging doctrine of *culpa*. By focusing on the conditions that might compel a person to cause damage, he is able to excuse them from the liability of wrongful loss.

It has been made clear that the emergence of the doctrine of *culpa*, while not immediately, developed out of the reasoning of the Roman jurists under the Lex Aquilia. Not only was the cause for liability clarified, but rather, the reasons that the jurists could give in response to questions of wrongful loss were expanded. More than before, the jurists articulated an increased awareness of the meaning of 'wrongfulness' in reference to the obligations imposed on an individual at 'fault'.

The development of *culpa* as a requirement for liability brings to mind the necessity of acquiring a better grasp of what this term came to mean in the practice of considering cases under the rule of the Lex. David Daube, in 'Roman Law: Linguistic, Social, and Philosophical Aspects,' writes that "Roman law is much admired for its three standards of liability: *dolus*, evil intent, *culpa*, negligence, and *casus*, accident. I deliberately ram your car with mine: *dolus*, I bump into your car from lack of care: *culpa*. A sudden tornado thrusts me into your car: *casus*." Daube argues that *culpa*, as it emerges from the jurists, is the basic principle of negligence. He cites the jurist Paul, who writes that *culpa* is grounded in the liability under the Lex Aquilia and is synonymous with *iniuria*, comprising *dolus* as well as negligence. As a result, *iniuria* is taken to mean both *culpa* and *dolus* with the exclusion of *casus*.[18]

Nonetheless, MacCormack in 'Aquilian *Culpa*', argues that the application of the doctrine of *culpa* can be interpreted in three different ways when bearing in mind the reasoning of the Roman jurists. He writes:

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[17] Ulpian, "The Disputations," in Frier, 101.
[18] David Daube, *Roman Law: Linguistic, Social and Philosophical Aspects* (Edinburgh: University Press, 1969), 146.

(i) That *culpa* is negligence, the failure to exercise the care of bonus paterfamilias and that it has this meaning both in classical and in later law;

(ii) that in classical law *culpa* expresses the causal connection between the act of damage and the person who committed it; sometimes this is expressed by saying that *culpa* means imputability. On this view the understanding of *culpa* as negligence is a product of the later law;

(iii) that in classical and later law *culpa* expresses conduct which can be considered as a matter of reproach on the part of the individual.[19]

MacCormack responds with the argument that *culpa* cannot be limited to the meaning of negligence, since carelessness is among many other factors that help to constitute a fault (*culpa*).[20] Thus, in order to determine how the jurists conceived of *culpa* as a requisite to liability under the Lex Aquilia, one must make reference to the jurists' own writings on the Lex.

In Case 19, Paul writes that, "if a tree-trimmer threw down a branch from a tree and killed a passing slave… he is clearly liable if it falls on public land and he did not call out so that the accident to him could be avoided…for it is *culpa* not to have foreseen what a careful person could have foreseen, or to have called out only when the danger could not be avoided."[21] This case clearly demonstrates how the jurists used *culpa* to refer to liability due to carelessness, whereby the onus lies on the defendant to show that they acted with a standard of care to ensure that damage to another's property would not occur. In this particular case, the jurists Paul and Mucius comment on how the standard of care of a tree-trimmer extends even into circumstances where he is working on private land, since in either case

[19] MacCormack, 202.
[20] MacCormack, 202.
[21] Paul, "The Edict," in Frier, 44.

it is foreseeable that he should shout beforehand to ensure that no one gets killed by the falling branches. The case is revealing since it shows the jurists' reliance on foreseeability as an effective measure for determining *culpa*.

Yet the question of whether negligence is the source of *culpa* or rather a mere component of *culpa* still persists. In Case 28, Paul describes the instance of a person setting a fire that unintentionally leads to the damage of another's grains or vines. He states that

> we should ask whether this occurred by his lack of skill or carelessness. For if he did it on a windy day, he is guilty of *culpa*.... Open to the same charge is someone who did not guard against the fire's spreading out. But if he saw to everything that he should have, or a sudden burst of wind spread the fire out, he is free of *culpa*.[22]

Paul's discussion provides new justification for the presence of *culpa*. In the first place, he notes that the act of lighting a fire on a windy day is demonstrative of a lack of skill (*imperitia*). Secondly, it was the carelessness of the defendant to watch it properly that is the mark of *negligentia*.[23] From this analysis it becomes evident that the case for fault (*culpa*) was not simply arrived at by the Roman jurists through the sight of negligence, but that an act of fault was completed when the individual liable was determined to have acted beyond his particular abilities. By extension, the claim of negligence as being a requirement for the presence of *culpa* still entails a consideration of the agent who is negligent, and what he could have and thus should have done otherwise.

Nonetheless, there still remains a strong correlation between the jurists' identification of negligence on the part of the defendant, and his resulting *culpa* as a requirement for liability. F.H. Lawson in his work 'Negligence in the Civil Law' reiterates this conclusion by stating that, "Under the Lex Aquilia even the slightest negligence counts. Whenever a slave wounds or kills with the knowledge of his

[22] Paul, "The Edict," in Frier44.
[23] MacCormack, 207.

master, there is no doubt that the master is liable to the Aquilian action. We take knowledge to mean here sufferance, so that a person who could have prevented an act is liable if he did not."[24] Lawson addresses a final point that is pivotal to the jurists' reasoning: an insistence on knowledge as a requisite for *culpa*. Beyond the obligation of foreseeable damage to property, there is also the consideration of a defendant's subjective capacity for knowledge. It is on this platform that Case 35 of the Lex Aquilia sheds light on this confusion. Ulpian writes:

Whether there is an action under the Lex Aquilia if a lunatic (*furiosus*) inflicts loss? Pegasus denied this; for what *culpa* can a person have who is not in his right mind? This view is exactly correct. Therefore the Aquilian action will fail, just as it fails if a four-footed animal inflicts loss, or if a rooftile falls. But also if a young child inflicts loss, the same will be held. But if an older child does this, Labeo says that because he is liable for theft (*furtum*), he is also liable in the Aquilian action; I think this view correct if he is already capable of wrongful conduct. The consensus among the three jurists is indisputable. *Culpa*, understood as fault, cannot be committed by a person with a mental incapacity to distinguish between right and wrong. Similarly, the claim for liability fails for persons who are unable to appreciate the consequences of their actions.[25]

To merely assert that the Roman jurists conceived of *culpa* as pure negligent liability is to lose sight of the grander position that the jurists took in front of the problem of *iniuria*. Ultimately, the historical transition from *iniuria* to *culpa*, as extending from 'without right' to 'fault,' is not simply a more complex form of wrongfulness under the Lex. Rather, the question of negligence posed by the Roman jurists could only be asked if they had first probed the question as to whether the individual can be deemed negligent in the first place. To this regard, the doctrine of *culpa* does not merely prescribe a

[24] Lawson, 127.
[25] MacCormack, 218.

standard of care, but must also address a defendant's capacities and subsequent duties that qualify his 'fault' under the Lex Aquilia.

Another intriguing aspect of the emergence of *culpa* under the Lex Aquilia is the way that it altered the lens from which the Roman jurists reasoned through a possible statutory action. Worthy of consideration is the possibility that *culpa* questioned the 'objective perspective' and introduced a 'subjective quality' into the formula for concluding Aquilian liability. Frier describes how the new emphasis on *culpa* and *dolus* invited a moral evaluation based on a subjective standard where the defendant's fault was determined with reference to their personal characteristics, incapacities, and circumstances. Nonetheless, Frier admits that juristic texts were likely understood objectively, with jurists asking not about what the defendant was individually capable of, but asking with greater priority whether they lived up to a standard of behaviour that was accepted by the Romans.[26]

Frier suggests two alternative approaches that might have guided the reasoning of the Roman jurists under the Lex Aquilia. To properly determine which approach more accurately reflects the procedure of the jurists, there is a need to refer back to the cases. In Case 30, Paul describes a situation where a defendant slays a slave who he believes to be free. Despite the defendant's mistaken knowledge, it is held that he will be liable under the Lex Aquilia.[27] In order for the jurists to warrant liability, they had to decide whether the defendant's *culpa* was determined by his belief about the person he was killing, or rather was the quality the defendant possessed when he slayed the person that he thought to be free.[28] This distinction, in many ways, clarifies whether or not the jurists would have looked at the defendant's personal mistake as an *exceptio* to Aquilian liability, or rather as a mistake that was independent of the 'fault' of the defendant. Paul is very clear that the mistake of the defendant

[26] Frier, *A Casebook,* 40.
[27] Paul, "Sabinus," in Frier, 47.
[28] Paul, "Sabinus," in Frier, 47.

is irrelevant to his liability, and it is unmistakable from this case that the jurists' foremost priority was to satisfy an objective standard of wrongfulness, identified through the presence of *culpa*.

Yet it cannot be overlooked that the emergence of *culpa* placed new emphasis on a variety of subjective factors that might be used to confirm 'fault'. Lawson gives evidence in favour of the subjective theory, citing the Roman treatment of cases where damage under the Lex can be attributed to a defendant's lack of strength or skill.[29] Lawson then writes that such a theory is consistent with an objective notion of liability, "for a man who undertakes something beyond his strength or skill is normally not acting like a reasonable man; but it is easy to see that the form in which the maxims are couched suggests a moral blameworthiness that is not emphasized in the objective theory."[30]

Lawson suggests that the presence of *culpa* indicates a greater consideration of the 'subjective perspective' yet argues that this admission is consistent with the Roman requirement for objective moral wrongfulness. This synthesis is most clearly shown in Case 31 of Frier's Casebook. Gaius writes that a muleteer unable to restrain the movement of his mules that trample over another's slave due to lack of skill is still liable for *culpa* under the Lex. Likewise, the same action is held if he cannot control the movement of his mules due to physical weakness.[31] The most relevant component of this case emerges when Gaius subsequently writes that it does not "seem unfair to count weakness as *culpa*, since a person ought not to undertake something when he knows or ought to know that his weakness will be dangerous to another."[32] As shown, the Roman jurists took into account the delicate balance between objective and subjective considerations in their efforts to determine a defendant's fault. While Gaius does not grant an *exceptio* in the case of physical weakness (*infirmitas*), he does however feel the need to give a justification to argue that the weakness of the defendant, preventing him from acting according to the duties of a reasonable person, must still comply with a standard of care that

[29] Lawson, 42.
[30] Lawson, 42.
[31] Gaius, "Provincial Edict," in Frier, 48.
[32] Gaius, "Provincial Edict," in Frier, 48.

accommodates his *infirmitas*. Therefore, *culpa* emerges as the legal principle that combines individual capacity with an impartial model of wrongfulness necessary for establishing liability under the Lex.

The most revealing aspect of the nature of the Roman jurists' reasoning is the fact that there appears to be little to no tension when considering whether the presence of *culpa* ought to be approached from a subjective or objective view. As seen in the previous case, the insistence on considering all of a defendant's circumstances while still holding them up to a standard of 'wrongfulness' is indicative of the multi-faceted nature of fault in the eyes of the jurists. Reinhard Zimmerman, in his work 'The Law of Obligations: Roman Foundations of the Civilian Tradition' provides a similar conclusion:

> It is apparent from these and other texts that the Roman lawyers approached the question of *culpa* in a casuistic manner. They did not try to subsume the facts of the individual case under a standardized test or formula. More particularly, they did not ask in each case whether the defendant ought to have foreseen the damage. Foreseeability or carelessness could be important issues, but they did not necessarily and conclusively determine the question of liability. The crucial issue was whether, more generally, the defendant had been at fault; whether, in other words, he had behaved on an evaluation of all the circumstances of the case and tended to be determined from an objective point of view.[33]

In reflection, it seems clear that the doctrine of *culpa* emerged out of the desire of the jurists to determine fault by paying attention to a defendant's behaviour. This development represents a unique shift in the history of Roman law. J.M. Kelly confirms this point in his article 'The Meaning of the Lex

[33] Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town: Juta, 1992), 1008-1009.

Aquilia', writing about the profound innovations that the introduction of the Lex Aquilia had on the entire Roman legal tradition. He states that the Lex Aquilia arrived at a pivotal time in Roman legal history, since it brought forth the newfound recognition that acts of *iniuria* amounting to economic loss required special treatment.[34] On a similar note, the cultivation of the doctrine of *culpa* was innovative in that it articulated the Roman jurists' persistence to classify the complete liability of the person under the Lex Aquilia. This is most clear when considering the jurists' attempts to define both the obligations and capacities of a defendant.

From its historical basis, the origins of the doctrine of *culpa* as 'fault' are rooted in the earlier notion of *iniuria*, meaning 'without right', and developed to become a key source of liability for the Roman jurists. The presence of *culpa* too, practically applied, indicates a larger breadth of liability previously unknown to the Roman jurists under the Lex. Beyond a mere indicator for negligence, the doctrine of *culpa*, reinforced through the commentaries of the jurists, expands the notion of fault to include factors particular to the capacities of the defendant. By extension, the emergence of *culpa* in the Lex Aquilia may also be attributed to the great resolve on the part of the jurists to take into consideration the totality of the defendant at 'fault'. It was this tendency of the jurists to examine both the subjective experience of the defendant as well as the objective notion of wrongfulness that allowed them to form the basis of *culpa*, and thus liability under the Lex Aquilia.

[34] J. M. Kelly, "The Meaning of the Lex Aquilia," *Law Quarterly Review* 80 (1964), 81.

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