

# What did *iniuria* in the *lex Aquilia* actually mean?

Paschalis PASCHALIDIS<sup>1</sup>

(*Université d'Oxford*)

## 1. Introduction

In the past a wide range of eminent authors have focussed on the relationship between *culpa* and *iniuria* in the framework of the *Lex Aquilia*. This debate has been generated by several extracts contained in Justinian's Digest, Book 9, chapter 2 (hereinafter 'D.9.2'), which seem to indicate that over the centuries the meaning of *iniuria* had changed. Few authors, however, have focused on the relationship between *damnum* and *iniuria*. In a recent article, Lord Rodger of Earlsferry persuasively argued that the phrase *damnum iniuria* is an asyndeton<sup>2</sup> in which both nouns are in the nominative<sup>3</sup>. He states that by Ulpian's time

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<sup>1</sup> MJur, MPhil (Oxon). Associate at Shearman & Sterling LLP (International Arbitration Group, Paris). Candidate for the DPhil in Law at Harris Manchester College, University of Oxford. Scholar of the Alexander S Onassis Public Benefit Foundation. I would like to thank AJB Sirks, the Regius Professor of Civil Law, for his valuable comments and contributions to this article, without which many mistakes would not have been avoided. I would also like to thank Tony Honoré, former Regius Professor of Civil Law, Dr James Edelman, Dr Joshua Getzler, Dr Helen Scott, Adam Rushworth and Jeremias Prassl for their constructive comments on this article in the Roman Law Study Group convened at All Souls College on 23 January 2008 as well as Lord Rodger of Earlsferry for his helpful insight. I should also express my gratitude to Geraldine Caulfield for correcting language mistakes. The usual disclaimer applies.

<sup>2</sup> Asyndeton is a rhetorical figure which omits the conjunction.

<sup>3</sup> A.RODGER, *What did damnum iniuria actually mean?* in A.BURROWS & LORD RODGER OF EARLSFERRY (eds.), *Mapping the Law, Essays in Memory of Peter Birks*, Oxford 2006, p.421, p.425; see also J.M.KELLY, *The meaning of the Lex Aquilia*, LQR 80 (1964) p.80.

... *iniuria* had come to mean *damnum*, more particularly loss caused by fault, even though unintentional. But it was the result of a development that had taken place over the best part of 500 years. The course of that development needs to be explored. For instance, how were *damnum* and *iniuria* originally to be distinguished? What, if anything, did *damnum* originally add to *iniuria* and vice versa? Is it relevant that *damnum* finds no place in chapter 1? What did Servius mean by saying in D.43.24.7.4 that a defendant who pulled down a building that was going to be destroyed *nullam iniuriam aut damnum dare videtur*? What is the force of *aut* in that sentence? Why did *damnum* apparently become the dominant term? Space precludes any further investigation of these and similar matters on this occasion: happily, the instructive mysteries of the *Lex Aquilia* are far from exhausted<sup>4</sup>.

The purpose of this article is to explore precisely these ‘instructive mysteries’ and find an answer to questions of interpretation of the *Lex Aquilia*. Proceeding on the assumption that Lord Rodger’s proposition about the true meaning of *damnum iniuria* is correct, the focus of this argument lies in the meaning and interpretation of *iniuria*.

## 2. *The relationship between iniuria and culpa*

The discourse on the distinction between *iniuria* and *culpa* owes a lot to modern legal scholarship. A systematic approach to these two terms appears to be a concern of modern legal scholars rather than of the Roman jurists themselves.

### a) The prevailing view: *iniuria* as an objective test

The prevailing view appears to suggest that initially *iniuria* was defined independently from *culpa*, the latter being a subsequent construction, which emerged as an effort to overcome the purely objective elements of the delict<sup>5</sup>. The initial period, where no distinction between delicts committed with and without *culpa* was made, was followed by the rise of *culpa* as a general criterion of subjective responsibility of Roman private law<sup>6</sup>. It was in classical times that the jurists started to think of *iniuria* in terms of *dolus* and

<sup>4</sup> See RODGER (as in note 3) p.437-438.

<sup>5</sup> M.F.CURSI, *Iniuria cum damno: Antigiuridicità e colpevolezza nella storia del danno aquiliano*, Milan 2002, p.4-5.

<sup>6</sup> R.von JHERING, *Das Schuldmoment im römischen Privatrecht in Vermischte Schriften juristischen Inhalts*, Aalen 1968, p.155s.

*culpa*, until the jurists of the Severan period finally sanctioned the identification of *iniuria* with *culpa*<sup>7</sup>. It was actually Justinian who distinguished between *iniuria* and *culpa* as two separate requirements for establishing Aquilian liability<sup>8</sup>.

There can be no reference to this topic without paying particular regard to the work of Schipani. In his view, *iniuria* is identified with the injustice that is committed by behaviour that cannot be justified on some ground.<sup>9</sup> *Iniuria* does not require regard to be paid to the subjective element of intention (*dolus*)<sup>10</sup>. The notion of *culpa* was introduced during the late Republic in order to hold a particular behaviour to be unlawful, in cases where the grounds for justification did not suffice to annul the reprehensibility of the act. Thus *culpa* would not only be relevant to the subjective element in proving the reprehensibility of the act, but also to the objective element of the delict, in establishing an unlawful conduct. It was in this way that the continuity between *iniuria* and *culpa* was established<sup>11</sup>.

This view was further elaborated by Cannata. He argued that unlawfulness (*illiceità*) and culpability (*colpevolezza*) are, as a matter of doctrine, distinct notions<sup>12</sup>. Such a distinction is reflected in the origins of the *Lex Aquilia*, when *iniuria* encompassed a purely objective responsibility<sup>13</sup>. The early concept of *iniuria* encompassed grounds of justification such as self-defence<sup>14</sup>, necessity<sup>15</sup>, honour in

<sup>7</sup> *Ibid.* p.5.

<sup>8</sup> R.ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civil Tradition*, Oxford 1996, p.1006-1007; IJ.4.3.2.

<sup>9</sup> S.SCHIPANI, *Responsabilità 'ex lege Aquilia': criteri di imputazione e problema della 'culpa'*, Turin 1969, p.83.

<sup>10</sup> *Ibid.* p.85.

<sup>11</sup> *Ibid.* p.152s, p.301s.

<sup>12</sup> C.A.CANNATA, *Sul testo della "lex Aquilia" e la sua portata originaria*, in L.VACCA (ed.), *La responsabilità civile da atto illecito nella prospettiva storico-comparatistica*, Turin 1995, p.40s; for a sharp distinction between the objective element of *iniuria* and the subjective element of *culpa* as imputability whose extent ranges from *dolus* to *culpa levis* see A.PERNICE, *Zur Lehre von den Sachbeschädigungen nach römischem Rechte*, Weimar 1867, p.26s; C.FERRINI, *Danni (azione di)*, in *Enciclopedia Giuridica Italiana*, Milan 1911, vol. IV, p.16. See also G.ROTONDI, *Dalla "lex Aquilia" all'art. 1151 cod. civ. Ricerche storico-dogmatiche*, in V.ARANGIO-RUIZ et al. (eds) *Scritti giuridici*, Milan 1922, vol. II, p.479s.

<sup>13</sup> *Ibid.* p.41.

<sup>14</sup> D.9.2.4, Coll.7.3.2; D.9.2.5 pr-1; D.9.2.45.4.

<sup>15</sup> D.9.2.49.1; D.43.24.7.4; D.47.9.3.7.

the case of killing a slave for adultery<sup>16</sup>, participation in lawful games<sup>17</sup>, exercise of public office<sup>18</sup> and private right<sup>19</sup>. Beinart argues that the classical jurists never made ‘radical advances’ but ‘gradual and cautious modifications of existing principles<sup>20</sup>’, thus developing the notion of *culpa* within the concept of *iniuria*. However, the early concept of *iniuria* ‘was never completely suppressed, rather it was submerged<sup>21</sup>’.

Daube suggested that the shift from *iniuria* to *culpa* occurred in the *Lex Aquilia* around 100 BC with Quintus Mucius Scaevola and Alfenus employing the term *culpa* as negligence in the context of D.9.2.31 and D.9.2.52.4 respectively<sup>22</sup>. Be that as it may, this development has had three major consequences: (1) the scope of unlawfulness was narrowed, meaning that if the damage was unlawful it could still be excused by lack of intent or negligence; (2) *culpa* tended to overlap with and cover the same field as *iniuria* and (3) *culpa* broadened the range of liability, meaning that acts that used to be *prima facie* lawful could be considered culpable, if done wilfully or negligently<sup>23</sup>.

Thus *culpa* and *iniuria* became intrinsically connected. To act *culpa* has been interpreted as to act *iniuria*, because *culpa* brings back to the behaviour in question the unlawfulness that a ground of justification had previously lifted. Simultaneously, to act *iniuria*, in its initial sense –i.e. to act without justification- has been equated with acting *culpa* because the act is directed against the rights of another and it is reprehensible to infringe upon another’s rights without justification<sup>24</sup>.

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<sup>16</sup> D.9.2.30pr.

<sup>17</sup> D.9.2.7.4; B.BEINART, *The relationship of iniuria and culpa in the lex Aquilia*, in *Studi in Onore di Vincenzo Arangio-Ruiz nel XLV Anno del suo Insegnamento*, Naples 1952, vol. I, p.279 at p.287 also adds D.9.2.52.4 as a case of lack of *iniuria*.

<sup>18</sup> D.9.2.29.7; D.18.6.13-14.

<sup>19</sup> D.9.2.5.3.

<sup>20</sup> See BEINART (as in note 17) p.280.

<sup>21</sup> *Ibid.* 285; See also ZIMMERMANN (as in note 8) p.1007.

<sup>22</sup> D.DAUBE, *Roman Law: Linguistic, Social and Philosophical Aspects*, Edinburgh 1969, p.153.

<sup>23</sup> See BEINART (as in note 17) p.285s.

<sup>24</sup> See CANNATA (as in note 12) p.41.

b) The alternative view: *iniuria* as a subjective test

MacCormack disagrees with Beinart's view that a change of interpretation of *iniuria* occurred in the late Republic or early Participate, arguing that *iniuria* had always been understood as fault<sup>25</sup>. He relies on cases such as the driving of a pregnant mare out of one's field<sup>26</sup>, the pruner<sup>27</sup>, the collisions<sup>28</sup>, the lantern of a tavern owner<sup>29</sup>, the ball games<sup>30</sup>, the barber<sup>31</sup>, the destruction of a house to prevent a fire from spreading<sup>32</sup>, and the cutting of a projection of a roof by a neighbour<sup>33</sup> as cases dealing with fault<sup>34</sup>. He did not preclude the possibility that the existence of a specific *ius* might affect the approach of the jurists. Nonetheless, in his view, the jurists always spoke in terms of *dolus* or *culpa*<sup>35</sup>.

His views appeared to be slightly different in an earlier article, where he recognised that in early law *iniuria* had the meaning of absence of right. The notions of *dolus* and *culpa* were introduced during the late Republic and in classical times '*iniuria* itself would be explained in terms of *dolus* and *culpa*<sup>36</sup>'. To support this latter argument he relied on extracts from Gaius<sup>37</sup>, Ulpian<sup>38</sup> and Paul<sup>39</sup>, which show how the delict could effectively be called *damnum culpa datum*<sup>40</sup>.

For others, *iniuria* cannot be interpreted as mere unlawfulness as it has an intrinsic subjective value indicating the will to offend the owner of the damaged object<sup>41</sup>. Neither does Birks share the majority

<sup>25</sup> G.MACCORMACK, *Aquilian Studies*, SHDI 41 (1975), p.1 at p.56.

<sup>26</sup> D.9.2.39pr.

<sup>27</sup> D.9.2.31.

<sup>28</sup> D.9.2.29.2-4.

<sup>29</sup> D.9.2.52.1.

<sup>30</sup> D.9.2.52.4.

<sup>31</sup> D.9.2.11pr.

<sup>32</sup> D.9.2.27.11.

<sup>33</sup> D.9.2.29.1.

<sup>34</sup> See MACCORMACK (as in note 25) p.43-55.

<sup>35</sup> *Ibid.* p.56.

<sup>36</sup> G.MACCORMACK, *Aquilian Culpa*, in A.WATSON (ed.) *Daube Noster Essays in Legal History for David Daube*, Edinburgh 1974, p.201.

<sup>37</sup> G.3.211.

<sup>38</sup> D.47.10.1pr; D.9.2.5.1; D.47.6.1.2; D.47.10.15.46.

<sup>39</sup> Coll 2.5.1 ; D.44.7.34pr.

<sup>40</sup> *Ibid.*

<sup>41</sup> K.BINDING, *Die Normen und ihre Übertretung : eine Untersuchung über die Rechtmässige Handlung und die Arten des Delikts*, Aalen 1965, vol. IV, p.48-51.

view. He thinks that in the framework of *damnum iniuria datum*, *iniuria* was a separate notion from *culpa* and that it implied that the *damnum* has to be caused by ‘contempt-*iniuria*’, thus making a link between this delict and the separate delict of *iniuria*<sup>42</sup>. *Culpa* was to be seen as the mental element of the delict. Apart from this, he argues that, except for “contempt-*iniuria*” (*ratione personae* – with regard to the person) there is an *iniuria ratione re* (with regard to the thing) requirement, meaning that Aquilian liability will be established only if, according to Hagiotheodoretos<sup>43</sup>, the thing is used *παρά φύσιν* (*praeter naturam* – contrary to nature)<sup>44</sup>.

c) *Iniuria as dolus*

- The pre-*culpa* era

There has been a very persuasive effort to link *iniuria*, at least in its early stage of the delict, with *dolus*<sup>45</sup>. The argument is based on the premise that once it is realised that the interpretation of *iniuria* as a purely objective test of unlawfulness constitutes an imposition of a modern concept which the Romans did not necessarily share, then it is possible to contemplate *culpa* in subjective terms, even from the very beginning of its history<sup>46</sup>.

It is noted that there is a great similarity between *iniuria* in *damnum iniuria* and *iniuria* as *contumelia*, in the sense that as damage done to a slave amounts to an offence to the *dominus* under the delict of *iniuria*, the killing of the slave also amounts to a prejudice to the patrimony of the owner under the delict of *damnum iniuria*<sup>47</sup>. It is noteworthy that the Roman jurists would in both cases qualify the offence as *iniuria*. ‘Thus *iniuria* to the owner would not only arise

<sup>42</sup> P.BIRKS, *Other men’s meat: Aquilian liability for proper use*, Irish Jurist 16 (1981) p.141.

<sup>43</sup> BS 3142.24-33, 3143.1-5; the following edition of the Basilica has been used: H.J.SCHELTERMA *et al.* (eds.), *Basilicorum Libri LX*, Groningen, Series A & B. However, for reasons of brevity reference will be made to the texts by the commonly used numeration.

<sup>44</sup> See BIRKS (as in note 42) p.148.

<sup>45</sup> See CURSI (as in note 5) p.19, 271-279; relying on BINDING (as in note 41) p.46 and M.KASER, *Typisierter “dolus” im altrömischen Recht*, BIDR 65 (1962) p.79.

<sup>46</sup> See CURSI (as in note 5) p.272.

<sup>47</sup> See E.PÓLAY, *Iniuria Types in Roman Law*, Budapest 1986, p.123.

when the slave would be hurt, but also *a fortiori* when the slave would be killed<sup>48</sup>.

The killing of a slave is thus not only equated to damage done to the property of the owner, but also to an affront to the owner, which is committed by killing the slave. In such a way the perpetrator performs an act of *potestas* which does not pertain to him and thus offends the owner. Therefore, initially *iniuria*, it is argued, could not be equated with *culpa* but with *dolus*<sup>49</sup>. This gave rise to a perfect match between *iniuria* and *damnum iniuria*: the first being concerned with physical and moral offences other than killing and the second being concerned with killing, a matter dealt with in chapter one of the *Lex Aquilia*<sup>50</sup>.

This approach is similar to the view taken by eminent British Romanists. For instance, Peter Birks referred to *damnum iniuria* and *iniuria* as ‘twin delicts<sup>51</sup>’ and Pugsley characterised the third chapter of the *Lex Aquilia* as ‘an off-shoot of the delict of *injuria*<sup>52</sup>’. However, Cursi does not assume that *iniuria* in *damnum iniuria* and *iniuria* are actually one and the same. Instead, Cursi argues that chapter one of the *Lex Aquilia*, which was the initial chapter, actually supplemented the delict of *iniuria* by covering cases where the slave had actually been killed. She only relies on an affinity between the two terms<sup>53</sup>.

The next claim of this approach is that the evolution of the delict of *iniuria* is not independent to that of *damnum iniuria*. The enlargement of the first chapter to include *pecus quadrupes* and the introduction of the third chapter to cover cases of damage done to inanimate objects had the following consequences. For the first time, there is an explicit reference to *damnum*<sup>54</sup>. It is also suggested that with the introduction of inanimate things to the scope of the *Lex Aquilia* a change was made. Under this new qualification of damaging behaviour cases envisaged by the first and second chapter would henceforth fall under the ambit of chapter three, placing thus the

<sup>48</sup> See CURSI (as in note 5) p.274-275.

<sup>49</sup> *Ibid.* p.275.

<sup>50</sup> *Ibid.* p.275-276.

<sup>51</sup> P.BIRKS, *The Early History of “iniuria”*, *Leg Hist Rev* 37 (1969) p.163 at p.182.

<sup>52</sup> D.PUGSLEY, *The Origins of the “Lex Aquilia”*, *LQR* 85 (1969) p.58.

<sup>53</sup> See CURSI (as in note 5) p.275-278.

<sup>54</sup> See text of the third chapter in D.9.2.27.5: *...si quis alteri damnum faxit...*

foundation for the distinction between *iniuria* and *damnum iniuria datum*<sup>55</sup>.

- The rise of *culpa*

According to this approach to *iniuria*, *culpa* appeared in the Aquilian scene at the end of the Republic and has ever since stood side by side with *dolus*. This led gradually to the identification of *culpa* with *iniuria*. How this came about is not entirely clear. It may well be the case that, as per the prevailing view<sup>56</sup>, *culpa* was introduced to cover cases where despite the existence of a cause of justification the jurists saw fit that liability should still attach to the perpetrator of the act. In cases like that of the shoemaker, the pruner and the owner who while driving a mare off his land struck it with the result that it lost its foal, Aquilian liability would still exist due to the extension of the notion of *iniuria* in order to encompass *culpa*<sup>57</sup>.

It must have been at a later stage that *culpa* absorbed the original notion of *dolus* and became fully identified with *iniuria*<sup>58</sup>. Simultaneously, *iniuria* could also have been used to indicate the act or damaging behaviour at the moment it occurred, according to Ulp D.9.2.5.1: ‘...*iniuriam hic damnum accipiemus culpa datum*...’<sup>59</sup>. This can be analogised with the notion of *contumelia* in the delict of *iniuria*. *Contumelia* signifies the *dolus* with which damage is sustained as well as the effect of the damaging act, i.e. the offence that has been suffered by the victim<sup>60</sup>.

This evolution had the result that the delict of *iniuria* would no longer cover the wilful wounding of a slave. The introduction of the third chapter of the *Lex Aquilia* in combination with the development of the notion of *culpa* had the consequence of providing a broader protection than that provided by the delict of *iniuria*. Thus the wounding of slaves and four-footed animals would be included under the rubric ‘*ceterae res*’ of the third chapter<sup>61</sup>.

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<sup>55</sup> See CURSI (as in note 5) p.279.

<sup>56</sup> See text to note 11.

<sup>57</sup> See CURSI (as in note 5) p.281.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* p.281-282.

<sup>60</sup> *Ibid.* p.282.

<sup>61</sup> *Ibid.*



According to Cursi, this led to the possibility of concurrent actions under both the *Lex Aquilia* and the delict of *iniuria* for the wounding of a slave. The case of the shoemaker, in her view, exemplifies the fact that classical jurists would not hesitate to contemplate the possibility that the two actions could concur, provided the wounding was done with intent.<sup>62</sup> This of course was not the case at D.9.2.5.1, but it might have been, had the shoemaker inflicted the injury wilfully.

The most important conclusion drawn in Cursi's work is that Ulpian, in speaking of '... *cum damno iniuriam*...' in D.9.2.49.1, actually defined the delict as an offence to dignity and as patrimonial damage done against the *paterfamilias*, who is nothing but the head of a patriarchal family. Additionally, the fact that *iniuria* figures in the genitive instead of the ablative in the expression *actio damni iniuriae* supports her argument that it is actually a reference to the separate delict of *iniuria*, regardless of whether one believes it to be part of an asyndeton or a double genitive where *damnum* is sustained because of a prior *iniuria*.<sup>63</sup>

d) The counterargument against the identification of *iniuria* with the subjective element

The aforementioned effort to link *iniuria* with *dolus* and *damnum iniuria* with the separate delict of *iniuria* has considerable force. However, at least in relation to the first part of the proposition, initially put forward in some form by Binding and Kaser, Schipani has raised three objections<sup>64</sup>.

First, an important difference between *dolus* and *iniuria* is that in the case of *dolus*, non-wilful behaviour can be opposed to wilful behaviour. However, this is not true of *iniuria*, where in the opposite case, i.e. behaviour which is done *iure*, the act is actually not punishable. Second, in delicts of *dolus*, the age of the perpetrator affects the gravity of the sentence, but this bears no consequence in deciding whether the act was committed *iniuria* or not. Third, the absence of *iniuria* in the second chapter of the *Lex Aquilia* indicates

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<sup>62</sup> *Ibid.* p.282-283, p.120-129.

<sup>63</sup> *Ibid.* p.283.

<sup>64</sup> See SCHIPANI (as in note 9) p.85s.

that the legislator did not wish that the perpetrator to be able to rely on a ground of justification.

However, these arguments can be rebutted. With regard to the first argument of Schipani, it has been suggested that it is not always the case that an act which is punishable when committed *dolo* corresponds to a version of the same act which is punishable when committed without intent. For instance, theft committed without *dolus* is not a non wilful version of the delict of the theft<sup>65</sup>.

As far as the second argument is concerned, it is argued that Schipani is only relying on the absence of direct evidence from the early stage of the *Lex Aquilia*. However, a mere argument *ex silentio* is not enough to prove his thesis<sup>66</sup>. With regard to the third argument, it is criticised for placing the cart before the horse. It only makes sense if one interprets *iniuria* as absence of grounds of justification. After all, the only reliance that the proponents of this theory may place on the sources is that related to the etymological definition of *iniuria* as '*quod non iure fit*' in Ulp D.47.10pr<sup>67</sup>.

### 3. *The role of iniuria in the Lex Aquilia*

It cannot be doubted that there are convincing arguments on both sides. However, there is perhaps a way of combining them both in one. The scholars who have followed the objective approach to *iniuria* seem to focus more on the result of the act, whereas the proponents of the subjective approach to *iniuria* appear to concentrate on the act itself. It was the gravity of the act that at the end of the day determined whether the act could be justified or not. The criterion that was implemented to measure the gravity was that of *dolus* and later on that of *culpa*. An excessive or abusive reliance on a ground of justification could in itself lead to the damage being brought about *iniuria*.

This chapter will show the way that the Aristotelian theory on the relation between just or unjust act and just or unjust result can be implemented to support this alternative approach to *iniuria*. It will be

<sup>65</sup> See CURSI (as in note 5) p.21; C.A.CANNATA, *Genesi e vicende della colpa aquiliana*, *Labeo* 17 (1971) p.64 at p.65.

<sup>66</sup> See CURSI (as in note 5) p.21.

<sup>67</sup> *Ibid.*

shown that at least linguistically *iniuria* is such a broad term that it can encompass the damage, the subjective element and the act itself.

a) The meaning of *iniuria*: *iniuria* as ὀδικία

Quite surprisingly, the texts that try to identify and delineate the various meanings of *iniuria* lie outside D.9.2. In D.47.10pr., Ulpian states that:

*Iniuria ex eo dicta est, quod non iure fiat: omne enim, quod non iure fit, iniuria fieri dicitur. Hoc generaliter. Specialiter autem iniuria dicitur contumelia. Interdum iniuriae appellatione damnum culpa datum significatur, ut in lege Aquilia dicere solemus: interdum iniquitatem iniuriam dicimus, nam cum quis inique vel iniuste sententiam dixit, iniuriam ex eo dictam, quod iure et iustitia caret, quasi non iuriam, contumeliam autem a contemnendo.*

Wrong (*iniuria*) is so called from that which happens not rightly; for everything which does not come about rightly is said to occur wrongfully. This is general. But, specifically, “wrong” (*iniuria*) is the designation for contumely. Sometimes again, by the term “wrong” (*iniuria*) there is indicated damage occasioned by fault (*culpa*), as we say in respect of the *lex Aquilia*; then, too, we sometimes call unfairness wrong (*iniuria*); for when someone delivers judgment unfairly or unjustly, it is called wrong (*iniuria*); for it lacks lawfulness and justice, as not being rightful; but contumely derives from despising or deriding<sup>68</sup>.

The Institutes of Justinian also provide a similar definition of *iniuria*, which has been derived probably from the *Collatio legum Mosaicarum et Romanarum*<sup>69</sup>. The relevant extract also compares the latter with the relevant Greek terms:

*Generaliter iniuria dicitur omne quod non iure fit specialiter alias contumelia, quae a contemnendo dicta est, quam Graeci ὕβρις appellant; alias culpa, quam Graeci ὀδίκημα dicunt, sicut in lege Aquilia damnum iniuria accipitur; alias iniquitas et iniustitia, quam Graeci ὀδικίων vocant. cum enim praetor vel iudex non iure contra quem pronuntiat, iniuriam accepisse dicitur<sup>70</sup>.*

<sup>68</sup> T.MOMMSEN, P.KRUEGER (eds.) & A.WATSON (tr.), *The Digest of Justinian*, Philadelphia 1985, vol. IV, p.772. This translation of the Digest is used throughout the article, but is slightly modified, where appropriate, in order to reflect the terms of the Latin text.

<sup>69</sup> The text in IJ.4.4pr. is identical with that in Coll.2.5.1.

<sup>70</sup> IJ.4.4pr.

'*Injuria*, in its general sense, signifies every action contrary to law; in a special sense, it means, sometimes, the same as *contumelia* (outrage), which is derived from *contemnere*, the Greek ὕβρις; sometimes the same as *culpa* (fault), in Greek ἀδίκημα, as in the *lex Aquilia*, which speaks of damage done *injuria*; sometimes it has the sense of iniquity, injustice, or in Greek ἀδικία; for a person against whom the praetor or judge pronounces an unjust sentence, is said to have received an *injuria*<sup>71</sup>'.

It is evident from these extracts that *iniuria* is open to four different interpretations, one in a general sense and three in a specific sense. Thus, *iniuria* is identified with unlawfulness in a general sense. In a special sense, it can either mean contumely or injustice caused by miscarriage of justice. D.47.10.1pr. and IJ.4.4pr. are not exactly identical with regard to the second interpretation of *iniuria*. In its second special sense, D.47.10.1 pr identifies *iniuria* with *damnum culpa datum*, whereas IJ.4.4 pr identifies *iniuria* directly with *culpa*. This straightforward linkage of *iniuria* and *culpa* is probably nothing but a simplification made for the teaching purposes of the Institutes<sup>72</sup>.

The Basilica supports the close relationship between *iniuria* and ἀδικία. An anonymous Byzantine jurist has attached two comments to B.60.21.1 (=D.47.10.1). According to the first:

Ἕβριν ἐκ τούτου καλοῦμεν, ὅπερ παρὰ τὸν νόμον γίνεται. Πάν γάρ, ὅπερ μὴ νομίμως γίνεται, ἀδίκως καὶ παρανόμως γίνεται καὶ λέγεται ἀδίκως γίνεσθαι. Τοῦτο μὲν οὖν σημαίνει γενικῶς ἢ iniouριάρουμ. Ἰδικώτερον δὲ iniouριάρουμ τὴν ἕβριν καλοῦμεν τὴν λεγομένην κοντουμελίαν ἢ τὴν ἀδικον ζημίαν ὡς ἐπὶ τοῦ Ακουιλίου νόμου. Ἔσθ' ὅτε δὲ καὶ τὴν ἀδικίαν iniouριάρουμ καλοῦμεν, ὅτε τις δικάζων ἀδίκως ἀποφαίνεται. Καλεῖται δὲ iniouρία ἢ ἕβρις, ὅτι νομίμου παντὸς καὶ δικαιοσύνης ἐστέρηται ὡσανεὶ μὴ νομίμως γινομένη. CONTουΜΕλίαν δὲ τὴν ἕβριν ἐκαλέσαμεν ἀπὸ τοῦ καταφρονεῖσθαι<sup>73</sup>.

We thus call ἕβριν anything that is done contrary to law. For everything that is done unlawfully, is done unjustly and contrary to law, and it is said that is done unjustly. So this is what *iniuria* means in a

<sup>71</sup> T.C.SANDARS (tr), *The Institutes of Justinian*, London 1853, p.518.

<sup>72</sup> For the meaning of *culpa* and its relation with *iniuria* see Ch III.3.F.

<sup>73</sup> BS 3544.

general sense. In a special sense, by iniuria we mean ὕβρις, which is called contumelia, or unjust damage, as in the *lex Aquilia*. We also call injustice iniuria, when a judge delivers an unjust judgment. ὕβρις is called iniuria because it lacks every lawfulness and justice, as it takes place contrary to law. We have called ὕβριν contumeliam from the verb despise.

According to the second *scholion*, ἐκ τοῦ ἴν' στερητικοῦ μορίου καὶ τοῦ ἴουρις', ὃ σημαίνει τὸ δίκαιον, γίνεται ἰνιουρία<sup>74</sup>. In English, 'iniuria is made of the privative prefix *in* and *iuris*, which signifies the law<sup>75</sup>'.

In the first three periods of the first *scholion*, the anonymous Byzantine jurist seems to have troubles in defining *iniuria* in its general sense. First, he appears to identify *iniuria* in its general sense with ὕβρις, one of the four kinds of delict. Confusion caused by the theme of Book 60, Title 21 'Περὶ ὕβρεων καὶ φλυαριῶν χάριτος' (*de iniuriis et famosis libellis*) might be a sufficient explanation of this misstatement. Second, his definition is nothing but a tautology. What is not lawful is unlawful. Yet, this kind of definitions is not uncommon among Roman and Byzantine jurists<sup>76</sup>.

The extract from the Institutes is particularly interesting for the understanding of *iniuria*. It involves ὕβρις, and the Aristotelian concepts of ἀδίκημα and ἀδικία. They are all identified with the three special meanings of iniuria. ὕβρις<sup>77</sup> is the Greek equivalent of *contumelia*<sup>78</sup>. Ἀδικία<sup>79</sup> is the equivalent of *iniquitas*<sup>80</sup> and *iniustitia*<sup>81</sup>.

<sup>74</sup> *Ibid.*

<sup>75</sup> Law does not fully encompass the Greek notion of 'δίκαιον', which not only does it signify the entirety of rules applicable in a certain place at a specific time, but also what is right, fair and just, as it is a derivative of the noun 'δικαιοσύνη' (justice).

<sup>76</sup> See D.47.10.1pr.; IJ.4.4pr. and compare with G.3.185: *nam quod manifestum non est, id nec manifestum est.*

<sup>77</sup> According H.G.LIDDELL & R.SCOTT, *A Greek-English Lexicon*, Oxford 1940, ὕβρις is defined as I.1. Wanton violence, arising from the pride of strength or from passion. 2. Lust, lewdness. 3. of animals, violence. II.1. An outrage. 2. An outrage to the person, especially violation, rape. 3. In Law, a term covering all the more serious injuries done to the person. III. Used of a loss by sea.

<sup>78</sup> According to P.G.W.GLARE (ed), *Oxford Latin Dictionary*, Oxford 1985, *contumelia* is defined as A. Insulting language or behaviour or an instance of it, indignity, affront. B. rough treatment.

<sup>79</sup> According to LIDDELL & SCOTT (as in note 77), ἀδικία is defined as I. Wrongdoing, injustice. II. Wrongful act, offence.

However, there seems to be a misunderstanding of the term ἀδίκημα. Ἀδίκημα is defined as an intentional wrong<sup>82</sup>, which is opposed to ἀμάρτημα<sup>83</sup> and ἀτύχημα<sup>84</sup>. Its direct identification with *culpa* is probably a mistake that the authors of the Institutes made.

Be that as it may, Kübler has indeed relied on this passage of the Institutes in order to support the proposition that the Roman standards of liability (*dolus, culpa* and *casus*) corresponded with the distinction made in Aristotelian philosophy between ἀδίκημα, ἀμάρτημα and ἀτύχημα<sup>85</sup>. In Rhetoric<sup>86</sup> and Nicomachean Ethics<sup>87</sup>, Aristotle had indeed made this triple distinction, which Kübler erroneously thought to constitute the origin of the Roman distinction between *dolus, culpa* and *casus*.

Daube has argued persuasively against this proposition<sup>88</sup>. Nonetheless, it may be still validly suggested that other parts of Aristotelian teaching may have indirectly influenced the way in which Roman jurists, as well-educated men living in Greek-Roman culture, have interpreted the notion of *iniuria* in the *Lex Aquilia*. The influence of Aristotelian teachings on the Proculians is, after all, well known<sup>89</sup>.

Aristotle dedicated Book V of the Nicomachean Ethics to the distinction between justice (δικαιοσύνη) and injustice (ἀδικία). In this Book he makes a pertinent point with regard to injustice: οὐ γὰρ

<sup>80</sup> According to GLARE (as in note 78), *iniquitas* is defined *inter alia* as unfairness. Cf. ‘...damnum iniuria dicitur alias iniquitas et iniustitia’ in *Wernerii Summa Institutionum, cum glossis Martini, Bulgari, Alberici, aliorumve*, in *BIMaE*, Bononiae 1914, vol I, p.420.

<sup>81</sup> *Ibid.*, *iniustitia* is defined as unjust behaviour, unfairness, injustice.

<sup>82</sup> EN 1135a19-23; according to LIDDELL & SCOTT (as in note 77), ἀδίκημα is defined as I. 1. Wrong done, intentional wrong, as opposed to ἀμάρτημα and ἀτύχημα. 2. error of judgement. II. That which is got by wrong, ill-gotten goods.

<sup>83</sup> According to LIDDELL & SCOTT (as in note 77), ἀμάρτημα in this context is defined as do wrong, err, sin.

<sup>84</sup> *Ibid.*, ἀτύχημα is defined as 1. Misfortune, miscarriage. 2. fault of ignorance, mistake.

<sup>85</sup> B.KÜBLER, *Der Einfluss der griechischen Philosophie auf die Entwicklung der Lehre von den Verschuldensgraden im römischen Recht in Rechtsidee und Staatsgedanke, Festschrift für Binder* (1900) 63s.

<sup>86</sup> 1374b 1s.

<sup>87</sup> 1135a 16 – 1136b 14.

<sup>88</sup> D.DAUBE, *Roman Law: Linguistic, Social and Philosophical Aspects*, Edinburgh 1969, p.130-156.

<sup>89</sup> G.PETROPOULOS, *Historia kai Eisgeseis tou Romaikou Dikaiou* (Athens 1944) p.130; M.KASER, *Roman Private Law*, Pretoria 1980, p.4.

ταῦτόν τὸ τᾶδικα πράττειν τῷ ἀδικεῖν οὐδὲ τὸ ἄδικα πάσχειν τῷ ἀδικεῖσθαι· ὁμοίως δὲ καὶ ἐπὶ τοῦ δικαιοπραγεῖν καὶ δικαιούσθαι· ἀδύνατον γὰρ ἀδικεῖσθαι μὴ ἀδικούντος ἢ δικαιούσθαι μὴ δικαιοπραγούντος<sup>90</sup>, ‘for to do what is unjust is not the same as to commit injustice nor to suffer what is unjust as to suffer injustice, and similarly in the case of committing justice and being justly treated; for it is impossible to suffer injustice if the other does not commit injustice or be justly treated unless he commits justice<sup>91</sup>’.

This extract from Aristotle will now be used as a criterion for establishing *iniuria* in D.9.2. – an analysis that will depend for its success on first showing the necessary link between the notions of *iniuria* and ἀδικία.

The latter can easily be achieved through linguistic analysis of these terms. The Oxford Latin Dictionary gives the following definition of *iniuria*: 1. Unlawful conduct. 2. Unjust and injurious treatment or an instance of it, injustice. 3. a. Without regard for equity, unjustly. b. without just cause, unjustifiably. 4. (specially in legal use) Any act, insulting in kind and intention, calculated to injure a person’s reputation or outrage his feelings (ranging from physical assault to defamation of character). 5. Loss or detriment inflicted on or sustained by a person in respect of his estate, rights etc. 6. Physical injury or impairment<sup>92</sup>. So *iniuria* can be viewed both as praxis or process and a result or situation. Definitions number 4, 5 and 6 cannot have any particular weight here as they contain the legal meaning that the term ‘*iniuria*’ gradually acquired over the centuries. Likewise, the Oxford Greek English Lexicon defines ἀδικία as I. injustice<sup>93</sup>. II. Wrongful act, offence<sup>94</sup>. The concepts of *iniuria* and ἀδικία are thus identical.

Furthermore, the two aforementioned *scholia*<sup>95</sup> from the Basilica exemplify the way in which *iniuria* means both injustice and

<sup>90</sup> EN 1136a27-29.

<sup>91</sup> My translation has been based on W.D.ROSS (tr), *Ethica Nicomachea*, Oxford 1925.

<sup>92</sup> See GLARE (as in note 78); compare with the Latin saying ‘*summum ius, summa iniuria*’.

<sup>93</sup> Cf J.4.4 pr on *iniuria generaliter*.

<sup>94</sup> LIDDELL & SCOTT (as in note 77).

<sup>95</sup> See p 7-8, text to note 74.

unlawfulness. *Damnum iniuria* is once again translated in Greek as ἄδικος ζημία. The fact that *damnum iniuria* has never been translated in English by using some derivative of injustice might have always deprived English Romanists from making the connection between *damnum iniuria* and *iniuria* in its general sense or its third special sense. The translation of *iniuria* in the delict *damnum iniuria* as unlawfulness has simply barred this possibility.

The identity of meanings of *iniuria* and ἀδικία is also confirmed by the translation of ἀδικία and its derivatives in the Greek New Testament as *iniuria* in the Vulgata<sup>96</sup>. An interesting text is Acts 27:10 and 21, where certain words are attributed to St Paul. The first extract reads in Greek: Ἄνδρες, θεωρῶ ὅτι μετὰ ὑβρεως καὶ πολλῆς ζημίας οὐ μόνον τοῦ φορτίου καὶ τοῦ πλοίου ἀλλὰ καὶ τῶν ψυχῶν ἡμῶν μέλλειν ἔσεσθαι τὸν πλοῦν (emphasis added). This was translated in the Vulgata by St Jerome as follows ‘viri, video quoniam cum *iniuria* et multo *damno* non solum oneris et navis sed etiam animarum nostrarum incipit esse navigatio’ (emphasis added)<sup>97</sup>. Were the author of the Acts and St Jerome playing with words and creating a parallelism with the delict in question?

Further down in 27:21, the Greek text reads: Πολλῆς τε ἀσιτίας ὑπαρχούσης τότε σταθεῖς ὁ Παῦλος ἐν μέσῳ αὐτῶν εἶπεν, Ἔδει μὲν, ὦ ἄνδρες, πειθαρχήσαντάς μοι μὴ ἀνάγεσθαι ἀπὸ τῆς Κρήτης κερδήσαι τε τὴν ὑβριν ταύτην καὶ τὴν ζημίαν (emphasis added). This extract was translated in Latin by St Jerome as follows: ‘Et cum multa ieiunatio fuisset, tunc stans Paulus in medio eorum dixit: oportebat quidem, o viri, audito me, non tollere a Creta lucrative facere *iniuriam* hanc et *iacturam*’ (emphasis added)<sup>98</sup>. Is St Jerome playing again another game with words? Does St Jerome this time seek to create a parallelism with the *Lex Rhodia de iactu*? After all St Paul, was referring to a sea voyage. Do these extracts have legal connotations? It is not unlikely, but still a guess.

<sup>96</sup> See Matt 20:13, Acts 7:24, 26-27, I Cor 6:7-8, II Cor 7:12, Col 3:25.

<sup>97</sup> Translated in English (probably erroneously) under the authority of the Catholic Church in the New American Bible as ‘Men, I can see that this voyage will result in severe damage and heavy loss not only to the cargo and the ship, but also to our lives’.

<sup>98</sup> Translated in English (again erroneously) as follows: ‘When many would no longer eat, Paul stood among them and said, “Men, you should have taken my advice and not have set sail from Crete and you would have avoided this disastrous loss.’



Reverting back to the meaning of *iniuria* and ἀδικία, they can be viewed both as praxis or process and a result or situation. This double meaning that *iniuria* and ἀδικία have can only be expressed with difficulty in English, and possibly every other Western European language.

Birks' *loss-wrong*<sup>99</sup> therefore does not capture the full breadth of *damnum iniuria*. Neither does unlawfulness. Even Lord Rodger's translation of *iniuria* in the asyndeton *damnum iniuria* as unlawful injury fails to fully reflect the various meanings that are embedded in *iniuria* as demonstrated above<sup>100</sup>. *Damnum iniuria* is thus nothing else but damage caused by doing injustice and injustice caused by damaging.

Therefore if one were to conceive *iniuria* (ἀδικία) as both the act that gives rise to damage and damage itself as the result of the act that has created an unjust situation, it might be possible to explain the role that *iniuria* has played in D.9.2. Such an effort would not be entirely without precedent. There have been instances where the act itself and the effect have been distinguished in relation to *iniuria*<sup>101</sup>, but without taking the further step to explain this multiple meaning of *iniuria* linguistically or through the Aristotelian theories on injustice.

However, before moving to establish this proposition, it should be noted that the link between *iniuria* and ἀδικία sheds further light on the way in which Lord Rodger noted that the Roman jurists felt comfortable in using the term *iniuria* to connote *damnum* by means of synecdoche.

b) Application of the Aristotelian principle to extracts from D.9.2

- Self-defence

D.9.2.4 deals with the killing of a slave-robber in self-defence. The extract from Nicomachean Ethics fully explains the reasons for not granting an action. Killing is an unjust act and can be viewed as committing an act of injustice (τῶν ἀδικῶν πράττειν) but the person who

<sup>99</sup> P.BIRKS, *The Edictal Rubric «ad legem Aquiliam»*, in R.PÉREZ-BUSTAMANTE (ed), *Estudios de Historia del Derecho Europeo: Homenaje al Profesor G Martínez Díez*, Madrid 1994, vol. I, p.81 at p.83.

<sup>100</sup> See RODGER (as in note 3) p.437, where it is argued that this translation of *damnum iniuria* reflects the meaning the delict had in Ulpian's time. The exact meaning of *damnum iniuria* in earlier times remains unclear.

<sup>101</sup> See CURSI (as in note 5) p.281-282; see text between n.58 and n.63.

has killed the robber is not committing injustice (ἀδικεῖν). Likewise, the robber suffers an unjust act (ἀδίκῃ πάσχειν) but no injustice is done to him (ἀδικεῖσθαι). This applies equally in every case of self-defence<sup>102</sup> and even more so if the killing is done to save one's life. If, however, A throws a stone against his attacker, B, and hits C, an innocent passerby, there is Aquilian liability, exactly because the throwing of the stone to any person is an unjust act and by hitting C, injustice is committed<sup>103</sup>.

The link between self-defence and *iniuria*- ἀδικία appears also in the Basilica. An anonymous jurist mentions in a *scholion* that οὐδὲ γὰρ ἐκ τοῦ μόνον ἀναιρεθῆναι ταῦτα τίκεται ὁ Ἀκουίλιος, ἀλλ' ὅτε ἀναιρεθῆ ἀδίκως ('so Aquilian liability is not generated by the sole fact that these [i.e. household slaves or four-footed animals] have been killed, but when they are killed unjustly')<sup>104</sup>.

- Damage caused by a lunatic, an animal or a tile

In D.9.2.5.2, Ulpian is not prepared to grant an action against a *furiosus* (lunatic) who had caused damage. The lunatic has committed an unjust act but nonetheless he is not capable of causing injustice. Ulpian thinks that the answer would still be the same if damage had been caused by an animal or a tile. However, anonymous Byzantine jurists have commented that in the case of the animal an *actio quadrupedaria* will be granted<sup>105</sup>. In the case of the tile an *actio in factum* will lie if it fell due to the owner's negligence (ἀμέλεια)<sup>106</sup>, unless it fell by accident (κατὰ τύχην)<sup>107</sup>. If damage is caused by an *inpubes*, it can be said again that the act is unjust but he still commits no injustice, so long as the child is less than 7 years old, according to Labeo, or is not *iniuriae capax*<sup>108</sup>.

<sup>102</sup> D.9.2.5pr.; D.9.2.45.4.

<sup>103</sup> D.9.2.45.4. Is it a coincidence that an identical case is described in the Nicomachean Ethics? Compare D.9.2.45.4 with EN 1135b14-17.

<sup>104</sup> BS 3092.9-10.

<sup>105</sup> BS 3094.1-3.

<sup>106</sup> BS 3095.19-21.

<sup>107</sup> BS 3094.3-4.

<sup>108</sup> In light of the foregoing discussion of the meaning of *iniuria*, compare *iniuriae capax* with δεκτικός ἀδικίας in B.60.3.5.2, where once again *iniuria* is identified with ἀδικία.

- The case of the instructor and the shoemaker

The case of the instructor has caused problems in its interpretation<sup>109</sup>. Birks has described this case as an example of texts moved by Justinian's commissioners<sup>110</sup>. His understanding of D.9.2.5.1-3 is that D.9.2.5.1-2 deals with the possibility of causing loss without any kind of unlawfulness. By contrast, D.9.2.5.3 is an example where loss is suffered and there is unlawfulness to support an *actio legis Aquiliae*, but not an *actio iniuriarum*<sup>111</sup>. This is understandable to the extent that Birks believed that Ulpian in Book 18 *Ad Edictum* was comparing the operation of the two delicts, *iniuria* and *damnum iniuria*<sup>112</sup>.

One should perhaps begin the interpretation of D.9.2.5.3 by setting it in context. D.9.2.2 contains the provision of Chapter 1 of the *Lex Aquilia* as well as its scope of application, with regard to slaves and animals. Texts from D.9.2.3 onwards deal with possible defences to an action brought on the *Lex Aquilia*. Having addressed self-defence in D.9.2.4 and D.9.2.5 pr, the relationship with *contumelia* in D.9.2.5.1 and the case of lack of capacity to commit injustice in D.9.2.5.2, D.9.2.5.3 deals with the question whether chastisement administered by a tutor is a possible defence to an action<sup>113</sup>. This is probably the reason a case which is not about killing has been placed by the compilers in the part of D.9.2 dealing with chapter 1 of the *Lex Aquilia*.

Ulpian reports that Julian has taken the view that the instructor is liable under the *Lex Aquilia*. The example of the shoemaker is the opportunity for jurists to discuss whether there can be an *actio iniuriarum* or a contractual claim based on *locatio conductio* against the tutor (shoemaker). Julian precludes the first possibility as there is no intention to insult, but to chastise. With regard to the second possibility, Ulpian admits that there is some debate. The reason is that only moderate punishment is conceded to a person who imparts instruction. Julian though is reported by Ulpian in D.19.2.13.4 to have

<sup>109</sup> D.9.2.5.3.

<sup>110</sup> P.BIRKS, *Ulpian 18 Ad Edictum: Introducing damnum iniuria*, in R.FEENSTRA *et al.* (eds), *Collatio Iuris Romani*, Amsterdam 1995, vol. I, p.17 at p.25-27.

<sup>111</sup> *Ibid.* p.27-28.

<sup>112</sup> *Ibid.* p.27.

<sup>113</sup> D.9.2.5.3: *Si magister in disciplina vulneraverit servum vel occiderit, an Aquilia teneatur, quasi damnum iniuria dederit?*

been in favour of granting an *actio locati* if the shoemaker has exceeded the required measure of *castigatio*.

It has been put forward that the crucial question is whether the degree of punishment was excessive. If that were the case Julian would grant the *actio locati*<sup>114</sup>. If the exercise of the power was reasonable, but the damage was caused due to other reasons<sup>115</sup> Julian would doubt that an *actio locati* should be granted<sup>116</sup>. Ulpian though is clearly in favour of granting an *actio legis Aquiliae*: ... *sed lege Aquilia posse agi non dubito* ('...but I have no doubt that action can be brought against him under the *Lex Aquilia*')<sup>117</sup>.

The Byzantine jurists also felt that this is the critical question that is being asked in D.9.2.5.3. Indeed, according to a *scholion* to B.60.3.5: Ἡ δὲ ἀμφιβολὴ αὕτη εἰς τὸ ἀναμφίβολου περιστήσεται ἐκ τῆς ποιότητος τοῦ σωφρονισμοῦ καὶ τοῦ τραύματος ('This doubt is reversed by the quality of the chastisement and the wound')<sup>118</sup>. However, although the case of the shoemaker finds itself in the middle of the discussion of the role of *iniuria*<sup>119</sup>, there are good reasons to believe that it is more related to the notion of *culpa*<sup>120</sup>. In D.9.2.6 Paul adds: *praeceptoris enim nimia saevitia culpa adsignatur* ('for excessive brutality on the part of a teacher is blameworthy'<sup>121</sup>).

In D.19.2.43 Paul appears to accept the possibility that both an *actio ex locato* and an *actio legis Aquiliae* can be brought, but the plaintiff will be allowed to recover only once. It is not entirely clear

<sup>114</sup> See V. ARANGIO-RUIZ, *Studi epigrafici e papirologici*, Naples 1974, p.469.

<sup>115</sup> e.g. the apprentice is given a blow on the head while he is working with a needle: see CURSI (as in note 5) p.108.

<sup>116</sup> *Ibid.*

<sup>117</sup> D.9.2.5.3 *in fine* in MOMMSEN (as in note 68) vol. I, p.279; see also to the same effect BS 3095.1-3: τὸν μέντοι Ἀκουίλιον ἀναμφίβόλως δέδωκεν εἰς ὅσον ἐργάζεται ὁ παῖς ἔλαττον διὰ τὸ βλαβῆναι τὸν ὀφθαλμὸν αὐτοῦ καὶ εἰς τὰ δαπανήματα τῆς θεραπείας τοῦ παιδός ('he [i.e. Julian] has granted without doubt an action on the *Lex Aquilia* for the fact that the child is working less due to the fact that his eye was damaged and the expenses of its medical treatment').

<sup>118</sup> BS 3094.20-22.

<sup>119</sup> Surprisingly the case of the shoemaker is not a chapter 1 type of case. It is neither about killing nor is the victim a slave, but a *filius familias*. It is thus assumed that the kind of action the jurists are debating is the granting of an *actio utilis*: see ARANGIO-RUIZ (as in note 114) p.470.

<sup>120</sup> See CURSI (as in note 5) 110; SCHIPANI (as in note 9) p.275.

<sup>121</sup> See MOMMSEN (as in note 117).

whether Paul in D.9.2.6 is referring to the standard of care that the instructor should demonstrate under the *Lex Aquilia* or *locatio conductio* or both. It might be the case that so long as the punishment does not result in severe physical injuries (like blinding or breaking bones) there is no Aquilian liability for two reasons. One is that normal punishment does not come within the linguistic meaning of the statutory verbs and creates no loss. The other, more Aristotelian in its conceptualisation is that reasonable punishment is not an unjust act, but even if it is one, it does not create a situation of injustice.

If one were to adopt the aforementioned Aristotelian approach to *iniuria* this case can be analysed as one of *iniuria*. The exercise of the power of chastisement on behalf on the shoemaker is a just and lawful act so long as it is exercised reasonably and not excessively. Thus in deciding whether the shoemaker acted *culpa* one is deciding whether the *damnum* was committed *iniuria*. Whether chastisement is a just act or not and thus whether injustice is made will depend on whether it was administered reasonably, that is whether the shoemaker acted *culpa* or not. *Iniuria* was caused by the negligent behaviour of the shoemaker. Simultaneously, the lack of *dolus* precludes liability arising under the *actio iniuriarum*.

- Damage caused *vi absoluta*

In the case of damage caused *vi absoluta*<sup>122</sup>, the person who physically caused the damage is committing an unjust act, but is not acting unjustly. In fact, he is not acting at all, but he is a mere instrument. This case can also be found in Nicomachean Ethics<sup>123</sup>. Ulpian reports that according to Proculus no action can be brought under the *Lex Aquilia* against the physical perpetrator of the act or the person who exercised *vis absoluta*. An *actio in factum* will be granted against the latter. The same can be said *mutatis mutandis* of the case where somebody obeys orders given to him by somebody who had such authority<sup>124</sup>.

<sup>122</sup> D.9.2.7.3.

<sup>123</sup> 1135a28-29.

<sup>124</sup> D.9.2.37 pr; For slaves committing delicts at the order of their masters see D.DAUBE, *The Defence of Superior Orders in Roman Law*, in D.COHEN & D.SIMON (eds.), *David Daube: Collected Studies in Roman Law*, Frankfurt 1991.

- Killing in games

The cases of killing in *colluctatio*, *pancratium* or boxing<sup>125</sup> best illustrate the applicability of Aristotle's belief that a person who commits an unjust act is not necessarily being unjust in that specific instance<sup>126</sup>. If a son under *potestas* is killed in a public competition, there is no action<sup>127</sup>. The act of killing is not unjust. Ulpian states that 'gloriae causa et virtutis, non iniuriae gratia videtur damnum datum'<sup>128</sup>. A *scholion* Basilica also confirms that this extract refers to *iniuria* as ἀδικία<sup>129</sup>. If, however, somebody kills a slave in a private competition<sup>130</sup> or a son in power who has shown his intention to

<sup>125</sup> D.9.2.7.4.

<sup>126</sup> EN 1134a32-33.

<sup>127</sup> Slaves could not take part in public competitions. Thus *alium* in 'si... alius alium occiderit' refers only to freeborn sons in power, who must have been the most frequent case of this kind. See R.FEENSTRA, *L'application de la loi Aquilia en cas d'homicide d'un home libre, de l'époque classique à celle de Justicien*, in J.A.ANKUM *et al.* (eds.), *Mélanges Felix Wubbe*, Fribourg 1993, p.141, 151; see BIRKS (as in note 110) p.29: Birks believed that this text precludes in addition the possibility of an *actio iniuriarum*.

<sup>128</sup> See note 125. There is only one recorded instance of a challenge to *pancratium* by Diodorus Siculus, *Bibliotheca historica*, Book 17, Chapter 100, section f in J.SKELTON (tr.), *The Bibliotheca historica*, Oxford 1956. It is the story of a duel between the Athenian Olympic winner Dioxippus and the Macedonian warrior Carrhagus that took place in front of Alexander the Great. Carrhagus appeared in the duel fully armed whereas Dioxippus was bearing just a club. However, Dioxippus managed to win and Carrhagus life was saved thanks to the intervention of Alexander the Great. *Pancratium* as well as the other sports was banned together with the Olympic Games by Emperor Theodosius in AD 393. It remains unclear whether D.9.2.7.4 was ever implemented in Byzantine times.

<sup>129</sup> BS 3096.19-20: Ἐπειδὴ δόξης ἐπιθυμία καὶ δι' ἀνδρείαν μᾶλλον, οὐκ ἀδικίας ἔνεκα ἀνείλεν αὐτόν ("Because he killed him due to his wish for glory and bravery rather than injustice").

<sup>130</sup> In a *scholion* (BS 3098.24-29) to B.60.3.7, Hagiotheodoretos comments that: Εἰ δὲ καιροῦ καλέσαντος καὶ ἀνάγκης τινὸς ἀπαιτούσης τὸν δούλον ἐπιτηδειότατόν τινα ὄντα εἰς τὸν ἀγῶνα διὰ πλείονα θαυμασμόν, τυχὸν ἔθνῶν παρόντων καὶ μελλόντων θαυμαστόν τινα τοῦ δούλου ἰδεῖν ἀγῶνα, ὅποια πολλὰ γίνεται, βασιλεὺς ἀγωνίσασθαι ἐπιτρέψει καὶ τοῦτο κελεύσει γενέσθαι, τί κωλύει οὕτω καὶ δούλον ποτὲ καὶ σπανίως ἀγωνίσασθαι δημοσίᾳ; ("If time is due and there was such a need demanding that a skilled slave takes part in a public competition in order for present and future nations to admire him in the competition, and the king allows him to take part in the competition and so orders, what is there to prevent a slave from competing in such a rare situation?").

abandon the fight, the granting of an action<sup>131</sup> will depend on whether the result of the killing will be viewed as unjust or not. In the latter case, the injustice stems from the continuation of a fight against a participant who has acknowledged defeat. In the former, it will depend on the owner's consent.

- The case of the cut of grapes and olives

The case of cutting ripe and unripe grapes and olives is a particularly interesting one<sup>132</sup>. Birks argued that the cutting of ripe fruits is a case about lack of *iniuria*<sup>133</sup>. Lord Rodger, on the other hand, rightfully thought that this extract is not about unlawfulness, but about loss<sup>134</sup>. This has to be right; indeed, His Lordship's understanding is confirmed by the translation of B.60.3.27.25 (=D.9.2.27.25), where it is stated that εἰ μέντοι πέπειροι ἦσαν οἱ καρποί, ἀργεῖ. Οὐδὲν γὰρ ἐξημίωσε τὸν δεσπότην, εἰ μὴ ἄρα τὰς σταφυλὰς ἔρριψε χαμαὶ καὶ διερράγησαν<sup>135</sup>, in English: 'if though the fruits were ripe, there is no action. Because he caused no loss to the owner, unless he dropped the grapes down on earth and they burst'.

This extract is part of the discussion by jurists on the meaning of statutory verbs of chapter 3 of the *Lex Aquilia*<sup>136</sup> and the fact that cutting *per se* is not enough. Aquilian liability also requires damage as a result of the cutting. If the olives, the corn or the grapes are ripe, there is no action because no damage is done to the fruit<sup>137</sup>. It can be

<sup>131</sup> It has been put forward that in such cases an *actio in factum* will be granted: A.WACKE, *Accidents in sport and games in Roman and modern German law*, THRHR 42 (1979), p.273 at p.282-283. However, there is no support for the granting of such an action instead of a direct one in D.9.2.7.4.

<sup>132</sup> D.9.2.27.25

<sup>133</sup> See above text to (n.44)

<sup>134</sup> See RODGER (as in note 3) 428s.

<sup>135</sup> B 2759.1.

<sup>136</sup> O.LENEL, *Palingenesia Iuris Civilis*, Graz 1960, vol. Alterum, p.530, § 625

<sup>137</sup> They would have arguably fallen on the ground in any event on their own. See with regard to the grapes a variety of a vine called *visulla* which flourished in the Sabine territory: K.MAYHOFF (ed.), *C Plini Secundi Naturalis Historiae*, Leipzig 1909, p.472: *nisi matura protinus rapitur, etiam non putrescens cadit* ("if it is not gathered at the very moment that it is ripe, it will fall, even before it decays"). Thus, if one cuts the grapes in the period between the moment they become ripe and the moment they fall, an '*aeque periturus*' type of argument, in the sense that the grapes would have fallen in any event, might appear plausible.

still collected from the ground and consumed or sold. The cutting of unripe olives surprisingly gives rise to an action, despite the fact that it is unripe olives that produce the best quality of oil<sup>138</sup>. The reason might be that unripe olives produce an excellent oil, but in very small quantities. It might be plausible to read this text as not allowing an action for the cutting of unripe olives at the point when the berry is just on the process of turning black, as this is the best time to harvest the olives<sup>139</sup>, regardless of whether they are destined for oil production or consumption.

There is a specific rule only for grapes owed to their softness. According to Octavenus, if the grapes are dropped in a way that they burst, then there is damage and an action is provided. This interpretation of D.9.2.27.25 can be reinforced by the strong possibility that 'Ulpian's main discussion of *iniuria*, covering issues relating to both chapters, was to be found in the place where the point first arose, in relation to chapter 1' of the *Lex Aquilia*<sup>140</sup>. Along the same lines, drinking another man's wine or eating another man's corn<sup>141</sup> is also a case about the meaning of statutory verbs. Drinking cannot fall under *usserit*, *fregerit* or *ruperit*. Thus an indirect action is granted.

- Exercise of public powers

In D.9.2.29.7, municipal magistrates can incur Aquilian liability by virtue of their *intra* and *ultra vires* acts, but only if damage is caused to property because of their acts. *Iniuria* becomes an issue only if the municipal magistrate causes damage to the property of someone who is resisting the exercise of his authority. The cause of damage is an

<sup>138</sup> See MAYHOFF (n.137) 512: *primum omnium cruda dat atque nondum inchoatae maturitatis; hoc sapore praestantissimum* ("The first oil of all, produced from the raw olive before it has begun to ripen, is considered preferable to all the others in flavour").

<sup>139</sup> *Ibid.*: *Quanto maturior baca, tanto pinguior sucus minusque gratus. Optima autem aetas ad decerpendum inter copiam bonitatem incipiente baca nigrescere cum vocant druppas, Graeci vero drypetidas* ("The riper the berry, the more unctuous the juice, and the less agreeable the taste. To obtain a result both abundant and of excellent flavour, the best time to gather it is when the berry is just on the point of turning black. In this state it is called druppa by us, by the Greeks drypetis").

<sup>140</sup> A.RODGER, *The Palingenesia of the Commentaries Relating to the Lex Aquilia*, ZSS 124 (2007) p.145 at p.155; See also RODGER (as in note 3) 428-430.

<sup>141</sup> D.9.2.30.2.



unjust act, yet the result does not amount to injustice. Nor has the citizen suffered any injustice, since he chose to violently resist the exercise of public power.

- The case of a cheated-on husband

The Aristotelian distinction between unjust act and unjust result is also confirmed by D.9.2.30pr. A cheated-on husband who kills a slave caught while committing adultery with his wife will not be liable under the *Lex Aquilia*. Once again the act of killing the slave is unjust. The owner of the slave will suffer loss even though he did nothing wrong. However, no injustice is committed since it is by virtue of the killing that the honour of the husband will be safeguarded.

- Necessity of force majeure

A very interesting case for the purposes of this article is D.9.2.49.1, which deals with the destruction of an adjoining house in order to create a firebreak. Ulpian reports the views of Celsus on the matter. Celsus thought that no action should be granted against the man who pulled down the house. Despite the fact that the destruction is an unjust act, necessity prevents injustice from being committed against the owner of the destroyed house. The same conclusion is reached in a parallel fragment, where Ulpian again is reported to have held that an *actio legis Aquiliae* cannot be granted because the demolition of the house cannot be seen to have been committed *iniuria* because someone who seeks to protect himself does not act unjustly when he cannot do otherwise (*nec enim iniuria hoc fecit, qui se tueri voluit, cum alias non posset*<sup>142</sup>).

The genuineness of the fragment has been contested. Gerkens has divided Romanists who believe that the text is not genuine in two groups: those who believe that the text is not genuine, but the compilers have not affected its substance which remains classical; and those who contend that the fragment is interpolated in a way that its substance is not original<sup>143</sup>.

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<sup>142</sup> D.47.9.3.7.

<sup>143</sup> J.F.GERKENS, "*Aeque Periturus...*": *Une approche de la causalité dépassante en droit romain classique*, Liège 1997, p.89.

In the first group, De Martino has argued that the whole text is a paraphrase, but it reflects accurately the opinion of Celsus<sup>144</sup>. Schipani considers that it is impossible to tell whether the denial of an action can be attributed to Celsus, but nonetheless the substance of the text has not been affected<sup>145</sup>. The second group believes that the text is interpolated because it may be the case that the lack of *iniuria* results from fear, which is purely subjective element<sup>146</sup>.

With regard to the first group, a substantial part of the literature in this area has taken the view that lack of *iniuria* can in fact be interpreted as lack of *culpa*. For instance, MacCormack believes that Celsus based his decision on the absence of fault<sup>147</sup>. For Kunkel, this fragment constitutes one of those instances, in which *iniuria* implies the subjective element of the delict, namely *culpa*<sup>148</sup>.

Ormanni and Schipani have tried to interpret the substance of the fragment without having much recourse to interpolation. The former took the view that *iniuria* is not a purely objective test as it contains references to both fear (*metus*) and force majeure (*magna vis*<sup>149</sup>), whereas Schipani relied on a parallel text (D.47.9.3.7) also attributed to Celsus to explain *iniuria* in this case in an objective manner, i.e. as 'impossibility to act otherwise' (*cum alias non posset*<sup>150</sup>).

This leads to the conclusion that there can be no action under the *Lex Aquilia* without *iniuria*. So it has been argued that Ulpian has demonstrated in D.9.2.49.1 the autonomy of *iniuria* from *damnum*<sup>151</sup>. This becomes clearer by examining the parallel fragment contained in D.43.24.7.4 where the possibility of granting both an interdict *quod vi aut clam* and an *actio legis Aquiliae* is discussed. There Servius similarly is not prepared to grant an action on the *Lex Aquilia*, as Ulpian reports, because 'nullam iniuriam aut damnum dare videtur'.

<sup>144</sup> F.DE MARTINO, *In tema di stato di necessità*, RISG 14 (1939) p.41 at p.46.

<sup>145</sup> See SCHIPANI (as in note 9) p.310s.

<sup>146</sup> See BINDING (as in note 41) p.52; L.ARU, *Appunti sulla difesa private in diritto romano*, Ann. Palermo 15 (1936) p.113 at p.138s; G.LONGO, *Sulla legittima difesa e sullo stato di necessità in diritto romano*, in *Sein und Werden im Recht, Festgabe von Lübtow*, Berlin 1970, p.321 at p.334.

<sup>147</sup> See MACCORMACK (as in note 25) p.55s.

<sup>148</sup> W.KUNKEL, *Exegetische Studien zur aquilischen Haftung*, ZSS 49 (1929) p.138 at p.164

<sup>149</sup> A.ORMANNI, *Necessità (stato di)*. *Diritto romano*, ED 27, Milan 1977, p.832.

<sup>150</sup> See SCHIPANI (as in note 9) p.310s.

<sup>151</sup> See GERKENS (as in note 143) p.97-98.

This has been a phrase that has caused trouble in its interpretation<sup>152</sup>. The trouble has been caused by the fact that, unlike D.9.2.49.1, D.43.24.7.4 appears to suggest that a distinction needs to be drawn between cases where the fire eventually reached the house that had been demolished and cases where it did not. In the latter type of case the neighbour who demolished the house is liable.

Several efforts have been made to explain the difference. Interpolation has been a popular explanation for the alleged discrepancy<sup>153</sup>. Most notably, Schipani has suggested that the words ‘aut damni iniuria’ have been interpolated<sup>154</sup>. This might be the case because the fragment was rather long and it was only further down that Servius dealt with the possibility of an *actio legis Aquiliae*<sup>155</sup>. He concluded that Servius’ position is incomprehensible and that judicial redress had to be sought through other procedural means.

Another way of reading the relevant text is to say that *damnum* refers to *damnum iniuria* but *iniuria* is actually a reference to separate delict of contempt. Some authority for this interpretation may be derived from D.47.10.5 pr in which it is acknowledged that entry into another’s house by force gives rise to liability under the *Lex Cornelia de iniuriis*<sup>156</sup>. However, it has been argued that such an interpretation does not take account of the possibility that actually *iniuria* in this context actually describes the kind of *damnum* in a way that it could be said that the action lies for ‘danno di *iniuria*’<sup>157</sup>.

Another, more preferable view has been put forward by Gerkens. The distinctions drawn by Servius between cases where the fire does not eventually reach the demolished house and thus there is an available remedy and cases where the fire does reach the house and thus there is no available remedy, in fact relates to the interdict *quod vi aut clam*<sup>158</sup>. In D.43.24.7.4 Servius and Ulpian are actually

<sup>152</sup> See RODGER (as in note 3) 438; In D.47.9.3.7 Ulpian appears to be reasoning in terms of fault in this case: ‘*utique dolo careo*’.

<sup>153</sup> For a summary of all the different views see GERKENS (as in note 143) p.53-60.

<sup>154</sup> See SCHIPANI (n.9) p.155s.

<sup>155</sup> *Ibid.* 156, note 6.

<sup>156</sup> For support of the idea that D.9.2.49.1 makes reference to *iniuria* as *contumelia*: J.M.KELLY, *Further reflections on the “Lex Aquilia”*, in *Studi in onore Edoardo Volterra*, Milan 1971, p.23; G.MACCORMACK, *On the Third Chapter of the “Lex Aquilia”*, *Irish Jurist* 5 (1970) p.174.

<sup>157</sup> See CURSI (as in note 5) p.142.

<sup>158</sup> See GERKENS (as in note 143) p.75.

concerned with the interdict, whereas in D.9.2.49.1 Celsus and Ulpian are dealing with *damnum iniuria*.

As Schipani suggested, it may well be the case that it is the compilers who edited the text in D.43.24.7.4, especially the reference to the *actio legis Aquiliae*. However, there is good reason to believe that that ‘nullam iniuriam aut damnum’ is not a hesitation on behalf of Servius, but his dealing with two matters simultaneously. As Gerkens rightfully proposes, the lack of *damnum* means that the interdict cannot be granted and the lack of *iniuria* means that the *actio legis Aquiliae* cannot be granted<sup>159</sup>.

Indeed, reasonable fear that one might lose his house justifies the destruction of the neighbouring house for the purpose of creating a fire break. Necessity is also discussed by Celsus and reported by Ulpian in D.9.2.49.1. Is it though impossible to argue that Servius was also contemplating that destruction to prevent fire from spreading would not give rise to injustice (*iniuria*)? Furthermore, the use of *aut* in this context seems to suggest that for Servius the delict is comprised of two equal requirements that need to be satisfied: *damnum* and *iniuria*<sup>160</sup>. *Iniuria* might come first in this phrase because the case for lack of *iniuria* is stronger than lack of *damnum*, especially if one envisages the possibility that the fire may have been put out before it reached the destroyed house.

This conclusion brings up another significant question. Why is it that there is no *damnum* in such a case? Is it the case that Servius believes that the house would have been destroyed by the fire in any event? If D.9.2.49.1 is read together with D.43.24.7.4, it can be concluded that the house would have in any event perished, i.e. even if it had not been demolished by the neighbour (*aeque perituris aedibus*). This argument has been put forward very forcefully by Gerkens<sup>161</sup>. In his view, the existence of damage has to be decided *ex praesenti statu* and not *ex post*. The fire, as long as it started before the demolition of the house, is not an *ex post* consideration. According to Gerkens, this is made explicit by the reference to Labeo’s holding on the case where the house is demolished first and

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<sup>159</sup> *Ibid.*

<sup>160</sup> See GERKENS text to note 151

<sup>161</sup> See GERKENS (as in note 143) p.80-81.

the fire is ignited later. The fire is an *ex post* consideration and Aquilian liability attaches to the act of demolition<sup>162</sup>.

A look into the Basilica also demonstrates that the Byzantine jurists thought of *damnum* and *iniuria* in a similar way, i.e. as independent requirements. B.60.3.49 (=D.9.2.49) sheds more light on the equal nature of these two requirements, both in the way that D.9.2.49.1 is summed up: 'Ὁ Ἀκουίλιος ἄδικον ἐπιζητεῖ ζημίαν'<sup>163</sup> and commented on: Τὸ λεγόμενον, ὅτι τὴν ἄδικον ζημίαν ὁ Ἀκουίλιος τιμωρεῖται, οὕτω χρῆ νοεῖν, ἵνα μετὰ τῆς ζημίας καὶ ἀδικία ἔνεστιν<sup>164</sup>. These extracts can be translated as follows: 'The *Lex Aquilia* requires unjust damage' and 'when it is said that the *Lex Aquilia* punishes the unjust damage, this should be understood to mean that injustice should exist therein together with the damage'. It is thus clear that *damnum* and *iniuria* are two equal headings of Aquilian liability that need to be satisfied. This is another instance where *iniuria* is identified with ἀδικία. If ἄδικος ζημία is the correct translation of *damnum iniuria* in Medieval Greek, it could be said that the correct translation of *damnum iniuria* in English is unjust damage<sup>165</sup>.

The aforementioned *scholion* concludes: ἐὰν γὰρ τις ἐκ μεγάλης ἀνάγκης ἤλθεν ἀκουσίως εἰς τὸ βλάψαι με, οὐ κατέχεται μοι, ὅπερ ὁ Κέλσος ἐπὶ τοῦ ἐπαγομένου ἔγραψε θέματος<sup>166</sup>. In English, 'so if someone unwillingly came to harm me due to a great necessity, is not liable to me, as Celsus wrote with regard to the raised matter'. This demonstrates that necessity precludes ἀδικία.

#### c) The rise of *culpa* within the sphere of *iniuria*

So far *iniuria* has appeared in cases where the wrongdoer's mental condition is such as to prevent him from being considered *iniuriae capax*<sup>167</sup> or where a preceding act (which may or may not be attributable to the victim) has created a situation in which an unjust

<sup>162</sup> *Ibid.* 81.

<sup>163</sup> B 2766.3.

<sup>164</sup> BS 3159.12-13.

<sup>165</sup> If one should wish to preserve the asyndeton in translation, the delict could be translated as damage injustice. Compare with BS 3090.4-5: "Ἦτοι περὶ πάσης ἀδίκου καὶ ἀλόγου ζημίας ἐπενεχθείσης τινί'.

<sup>166</sup> BS 3159.13-15.

<sup>167</sup> D.9.2.5.2.

act was necessary to defend some other value (e.g. life<sup>168</sup>, property<sup>169</sup>, or law and order<sup>170</sup>), or where there is a social consensus that such acts do not give rise to injustice<sup>171</sup>. The case of the shopkeeper and the lantern will show how the focus on *culpa* arose within the sphere of *iniuria*.

- The case of the shopkeeper and the lantern

In D.9.2.52.1, Alfenus is prepared to grant a direct action to the lantern thief only if the shopkeeper poked out his eye intentionally. Otherwise, the shopkeeper is absolved of Aquilian liability 'as the damage was really the lantern stealer's own fault (*culpa*) for hitting him first with the whip<sup>172</sup>'. This allows for the hypothesis that if the shopkeeper would poke out the eye of the lantern thief by his own negligence, without being provoked by the latter, he would still be liable. In this sense, only if the thief has been at fault, the shopkeeper's fault will not matter. This is in tune with the lack of a doctrine of contributory negligence in Roman law<sup>173</sup>. Thus the shopkeeper will be liable only if he poked the eye intentionally, just like the javelin thrower will be liable for a killing a slave who is walking on a field reserved for javelin throwing, only if he has targeted him<sup>174</sup>.

In Aristotelian terms, poking out an eye is an unjust act, but no injustice is committed against the lantern thief. He suffers an unjust act but does not suffer injustice, respectively. Why is it that no injustice is committed? Or, why is it that no injustice is suffered? In answering these questions, recourse was made to the fact that two acts<sup>175</sup>, *per se* unjust, created a situation in which the shopkeeper reacted and poked out the thief's eye. In this sense, the whole incident would not have taken place if it were not for the stealer's intention to

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<sup>168</sup> D.9.2.5pr; D.9.2.45.4.

<sup>169</sup> D.9.2.49.1.

<sup>170</sup> D.9.2.29.7.

<sup>171</sup> D.9.2.7.4 (killing of a son in power in a public contest).

<sup>172</sup> D.9.2.52.1.

<sup>173</sup> See ZIMMERMANN (as in note 8) p.1010-1111.

<sup>174</sup> D.9.2.9.4.

<sup>175</sup> Namely, the act of carrying away the lantern and striking the shopkeeper with a whip.

fight. Thus, the incident was due to the thief's own *culpa*<sup>176</sup>. The latter precludes the rise of injustice (*iniuria*<sup>177</sup>). What is surprising, of course, if the establishment of liability for personal injuries to the thief, who seems to be a freeman!

- The case of the pruner

The case of the pruner concerns liability that arises from damage caused by branches that are cut from the tree and kill a passing slave<sup>178</sup>. The genuineness of the fragment has been contested. The use of the term *machinariarius* has led several authors to suggest that the text has been subject to interpolation by the compilers<sup>179</sup>. Schipani, in particular, pointed to a *scholion* by the Byzantine jurist Dorotheos in the *Basilica*<sup>180</sup> to suggest that the original text was about killing as a result of branch that was cut off a tree<sup>181</sup>. He took the view that the Byzantine text shows that the compilers actually combined two cases into one because of their affinity<sup>182</sup>.

The case of the pruner is different to that of the shopkeeper. The cutting of branches cannot be considered as an unjust act (*τᾶδικοι πρόπτειν*). The result of the act though might be unjust. This would have depended initially on whether the act was committed on public or private land. Only in the first case, Aquilian liability of the pruner would have been established. Later on, another specification was added with regard to private land. The pruner would also be liable if there was a path going through the land in which he was pruning.

Therefore, injustice here takes the form of *culpa*. The crucial passage is: 'culpam autem esse, quod cum a diligente provideri poterit, non esset provisum aut tum denunciatum esset, cum periculum evitari non possit'. The verb *provideo* in this context can be translated either as foresee or as take precautions. Schipani believes

<sup>176</sup> In this context, *culpa* is meant as in 'Mea culpa, mea culpa, mea maxima culpa!' (Penitential Rite of the *Missale Romanum*) and not as negligence; other authors believe this case is about exceeding the limits of self-defence: see ZIMMERMANN (n.8) p.1000; A.WACKE, *De jure* 20 (1987) 88.

<sup>177</sup> See SCHIPANI (as in note 9) p.174.

<sup>178</sup> D.9.2.31.

<sup>179</sup> F.H.LAWSON, *Negligence in the Civil Law*, Oxford 1950, p.117 note 31; see SCHIPANI (as in note 9) p.141-143.

<sup>180</sup> BS 3143.23-27.

<sup>181</sup> See SCHIPANI (as in note 9) 142.

<sup>182</sup> *Ibid.*

that it is more appropriate to translate it in the former manner, as this would match with the objective character that *culpa* had in Republican times, i.e. when Mucius to whom the phrase is attributed was writing<sup>183</sup>.

Indeed the death of the slave was the pruner's fault as it would have been easily avoidable by the pruner himself (e.g. by carefully checking to see whether someone is walking on the path or by choosing not to prune trees next to a path). Thus, Mucius believes that the pruner will be liable if he did not heed due diligence. His standard is objective. It will depend on objective circumstances, i.e. whether there was a path at all or not. Thus whether injustice (*iniuria*) is committed will depend on the circumstances of the case and the diligence that the wrongdoer was expected to show in such circumstances.

It was only later, and definitely by Paul's time, that *culpa* in this context acquires a more subjective character. This is demonstrated by the use of the term *divinare*<sup>184</sup>. In Paul's view, the pruner cannot be liable for *culpa* if he could not have guessed that someone would pass through that place. Thus whether injustice (*iniuria*) was committed would depend on this latter consideration. However, the objective element in this test was never abandoned as even in Paul's view the public or private nature of the path had to be taken into account. Cutting branches in different kinds of path impose different kinds of care or diligence that the pruner should show.

- The case of the barber

The case of the barber<sup>185</sup> is also pertinent. Various authors have tried to approach this case in terms of causation<sup>186</sup>, fault or assumption of risk<sup>187</sup>. However, another possible way of analysing Proculus' view might be the following. Loss is certain. The slave has been killed. What is not certain though is who the perpetrator of injustice is.

Proculus specified that it would be the barber's fault as he had set up his premises next to a field reserved for games or at a place which

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<sup>183</sup> *Ibid.* 152.

<sup>184</sup> *Ibid.* 150.

<sup>185</sup> D.9.2.11pr.

<sup>186</sup> W.W.BUCKLAND & A.D.McNAIR, *Roman Law and Common Law, A Comparison in Outline*, Oxford 1952, p.370s.

<sup>187</sup> See ZIMMERMANN (as in note 8) p.1011-1013.



is much frequented. Ulpian appears to believe that there can be no recovery under the *Lex Aquilia* as the slave himself had chosen to be shaved at such dangerous a spot. The doctrine of contributory negligence would bar recovery. Proculus' view appears to be in tune with Aristotle's view that it is impossible to treat oneself unjustly<sup>188</sup>. Thus, in Proculus' view an action is granted against the barber, who albeit acting justly has committed an injustice.

This could appear to contradict D.9.2.7.3 where Proculus refuses to grant a direct action against the person who pushed the person who caused the damage<sup>189</sup>. He appears willing though to grant an *actio in factum* against the person who pushed. This case can be distinguished from the case of the barber, where the latter exercises a dangerous work in a dangerous place<sup>190</sup>. The decision to exercise the profession of the barber next to a field reserved for ball games is what has made the barber act *culpa* in the eyes of Proculus. On this basis he appears prepared to grant a direct action.

- Collision cases

In collision cases<sup>191</sup> there is no act prior to the damage. In such cases injustice will arise only if there was an act that the sailors of the boat that crushed in the other boat could have done to prevent damage from occurring. In such a case there would be an unjust omission. Once again whether injustice has arisen will depend on whether there was an act available to the said sailors that would prevent the damage of occurring. This is, as in the previous case, a test of due diligence.

- Burning thorns in a field

Even cases which have been thought to be dealing purely with *culpa* can be explained in terms of *iniuria*. D.9.2.30.3 is dealing with the case of a man who is burning stubble and the fire spreads to a neighbouring vineyard. Aquilian liability will depend on whether injustice was committed. The act of burning thorns *per se* is not an unjust act. However, doing so on a windy day or without taking any precautions will amount to negligence (lack of due diligence) on his

<sup>188</sup> EN 1136b3-7, 15-25.

<sup>189</sup> See SCHIPANI (as in note 9) p.332-333.

<sup>190</sup> *Ibid.* 332.

<sup>191</sup> D.9.2.29.2-4.

behalf. Thus, a situation of injustice will arise from a just act such as burning thorn in a field.

In conclusion, it can be noted that whenever in the facts there was an unjust act which did not give rise to injustice,<sup>192</sup> the Roman jurists would have thought that the requirement of *iniuria* had not been satisfied. When, however, the act was just but injustice had occurred nevertheless, Aquilian liability would be still established on *iniuria*, i.e. on the existence of a situation of injustice that was attributable to the defendant and which he could have avoided had he acted prudently.<sup>193</sup>

- *Damnum iniuria* as *damnum culpa datum*: an Aristotelian approach

If *damnum iniuria* meant unjust damage why would some Roman jurists appear to say that the said delict could in effect be called *damnum culpa datum*? Gaius is presenting the delict in question as one where damage is compensated only if it is caused *iniuria*, i.e. caused by intent (*dolus*) or negligence (*culpa*<sup>194</sup>). Ulpian in D.47.10.1 pr also states that *iniuria* means to cause *damnum* by *culpa*. Paul makes a similar statement about *damnum* that is caused *ex culpa*<sup>195</sup>.

It thus has been thus proposed that *iniuria* has a double meaning. Its subjective side is identified with *culpa*. But in terms of result or effect (*termini effettuali*) it actually means *damnum*<sup>196</sup>. Although this dualism should not be viewed as absolute, Cursi suggests that the reason of this dualism is that it is unthinkable that there is Aquilian *damnum* without *culpa* or vice versa Aquilian *culpa* without *damnum*<sup>197</sup>. So Cursi speaks of a ‘coincidenza, sul piano “effettuale”, di *iniuria* e *damnum*<sup>198</sup>. Aristotle’s theory on force and involuntariness might shed some light into this and explain how this approximation came about.

Actions (πράξεις) are distinguished between these which are not in human power and these which are (πράξεις ἐφ’ ἡμῖν). The latter are again distinguished between these which humans do without

<sup>192</sup> See Ch III.2.

<sup>193</sup> D.9.2.31; D.9.2.30.3.

<sup>194</sup> G.3.211.

<sup>195</sup> D.44.7.34pr.

<sup>196</sup> See CURSI (as in note 5) p.134, p.143

<sup>197</sup> *Ibid.* 143.

<sup>198</sup> *Ibid.*

choice (e.g. grow older) and these which humans have the choice to do or not to do<sup>199</sup>. The second category is further divided between involuntary actions, such as force and ignorance (βία, ἄγνοια<sup>200</sup>) and voluntary ones, of which somebody is responsible (αἴτιος) in a strict sense<sup>201</sup>. Voluntary action is performed in a certain state of cognition<sup>202</sup> and embraces situations like duress and necessity<sup>203</sup>. In the Nicomachean Ethics<sup>204</sup>, it is generally ‘a necessary condition for someone to be held responsible for an episode that he should have done it or let it happen voluntarily<sup>205</sup>’.

Duress and necessity are voluntary actions to the extent that the person acting under duress or necessity had always the choice not to act and to suffer the consequences of that state of duress or necessity. However, the mere fact that the act was voluntary did not mean that it was not pardonable<sup>206</sup>. If the act under duress were committed for the greater good, it would be praised<sup>207</sup> and if it were committed under great pressure then it would be pardoned<sup>208</sup>. But if it were committed via great evil<sup>209</sup> or for small good<sup>210</sup>, the act would be blamed on its perpetrator<sup>211</sup>. Therefore, it can be said that in Aristotle’s view, a person is responsible (αἴτιος) for an action (πράξις) that was in our human power to choose to do or not to do (ἐφ’ ἡμῖν) and that was voluntary (ἐκούσια). He will be exempt from blame on certain situations, where the act is done for the greater good or some noble end.

<sup>199</sup> A.KENNY, *Aristotle’s Theory of Will*, London 1979, p.11; Compare with Cicero’s *Topica* paras 58 and 62 on causes which by its own force brings about with certainty the result that is subject to this force and causes which are fully efficient but without which an effect cannot be brought about. See T.REIHARDT (tr.), *Cicero’s Topica*, Oxford 2006, p.320-323.

<sup>200</sup> *Ibid.* 29.

<sup>201</sup> *Ibid.* 11.

<sup>202</sup> *Ibid.* 25; See Eudemian Ethics 1224a5-8.

<sup>203</sup> *Ibid.* 34-35.

<sup>204</sup> EN 1110a20.

<sup>205</sup> See KENNY (as in note 199) 28; this reminds a lot of *culpa* as negligence.

<sup>206</sup> *Ibid.* 35.

<sup>207</sup> EN 1110a2.

<sup>208</sup> EN 1110a24.

<sup>209</sup> EN 1110a25.

<sup>210</sup> EN 1110a27.

<sup>211</sup> See KENNY (as in note 199) p.65.

Although this article is not suggesting that Aristotle expressed himself in terms of legal responsibility<sup>212</sup>, it cannot be precluded that Roman jurists would be influenced by his teachings in the way that they would shape the law<sup>213</sup>. The Aristotelian approach as summarised at the end of the preceding paragraph is not very distant from the approach of Roman jurists to the delict in question. The delict of *damnum iniuria* was thought to have been committed if *damnum* had been caused by the defendant, which could not be excused by the defence of lack of *iniuria*. *Damnum* needed to be caused by a voluntary act of the defendant<sup>214</sup>.

This voluntary act would bring responsibility in the scene. *Culpa* in all the cases that have been analysed above involved an inquiry of whether the defendant could have avoided the incident by acting diligently. It was in a sense a question about whether it was in the defendant's power to do or not to do the act that gave rise to *damnum*. In case it was within such power, he would be seen as *culpa reus est*<sup>215</sup>. Cases of *dolus* were clear cases of voluntary acts causing damage. Voluntary actions would also cover acts of negligence (*culpa*). Involuntary actions would strictly extend to cases of force or ignorance. The agent of the act must make no contribution whatsoever. In a contrary case, his act would be seen as a voluntary and blameworthy one (e.g. if a jostled courtier thumps the monarch harder than he is forced to he is responsible<sup>216</sup>).

Once the plaintiff had established that *damnum* had been suffered due to the defendant's *culpa*, it might have been upon the defendant to prove that he had nonetheless acted *iure*<sup>217</sup>. In this sense, it could be said that lack of *iniuria* constituted the only possible defence to *culpa*. Consequently, despite the fact that *damnum* had been caused and was

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<sup>212</sup> *Ibid.* p.28.

<sup>213</sup> For an example of the influence of Aristotelian teaching on Cicero through the Stoics, see Cicero's *Topica* § 59.

<sup>214</sup> In Aristotelian terms this means that the defendant should have caused *damnum* through an act that was in his power to choose to do or not to do.

<sup>215</sup> D.9.2.30.3, where somebody is held liable for light a fire to burn thorns in a field on a windy day.

<sup>216</sup> *Ibid.* 29.

<sup>217</sup> For this 'negative' role of *iniuria* was also contemplated in S.CONDANARI-MICHLER, *Über Schuld und Schaden in der Antike*, in *Scritti in onore di Contardo Ferrini*, Milan 1948, vol. III, p.96: *iniuria* attaches to the case where a ground of justification could be *prima facie* relied upon to justify the act.

attributable to the defendant, there would be no liability as the debated act would not give rise to injustice, given the circumstances in which the act had been committed. In other words, whether injustice (*iniuria*) is committed or not will depend on the existence of a balance between the act and the result in the given circumstances. Disproportionate actions and reactions should clearly come within the scope of the delict.

If a test that could unveil the rationale of the different solutions given by different jurists were to be constructed, it could be summarised as this. Causing damage to another's property by intent or negligence could be, on certain occasions, possibly excused by some ground of justification. Whether the act would be ultimately excused would depend on whether recourse to the ground of justification could be still necessary had the perpetrator acted diligently. Only if the answer to the latter were negative, it could be concluded that injustice (*iniuria*) had been committed. In trying to strike this balance between the necessity of reliance on the ground of justification, on the one hand, and lack of diligence (*culpa*), on the other, different jurists could reach different conclusions.

It is not argued though that the Roman jurists in developing the law on *damnum iniuria* had reached such a level of sophistication. The argument merely is that it was this specific cultural and educational background they shared that has shaped the way in which they have dealt with the delict in four ways: *damnum*, *dolus* and *culpa* (as mental element), *culpa* as attributability and *iniuria*, rather than some conscious and structured effort to systematise the delict. *Culpa* thus can be viewed as covering two related spheres. One is related, as it has just been demonstrated, with the nature of the act as voluntary or involuntary. The other, as it will be now argued, is related to the fact that *culpa* is not a mechanism of causation but of attribution of blame.

d) *iniuria* as *damnum* caused *παρ' αἰτίας* of the defendant

In the interpretation of *iniuria*, D.9.2.5.1 and two *scholia* in B.60.3.5 (= D.9.2.5.1-3) are key texts. In D.9.2.5.1, Ulpian states: *Igitur iniuriam hic damnum accipiemus culpa datum etiam ab eo qui nocere noluit*. Monro translates this extract as follows: 'Accordingly we must here understand *injuria* to mean damage done by negligence

(*culpa*), even by a person who had no desire to do harm<sup>218</sup>. Kolbert translates it in a slightly different manner: ‘Therefore, we interpret *iniuria* for present purposes as including damage caused in a blameworthy fashion, even by one who did not intend the harm<sup>219</sup>’.

This is one of extracts on which Lord Rodger relies in order to show that *iniuria* could be used ‘as a synonym’ for *damnum*, ‘which the defendant causes by fault even when he did not intend to cause harm<sup>220</sup>’. The translations are not uniform and certainly do not match with the one contained in B.60.3.5 (= D.9.2.5.1-3).

There, anonymous Byzantine jurists have added two *scholia*. According to the first one: Τὸ ἐν τῷ νόμῳ κείμενον ἸΝΙΟΥΡΙΑ Ὅ νόησον μὴ ὡς ἐπὶ τῆς ἰνιουριάρουμ πρὸς ὕβριν <ἀν>ηρησθαι, ἀλλὰ παρανόμως ἀνηρησθαι καὶ παρ’ αἰτίαν ἐμήν. (emphasis added<sup>221</sup>). This extract may be translated in the following manner: ‘What is stated in the legislation as INIURIA, do not understand it as if it means to be convicted by the *actio iniuriarum* for contumely (ὑβρις), but with reference to killing *contrary to law* and *for which I am responsible*<sup>222</sup>’.

According to another *scholion*, Ἰνιουριάρουμ τοίνυν ἐν τῷ Ἀκουιλίῳ νοοῦμεν τὴν ζημίαν τὴν παρ’ αἰτίαν τοῦ ἐναγομένου συμβάσαν, εἰ καὶ μὴ βουλόμενος ζημιῶσαι τοῦτο ἐποίησεν. (emphasis added<sup>223</sup>). This extract can be translated as follows: ‘So by *iniuria* in the *Lex Aquilia* we mean the damage that has taken place *according to the defendant’s responsibility*, even if he acted without wanting to damage’ (emphasis added). Thus the use of the term αἰτία

<sup>218</sup> C.H.MONRO, *Digest IX.2: Lex Aquilia*, Cambridge 1928.

<sup>219</sup> C.F.KOLBERT, *The digest of Roman law: theft, rapine, damage and insult*, Hammondsworth 1979, p.72.

<sup>220</sup> See RODGER (as in note 3) 434s.

<sup>221</sup> BS 3093.11-16

<sup>222</sup> According to LIDDELL & SCOTT (as in note 77) αἰτία means: I. 1. responsibility, mostly in a bad sense, guilt, blame, or the imputation thereof, i.e. accusation, 2. in forensic oratory, invective without proof, 3. in good sense, 4. expostulation. II. cause III. occasion, motive IV. head, category under which a thing comes V. case in dispute. Cause here should not be taken to mean cause in a legal causality sense, but probably reason. The primary example of this meaning of αἰτία used by Liddell & Scott comes from Herodotus’ Prooemium: δι’ ἣν αἰτίην ἐπολέμησαν (the cause/reason they fought for). Heimbach has also translated αἰτία as culpa in this context: *Quod est in lege, iniuria, ne putes, ut in actione iniuriarum, pro contumelia dici, sed pro eo, quo fit illicite et culpa mea.*

<sup>223</sup> BS 3093.26-27.

in this context cannot be equated with cause or the identification of the author of the event, as Schipani suggested<sup>224</sup>.

It can be seen now that these Byzantine jurists chose to identify αἰτία with *culpa* meaning responsibility rather than negligence and not with cause or causation. Support for this argument can be derived by the placing of both *scholia* in B.60.3.5 (= D.9.2.5.1-3), which is the text dealing with the case of *damnum* brought about by a lunatic, an animal, a tile, an *inpubes* or a tutor. The second aforementioned *scholion* is followed by the phrase: “Ὅθεν ἐζητήθη, εἰ κατὰ μαινομένου ζημιώσαντος κινεῖται ὁ Ἀκουίλιος” (For this reason, it was asked whether there can be an Aquilian action against a lunatic who has done harm)<sup>225</sup>. There is no doubt that the act of the lunatic is the *causa* of the *damnum*. However, he cannot be held liable ‘ἐπειδὴ μὴ δύναται κούλπα εἶναι ἐν τῷ μαινομένῳ τῷ μὴ ἔχοντι λογισμόν’ (because there can be no *culpa* in the lunatic who has no reasoning power)<sup>226</sup>. It thus clear that αἰτία had been used to connote responsibility and blame rather than causation.

These extracts demonstrate the way in which *culpa* was linked with the attribution of damage to a specific individual. The first extract separates two requirements of Aquilian liability, namely contrariness to law and responsibility for the damage. The second extract makes an even more important statement. *Iniuria* in the *Lex Aquilia* is taken to mean *damnum* for which the defendant is responsible, even though he did not wish to do any harm. The two texts read together present all the requirements for the establishment of Aquilian liability. The first is the existence of *damnum*. The second is that *culpa* as the mental element is not *per se* enough to establish liability, but is a necessary condition. The third is *culpa* as αἰτία (attribution/ responsibility) and the fourth is contrariness to law. Law here means justice as expressed through the rules that are applicable in a certain place at a certain time<sup>227</sup>.

The cases discussed in the Digest confirm that these were indeed the components of liability, but they were never presented altogether

<sup>224</sup> See SCHIPANI (as in note 9) p.470.

<sup>225</sup> BS 3093.27-28.

<sup>226</sup> BS 3093.29.

<sup>227</sup> See note 75.

in every case. The jurists focused at each case on the specific component of liability which they thought was controversial.

- Cases about *culpa* as *αἰτία*

Cases where A has pushed B and B has wounded C<sup>228</sup> are examples of lack of *culpa* (attribution) as the perpetrator of the act cannot be seen as *αἴτιος* (responsible) for the incident to the extent, as has been demonstrated above, that he has not made any voluntary contribution to the incident. The same can be argued in collision cases<sup>229</sup>, unless the sailors could have done something to avoid the damage, in which case they would be seen as *αἴτιοι* (responsible).

The case of the shopkeeper<sup>230</sup> chasing the passer-by who had carried off his lantern is an exquisite example of this Byzantine approach to *culpa* as *αἰτία* (responsibility). The chase ended up in a fight in which the lantern thief hit the shopkeeper with a whip and the latter fought back and struck out the eye of the former. Alfenus held that liability lies with the person who struck the first blow. He would be deemed to have caused the damage, unless the shopkeeper knocked his eye out on purpose. In a *scholion* to this passage another anonymous Byzantine jurist wrote that ‘πρώτος γὰρ ἤμαρτεν ἐκείνος τύψας αὐτόν’ (because it was him –i.e. the lantern thief– who sinned first having hit him –i.e. the shopkeeper<sup>231</sup>). Thus the incident is not attributable to the shopkeeper. It will be attributed only if ‘μὴ προετυπήθη, ἀλλὰ θέλων ἀποσπάσαι τὸν λύχνον ἐμαχέσατο’ (‘he had not been beaten first, but fought because he wanted to recover the lantern<sup>232</sup>’).

The cases of the pruner<sup>233</sup> and barber<sup>234</sup> are also cases about *culpa* as *αἰτία*. Liability of both the pruner and the barber is established on the basis that the incident could have been avoided if they had taken reasonable precautions<sup>235</sup>. In this sense their actions causing death or injuries were voluntary and blameworthy. It should be noted that

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<sup>228</sup> D.9.2.7.3.

<sup>229</sup> D.9.2.29.2-4.

<sup>230</sup> D.9.2.52; B.60.3.51.

<sup>231</sup> BS 3163.2.

<sup>232</sup> B 2767.3-4.

<sup>233</sup> D.9.2.31; see Ch III.3.B.

<sup>234</sup> D.9.2.11pr ; see Ch III.3.C.

<sup>235</sup> *Supra*.



*culpa* has been developed in this way as a specification of *iniuria*. Cases about *culpa* remain cases of *iniuria*. The fact that the defendant is not thought to be culpable (αἴτιος) means that although his act may be unjust, the situation that was created was not one in which he committed injustice. Therefore it is not enough that a situation of injustice has been created. It had to be attributable (*culpa*) to the defendant.

A similar case is that of a muleteer who caused damage while driving his mules<sup>236</sup>. He is held liable if he failed to control the mules either due to his *imperitia* or illness. An anonymous Byzantine jurist has added a pertinent *scholion* to B.60.3.8.

Ἐὶ δὲ καὶ μουλίων κατὰ ἀπειρίαν μὴ δυνηθεὶς ἐπισχεῖν τὴν ὀρμὴν τῶν μουλῶν αἴτιος γένηται τοῦ συντριβῆναι δοῦλον ἐξ αὐτῶν, κατέχεται ὡς κούλπαν ἀμαρτήσας. Τὸ αὐτὸ ἐστίν, εἰ καὶ δι' ἀσθένειαν αὐτοῦ μὴ περιγέγονε τῶν μουλῶν. Καὶ μηδὲ νομιζέσθω ἄδικον τὸ διὰ τὴν τοῦ σώματος ἀσθένειαν ὡς αἴτιον τῆς βλάβης αὐτὸν κατέχεσθαι· ἐπιτήδευσιν γὰρ τις οὐκ ὀφείλει ποιεῖν, ἥνπερ οἶδε μὴ δύνασθαι ποιεῖν, ἢ εἰδέναι ὀφείλει, ὡς οὐ δύναται. Καὶ οὐδὲ χρὴ τὴν ἄλλου ἀσθένειαν ἄλλῳ ἐπιζήμιον γίνεσθαι<sup>237</sup>.

If by virtue of his inexperience he has failed to control the impulse of the mules and thus became responsible for the mules crushing a slave, he is liable under the *Lex Aquilia* as having committed the error of *culpa*. The same goes for the case where he has failed to control his mules due to his illness. And do not believe that it is unjust to hold him responsible for the harm because of the illness of his body. One should not pretend that he is able to do something that he knows he is not able to do, or should have known that he is not able to do. And one should not let one's illness be to the detriment of someone else. (my translation)

This example illustrates the way that *culpa* as αἰτία and *culpa* as negligence come together with a consideration of injustice (ἀδικία). The muleteer is held responsible for the incident as he voluntarily assumed a task for which he was not suitable. In this sense, the muleteer's negligence is the connecting factor between the damage and his responsibility.

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<sup>236</sup> D.9.2.8.

<sup>237</sup> B.3099.12-18.

- Cases of *iniuria* as contrariness to justice

However, in self-defence cases<sup>238</sup> the debated issue was whether the defence of lack of *iniuria* would be applicable. Killing that has taken place in a private game of *pancratium* or wrestling against a slave may be excused if the slave has participated in the game with the consent of his master<sup>239</sup>. Consent of the owner is a complete defence for the participant in the game who killed the slave. This case is about lack of *iniuria* as contrariness to law. The same applies for the cheated-on husband who kills a slave for committing adultery<sup>240</sup>. The defence of lack of *iniuria* is available to him.

Finally, the case of acting under orders<sup>241</sup> and the destruction of an adjoining house to prevent fire from spreading<sup>242</sup> can also be explained in these terms. As it has already been shown in cases of duress or necessity, the individual is perceived to have acted voluntarily, but the act is praised or pardonable depending on its ends, i.e. if it is performed for the greater good or under great fear or stress<sup>243</sup>. The case of chastisement by the instructor<sup>244</sup> can on Julian's view be added on the list of cases of lack of *iniuria*<sup>245</sup>. Damage caused in the exercise of public authority against somebody who resists lawful process can also be thought of as not having been caused *iniuria* by the magistrate<sup>246</sup>.

- Cases about the mental capacity to commit injustice

The case where damage is caused by a lunatic, an animal or a tile kills is about the lack of the mental capacity to commit injustice<sup>247</sup>. An anonymous Byzantine jurist has added a *scholion* to state that the *furiosus* (lunatic) has no λογισμὸν (reasoning power) so that he cannot be held to have caused the damage<sup>248</sup>. Things are very similar

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<sup>238</sup> D.9.2.4; D.9.2.5pr; D.9.2.45.4.

<sup>239</sup> D.9.2.7.4.

<sup>240</sup> D.9.2.30pr.

<sup>241</sup> D.9.2.37pr.

<sup>242</sup> D.9.2.49.1.

<sup>243</sup> See Ch III.3.F, text to note 208.

<sup>244</sup> D.9.2.5.3.

<sup>245</sup> See Ch III.2.C.

<sup>246</sup> D.9.2.29.7.

<sup>247</sup> D.9.2.5.2.

<sup>248</sup> BS 3093.29.

different in the case of an *inpubes* (a minor) causing damage. For both Labeo and Ulpian the issue turns on whether the child is *iniuriae capax* (capable of injustice). Labeo puts an objective threshold at the age of seven, Ulpian, on the other hand, takes a more subjective approach, suggesting that for liability to exist it will have to be established that the child could understand the unjust nature of its act.

#### 4. Conclusion

This article has tried to establish the proposition that *iniuria* never disappeared from the Aquilian scene. It has always been present in the mindset of Roman jurists, although not always so explicitly. On certain occasions, as set out above, the jurists spoke of *culpa*, followed by a gradual development of various approaches to injustice (*iniuria*) from *culpa* as fault or blame to *culpa* as negligence. The linguistic meaning of *iniuria* as well as the philosophical heritage of Aristotle assisted this kind of development. It was not until the time of Emperor Justinian that *iniuria* was completely separated from *culpa* so as to deal with situations of unlawfulness as opposed to injustice<sup>249</sup>.

*Damnum iniuria* therefore did not just mean loss and unlawful injury. It meant something more than that, namely loss caused by injustice and injustice caused by loss<sup>250</sup>. The identification of *iniuria* with ἀδικία, its linguistic meaning as both an unjust act and an unjust result, the Aristotelian idea that the latter does not necessarily flow from the former and the consideration that malice, negligence and fault are all factors that are a kind of (and lead to) injustice, all these elements combined clarify the background of Ulpian's statement in D.47.10.1pr. that '*interdum iniuriae appellatione damnum culpa datum significatur, ut in lege Aquilia dicere solemus*'. *Damnum* and *iniuria* were always two linked but distinct headings of the *Lex Aquilia* that needed to be satisfied for liability to be established.

<sup>249</sup> See ZIMMERMANN (as in note 8) p.1007.

<sup>250</sup> D.47.10.1pr. : *iniuria ex eo dicta est, quod non iure fiat: omne enim, quod non iure fit, iniuria fieri dicitur.*