WHY DID ANCIENT ROMAN LAW LACK A CIVIL ACTION FOR NEGLIGENT INJURY TO FREE MEN?

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*1.0 Introduction and Summary.

This paper tries to answer the question why ancient Roman law did not have a civil action for bodily injuries negligently inflicted on free men. This is a small problem within a very small area of Roman law, which has, however, not been solved with anything approaching completeness. My effort begins by sketching the two areas of the law which bracket the spot where the missing action would fit, if it had existed. On the one side, Roman law had a civil action for physical injuries to free men, but they had to be inflicted with intent. On the other side, a Roman statute gave an action for injuries negligently inflicted, but not to free men. The puzzle is, why not? I take up the stock justification the Roman jurists gave, to the effect that a free man's body has no price, and try to show that this cannot be taken at face value. I suggest, by way of alternative, that the creation of a tort rests on the imposition of a duty, and that the Roman scheme of obligations, both in its theoretical and in its underlying social aspects, was peculiarly unfit for and resistant to the contemplated innovation. The conceptual framework of Roman tort law in the creative period was too close to its roots in primitive notions of revenge to serve well as base for an affect-neutral compensation mechanism along modern negligence lines, on the one hand, and the wellsprings of law were too tightly guarded by the potential defendants, the 'deep pockets' of Roman society, on the other hand, to permit the imposition of this obligation. In this way I hope to show that it is not strange or surprising that, as Professor Nicholas has written, "the free man who was negligently run down and injured in the streets of Rome had [...] no remedy." (Nicholas 1962:222).

*1.1. Special Problems in Establishing a Negative in Roman Law.

To establish a negative proposition is difficult enough in the exact sciences. It is a formidable task in history generally. In the legal history of Roman antiquity, the task seems at first sight insurmountable. The primary sources are so exceedingly scant, so fragmentary and so unreliable that scholarship here has to rely much more on guesswork to form a completed picture than would be acceptable in many other fields. To take it chronologically, the first 400 years of the republic are so meagre in surviving sources that "statements for these centuries . . . are largely conjectural." (Jolowicz 1967:5) The texts of the principal statutes during this period, which are central to the topic of this paper, are not directly preserved, and are known only through second-hand fragments. Sources for the last century and a half of the republic are significantly better, given especially the survival of the works of Cicero. But Cicero, unfortunately, had little to say about our topic. (Merguet II 1880:3; De Cacqueray 1857 lists nothing under delit or damnum). The only moderately complete and verified text in the whole thousand-year period is a one-volume nutshell, the Institutes of Gaius, written 161 A.D. From about 250 A.D. until 533, there is virtual darkness in the sources. (Jolowicz 1967:516, but see Lawson 1950:3). The comprehensive restatement of Roman law which then appeared, Justinian's Corpus Iuris Civilis, forms a dense and elaborate tapestry in which truth and untruth are most subtly interwoven. Not only did Justinian's compilers tear individual strands of the classical law from their context, but they also spun them anew in many places; and moreover, as Jolowicz points out, the whole cloth is dipped in Byzantine dye, so that "there are peculiar difficulties in ascertaining the true nature of the classical law." (Jolowicz 1967:418). So doubtful is the authority of this work that already a century ago, before the full extent of the interpolated material in Justinian's Digest was

suspected, it was already an acceptable scholarly tactic, in the exceptional case, to reject all the surviving versions of a given passage and rewrite the text to suit one's hypothesis, "for it is possible that all the copyists have made the same mistake." (Grueber 1886:xv.) The difficulties are multiplied if we ask not about the texts, but about the law in effect in a given area, for this was often altogether different, and known only in the most remote way. (Jolowicz 1967:418). It is therefore not a simple matter to establish the absence of a law, proceeding or institution, especially one of minor dimensions. The argument must proceed from several points. It is impossible to avoid conjecture altogether. The proof can at most be put as a matter of probabilities.

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*2. The Elements of the Missing Action

2.0 Delict in General.
2.1. Action for Physical Injury.
2.2. Action for Negligence.

*2.0. Delict in General. The question of negligent injury to free men forms a small crevice in the Roman law of delict, which is a minor and ill-fitting stone in the mosaic of Roman private law as a whole. One has only to survey the Institutes of Gaius, the most reliable single guide to the whole of classical Roman private law, to become convinced of this. Gaius divides his work into three major parts: the law of Persons, of Things, and of Actions. The first main part deals with issues of civil status, e.g. freedom and slavery, marriage, paternity and guardianship. The second main part (Things) covers a very broad range of matters, and is divided three ways. The first subdivision classifies the methods of acquiring things "singly," as by our choice and selection, for instance, by buying them, or obtaining the use of them, or finding them. This occupies nearly one hundred numbered sections. The second, much more elaborate subdivision, discusses acquisition of things "universally," that is, the

acquisition of estates from the dead. This is the real centerpiece of Gaius' work. (And probably of Roman private law as a whole; see the statistical article of Kelly, below.) It occupies nearly three hundred sections. The last subdivision of the law of Things deals with Obligations. This contains approximately 130 sections. There are two kinds of obligations. The first is obligations arising from contract. This counts 90 sections. The law of obligations arising from delict, finally, occupies the last 40 sections at the tail of Things. Directly thereafter begins the final main part, dealing with Actions, which is more or less civil procedure. Delict, then, has the lowest priority of any topic in the substantive law; it is treated almost as an afterthought.

The internal evidence, moreover, is that the placement of delict under the heading of "obligations," rubbing elbows with contract, was an awkward one. Professor De Zulueta shows persuasively that Gaius's classificatory scheme lacked all inner conviction. (De Zulueta II:9). In several passages, Gaius treats contract as the exclusive source of obligations, and he uses the word "obligations" in the discussion of delict only twice. (deZulueta II:142). The explanation is that "delictual obligation" was a novel concept in Gaius' time, which probably struck the traditionalists among his readers as a barbarous neologism. The older books (which are, however, known mainly by conjecture) probably treated these topics as entirely separate chapters, and did not class delict as an "obligation" at all, certainly not in the same breath with contract. Gaius was among the first to do so. This is why his treatment of the topic is, in the words of Professor De Zulueta, so infelicitous. His infelicity is the roughness of the pioneer. (deZulueta II:141). Justinian, who followed the Gaian schematic on this point, gives a much more polished and rounded, but also much more abstract treatment (Jolowicz 1967:427), but that was 350 years later.

Professor Buckland defines "delict" as "essentially a wrong done." (Buckland 1921:571). The modern term, tort, says just this. Mommsen, somewhat anachronistically, speaks of "derailment" (Entgleisen), meaning misstep, faux pas. (Mommsen 1899:11). These nominal equivalents, however, do not illuminate the gap that separates delict from contract and makes it distinct. Much more to the substance is the fact, generally noted, that delict involved the exaction of a penalty from the wrongdoer, in contradistinction to the contract remedy, which is, typically, merely for restoration of the value lost. (See, e.g. Buckland 1921:571). Another distinction is that a contract action could be brought against the heir of the party in breach; a delictual action adhered to the person of the wrongdoer and died with him. Delict was intensely personal. Contracts had already begun to be assignable, but a third party was never permitted to satisfy the wrongdoer's delictual liability. (Buckland 1921:404-05). Even where a wrongdoer, through unrelated acts, had suffered a loss of civil status, including loss of citizenship and freedom (capitis deminutio), he remained liable for the delict, since he was still the same man. If two or more wrongdoers in concert committed the wrong, each was individually liable for the full penalty. Finally, where the injury was inflicted by a slave or a child in his father's power, the noxal remedy applied. This meant that the master delivered the wrongdoer to the aggrieved party, to receive a beating, to have his bones broken or to be put to death, depending on the wrong. (See e.g. Id; also Watson 1965, Ch. 18; also Buckland 1908:100, who says that sending over the slave to receive a thrashing was the common course for minor delicts.). Buckland sums up the heart of the matter, and the consensus of the authorities, when he writes that the action for delict "was in origin a legal substitute for self-help, which in this case meant revenge." (Buckland 1921:571, deZulueta II:196; Jolowicz 1967:176). Even when the penalties were monetary, they were assessed in a penal form, with retaliation as aim. (de Zulueta II:198.)

Contractual obligations had an altogether different historical root than delict. "Obligation," early on, meant the "binding" of a person, (See Jolowicz 1967:427) and must (despite Buckland's doubts, Buckland 1921:404 fns.) have originally referred to the ropes or fetters with which the insolvent debtor was "bound off." (deZulueta II:144; Macqueron 1975:21). The enslavement of one party by the other -- often but not always permanently -- was the usual outcome of early contractual relations. It is a modern anachronism to think of contract arising originally out of the consent of the parties. (Hagerstrom 1965:41; see also Muirhead 1886:150; Pringsheim 1961:313). The most archaic known contractual institution is nexum, a kind of debt, which created the class of nexi, debt bondsmen or debt "slaves," whose oppression, miserable conditions and revolts constituted a grave social question already at the dawn of Roman history. (deZulueta II:143; Buckland 1921:426; Levy-Bruhl 1934:140). Yet this contractual relation, despite its great antiquity, is still more "modern" and more "civilized" than delict.

Delict, insofar as conjecture into this obscure area is permissible, had its root even earlier, in the prehistoric Roman community, prior to the rise of commerce and the state, before the division into creditor and debtor. The aggrieved party's delictual action was originally, and even much later, a private blood action. (Delict is also much older than the concept of crime; crime split off from delict later to signify a delict punished by the state. (Mommsen 1899 10-11).) In the Twelve Tables, the first Roman written code of laws, "delicts are much more prominent than contracts." (Muirhead 1886:149). Thus the owner of a house may kill the thief he surprises there; the breaking of a limb may be punished by breaking a similar limb of the wrongdoer; letting one's animals graze on another's pasture by night brought the penalty of crucifixion, and so on. (See the discussion in Jolowicz 1967:171-174). There are money penalties too,

but they are in the background. The dominant spirit is analogous to the Old Testament's "eye for eye, tooth for tooth." The Roman word for this principle was talion. "It seems that, when the Twelve Tables were enacted, it was not yet possible, if desirable, to overcome private vengeance." (Daube 1936:267). It required a very long process of development before delict was defused; that is, before the intensely personal blood heat dissipated from it, and it could be placed alongside and assimilated to the relatively cooler, more objective set of relations comprised in contract. Roman legal thought probably did not accept this infiltration of contract into delict until the beginning of the second century A.D., that is, (deZulueta II:196), in Gaius' time, long after the constituent mold of Roman law had set; and it never abandoned its original brand of equity completely. The Roman delicts always retained their penal, vengeful character. (Nicholas 1962:207).

Nearly all the color had drained out of the categories by the end of the classical period. (Levy 1956:14: "Die einstige Farbigkeit im Reigen der Obligationen verblasste, und die Hindernisse auf dem Wege zu vollkommener Vertragsfreiheit ebneten sich ein.") For Justinian, writing approximately a thousand years after the Twelve Tables, "an obligation is a legal bond whereby we are constrained by the need to perform something according to the laws of our state." (Inst. Book III, Tit. XIII.) All distinction between contract and delict is wiped out at this level of generality. That contract and delict both arise as relations between persons is forgotten here. (fn: here compare: "The inner essence of obligation is altogether a simple one; it is a relation between persons." (Mitteis 1886:114)) The emphasis is, rather, on the relation between persons "and the laws of the state." The obligation arising from delict, like that of contract, appears as one imposed from above, by "statute," which then meant, rather, by praetorian edict. (Gaius, by contrast, had studiously ignored the edicts, and deZulueta thinks that Gaius would deny that praetorian edicts are

capable of creating true obligations. (deZulueta II:141).) The stamp of the intervening centuries of despotism is clear in the Justinian formulation. The law of delict, formerly the black sheep, developed in the post-classical period into the "stepchild" of Roman law (Levy 1956:14). Its penal element was gradually peeled off and absorbed by the criminal courts; so that what remained had more and more a purely compensatory character. (Levy 1956:305). But by then the law of Roman classical antiquity was over, at least in Rome; the "Dark Ages" had begun.

Delict in general is conventionally (de Zulueta II:197) divided into three substantive parts, furtum (approximately: theft, conversion); iniuria, which included physical injuries as well as injuries to reputation; and damnum iniuria datum, which means, very loosely, economic loss from damage to property. Since the topic of this paper, the "missing" tort for negligent injury to free men, lies bracketed between iniuria and damnum iniuria datum, this pair of delicts is of particular interest, and I will now turn to it.

*2.1 Action for Physical Injury

2.10 Summary.
2.11 Killing.
2.12 Injuries.
2.13 Intent.
2.14 Damages.
2.15 Choice of Forum.

*2.10. Summary. The Roman laws that concerned the killing and injuring of free men evolved out of a primitive sacramental origin. Killing and injuring were treated separately. For killing, the original action was parricidia. Parricide applied only to free men; it did not apply to slaves, women or children under power. For injuries, the constituent law was the Twelve Tables. It provided talion, retaliation in kind, with money penalties in the alternative. The Twelve Tables punished only injuries done with intent (dolus).

*2.11. Killing. The beginnings of the Roman law of killing are lost in the obscurity of the gentile sacraments. Religious rule prescribed penance for the wrongful killing of a free man; if the killing was accidental, a ram was sacrificed. (Daube 1936:267). The first law in this area is attributed to King Numa (probably in the 6th century B.C.). It defined the killing of a free man as "parricide," but the meaning of this term is as mysterious as the provisions of the law. Many scholars have tried to derive the word from "pater" or even "patrician," but the etymologists have demurred. (Mommsen 1899:612-13; Levy-Bruhl 1934:77). Mommsen thought that it meant killing of a close family member or neighbor. (Mommsen 1899:612; except for a father's killing a child, which remained legal until the fourth century A.D. Mommsen 1899:618.) In any case, this was the original term for unlawfully killing a free man. The Twelve Tables provided no civil penalties (apart from religious penance) for killing a free man. (Mommsen 1899:836). Killing a slave, a child or (early on) a woman, unless done with excessive cruelty, was treated as property damage. "Homicide," as the unlawful killing of any human, was a later term. Whether the state would take a part in the prosecution of an unlawful killing depended on whether the dead man was a member of a group or class under its protection. (Mommsen 1899:622). Before the plebeian accession to the state, this included only patricians and foreigners covered by treaty. (Levy-Bruhl 1934:91). Later, under the Cornelian law (ca. 81 B.C.) it included all free men. (Mommsen 1899:626). The heirs of a free man wrongfully killed had no civil action for money recovery against the killer. (Mommsen 1899:89 n.4). The reason given was that the heirs can have no more claims than the decedent. (See e.g. Watson 1965:253). A man cannot have or transmit an action for his own death. (Buckland 1908:677).

*2.12. Injury. The Law of the Twelve Tables (around 450 B.C.) was the first statute to provide private penalties for the wrongful infliction of injury. It did not cover killing. (Mommsen 1899:790). Three clauses were applicable. In

case of "membrum ruptum" -- a serious physical injury not further defined -- the victim, if a free man, had talion, the right to inflict the same on the wrongdoer, provided no settlement was reached. If the victim were not free, the law is silent. (Daube 1936:267). In case of "os fractum," (broken bone), the law applied both to free man and to slaves. There was a fixed penalty of 300 asses if the victim were a free man, 150 if slave. (Ehrhardt 1951:89-91). The third category, "iniuria," was open-ended, and provided for a fixed payment of 25 asses. (See e.g. Jolowicz 1967:174). This category probably referred to injuries to personality more than to bodily harm; if so, it protected only free men. The later law, in any case, built on the third category to develop an extensive array of actions for injury to personality and reputation, for example, spreading defamatory rumors, speaking disrespectfully to properly attired women; following a woman or youth too closely with immoral design; accusing a judge of being bribed; falsely accusing a debtor of being insolvent; etc. (See e.g. Raber 1969). When inflation of the currency eventually robbed the fixed penalties in the Twelve Tables of their sting, the praetors by an edict (or edicts -- the exact sequence and content are in dispute; Raber 1969:5) provided for a more general pleading of the kinds of injury and for flexible damages. (Watson 1965:248; see also Buckland 1921:585.) Free men could bring this action for injuries to themselves. (Mommsen 1899:62). If the injury was to a slave, to a wife or a child under power, and were done so as to bring disrespect on the master, it was counted as an injury to the master. "An injury is never considered as done to the slave, but through him to the master." (Inst. 4.4.3.; translated Cooper 1812:320.) In exceptional cases, a son under power might bring the action himself. (Mommsen 1899:799). Whether slaves were ever allowed to bring it, as an exception, in case of atrocious cruelty by their masters, is speculative and doubtful. (Raber 1969:84; but compare Buckland 1908:78-82).

*2.13. Intent. Only injuries inflicted with unlawful intent gave rise to an action for iniuria. (Watson 1965:250; Mommsen 1899:785; Raber 1969:108,174; Hausmaninger 1980:205; Buckland 1921:585; Jolowicz 1967:177-78; DeZulueta II:198,214). The term for unlawful intent was dolus, implying deceit, double-dealing, craftiness; it was often coupled with malus. (Mommsen 1899:86). It presupposed mental competence. Insane persons or infants were incapable of committing iniuria. (Dig. 47.10.3.1; see commentary by Raber defending this passage as authentic in view of great number of corroborating passages.) Someone can suffer iniuria without at first knowing that he has been wronged, but no one can commit this delict without knowledge that his conduct is unlawful. (Id. 109). Thus Mommsen says: "Unlawful intent has as necessary presupposition the knowledge of the facts which compose the violation of law; actual error in this regard voids culpability. He who insults an official, not knowing his position, is not guilty of lese majeste; sexual relations in ignorance of the bar of family relatedness is not incest; whipping a free man who was believed to be a slave is not an insult." (Mommsen 1899:86). Whipping a free man with good intentions likewise voids culpability; thus a master cobbler who beat his freeborn apprentice with a rod to punish him for a mistake, and put the boy's eye out, was not liable for iniuria because his intent had been to correct and improve, not to inflict harm or insult. (Dig. 9.2.5.3; see commentary in Raber 1969:123-125).

In determining the presence or absence of intent, the Roman sources pay next to no attention to the wrongdoer's actual subjective events. (Mommsen 1899:626). No weight is placed on state-of-mind testimony. (Raber 1969:125). The state of mind is inferred from the facts of the situation and imputed to the actor on that basis. (Hasse 1836:49). The imputation is often stereotyped (schablonenhaft). (Mommsen 1899:626 n.2). The jurists were not disturbed by the thought that in a few cases a competent person might be found liable even though he actually lacked the subjective element, provided he conducted himself in the manner typical of

those who have the evil intention. (Raber 1969:174). When there was any doubt, the jurists decided the matter by applying legal rules to the facts of the case, not by asking what the parties had intended. Only later, with Justinian, did the subjective element come more to the forefront of the law. (Jolowicz 1967:532).

Whether at an early stage this delict was punished on a strict liability basis, that is, whether negligent as well as knowing and intentional acts were actionable, is speculative. Mommsen sometimes thought that negligence (culpa) probably was originally included within iniuria in the Twelve Tables, (Mommsen 1899:790-791, but compare p. 85); but he admitted that this was conjecture, and cannot not be proved. (1899:836 n.4). He makes the suggestive remark that, although strict liability may have been the more influential notion in early society, it clashed with the powerful vindictive urge inherent in delict. He says, "talion for negligent conduct is problematic." (Mommsen 1899:836 n.4). There is an asymmetry between revenge and negligence. The vindictive remedy, designed to acquit a vindictive wrong, misses the mark when the wrongdoer is not malicious, only careless. Retaliation becomes problematic. To acquit a negligently done injury with a like wound done on purpose seems harsh. Yet to answer carelessness with counter-carelessness may be no answer at all. In any case, by early republican times, at the latest, iniuria required dolus. (Mommsen 1899:88, 790-91.) The conjecture that the Twelve Tables originally punished not only intentional and negligent but also accidental acts is too weak to be sustained. (Von Lubtow 1971:85-86, Lawson 1950:5,7.)

*2.14. Damages. Mommsen says: "As regards delicts, there is from the beginning a difference between the treatment of women, aliens and unfree persons on the one hand, and Roman citizens on the other; and although the difference may have diminished in the course of development, it did not disappear." (Mommsen 1899:79). This basic fact is well illustrated in the area of damages. The

principle that damages depend on civil status was already declared in the Twelve Tables, with its penalty of 300 asses for breaking a free bone and 150 for a slave bone. The later law, while it dropped the fixed amounts, only retained and greatly elaborated on the principle. Thus Justinian writes

> "the estimate of an injury is increased or diminished according to the degree and quality of the person injured; a gradation not improperly observed even as to slaves; so that one estimate may be adopted in the case of a steward or agent to his master, and a lower one in the case of an inferior slave. . . . An injury is esteemed atrocious, from the nature of the fact, as when a man is wounded by another, or beaten with a club -- from the place, as when an injury is done in a public theatre, in an open market, or in the presence of the praetor -- and sometimes from the rank of the person, as when a magistrate, or a senator, receives an injury from one of mean condition, a parent from his child, or a patron from his freedman; for these cases demand a heavier punishment, than where an injury is done to a stranger, or a person of low degree."

(Inst. 4.4.7., Cooper tr. 1812:322). Where the injury was done to a slave owned by several masters, the damages were not apportioned according to their respective shares of ownership, but rather according to their rank. (Inst. 4.4.4., Cooper tr. 1812:320). Justinian's observations reveal a much more complex method of calculating damages than the Twelve Tables. The simple slave/free dichotomy is submerged under a proliferation of ranks and degrees. The wrongdoers "of mean condition" or "low degree" to which he refers would have included free men, since slaves could not be party to a civil action. (See e.g. Buckland 1908:). The calculation of damages requires weighing not only the station of the victim but also that of the wrongdoer. An injury directed upward (defendant of low rank, plaintiff of high rank) brought a larger recovery than one directed downward. The scale of penalties was regressive; that is, recovery was more or less inversely proportional to ability to pay.

*2.15. Choice of forum. The extent to which the private action for iniuria was preferred over the criminal action, when the latter was available, is not well known; scholars dispute even whether the private action could be had as a supplement to the criminal, or only in the alternative. (See e.g. Watson

1965:246.) These distinctions were not as clean-cut as they are today. Thus certain private persons (the illustrious ones, "who are above others," as Justinian says), had the right to conduct criminal prosecutions through private procurators in their employ, at least under the constitution of Zeno. (Inst. 4.4.10). In the later empire, private landlords "acquired powers of jurisdiction" over their nominally free cultivators heedless of the imperial law. (Jolowicz 1967:455). Even earlier on, the distinction between delict and crime was by no means hard and fast. (Mommsen 1899:1011). One constant element determining an injured party's choice of forum, in any case, would be the assets of the wrongdoer. Professor de Zulueta, among others, has pointed out in regard to the delict of theft (furtum) that the criminal action was much more frequently used than the private, because common thieves had no assets from which recovery could be had. (De Zulueta II:199). This would have been true by analogy for the other delicts as well.

A related question for the Roman plaintiff was whether to initiate suit at all. Larger perhaps than the cost factor was the risk of suffering loss of dignity and reputation in the litigation process. Roman litigation permitted the most vituperative ad hominem attacks on the parties, even in ordinary civil cases. "For the reputable Roman it must have been mortifying to . . . have to submit to abuse by his opponent's counsel and to the malicious interest of spectators." (Kelly 1976:101). Although both defendant and plaintiff faced the exposure, the weight of approbation would lie more heavily on the party initiating the suit.

*2.2 Action for Negligence

*2.11 Summary. The Roman action for negligent damage to property was founded in the lex Aquilia. This law replaced the fixed damages of the Twelve Tables with variable damages according to formulas. It widened the concept of harm from the specific "broken bone" of the Tables to a generic notion of all damage committed to owned things. Finally, it reduced the variety of possible kinds of property damage to a single denominator, the economic loss caused by the harm to the owner. It provided for recovery in case of negligent as well as intentional harm. It did not provide action for negligent injury to free men. Whether derivative actions based on the lex Aq. provided such remedies is disputed, and improbable.

*2.12. Origin and Content of the Law. The Law of the Twelve Tables contained several penalties for damage to property, e.g. grazing one's animals on another's pasture, felling another's trees or burning another's crops or house. There may have been additional single-purpose property damage laws as well. (Daube 1936:253-4; Lawson 1950:5-6.) The first comprehensive property damage enactment is the lex Aquilia, which is generally assigned to the year 287 B.C., in the same year as the lex Hortensia. (Lawson 1950:4; Von Lubtow 1971:15.) It was a plebiscite, not a leges; i.e. an enactment of the plebeians, not of the patricians, and if it was enacted soon after the lex Hortensia, then it was probably the first plebiscite that was binding, in principle, on the patricians. (See below, Sec.). The text of the law is known only second hand and incompletely. It had three chapters. The first and third dealt with losses due

to property damage, and the second dealt with damages due to fraud by the guarantor (adstipulator) of a loan. The import of the second chapter, and the reasons for its placement between the others, are matters entirely of conjecture. (Lawson 1950:7; Watson 1965:236). Gaius' brief account is the sole source of information on the second chapter. It was already obsolete by his time. (Inst. III.216). Justinian simply says it is not in use (Inst. 4.3.12).

The two surviving chapters treat killing and injury separately. Chapter 1 provides that whosoever shall wrongfully kill another's slave or cattle shall be condemned to pay the owner the highest value thereof "in that year." Chapter 3 covers nonfatal wounds, probably at first only to slaves and animals, but its scope was soon extended. (Daube 1936:253). In Gaius' time, the third chapter covered "all other damage to property," including inanimate things. (Inst. III.217). A thirty-day period is fixed in connection with the assessment of damages. Although the term used for injury, ruptum, is identical to that in the Twelve Tables, this was probably from the beginning read broadly, as covering any kind of physical harm committed. (Gai. Inst. III.217.)

The name of the action brought under either of these two chapters was damnum iniuria datum. (The word damnum, however, is only used in the third chapter of the law, Daube 1936:259). Mommsen gives an etymology of damnum; it meant originally "gift" or "offering," specifically in the sense of the offering made by the wrongdoer to acquit the delict. (Mommsen 1899:13 n.1). However, in its legal significance in connection with the lex A., the term signified the economic loss, if any, suffered by the owner of the damaged property. (Pernice 1867:94; Daube 1936: ;Watson 1965:236 n.2). It has nothing to do with damage to property per se. Where there is damage but no economic loss, there is no Aquilian action. Thus where someone crushes fruit that would otherwise rot, or cuts dead trees that are in need of being cut, or castrates another's slave, increasing his value, the owner cannot invoke the Aquilian law, (Pernice 1867:97-

98) although in the latter case he had other actions (Buckland 1908:37). The term iniuria here has its broad meaning of "wrong." Thus the name of the delict could be read "wrongful infliction of economic loss."

*2.13. Negligence. The wrongful infliction of damage under the lex Aquilia comprised both intentional and negligent acts. "He is deemed to kill wrongfully, by whose malice or negligence the death is caused. There being no other statute which visits damage caused without fault, it follows that a man who, without negligence or malice, but by some accident, causes damage, goes unpunished." (Gai. Inst. III.211). Whether the inclusion of negligence was intended from the start or whether it was read into the law somewhat later, but before Gaius' time, cannot be determined. (Watson 1965:239-241; Lawson 1950:14-15). Scholars disagree whether dolus (bad intention) or culpa (negligence) was the more ancient term. (Pringsheim 1961:305; De Zulueta II:198). The consensus of the authorities, in any case, is that delicts under the Twelve Tables required guilty intention (dolus), while under the Lex Aquilia, either intention or negligence were sufficient for liability. (De Zulueta II:198). Buckland says, in regard to the lex Aquilia, that "The damage must be unlawful, but need not be wilful; negligence was enough. But the negligence must be active; mere omission did not suffice." (Buckland 1921:581). The account that follows treats negligence in only in the context of damages to chattel, where the concept is comparatively simple; its application in the realm of intangible obligations, particularly in testamentary law, presents by comparison "devilish complications." (Hasse 1836:64).

Justinian gives a number of illustrations of the negligence concept. For example, if A is practising his javelin throw and hits the slave of B who is passing by, there is no liability if A is a soldier and is practicing on a normal exercise field; otherwise, he is guilty of negligence. Or if A prunes a tree and

throws off a branch which hits the slave of B, A is negligent if it is by a public road and he has not shouted a warning. Medical malpractice toward slaves is also actionable as negligence; for example, if a doctor begins treatment of the slave of B, but then abandons it and thereby causes the slave's death, he is liable to B. (Inst. 4.3.4-6.) Failure to perform up to the standard for the occupation is also negligence, thus:

> "If a mule-driver, from want of skill, is unable to manage his mules, and a slave is run over by them, the mule-driver is at fault; and, if he want strength to rein them in, when another man is able to do it, he is then equally culpable; and the same may be said of a rider, who, through want either of strength of skill, is not able to manage his horse." (Inst. 4.3.8, tr. Cooper 1812:314.)

Thus there is liability for undertaking tasks for which one is unequipped, implying that a reasonable person would not have done so. In negligence as in intent, the Romans proceed by imputing negligence to the actor on the basis of the known events, without regard to subjective testimony. The fault of the actor lies in conducting himself in such a way that he could be held morally accountable. (Hasse 1936:49). The standard is objective; it is the standard of ability, strength, or diligence required by the occupation (e.g. medicine, mule-driving) or the standard of prudence (in ethical matters) of the good paterfamilias. (Hausmaninger 1980:25). But the harm had to be foreseeable; thus where a freak gust of wind fanned a controlled fire into a conflagration, or where nothing could prevent a ship from ramming another, there was no culpa. (Id., 26). The insane and infants are excluded from liability, because incapable of conforming to the standard. (Von Lubtow 1971:85).

If a wrongdoer (or successive ones) first wounded and then killed the slave or beast, the owner had separate actions under the first and third chapters of the Aquilian law. (Dig. 9.2.31.1; see Von Lubtow 1971:66). If a wrongdoer injured a slave in a manner insulting to the master, the master had actions both for Aquilian damages and for iniuria. (Von Lubtow 1971:80). If the slave was

killed, the owner in Gaius' time had the option of suing for Aquilian damages or initiating a capital criminal prosecution. (Inst. III.213.) In Justinian times he could do both. (Inst. 4.3.11.) If the slave was killed as an insult to the master, the latter had, presumably, all three actions at once.

*2.14. Damages. Whether damages under the Aquilian law are punitive in character is the subject of an old debate. Gaius plainly classes it among penal measures. (Inst. IV.6-9). Justinian, 350 years later, put it among the "mixed" acts, partly penal and partly compensatory (reipersecutory) in nature. (Dig. 4.3.6.19.; see the commentary on the difference in Pernice 1867:119). The weight of authority since then has probably favored Gaius. Grueber summed up the penal elements of the law as follows: (1) noxal surrender, i.e., the master delivered the malfeasant slave or son to the plaintiff for punishment; (2) multiple liability, i.e. each of joint tortfeasors was liable for the full damages and (3) active heritability, i.e. the action was transmissible to the plaintiff's heir, but (quite unlike a reipersecutory action) not to the defendant's, except if the defendant's estate was enriched by the tort. (Grueber 1886:275; Hausmaninger 1980:33). Thus the law was penal "even in the latest stage of its development." (Id. 278).

Punitive characteristics are also evident in the schedule of damages, considered quantitatively. The law looked not to the immediate replacement value of the destroyed or damaged chattel, but, as a minimum, to the total economic impact of the loss on the owner. Sentimental value was not counted. (Dig. 9.2.33.) But the aggrieved owner could obtain several sorts of consequential damages. For example, if the slave had been named heir by A, as a device to transmit A's estate to B, but was killed before B formally invested him, then B could recover from the killer not only the value of the slave but also the value of the inheritance. (Gai. Inst. III.212.) Or, if the slave is one of a pair of

twins, or a member of a troupe of actors or musicians, the depreciation of the set is assessed against the wrongdoer, just as with a team of chariot-horses. (Id.) In all these cases, it is expressly "not only the value of the thing damaged in itself that is assessed," (Id.) but its value to the owner. Moreover, the plaintiff could recover more than its value to him, even from a solo tortfeasor. This is implicit in the time frame within which damages were calculated. As Gaius explains:

> If, for instance, a slave is killed who is lame or one-eyed, but had been free from defect within the year, the measure of the condemnation is his highest value in the year, not his value at the time of his being killed. This means that sometimes an owner recovers more than the loss that has been inflicted on him.

(Inst. III.214). This is for killing. Where there is only injury, there is a thirty day period, but whether this was always treated parallel to the year, as it was by the time of Gaius, (Inst. III.218), or whether it originally had another function, as Daube has conjectured, has not been established. (Daube 1936: 253-56.) What is clear is that the law, along every dimension, calculated damages expansively in favor of the aggrieved proprietor. His actual economic loss was the minimum of his entitlement.

A final punitive element in the schedule of damages was the provision that the plaintiff who denied liability had to pay double in the event the court found against him. (Lawson 1950:11). This is more of a procedural than a substantive penalty, and has no intrinsic connection to this particular law; it could be applied to any action. Ironically, when in late classical times the shift of the capital to Constantinople set the Western realm culturally adrift, the Western jurists gradually forgot or muddled up all the other features of the Aquilian law. It then came stand for nothing more than the rule of double damages for the liable defendant who fails to admit. (Levy 1956:328-335).

In its schedule of damages, in short, as in its structure of liability, the law shows clear penal characteristics. Nevertheless, by comparison with the

talion and the liquidated damages of the Twelve Tables, the Aquilian law shows a development toward the compensatory (or 'reipersecutory') model of damages. For this reason, Justinian's classification of the law as "mixed" still has its defenders. (De Zulueta II:210; Von Lubtow 1971:36.) There is no talion in the Aquilian law, except insofar as talion may be inherent in noxal liability; and the calculation of the remedy takes the value of the loss (to the owner) as one of its factors. Still, this loss is treated as the minimum, not as a limit on recovery, and the law's provisions for multiple liability, passive intransmissibility and double damages also clearly demarcate it from modern, contract-based notions of damages for negligence. Comparison with the Twelve Tables also reveals that the advance in the direction of contract brought with it reduced esteem for the slave. Where the Twelve Tables estimated the value of his broken bone by reference to that of a free man, the Lex Aquilia measures him against the ox and the chariot horse. (Ehrhardt 1951:87; see also the comments attributed to Celsus in Dig. 9.4.2.1.). This diminution appears to reflect the growth of slavery as an institution, from small-scale, patriarchal or quasi-familial circumstances into the large-scale commercial enterprise it became by the second century B.C. (See generally Buckland 1908.) The Aquilian law, as we know it, must have furthered this development. Its surviving features seem tailored primarily for the protection of property in slaves. Insofar as the slaveless and free part of the Roman plebs benefited from the enactment, the gain must have resided mainly in the lost second chapter.

*2.15. Negligent Injury to Free Men. In all the illustrations of Aquilian liability cited above, the injured person is a slave. The slave is run through by a javelin, the slave is hit by a thrown branch, the slave is abandoned by the doctor, trampled by runaway mules, etc. These citations could be easily multiplied beyond reasonable suspicion of interpolation. Rare, however, and

partly disputed, are the texts where negligent injury is done to free persons. The undisputed part first:

The free Roman had an action for negligent injury to himself in three kinds of cases, none of them within the Aquilian law. The first case was if the free man was on a street, and was injured by refuse or wastewater thrown from a house ("De his qui dejecerint vel effuderint"). (Lawson 1950:22). He recovered a fixed sum, 50 solidi, from the principal occupant of the house. This action could be brought not only by the free man in person, for injuries, but also, if he was killed, by an heir. (Watson 1965:269). The second case, actio de feris, gave him a recovery of 2000 sesterces if someone kept wild beasts without authorization, and carelessly allowed them to maim or kill him. (Mommsen 1899:836). The last was a very early action providing consequential recovery against the owner of a rabid dog that bit him, or any other domestic animal that injured him while acting contrary to its nature (actio de pauperies). (Buckland 1921:598; Watson 1965:266-69; Hausmaninger 1980:32). Speaking of the latter, Justinian makes a point of saying that "an action can be brought on this statute on account of free persons also." But the compensation was consequential only, in that the injury (disfigurement) was not to be taken into account, "for no valuation can be made of a free man's body," but he could recover medical costs and lost employment due to disability. (Dig. 9.1.3.pr.)

The features of the refuse-and-wastewater action are exceptional not only in that damages are assessed for negligent injury to a free man, but even more so because the heir is permitted to recover. The Roman principle that no man can transmit an action which he could not himself have brought is here broken through. (Watson 1965:269; see above, Sec.). The date of this enactment is not known.

As for damages under the lex Aquilia, the texts show really only two cases.

The first involves the apprentice cobbler already mentioned; the other involves prize fighters. They are both from Justinian's Digests, and both are ambigous in import, and of disputed authenticity.

In the ninth book of the Digests, the jurist Ulpian is made to discuss the question whether the Aquilian law or the delict of iniuria or some other enactment covers certain cases. The jurist Julian is made to recount the case of a cobbler who struck his apprentice with a rod to chastise him for making a mistake, and put his eye out. It is stipulated that the cobbler did not intend to harm the apprentice, but only to correct and improve him; iniuria therefore did not lie. The apprentice was a freeborn filiusfamilias, not a slave, but in his father's power. The question is: does the Aquilian action lie, or the actio ex locato -- a law of contract relative to hired tutors. (See Jolowicz 1962:175 n. 6). Julian is made to say, in the quasi-dialogue format of the Digests, that "I have no doubt that he (the father) has an action under the lex Aquilia." (Dig. 9.2.5.) His respondent answers, in seeming agreement, that "excessive severity in a teacher is counted as negligence." Julian is made to conclude that "the father will recover his prospective loss of profit from the son's services through the eye being destroyed, and the expenses incurred in medical attendance." (9.2.7.pr.).

This case involves several important issues, and has been very heavily commented. (See the references in Pringsheim 1962:1 and in Valino 1973: 99 n. 146, 100 n. 147.) Only a narrow ray of that controversy is of interest here. A number of modern scholars consider the sentence "I do not doubt..." as a Justinian fabrication. Thus Pringsheim (1961:7) and Von Lubtow (1971:118) brand it as a flagrant interpolation, and claim that the weight of scholarly opinion is on their side. The real reference is to the actio locati, and this is shown by comparison of parallel manuscripts. Pringsheim, along with Macqueron, finds support, or at least no contradiction, in a recently discovered manuscript

fragment written in Greek, in Egypt, in the 4th century, i.e. a century before Justinian, which contains as a marginal insertion a barely decipherable parallel reference to the text in question. Pringsheim concludes that Justinian's compilers probably based copied this earlier provincial interpolation. (Pringsheim 1961:12-13; Macqueron 1975:321-22).

Even if the text were genuine, however, it would only tend to demonstrate that the Roman paterfamilias had over his son a power analogous to that over a slave. Note that the action under the Aquilian law (if indeed it was given in such a case) is not given to the "free" victim of the injury (here perhaps also barred because of his youth), but to his father, and that the father's interest in the matter derives from loss of profit in the son's services, much as if the son were a mule or horse. The parallel between the father/son relation and the master/slave relation forms one of the great truisms of Roman law. Mommsen already pointed out that the domestic power of the paterfamilias over his descendants is nominally different from that over slaves, but that in law the descendants stand toward the father essentially as unfree persons, even very late in history. (Mommsen 1899:18; accord Lawson 1950:21). It is a considerable exaggeration to cite this passage, as is occasionally done,(see Valino 1973:113,119) to show that "free men" had an action under the Aquilian law for negligently inflicted injuries.

Another passage in which an Aquilian action on behalf of free men seems to be implied is D.9.2.7.4. This deals with prize fights. Here it is said that the Aquilian action lies if one fighter injures another after the other has quit; and this may pertain to free men. The difficulty is that it may also pertain to slaves. The passage is evidently unclear (Lawson 1950:84 note to s. 4). Von Lubtow says it is hopelessly garbled, and is either partly or entirely interpolated. (Von Lubtow 1971:119). No weighty conclusions can be founded on it.

*2.16. The Question of Analogous Actions. The main sources of Roman law were the civil enactments and the edicts of the praetors. The praetors, however, also supplied a class of decisions termed "decretal." These were not based on rules announced in advance, publicly, as were edicts. They were in the nature of private bills. (Macqueron 1975:319). Plaintiffs pleaded them on the principle of analogy from existing law. Such actions were termed "actio utilis" or "in factum" or "de exemplo." (Jolowicz 1967:532). Some of them were well known, and had practically the currency of edict. Thus the praetor commonly gave "utilis" actions extending the Aquilian law to indirect harm or trespass on the case, and to cases of economic loss without damage, as when A releases B's slave and helps him escape. (Id.) Whether there were also other analogous actions which extended the Aquilian law to cover negligently inflicted injury to free men is a topic of scholarly debate.

There is no mention of such actions in Gaius, but there is a single sentence in the Digests on which the theory of such actions mainly rests. In this passage, Ulpian is made to say "A free man has an actio utilis on the Aquilian law on his own account; he has not a direct action, since no one is considered owner of his own limbs." (9.2.13.pr.). The second half of this sentence is so often repeated in various forms and places that it very probably represents a classical theme. (See e.g. Dig. 9.3.1.5 and 1.7.) But the first part is very much disputed. Lawson, Pringsheim, Von Lubtow, and a number of others consider it an interpolation. (Von Lubtow 1971:120; Pringsheim 1969:13; Lawson 1950:92 fn.) Lawson explains his doubts this way:

> It is one of the oddest of the odd things in Roman law that the freeman's action for personal injury negligently inflicted, one of the commonest of all actions in the modern world, should be mentioned only here. . . . It is useless to say that such injuries seldom occurred, for the Digest has much to say about similar injuries to slaves. The action certainly existed in the time of Justinian or this passage would not be here. One is tempted to agree with De Medio, [citation omitted], who thinks that Ulpian refused both actions and that the present passage has been altered by the compilers.

> This would explain the uniqueness of the passage. It was natural for Ulpian to give his negative decision only once, and, that being so, the compilers would find only one passage to alter. There was no corresponding passage in the Institutes of Gaius and so the freeman's remedy is not mentioned in the Institutes of Justinian.

(Lawson 1950:92 fn.) The passage is a slim reed from which to hang a historical hypothesis that the praetors gave a free man a remedy for negligent injury in more than the exceptional case. Nevertheless, there are a few who consider the text "substantially classical" (See Valino 1973:97 and works cited there).

The procedure by which such actions could be brought, if at all, is an important question in assaying their reality. Pernice among others pointed by way of hypothesis to the fictitious device by which the praetor allowed peregrines to bring actions with the formula, "if X were a citizen." (Pernice 1867:159; Gaius IV.37; Valino 1973:113). Could a free man, X, get into court by bringing the action with the analogous fictitious formula, "if X were a slave"? This seems unlikely, for, as Buckland points out, "in relation to procedure the incapacity of slaves is strongly accentuated. They could not be in any way concerned in civil proceedings, which must be, from beginning to end, in the name of the master." (Buckland 1908:83). Pringsheim says that this would have repulsed the Roman jurists. (Pringsheim 1962:13) The free man could not bring the action in the name of a slave. He would need a double fiction; he would have to assert that he was a slave, to fit within the Aquilian action, and simultaneously that he was the owner that slave, to get into the courthouse door. He would be pleading that he was the owner of himself as slave. This compound fiction stretches credulity as regards Roman procedure. Furthermore, it flies straight in the face of the maxim by which the Roman jurists barred the free man's remedy for negligence, that "no man is the owner of his own body." (See D.9.2.13.pr., above). Indeed, this motto, which I will examine critically below, might have been invented precisely to bar the sort of double fiction here contemplated. Accordingly, scholars who have considered the problem of the free

man's remedy from the procedural standpoint lend slight credence to the Justinian rendition of the classical law on this point. Thus Daube remarks that we might expect provisions for personal injury to be merged in the Aquilian. "But again it was only in later times that wounding of a free man was looked upon as a damnum." (Daube 1936:254). Nicholas, in a passage already quoted, says "an actio utilis was eventually given, but probably not until the time of Justinian." (Nicholas 1962:222) Watson says that there is "no evidence" that the actions analogous to the Aquilian, and ascribed to Ulpian, were actually being given; the most that could be said is that they might be given in late classical law, but not earlier. (Watson 1965:246). Hausmaninger's recent monograph expresses similar skepticism. (Hausmaninger 1980:32).

*2.3. The Question of Ownership in a Free Man's Body
2.31 Summary
2.32 Taken at Face Value
2.33 Taken Critically

*2.31. Summary. The jurists' justification for barring the free man's remedy for negligence was that "a free man's body has no price." If this is taken at face value as a serious proposition, it produces a series of doctrinal puzzles which have, so far, led to no definite conclusion. It is more productive to treat the maxim critically, and to reject it as a real motivating factor in Roman law.

*2.32. The Thesis Taken at Face Value. Every doctrinal encounter with the question of a free man's action for negligence in the Digests is met with the maxim that "no estimate can be put on the body of a free man," or words to that effect. (E.g. Dig. 9.1.3.pr., 9.2.13.pr., 9.2.23.1., 9.3.1.5, 9.3.1.7.; Ehrhardt also cites Dig. 46.8.8.2 (Labeo); 40.7.9.2. (Sabinus) and others. (Ehrhardt 1951:91 fn. 62).) The same thought is variously expressed by saying that the free man is incapable of being owned, or of having a market value, of having a

price put on him, or of becoming an article of commerce. The maxim applies both to the body as a whole, in case of death, and to the individual limbs, in case of injury.

If taken at face value, as a doctrinal proposition about the relations of property as they affect a free man's body, this maxim quickly raises a number of puzzles. One port of entry into the problem is manumission, the process by which a slave, i.e. a man whose body is owned and has a market price, becomes freed and, by convention, is not owned and has no price. What happened to the master's property interest in the slave's body? Where did it go? Who obtained it? A rare and instructive discussion of this point is Buckland (1908:714). In an appendix to his great work on Roman slavery, Buckland starts by saying that the conception of manumission is a unique one, difficult to express in terms of other relations. Manumission is not conveyance or transfer:

> What was given to the man was not dominium over himself: no man has that. The lex Aquilia gave no action to a man for personal damage, precisely for this reason. It is true that Vangerow holds this text of no force in this connexion; he says that what Ulpian means is that the lex applies only to onwership of things in the ordinary sense, and this does not cover his ownership of himself. But what Ulpian says is that the man has no actio Aquilia, because he is not dominus of his members. That is, his right is not dominium. That it is analogous to ownership is true, but this does not justify Vangerow's inferences. Personal independence is not ownership of one's person. We know that manumission by will is not a legacy. What is conferred is liberty with citizenship. ...

(Id.) This is all very well, but the writer has not confronted the central fact that the man's body, as slave, was not only under the power of his master, but also was owned by him; he was a res, a thing. What happened to that ownership interest? Buckland continues:

> What passes to the man is not what belonged to the master: his liberty and civitas are not subtractions from those of the dominus. There are other cases in which cessio in iure is applied in the same way: the potestas which is acquired by the cessio in iure which is the last step in adoptio is not identical with the right which is destroyed. The cases seem parallel; what is released is something other than what is acquired. ...

(Id., 714-15). This verges on the mystical. The writer again focuses on the

political aspect, the acquisition of civitas, without coming to grips with the underlying question of the master's property right in the slave's body. More eloquent but equally unconvincing is the conclusion:

> Manumission is not transfer of dominium: it is creation of a civis, and release not merely from ownership, but from the capacity of being owned.

(Id., 715). The practical problem with this, as Buckland himself illustrates elsewhere in his work, is that the civis had by no means lost "the capacity of being owned," but might be re-enslaved at any time. So, too, a man born free who had never been owned might become a slave in the future, demonstrating that the "capacity of being owned" was everpresent. After further excursions, Buckland in effect throws up his hands in frustration with the remark that the Romans were by no means "slaves to logic":

> If conveyance, gift of civitas, release from the position of a res are all present to the minds of the framers, and these are by no means slaves to logic, any one of these analogies may be the determining cause of a particular part of the form without entitling us to draw any inferences... as to the real nature of the transaction.

(Id., 716). Thus the "simple" question of property in a free man's body, if taken at face value, leads this learned writer into a deep thicket of cessio in iure tutelae, ususfructus and hereditatis, manumission inter vivos in pontifical times, manumission vindicta, addictio, confessio, iteratio, and so forth, where he struggles in wider and wider circles of conjecture, abutting finally with the question whether a person freed vindicta could be a latin, which is moot because the texts are silent. (Buckland 1908:718).

A more recent approach is that of Jolowicz, who treats the mancipation of "free subordinate members of the family." He does not directly take up the Aquilian maxim, but his discussion -- which partly reproduces the views of another writer -- is relevant to it. When a family dependent was set free, he writes, there

> could be no transference of rights, because the right acquired by the mancipio accipiens (mancipium) was different from that lost (patria potestas

> or manus), but renunciation of his own right by the paterfamilias and a guarantee not to interfere with that asserted by the other party are perfectly conceivable. This argument is also in harmony with what is becoming more and more the common doctrine, i.e. that strictly there was no transference of ownership in early Roman law at all, but that each man's right had to be based upon a unilateral assertion of his own, such as is to be found in the ex iure Quiritium meam esse aio of both mancipatio and in iure cessio."

(Jolowicz 1967:555). So, the paterfamilias "renounces" his rights to the body of the dependent, which included the right to kill it, to place a market value on it, to rent it out and to sell it, and swears not to interfere with these rights if another party asserts them. It is then up to the other party to make a "unilateral assertion of his own." Unilateral renunciation of property rights extinguishes property rights; unilateral assertion creates them again. This reasoning disposes of the problem plaguing Buckland, of tracing the father's remainder through a transfer process. The question arises, however, why every other party can assert the rights renounced by the father, but the accipiens himself is barred from making the assertion in his own behalf? If unilateral assertion is the source of property rights, then the Roman free man should have been in a position, by making a "unilateral assertion of his own," to acquire for himself the 'auto-corporal' rights required for a negligence action. The way in which the form of the process is conceived, whether as bilateral transfer or as double unilateral assertion, explains very little. It merely restates the puzzle in a different -- perhaps more illuminating -- form.

*2.33. The Thesis Taken Critically. Mommsen, who saw the shadow side of Roman law more clearly than others, perhaps because he focused on the penal system rather than on inheritance law, dismissed the Aquilian rationale in a passing remark, as not worthy of serious consideration. "The justification given in the lawbooks for this [lack of a free man's remedy], that there is no equivalent for a human life, is applied also to mere bodily injuries, but it hardly governed ancient jurisprudence." (Mommsen 1899:836). Ehrhardt, too, who studied slavery

and the principle of monetary damages (litis aestimatio), came to the conclusion that the maxim about the pricelessness of the free man's body was puffery, and that "the free Roman had to pay a high price for this arrogance." (Ehrhardt 1951:92 fn. 72.) Among more recent writers, Kelly has taken up a critical line (although unfortunately only to reach the wildly improbable conclusion that the lex Aquilia was a comprehensive general liability statute applying to almost everyone, Kelly 1964:77-81). Kelly writes:

> It is no answer to say: because a free man is extra commercium, he is not an item of property, he has no economic value, his paterfamilias suffers no economic or pecuniary loss through his death. Such an argument fails to touch the realities of the early and middle Republic, in which a free son's status (if he is in potestate) is as absolutely subject as a slave's, in which a son working on his father's farm is as much a valuable economic unit as a labouring slave is, and in which the sale of free sons for money was not unknown.

(Kelly 1964:76). The general theme of the critical approach is that the "pricelessness of the free man" was a threadbare fiction. The reality contradicted this assertion in a number of fundamental points. The main items of the thesis are touched on in what follows.

-- The constituent law, the Twelve Tables, already fixed a monetary payment which would acquit an iniuria, an intentional harm. Thus a free man's broken bone, as we saw above, could be acquitted for 300 asses; lesser injuries for 25. Although this was a penalty, not a compensation, it provided an available precedent for actions for negligence. It would have been merely a matter of setting a schedule of penalties for injuries negligently inflicted, parallel to the schedule for intentional ones. The same result could have been reached by an alternate route. That is, on the Twelve Tables' principle of 300 asses for a broken free bone, 150 for a slave bone, the penalties for negligent infliction of physical injury to a free man could have been simply fixed at twice those given for a slave. Ehrhardt makes this point. (Ehrhardt 1951:87).

-- The Roman system of damages relied on monetary penalties (litis

aestimatio) to an inordinate degree compared to modern law. The Roman jurists had practically no other powers; they could not, for example, compel return of a thing wrongfully taken, grant specific performance of a contract, or order injunctive relief of any kind. Every claim had to be remediable in money, or it could not be brought. (Ehrhardt 1935:37). This principle may have already been established by the Twelve Tables; it was, in any case, very old. (Id., 41). Why did Roman courts routinely assess money penalties for wounds inflicted upon a free man with intent, but suddenly stand as if impotent before the identical injury when it was caused by negligence? The problem could not have been the alleged incommensurability of free limbs and money.

-- If a free man's body has no price, how to explain the sale of free children by their fathers? The Twelve Tables already recognized this institution with a provision that a father who sold his son three times gave him up. That this was done for economic gain is not disputed. (De Zulueta II:41). Mommsen points out that even very late, "no one thought of penalizing such a sale as a deprivation of freedom." (Mommsen 1899:783). And how to explain the fact that children under power, like slaves, were subject to noxal liability? (See e.g. Levy-Bruhl 1947:85). Indeed, how to explain that the basic definition of the more important kind of Roman property, the res mancipi, expressly includes wives, bondsmen and children, who were free at civil law? (Jolowicz 1967:552).

-- The delict of plagium provided penalties for the theft (furtum) of free persons, which was carried on as a commercial enterprise, at least during the turbulent period at the end of the republic. (See Dig. 47.2.14.13, and 38.1; cited by Buckland 1908:677 fn. 2). Mommsen points out that free persons were not only commercially "stolen" and sold, but that state-chartered entrepreneurial societies played the leading role in this business. (Mommsen 1899:780 fn. 8 and 781 fn. 2). The delict of plagium was created in part to control this traffic,

but by no means to stamp it out; the delict applied only to the capital, not the provinces. (Id.) By means of this trade, and by the delict which regulated its abuses, the Roman courts had a ready yardstick for measuring the market value of a free person.

-- A contract was valid by which a free man was sold as a slave, supposedly because of the difficulty of telling them apart. (Buckland 1908:6). Roman law also recognized scores of other ways by which the free man, despite the pricelessness of his body, could be and was seized and sold into slavery; e.g. as penalty exacted by one who caught him as a thief in the act (furtum manifestum), by the state for evasion of the census or evasion of military service (for which the offender was "sold") (Buckland 1908:401). Likewise, the judgment debtor "might ultimately find himself sold into slavery;" (Id., 402); the abandoned child might be enslaved or sold by the finder; as were runaway coloni; children of forbidden unions with barbarians; persons convicted of crime and sentenced to capitis deminutio maxima; and others, all free. Buckland 1908:401-403).

-- The free Roman's priceless members could be chained and thrashed by his creditor in nexum until his debt was paid. (Jolowicz 1967:557). The coloni, who were free men, and who did the bulk of the labor in the countryside during the classical period, could be seized bodily and forcibly returned to their landowner if they left. (Von Lubtow 1955:451). The adscripticii, who were also free men, were subject to corporal punishment, could not alienate their possessions without their lord's permission, and could bring no action against him save in exceptional cases. (Jolowicz 1967:453). Guild artisans , even if they were free, could be forced to occupy their incommensurable limbs in their assigned branches of commerce, and penalized if they left. (Id., 452). The inestimable flesh of other workmen, also free, was branded to prevent their escape. (Id.).

-- The edicts giving actions for negligently thrown refuse and wastewater and for animal injuries, mentioned above, expressly recognized that negligent

injury to a free man could, in practice, be compensated. That the payment was given as a penalty rather than as a price did not alter the case. That it was limited (in the animal case) to costs of medical treatment and lost wages also was not essential. In the case of thrown refuse, the praetor gave a fixed penalty if the victim were killed, and "according to the justice of the case" if he were merely injured. This edict represents a break with the principle that a free man's body cannot be valued, and the Roman jurists, according to Ehrhardt, were expressly aware of it. (Ehrhardt 1951:91).

The conclusion to be drawn is that the maxim about the pricelessness of the free man's limbs had in Roman law a narrow sphere of validity. It did not apply to limbs intentionally injured, nor even in all cases of negligent injury. Nor did it operate to protect him on scores of occasions when others, including his creditors and the officials of his state, measured his body with a knowing eye, affixed a price, and sold him away. The immeasurable value of his limbs did not protect him from being chained, beaten or branded. Indeed, it is doubtful whether the Roman free man ever encountered this juristic phrase in any sphere of life, other than in the event he was run through by a javelin, maltreated by a doctor, or trampled by a chariot horse. Then, and only then, as the courthouse door was barred in his face, would he learn that his membrum ruptum and os fractum were priceless objects extra commercium.

*2.4 Who are the Free Men?
2.41 Summary.
2.42 Who Were the Free Men To Whom the Action was Denied?

*2.41. Summary. In the thesis that Roman law had no action for negligent injury to free men, the most troublesome part is the meaning of "free." A rough estimate yields the result that the average "free man" of ancient Rome was a plebeian and a peasant, who might own a small plot of land, but little else; that

over the course of time he lost that, and his freedom with it; so that in the long run the distinction between slave and free man became obscured.

*2.42. Who were the free men to whom the action was denied? The most difficult part of the problem why Roman law denied an action to free men for negligent injuries is to know who these "free men" were. Roman society, as it presents itself for example in the work of Gaius, and much more so in Justinian, reveals a bewildering variety of statuses, estates, ranks, classes, orders, degrees and peoples of every description. There are nexi, alieni, judicati, persons in mancipio, the incensi, coloni, pelegrini, adscripticii and dozens of others. The simple "slave v. free" distinction lies buried underneath it all, somewhere. Buckland, who spent years sorting out who were slaves, opens his book on Roman slavery with the observation that "No one has defined liberty well." (Buckland 1908:1).

Levy-Bruhl fortunately spares us the necessity of having to engage in a lengthy taxonomy with the following brief question and answer. What were the "free men" -- homines liberi? "They were the plebeians," in contradistinction to patricians. (Levy-Bruhl 1934:85). The patrician element were also "free"; but the term "free men" in aepublican Rome had a more particular reference. It referred to the plebs. To say that "free men" had no action for negligently inflicted injury is to say, in other terms, that plebeians had no such action. With this in mind, we can pose the question of the free man's negligence remedy in its historical framework.

At the time of the Aquilian law, if in fact it was contemporary with the lex Hortensia, the Roman plebs was on the ascendant of a bitter centuries-long struggle for equality with the Roman patriciate. The lex Hortensia, indeed, represented a major achievement for the plebeians; by its terms, the Roman senate, then an exclusively patrician institution, was deprived (at least in principle) of its veto power over the plebeian legislative enactments. (Homo

1962:68,71; Sinnigen 1977:82; Binder 1965:371). This ushered in the "golden age" of the Roman republic (287-214 B.C.), the period when the plebs was at the height of its power. (Homo 1962:133). The plebs then consisted of three main segments. At the top of the plebs was a narrow segment of wealthy land-owning plebeian families, who had gained some limited acceptance by the patricians, and merged with them politically to an extent. In the middle was a numerous stratum of medium and small landowners and peasants, who formed the principal popular base of the republic. Below was a growing mass of free but propertiless and indebted peasants, descendants of the nexi, free citizens at law but dependents, servants or bondsmen in fact. (Homo 127-133). In appearance, there is popular (citizen) sovereignty, but there is a property franchise, and voting is heavily weighted in favor of the nobility and the rich. In practice the coalition of leading plebeian families with patricians largely nullified the power of the popular assemblies and gave to the government a decidedly oligarchic character. (Sinnigen 1977:82). The joint plebs-patrician oligarchy was as conservative as its purely patrician forerunner. (Homo 1962:58-59).

This was, very broadly, the framework within which the Aquilian law was enacted and given its initial stamp. Its first and third chapters, as we have seen, imposed on society the duty to avoid negligent conduct which caused losses to the owners of slaves, cattle and other movables. It provided penalties for breaches of that duty. This enactment is consistent with the conservative, slave- and land-owning character of the regime. The same character also sheds light on the question why there was no general delict of negligent injury to free men. To create such a tort would have meant the imposition on society of a duty to avoid negligent conduct which caused bodily injury to citizens irrespective of their property. It would create a duty of care even toward those who had no property at all. Patricians would be placed under an everyday obligation toward

ragged-trousered plebeians who had no vote. This would have appeared to Roman lawmakers as an idle, dangerous, or lunatic abstraction, entirely contrary to the spirit and practice of their law of obligations generally, and of delict particularly. In its implementation, such a novel obligation would have signified, at least in principle, that the doors of the court would be open to suits brought by penniless plaintiffs against members of the wealthy ruling families every time that a chariot ran down a pedestrian. The plebeian elite, like the old patrician nobility, had nothing to gain, and much to lose, from such an enactment. Moreover, there were formidable procedural obstacles. The right of the plebeians to make enactments binding on the patricians was still of very tender vintage, and was by no means consolidated. Until around the middle of the third century, there were still dual organs of government in every branch, one for each order, and their effective unification was slow work. (Homo 1962:69). Finally, no matter how deeply the plebeians penetrated into the other organs of government and administration, the sources of law throughout remained in the hands of the oligarchy. Jurists were the single most important source of law in republican times. The large majority of these were of the hereditary nobility, and the remainder were from the uppermost strata. (Levy 1967:42-44.) When the praetors became the chief source of law, the grip of the oligarchy tightened further. (Jolowicz 1967:448-449). This was, in sum, a forbidding matrix for any fledgling equivalent of a modern tort of negligence.

Yet, unlikely as was the chance of the Roman plebs to secure the recognition of a principle of negligence on their behalf during the 'golden years' of the republic -- if this occurred to them -- the chances grew incomparably worse thereafter. Livius gives a vivid picture of the misery of the plebs of the late republic; of the encroachment of the patricians on the public lands, the betrayals of demagogues, the harshness of the debt laws with their compulsory labor, etc. (Quoted in Binder 1965: 177-179). With the turn toward empire, the

socio-economic foundation shook and then crumbled beneath the middle class of independent peasant-citizens who made up the solid core of the "free men." Their ranks were decimated in the endless wars of conquest, their labor devalued by the massive import of slaves, their land stolen by the oligarchy. The concentration of property was so rapid that in 104 B.C. the Tribune L. Marcius Philippus declared in the Comitia: "There are not in the city two thousand citizens who own property." (Homo 1962:91). Small farms growing food crops gave way to vast capital-intensive latifundia producing luxury crops. (See, e.g., Von Lubtow 1955:324-333). Agrarian revolts were drowned in blood. The peasants who remained on the land were reduced to quasi-slaves; the remainder drifted into the cities to form a shiftless, rootless urban mass dependent on the public dole. Demagoguery was rife. The last remnants of free institutions were crushed. Tribunes metamorphosed into emperors, and emperors into oriental despots. Servility became the temper of public life. The concept of liberty came to mean a privilege extended conditionally by the generosity of the emperor. (Thus, in a thumbnail, Von Lubtow 1955:333-454.) In short, the boundary between free men and slaves was obliterated, not by the emancipation of the latter, but by the quasi-enslavement of the former. The fiction that the limbs of free men and of slaves were incommensurable became pointless. In the late empire, outside the few seats of academic learning, the jurists who applied the Aquilian law abandoned any attempt to distinguish between slaves and free men. (Levy 1956:330). The courts, as creatures of the absolute monarchy, lost continuity with the thoughtways of republican jurisprudence. (Jolowicz 1967:456). Even the express terms of the Aquilian law became obliterated; all that was remembered was the proviso for double penalties if the liable defendant failed to admit. (Levy 1956:328-335). The law itself, which was constantly before the courts in the early period (Daube 1936:264), fell into disuse. Of the 1,300 cases Justinian's

compilers reported in the Digests, the number that deal with the lex Aquilia is just seven. (Kelly 1976:83).

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*3.0 Conclusion: Why Roman Law Gave No Action for Negligent Injury to Free Men

The conclusion of this paper may now be summed up in a few words. Roman law lacked an equivalent of the modern tort of general negligence for two main reasons. First, the Roman law of delicts remained too deeply committed to punitive and retaliatory concepts of recovery to work out an effective mechanism for compensating interpersonal negligence. Mommsen's remark that "talion for negligence is problematic" is precisely on point. The asymmetry inherent in positing retaliation as a remedy for carelessness could be masked and its effects neutralized so long as the injury was to chattel. But where the injury is directly between persons, particulary individuals from feuding social orders, the incongruity of revenge as a response to negligence leads to insuperable tensions, particularly where the system of litigation entails so much scathing exposure and risk of humiliation for the parties. To achieve a modern system of negligence litigation, the Romans would first have had to let go of talion. It is possible that their retaliatory penchant was rooted in the agrarian condition of the society, so that no significant progress on this count could be expected until the politically active portion of the population, at least, had left the peasant mode of life. But that is conjecture. What is certain, secondly, is that the Roman scheme of obligations, particularly in the area of delict, was predicated on overt inequalities of status, sex, and property. This, too, Mommsen pointed out as an indelible feature of the old civil law. Slavery was fundamental. The structure of penalties, as we have seen, was expressly top-down and regressive. Ritualistic unilateral renunciation and assertion, rather than bilateral consensual contracts, were the rule. The general tort of negligence, with its universal duty of care by all toward all, is a modern juridical construct which

rests on the supposition of a population of juridically free and equal contracting parties. It is as much an anomaly in the context of ancient Rome as a railroad or sewing machine. Even if the free republican peasants had thought to articulate such a concept, which is conceivable, it would have been another matter entirely to put it into law. The main class of prospective beneficiaries of such a novel obligation, the propertiless plebs, counted for next to nothing in the political scheme. The main class of prospective defendants, the 'deep pockets' of Roman society, had a vise grip on the sources of law. In sum, the odds were very much against a general negligence tort in Roman society. The litigation of personal negligence actions, which makes up by far the largest class of business of modern common-law courts, therefore occupied a vanishingly small role in Roman law. The Roman plebeian probably had a difficult enough time obtaining compensation at law for his intentional wounds to worry much about the others. It was already a very great advance that he might obtain damages if someone's rabid dog bit him, or a circus lion, or if a householder emptied a chamberpot on his head. From such humble beginnings our modern actions grew.

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