

## HOW THE ROMANS DID FOR US: ANCIENT ROOTS OF THE TORT OF NEGLIGENCE

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That the tort of negligence is in a mess goes almost without saying; and given its ever increasing dominance within the common law of tort, it follows that the law of tort is in a mess too. Legal historians cannot hope to offer cures for its ills, and they would not presume to enter into the theoretical controversies about the proper scope of the law, be it expressed in terms of economic efficiency or moral values. They may, though, be able to shed some light on how the present state of affairs has come about.

Some degree of messiness is probably inevitable. Since tort, unlike contract or the law of property, is primarily reactive to events that have occurred in the past, and hardly at all concerned with facilitating the orderly regulation of individuals' affairs, there will inevitably arise cases in which a legal remedy seems called for but where none has been provided in the past. The law needs to have the flexibility to respond to these, and hence there is a degree of unavoidable uncertainty on its outer boundaries. However, the modern tort of negligence falls far below an acceptable level in this respect. Not only does it fail to give guidance as to the appropriate result in situations that have not been seen before, but it lacks the precision which would allow the operation of the rules in commonplace situations to be confidently predicted.

The problem is not a new one. If we go back a century and a half, to the infancy of the tort of negligence, the germs of the modern malaise are clearly visible. On the one hand there was a very sharply defined, and ever-increasing, list of duties of care, with little in the way of principle giving shape to the law; on the other, the questions whether the duty had been breached and whether the plaintiff had suffered a recoverable loss were framed in such abstract terms – carelessness, reasonableness, foreseeability, directness – as to lack any tightness of application. In reality the over-precision of duties of care and the over-abstractness of the other elements of the tort were opposite sides of the same coin, both leading to cases being treated essentially on their own particular facts. So, while the modern law has lost the sharpness of definition of duties of care which characterised the law of the middle of the 19<sup>th</sup> century, the practical consequences of this shift are not in themselves significant.

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The purpose of this paper is to look at the way in which the fundamental elements of the common law tort of negligence came about. To a large extent, it is suggested, the framework of ideas was borrowed from the Natural lawyers of the 17<sup>th</sup> and 18<sup>th</sup> centuries, underpinned by principles developed by the Roman lawyers. The story, therefore, is by no means a purely English one. It is, moreover, necessary to go back to pre-Roman legal systems in order to identify exactly what the legacy of Roman law was. It will be argued that the Romans introduced two new elements into the law of tort (in Roman terms, the law of delict): a generalised idea of compensation for loss and a dependence of liability on fault; that the Natural lawyers were responsible for two further features: the crystallisation of fault in terms of the failure to take reasonable care and an analysis of liability in terms of the breach of an antecedent duty to act carefully; and that structural features in the common law system of the forms of action enabled this model to be fitted seamlessly into the fabric of English law.<sup>1</sup>

## I FROM THE *LEX AQUILIA* TO THE MODERN LAW OF TORT

It may be useful to begin by giving a very brief overview of the historical framework of the continental European legal tradition (rooted in Roman law) and the common law tradition.

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1 Given the scope of the paper, I have made no attempt to give comprehensive references to the secondary literature. In general I have confined myself to books and articles in English, referring only sparingly to foreign materials.

A note on primary sources outside the Common Law tradition: the Ancient Near Eastern texts are most conveniently accessible in English in Martha T Roth, *Law Collections from Mesopotamia and Asia Minor* (2<sup>nd</sup> ed, 1997); also useful is the Italian translation, with substantial notes, by Claudio Saporetti: *Antiche Leggi* (1998). For Greek laws known from inscriptions I have largely relied on the editions of Henri van Effenterre and Françoise Rudé, *Nomima* (1994–95) two vols (in French) and Reinhard Koerner, *Inschrifliche Gesetzestexte der Frühen Griechischen Polis* (1993) (in German); for an English translation of the principal texts see Ilias Arnaoutoglou, *Ancient Greek Laws* (1998). Roman legislative material is most conveniently accessed in Michael Crawford (ed), *Roman Statutes* (1996); for the *Institutes* of Gaius I use the edition and translation by Francis de Zulueta (1946); other Roman sources are to be found in the *Corpus Iuris Civilis* of the Emperor Justinian, of which there are many editions. Conventional abbreviations are used for the Roman sources: G = *Institutes* of Gaius, J = *Institutes* of Justinian, D = *Digest* of Justinian.

## A The Roman Tradition

There is little dispute about the main outlines of the history of the core of delictual liability from Roman law to the continental European law codes of the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>2</sup> It begins with the enactment of the *lex Aquilia* ('lex'), probably in the first half of the third century BC.<sup>3</sup> This provided, first, that the person whose slave or animal was wrongfully killed should receive the highest value that the thing had had in the previous year; and secondly, that where property (possibly just slaves and animals) was wrongfully 'burnt, smashed or maimed' the owner should receive 'how much it was worth in the nearest thirty days'.<sup>4</sup> The purpose of the lex was probably to introduce an essentially compensatory measure of damages, in place of the fixed penalties which we know to have existed formerly.<sup>5</sup> However, the incorporation of liability under the lex into the Praetors' Edict (probably in the second century BC) set it in place as the main source of liability for the wrongful causation of loss through the infliction of physical damage to property. By the second century AD at the latest, juristic interpretation had introduced into the lex a principle that a person should be liable only if the loss had been caused by his or her fault (*culpa*) and the lex had begun to be extended by analogy so that its principle potentially encompassed any causation of economic loss whatsoever.

The eclipse of Roman law after the time of the Emperor Justinian allowed a pause for breath, but with its revival towards the end of the 11<sup>th</sup> century, the development continued. At first there was little advance on the law as it was found in Justinian's *Corpus Iuris Civilis*, for the glossators and early commentators were primarily concerned to explicate the written text rather than to build on its foundations. The 16<sup>th</sup> century marked a shift from this: humanist writers, principally in France, began to explore the principles underlying the law, and neo-Scholastic writers, mainly in Spain, began the process of assimilating Roman law, Canon law and Scholastic theology. These two movements flowed together into the work of the Dutchman Hugo Grotius, in whose *De Iure Belli ac Pacis* we first find a statement of a general principle of liability for loss caused by one's fault.

Grotius' work formed the basis of the theorising of the Natural lawyers of the 17<sup>th</sup> and 18<sup>th</sup> centuries – Samuel Pufendorf, Christian Thomasius, Jean Barbeyrac, Christian Wolff – whose ideas passed into the general intellectual currency of the Europe of the Enlightenment. They were picked up by the legal

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2 G Rotondi, 'Dalla Lex Aquilia all'Art 1151 Cod Civ: Ricerche Storico-Dogmatiche' in *Scritti Giuridici* (1922) vol II, 465; F H Lawson and B Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* (1982); Reinhard Zimmermann, *The Law of Obligations* (1990) 952–1049; Bénédicte Winiger, *La Responsabilité Aquilienne en Droit Commun* (2002). For the post-Roman law, there is a huge amount of useful detail in G P Massetto, 'Responsabilità Extracontrattuale: Diritto Intermedio' (1988) *Enciclopedia del Diritto* 1099. See also the contributions in two recent collections: L Vacca (ed), *La Responsabilità Civile da Atto Illecito nella Prospettiva Storico-comparatistica* (1995); and Eltjo J H Schrage (ed), *Negligence: the Comparative Legal History of the Law of Torts* (2001).

3 The traditional date is 287/6 BC. Modern scholarly opinion favours a rather later date, though the arguments for this do not strike me as compelling.

4 Below, n 26.

5 For example, in Table I, 13–15 of the *Twelve Tables* (below, n 23).

codifiers of the 18<sup>th</sup> and 19<sup>th</sup> centuries, forming the basis of the provisions relating to delictual liability in the French *Code Civil* of 1804 and the Austrian *Allgemeine Bürgerliche Gesetzbuch* of 1811, which in their turn provided the model for most (though not all) of the codes of the 19<sup>th</sup> century.

## B The English Common Law

The story in England is rather different, but its outlines are no less well-known.<sup>6</sup> The starting point of the liability for wrongs in the Middle Ages was the writ of trespass, which by the end of the 13<sup>th</sup> century was focused on invasive interferences with land, goods or the person. In the language of the writ, the defendant must have acted forcibly and in breach of the King's peace, though the idea of force was so minimal that we may treat it as a near-fiction, and the idea of the breach of the King's peace had lost practically all of whatever meaning it had once had. From the third quarter of the 14<sup>th</sup> century, there spun off from the action of trespass a variant form which came to be known as trespass on the case, in which the plaintiff outlined the circumstances in which the defendant had allegedly caused loss to him or her, with no requirement that there should have been any force or breach of the King's peace, and asked the court for a remedy. By 1390 trespass on the case was being seen as a form of action in its own right and not simply a variant form of the action of trespass; it was potentially unbounded, and slowly over the course of the next few centuries came to dominate the field which we now think of as the law of tort.

On the face of it, liability in trespass in the Middle Ages was strict; liability in case was more transparently fault-based. Around the beginning of the 18<sup>th</sup> century, for a variety of technical procedural reasons, litigants began to attempt to use case where they might have used trespass. Though some limits were put on their power to choose which form of action to use, in practice there seems to have been a substantial channelling of claims away from trespass and into case. This had the effect of sharpening the focus on fault as the basis of tortious liability. At the same time, the writings of the Natural lawyers, especially Samuel Pufendorf, were beginning to exercise a very strong influence upon English law. What had there appeared as a rule of conduct that one ought to exercise reasonable care not to injure others was taken up in the common law as the rule of law lying at the basis of liability in the action on the case. This crystallised into a tort of negligence towards the middle of the 19<sup>th</sup> century, explained in terms of the causation of loss as a result of the failure to take reasonable care in circumstances where there was a duty to do so.

Through the 19<sup>th</sup> century and well into the 20<sup>th</sup>, the very general principle of liability for the failure to take reasonable care was offset against a highly particularistic approach to duty situations. In truth, the practical operation of the tort of negligence was more dependent on the judicial determination of the precise scope of the duty of care operative in any situation than it was on the evaluative question – decided by the jury – whether reasonable care had been

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6 David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 39–70, 155–201; J H Baker, *An Introduction to English Legal History* (2002) 401–21.

taken. From the 1930s, partly as a result of the general principle of liability enunciated by Lord Atkin in *Donoghue v Stevenson*<sup>7</sup> and partly as a result of the disappearance of the jury in civil trials in England, the particularistic approach to duty situations was superseded by a more or less empty rule that one should take reasonable care to avoid injuring one's neighbour. This generated the all-embracing but largely formless tort of negligence characteristic of common law systems at the start of the 21<sup>st</sup> century.

### C The Shape of the Modern Law

In tracing through the development of the modern tort of negligence from the *lex Aquilia*, attention needs to be paid to four principal elements:

- (a) the generalisation of liability in terms of the causation of loss;
- (b) the framing of the legal rules in such a way as to require an evaluation, typically but not necessarily a moral evaluation, of the defendant's conduct, which we might express in terms of fault or blameworthiness, or of the Latin *culpa*;
- (c) the crystallisation of this evaluative aspect as the failure to take the care that would have been taken by a reasonable person in the circumstances; and
- (d) the analysis of liability not simply in terms of the blameworthy or negligent causation of legally recognised harm, but as the breach of an antecedent duty to take reasonable care not to cause such harm.

Though the story is normally seen as beginning with the Romans, it may be that many of the critical early moves towards the general form of the modern tort of negligence were taken by the Greeks. Moreover, in order to contextualise and understand the (Greco-)Roman innovations, it is necessary to interpret them against the background of the earlier systems of the ancient Near East, as visible principally through the 'codes' of Eshnunna, Hammurabi and the Hittites.

## II COMPENSATION FOR LOSS

The first feature to investigate is the generalisation of the principle of compensation for loss; the move away from particular wrongs expressed in terms of the type of harm caused and/or in terms of the mode of causation of the harm, with fixed penalties for infractions.

### A The Ancient Near East and the Hellenistic World

The most obviously visible feature of the legal texts of the Ancient Near East is the specificity with which wrongs are treated. There is nothing approximating to abstract classification, simply a list of wrongs with appropriate penalties attaching to them. These specific wrongs were dotted around the texts, with no attempt to bring them together as a single category. Sometimes, it is true, there

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7 [1932] AC 562.

are clumps of provisions specifically touching related forms of injurious wrongdoings such as homicide,<sup>8</sup> bringing about miscarriages<sup>9</sup> or causing bodily injuries,<sup>10</sup> but no less commonly they are linked to other provisions dealing with the same subject matter, such as orchards,<sup>11</sup> sales,<sup>12</sup> physicians,<sup>13</sup> or women.<sup>14</sup> It would be wrong to interpret the list of wrongs which we have in any particular system as if it were complete in itself,<sup>15</sup> but in so far as analogical extensions occurred we may suppose that they were held in check by the concrete cases and would not travel too far away from them.

There are no surviving Greek codes remotely as complete as those of Babylon or the Hittite kingdom, but the relatively substantial fragments of the fifth century Cretan codes of Gortyn and Eltynia point to an approach similar to the earlier codes: the listing of specific wrongs, with some clumping of topics related in terms of their subject matter.<sup>16</sup> Individual acts of legislation do nothing to undermine this impression.

Classical Athens, perhaps, marks an advance on this. The law of homicide, for example, was both self-contained and sophisticated,<sup>17</sup> and the specific examples of assaults and insulting behaviour found in the Ancient Near Eastern codes, ranging from mutilation to face-slapping, had been superseded by a general provision covering *hubris*.<sup>18</sup> Most relevant for present purposes, the form of action most commonly attested in the forensic speeches of the orators of the fifth and fourth centuries is the *dikē blabēs*, a claim to compensation for loss wrongfully caused.<sup>19</sup> Opinion is divided over whether this was already a generalised claim, formulated at a sufficiently abstract level to enable it to cover

8 *Hittite Laws* §§ 1–6; see also §§ 43, 44a, 174, all of which deal with homicides too.

9 *Laws of Hammurabi* §§ 209–14; *Middle Assyrian Laws* §§ A50–A53; *Hittite Laws* §§ 17–18.

10 *Laws of Ur-Namma* §§ 18–22; *Laws of Eshnunna* §§ 42–7; *Laws of Hammurabi* §§ 195–206; *Hittite Laws* §§ 7–16.

11 *Laws of Lipit-Ishtar* §§ 7–10; §§ 9 and 10 deal with theft in an orchard and cutting down trees respectively.

12 *Laws of Eshnunna* §§ 39–41; § 40 provides that a person who claims to have bought but who cannot identify the seller should be treated as a thief.

13 *Laws of Hammurabi* §§ 215–23; §§ 218–20 deal with injuries stemming from medical treatment; cf *Laws of X* §§ f–i.

14 *Middle Assyrian Laws* §§ A1–A59; §§ A1–A25 deal with various wrongdoings, §§ A50–A53 with causing miscarriages.

15 Raymond Westbrook, *Studies in Biblical and Cuneiform Law* (1988) 5–6.

16 Effenterre and Rudé, above n 1, vol II, 290–2, 292–8. The inscriptions are generally dated to the fifth century, but the texts may possibly be earlier. See generally Michael Gagarin, *Early Greek Law* (1986) 63–7.

17 Douglas M MacDowell, *The Law in Classical Athens* (1978) 109–22; Douglas M MacDowell, *Athenian Homicide Law* (1963); Michael Gagarin, *Drakon and Early Athenian Homicide Law* (1981); S C Todd, *The Shape of Athenian Law* (1993) 271–6. See further the discussion below n 95 and accompanying text.

18 Quoted by Demosthenes, *Against Meidias* XXI, 47. MacDowell, *Law in Classical Athens*, above n 17, 129–32 provides a useful overview of a complex and controverted topic. For the Ancient Near Eastern laws see Martha T Roth, ‘Ancient Rights and Wrongs: Mesopotamian Legal Traditions and the Laws of Hammurabi’ (1995) 71 *Chicago-Kent Law Review* 13, 24–36.

19 H J Wolff, ‘The ΔΙΚΗ ΒΑΑΒΗΣ in Demosthenes, Or, 55’ (1943) 64 *American Journal of Philology* 316; H Mumenthey, *Zur Geschichte des Begriffs Blabē im Attischen Recht* (1971); MacDowell, *The Law in Classical Athens*, above n 17, 149–53; Robin Osborne, ‘Law in Action in Classical Athens’ (1985) 105 *Journal of Hellenic Studies* 40; Todd, above n 17, 279–82.

any case of wrongful loss whatsoever, or rather a remedy appropriate to the framing of claims for wrongful loss but where the injured party had to point to the commission of some specific wrong in order to succeed in the action. The former seems to demand that we attribute to the Greeks a precocious tendency towards legal abstraction, while the latter necessarily presupposes the existence of a list of specific wrongs that is not otherwise attested.<sup>20</sup> Whatever the truth of the matter, it is clear that the *dikē blabēs* generated the potential to formulate a general principle, and that at a remedial level it had the elasticity to incorporate not simply claims for loss resulting from physical injury or property damage, but also claims for loss of expectation arising from breach of contract and perhaps even claims where the loss could not be expressed in monetary terms at all.<sup>21</sup>

## B Roman Law

In many respects early Roman law resembles these earlier systems. The *Twelve Tables* (circa 450 BC) bears a sufficiently close resemblance to the earlier ‘codes’ that it can be seen as belonging to the same broad tradition; the Romans themselves were perhaps aware of a link, tracing their origins back to a Greek model.<sup>22</sup> The approach to the treatment of wrongs in the *Twelve Tables* is to all intents and purposes identical to that found in the Near East and the Hellenic world. General principles are nowhere to be found, simply a selection of wrongs dotted around the text, each with its own penalty. Personal injuries, for example, are represented by a group of provisions in Table I:

- (13) If he has maimed a part (of a body), unless he settles with him, there is to be talio.
- (14) If he has broken a bone of a free man, 300 (asses), if of a slave, 150 (asses) are to be the penalty.
- (15) If he do (any other) injury [?to another?], 25 (asses) are to be the penalty.<sup>23</sup>

Other wrongs, found elsewhere in the text, include chopping down trees, casting magic spells, pasturing animals on another’s land, cutting another’s crop by night, and arson of buildings or corn.<sup>24</sup> In addition, we should suppose that there will have been other ‘common law’ wrongs, of whose details we have no knowledge.<sup>25</sup>

20 For the former argument, see Mumenthey, above n 19, followed by Todd, above n 17, 279; for the latter, see Wolff, above n 19, 323–4.

21 For example Demosthenes, *Against Meidias* XXI, 25 (property damage), *For Phormio* XXXVI, 20 (failure to repay loan), *Against Boeotus* XXXIX, 40 (using another’s name); see Todd, above n 17, 281–2.

22 Raymond Westbrook, ‘The Nature and Origins of the *Twelve Tables*’ (1988) 105 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 74. The link with Greece is made by Livy, *History of Rome*, III, 31.

23 Michael H Crawford and A D E Lewis, in Crawford (ed), above n 1, vol II, 604–8. Other editions number these provisions as Table VIII, 2–4.

24 Table I, 16, Table VIII, 1, Table VIII, 3, Table VIII, 5, Table VIII, 6 (adopting the numbering of Crawford, above n 1).

25 It is hard to believe, for example, that there were remedies for maiming and breaking slaves’ bones, but not for killing them.

This is the background against which the *lex Aquilia* was enacted. No copy of the original text survives, but quotations by later lawyers enable us to reconstruct the relevant provisions – chapters one and three – more or less reliably:

- (1) If anyone shall have unlawfully killed a male or female slave belonging to another or a four-footed animal, whatever may be the highest value of that in that year, so much money is he to be condemned to give to the owner.
- ...
- (3) If anyone may cause loss to another, insofar as he shall have burnt, smashed or maimed unlawfully, whatever may be the value of that matter in the thirty days next [‘preceding’/‘following’], so much money is he to be condemned to give to the owner.<sup>26</sup>

The specific, casuistic nature of the legislation is unmistakeable. The first chapter deals precisely with the killing – more properly, the forcible killing (*occiderit*) – of slaves and four-footed grazing animals; the third chapter, according to the best interpretation, with their burning, smashing or maiming.<sup>27</sup> No doubt, as occurred in other early legal systems, there was scope for analogical extension – we know that this happened in the case of the third chapter, where the range of ‘maiming’ (*ruperit*) was extended to cover ‘spoiling’ (*corruperit*),<sup>28</sup> and we might suspect that non-forcible killings would have been treated as falling within an extended sense of killing (*occiderit*) in chapter one – but there is as yet no hint of any generalisation of liability. There is no reason why we should be surprised by its limited scope. Indeed, the modern consensus is probably that the *lex* was not concerned with the creation of legal liability where none had existed before, but rather with the alteration of the criteria by which damages for certain specific forms of wrongs were assessed.<sup>29</sup>

By the start of the third century AD, it could be said that the *lex Aquilia* was not simply one source of liability for the wrongful causation of damage to property: rather, according to Ulpian, it had superseded all previous laws on the subject so that there was no longer any need to mention them.<sup>30</sup> It is not clear exactly how the expansion of the *lex Aquilia* came to take place, but three factors seem to have interrelated to bring it about. First was a relocation of the *lex Aquilia*, away from altering the mode of assessment of damages<sup>31</sup> to being the actual source of liability. This would seem to have been the effect of the incorporation of the first and third chapters of the *lex* in the Praetors’ Edict (probably in the second century BC), where they served as the basis of the action

26 J A Crook, in Crawford (ed), above n 1, 723–6.

27 For this interpretation, see David Daube, ‘On the Third Chapter of the *Lex Aquilia*’ (1936) 52 *Law Quarterly Review* 253. A plenitude of other interpretations are possible, in particular that it aimed at the total destruction of objects not covered by ch 1. It does not affect the present argument which view one takes.

28 D 9.2.27.13 (Ulpian).

29 A M Honoré, ‘Linguistic and Social Context of the *Lex Aquilia*’ (1972) 7 *Irish Jurist (New Series)* 138, 147; Zimmermann, above n 2, 961; Bénédicte Winiger, *La Responsabilité Aquilienne Romaine: Damnum Iniuria Datum* (1997) 35.

30 D 9.2.1.pr. The Latin clearly expresses that there had been no formal repeal of the earlier laws, but that they had been overtaken by the *lex Aquilia*.

31 See above n 29 and accompanying text.

for wrongful loss.<sup>32</sup> Secondly, the praetors began to provide remedies (known as *actiones utiles* or *actiones in factum*) outside the narrow confines of the literal interpretation of the *lex*,<sup>33</sup> and, thirdly, from the first century AD, the jurists began to push at the boundaries of these praetorian remedies.

The extension of the first chapter, from killings falling within the word *occiderit*<sup>34</sup> to all modes of bringing about death, was not especially important: it was necessarily bounded by the requirement that the defendant have caused the death of a slave or animal in some way. By contrast, the extension of the third chapter was supremely significant. Its original form had referred to the imposition of liability for loss (*damnum*),<sup>35</sup> but the elasticity inherent in this formulation was held firmly in check by the requirement that there should have been a ‘burning, smashing or maiming’; even when this was extended by the early jurists to cases of ‘spoiling’, it was still necessary that there should have been some sort of physical damage to property.<sup>36</sup> The introduction of the praetorian actions removed the need for this limitation, with the result that liability could extend into any patrimonial loss whatsoever. Already by the beginning of the first century AD it was being said, at least in certain cases, that a person who wrongfully caused property to be lost would be liable to an *actio in factum* even where the property was not damaged in any way: for example, where coins were dropped or knocked into a river or drain,<sup>37</sup> where a misguided joker waved a red rag at a bull with the result that it charged away and disappeared,<sup>38</sup> or where a compassionate person released an animal caught by a hunter in a trap.<sup>39</sup> How far could this go? A group of texts attributed to Ulpian suggest that by the early third century the principle was being applied to allow the recovery of compensation where a member of one’s family had been injured and medical expenses had been incurred as a result.<sup>40</sup> Although the injury itself was not compensatable under the *lex* (since there was no quantifiable property damage) the pecuniary loss suffered as a consequence of the injury may have been; there was not a great deal of difference between wrongfully causing a person to lose a coin and wrongfully causing him to spend it. Nor, we may well think, was there any compelling reason in principle to limit this to loss

32 For the Edict of the Praetors, the register of actions available in Roman private law, see, eg, Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History* (2<sup>nd</sup> ed, 1973), 91–4.

33 P G Stein, ‘School Attitudes in the Law of Delicts’ in *Studi in Onore di Arnaldo Biscardi* (1982) vol II, 281, 287–93.

34 There was no juristic consensus about the precise boundary of *occiderit*: in Ulpian’s treatment of the question (D 9.2.7.1–8, D 9.2.9 and D 9.2.11.pr–5) we can find it depending on whether the killing was brought about by a deliberate act, by violence, or by a direct act. The *Institutes* of Gaius (G 3.219) and Justinian (J 4.3.16) refer only to directness.

35 Fundamental to this interpretation is David Daube, ‘On the Use of the Term *Damnum*’ in *Studi in Onore di Siro Solazzi* (1948) 93.

36 For the interpretive brittleness of ‘spoiling’ (*corruperit*), see Ulpian’s discussion at D 9.2.27.13–28.

37 D 19.5.23 (Alfenus); D 9.2.27.21 (Sabinus).

38 D 47.2.50.4 (Ulpian, citing Labeo).

39 D 41.1.55 (Proculus).

40 D 9.2.7.4, 13.pr. D 9.2.7.pr is sometimes interpreted as showing the same development, but it does not in fact do so (it refers to the damages in a contractual action); D 9.2.52.1, also sometimes relied on, is far too inexplicit to be of value.

consequent upon injuries to the members of one's family and not to that consequent upon injuries to oneself. By the time of Justinian, the generalisation may have been essentially complete: a straightforward reading of *Institutes* 4.3.16 points ineluctably to the conclusion that an *actio in factum* would lie, in the absence of any other remedy, whenever loss had been wrongfully caused, notwithstanding that there had been no damage suffered to any property.

Whatever the scope of Justinian's *actio in factum*, though, it was a residuary remedy. There remained other delicts with their own specific ranges: for example, the *lex Aquilia* itself, and *servi corruptio*<sup>41</sup> (where a slave had been morally corrupted). There was a category of quasi-delict, covering an oddly-bunched set of circumstances: where something was poured or thrown from a house, or something was suspended or placed dangerously by a highway; where a guest's goods 'disappeared' from an inn or ship; or where a judge was guilty of some impropriety in the conduct of an action at law.<sup>42</sup> The misperformance of contracts – an important part of the developed common law tort of negligence – was dealt with primarily by contractual actions. None the less, the apparent generalisation of the *actio in factum* meant that these specific forms were like islands in an unbounded sea of potentially actionable wrongdoing.

### C The European *Ius Commune*

Whatever the degree of generalisation that had been achieved by the time of Justinian's compilation, the texts retained a good deal of the shape of the earlier law. When the study of Roman law revived in the late 11<sup>th</sup> century, the main thrust of its proponents' work was to explain and harmonise the texts as they then stood. As a result, there was no attempt to construct a firm general principle out of the materials that were present in them. Principle-based reasoning was not wholly absent, however; it lay behind the one significant change that took place in the 12<sup>th</sup> and 13<sup>th</sup> centuries, the expansion of liability to financial loss flowing from the death of a free person.<sup>43</sup>

Where fidelity to the Roman texts was not an issue, the general principle could emerge more starkly. It is found, quite explicitly stated, both in the Canon lawyers' *Decretals*<sup>44</sup> and in the 13<sup>th</sup> century Spanish *Siete Partidas*,<sup>45</sup> though in both of these the detailed working out of its operation owed a good deal to the Roman texts on the *lex Aquilia*. As early as the 14<sup>th</sup> century, though, Baldus had alluded to the need to make use of some general principle in order to make sense of the specific cases found in the *Digest*, even if the influence of the specific situations was still strongly felt.<sup>46</sup> A firmer move was made by the 16<sup>th</sup> century

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41 D 11.3.

42 J 4.5.

43 R Feenstra, 'Théories sur la Responsabilité Civile en Cas d'Homicide et en Cas de Lésion Corporelle avant Grotius' in *Fata Iuris Romani* (1974) 323, 328–9.

44 X, 5.36.9: 'If loss is caused by your fault ... you ought to compensate.' On the Canon law, see H Dondorp, 'Crime and Punishment' in Schrage, above n 2, 101.

45 *Siete Partidas*, P 7.15.2, 7–28.

46 Winiger, above n 2, 51. See also J Hallebeek, 'Negligence in Medieval Roman Law' in Schrage, above n 2, 73, 82–5.

French humanist Donellus, who was prepared to bring together analogous situations which would none the less have been treated distinctly by the Romans. The direct actions under the *lex Aquilia* for killing or damaging property were linked with the Romans' *actio servi corruptio*, the claim for damages for the moral corruption of a slave, since they shared the feature that a person's property had been made worse in some way.<sup>47</sup> Thus the cases of knocking coins into the river or freeing slaves and animals were set alongside a collection of essentially procedural remedies, held together by the common feature that one person had been made worse off by another's wrong without any property having been damaged or destroyed.<sup>48</sup> Still, for Donellus each wrong retained its individuality, albeit against the background of an identified general principle, and his commentary on the *lex Aquilia* itself bears little trace of impetus towards a truly general test.<sup>49</sup>

More important, perhaps, were the writings of the Spanish neo-Scholastics, whose achievement was to marry together Scholastic theology and law. As a result they were not constrained by the specificity of the Roman law texts in the way that Bartolus, Baldus and Donellus were. For those who took as their starting point the *Summa Theologica* of Thomas Aquinas rather than the *Corpus Iuris Civilis* of Justinian, there was no necessity for any discussion of specific wrongs. Beginning with the principle that there was an obligation to redress the imbalance when there had been a wrongful causation of loss, the only question that then arose was whether the loss had been caused wrongfully.<sup>50</sup> But those too who approached the matter from a more purely legal standpoint could adopt a similar generalisation, bringing together under the same heading wrongs which would have been treated as distinct entities by the Roman lawyers.<sup>51</sup> Their concern, however, was as much with moral responsibility, liability in conscience, as with civil liability for wrongdoing; some further step was required before their generalisation could take root in the law.

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47 Donellus, *Commentariorum de Jure Civili*, Book 15, chh 26, 27 in *Opera Omnia* (1842) vol IV, cols 231–40.

48 Ibid vol IV, cols 241–52.

49 Donellus, *Commentaria ad Tit D ad Legem Aquiliam* in *Opera Omnia* ibid, vol X, cols 1–18.

50 Martin de Azpilcueta (Navarrus), *Consilia*, Book V, *De Simonia*, Cons C § 2; *De Iniuria et Damno Dato*, Cons IV § 1 (in *Opera Omnia* (1594) vol II(2), 161, 215); Soto, *De Iustitia et Iure* (1556, reprinted 1967–68) vol IV, 6.5; vol IV, 7.3 (but note vol V, where Soto does in fact go through specific wrongs); Lessius, *De Iustitia et Iure* (1618) vol II, 7.5, 6. The root of their views is to be found in Thomas Aquinas, *Summa Theologica*, *Secunda Secundae*, q 62 art 4: 'A man is bound to make restitution according to the loss he has brought upon another.'

51 Molina, *De Delictis*, Disputation 697 in *Opera Omnia* (1615) 53: no principled distinction is made between the situations arising under the *lex Aquilia* and the liability of the defaulting judge, notwithstanding their very different categorisations in Roman law. An additional, and important, legal influence was the *Siete Partidas*, above n 45.

These streams came together in Hugo Grotius.<sup>52</sup> In *De Jure Belli ac Pacis* he identified wrongdoing (*maleficium*) as a source of obligation, proceeding to define it in terms of *culpa*:

By a wrong we here mean any fault, whether of commission or of omission, which is in conflict with what men ought to do, either generally or by reason of a special quality. From such a fault, if damage has been caused, by the law of nature an obligation arises, namely, that the damage should be made good.<sup>53</sup>

This is not just a background principle: every *culpa* whatsoever which causes loss raises an obligation to compensate. Grotius' sources for this general statement are transparently the Spanish neo-Scholastics: his principal references are all to this tradition – Aquinas, Covarruvias, Soto and Lessius<sup>54</sup> – but the step has been taken to translate the principle from the realm of conscience into the realm of law. Admittedly the *De Jure Belli ac Pacis* was concerned with Natural law rather than the positive law of any particular state, but his approach was not so limited: he applied exactly the same analysis in his eminently positivist *Introduction to the Law of Holland*.<sup>55</sup> The Roman texts are not ignored in the *De Jure Belli ac Pacis*, but they are now integrated into the text, and in reality treated simply as illustrations of the operation of the general principle.<sup>56</sup>

Grotius' approach marks the final articulation of the general principle which had almost been reached by the time of Justinian more than a millennium earlier. Grotius may have recognised the obvious difficulty with such an unbounded formulation of the scope of liability, for he went on to hint at the provision of some internal legal structure through the enumeration of those interests the interference with which would be actionable: one's life, one's body, one's limbs, one's reputation, one's honour and one's freedom.<sup>57</sup>

Grotius' most important follower, Samuel Pufendorf, followed very much the same line of generalisation: if one person wrongfully caused loss to another, the victim was entitled to be compensated.<sup>58</sup> As with Grotius' *De Jure Belli ac Pacis*,

52 Feenstra, 'Grotius' Doctrine of Liability for Negligence: its Origin and its Influence in Civil Law Countries until Modern Codifications' in Schrage, above n 2, 129; R Feenstra, 'Das Deliktsrecht bei Grotius, insbesondere der Schadenersatz bei Tötung und Körperverletzung' in R Feenstra and Zimmermann (eds), *Das Römisch-Holländische Recht, Fortschritte des Zivilrechts im 17 und 18 Jahrhundert* (1992) 429. Grotius' central position in the development of a general liability has long been recognised: full reference to the earlier writers can be found in Feenstra's works.

53 Grotius, *De Jure Belli ac Pacis* II, 17.1; for the meaning of *culpa*, see below 497. The best translation, from which quotations are largely taken, is that of Francis W Kelsey, *The Law of War and Peace* (1925) in the *Classics of International Law* series.

54 Feenstra, 'Deliktsrecht', above n 52, 431.

55 Grotius, *Inleidinge tot de Hollandsche Rechtsgeleerdheid* III, 32; the most useful translation is that of R W Lee, *The Jurisprudence of Holland* (1926). On this aspect of the *Inleidinge*, see Feenstra, 'Grotius' Doctrine of Liability for Negligence', above n 52, 134–8.

56 See, eg, Grotius, *De Jure Belli ac Pacis* II, 17.13–15, specifically described as *exempla*.

57 Grotius, *De Jure Belli ac Pacis* II, 17.2.1; there is a similar list in the *Inleidinge*, III, 33.1, adding one's property to the various personal interests enumerated in the *De Jure Belli ac Pacis*. It is highly likely that this list derives from Donellus. See Feenstra, 'Grotius' Doctrine of Liability for Negligence', above n 52, 141.

58 Pufendorf, *De Officio Hominis et Civis* I, 6.2, 4; *De Jure Naturae et Gentium* III, 1.1, 2. The former is edited by James Tully, *On the Duty of Man and Citizen* (1991). The latter was translated by Basil Kennett as *Of the Law of Nature and Nations*; I have used the 4<sup>th</sup> ed (1729), with the notes of Jean Barbeyrac.

this was illustrated by reference to texts drawn from Roman law, but these did nothing to undermine the generality of the principle. However, unlike Grotius, Pufendorf does not hint at any limits to the operation of this principle through a list of protected interests. On the contrary, when he does refer to the interests that may be infringed, his purpose is to stress that the idea of loss should not be narrowly construed.<sup>59</sup> His approach was dangerously open-ended:

[The word damage] implies all Hurt, Spoil, or Diminution of whatsoever is already actually our own; all Interception of what by a perfect and absolute Right we ought to receive, whether such Right be the original Gift of Nature, or whether it be allow'd us by human Institution and Law. And lastly, all Omission or Denial of any Duty, or Performance, which others by a perfect Obligation stand bound to pay us.<sup>60</sup>

## D English Law

The principle vehicle for civil claims arising out of wrongdoing in the Middle Ages was the action of trespass. In its developed form, substantially reached by the end of the 13<sup>th</sup> century, it was based on an invasive interference with land, goods, or the person.<sup>61</sup> There may, perhaps, have been a belief that a person who was injured should be compensated – ‘[i]f a man suffers damage it is right that he should be compensated’<sup>62</sup> – but the operation of any such principle was inevitably held in check by the requirement that an invasive interference be shown.

The action on the case, which emerged in the second half of the 14<sup>th</sup> century, was not so constrained. In principle, it was utterly open-ended, potentially capable of reaching any economically quantifiable loss whatsoever, though there was, perhaps, a reluctance to extend it beyond actual out-of-pocket loss to the loss of expectations.<sup>63</sup> Of greater concern than the nature of the loss was the way in which it was brought about. At first, case was largely limited to two situations: where the loss occurred in the course of performing a contract, and where the loss had been caused indirectly.<sup>64</sup> The latter took various guises: as well as the obvious situation where some cause had intervened between the defendant’s act and the injury, it included the liability of innkeepers for the loss of their guests’ goods, the liability of the keeper of an animal known to be dangerous, and the

59 Pufendorf, *De Officio Hominis et Civis* I, 6.3; *De Iure Naturae et Gentium* III, 1.3.

60 Pufendorf, *De Iure Naturae et Gentium*, above n 58, III, 1.3. Jean Barbeyrac, in his note to this passage, goes even further: ‘It ought also further to be observed, that a Damage or Hurt may be done to the Soul by neglecting to inform the Mind, or regulate the Passions of such as we are obliged to instruct or reform, and much more by leading them on purpose into any Error or Vice from which we ought to restrain them.’

61 Ibbetson, above n 6, 39–43.

62 *Hulle v Orynge* (‘*The Case of Thorns*’) (1466) YB M 6 Edw IV f 7 pl 18 (translated in J H Baker and S F C Milsom, *Sources of English Legal History* (1986) 327) (Littleton J). This was disputed by Yonge Sjt: ‘In cases where a man has *damnum absque iniuria* he shall not have an action; for if there is no wrong it is not right that he should recover damages.’

63 This did occur in the 16<sup>th</sup> century as the action on the case (in its specific manifestation as the action of *assumpsit*) came to allow expectation damages in cases of breach of contract, but this was the exception that proved the rule: it was accompanied by the redefinition of liability in contractual terms, despite the obviously trespassory base of the form of action: Ibbetson, above n 6, 126–35, especially at 131–2.

64 *Ibid* 48–56.

liability of the householder for the escape of fire. Alongside these, by the early 16<sup>th</sup> century a number of specific wrongs had crystallised – nuisance, conversion and defamation – and it had begun to make inroads into the law of contract,<sup>65</sup> while the plea rolls show a whole range of situations in which individuals who thought they had suffered loss tried successfully or unsuccessfully to shift the burden onto someone else. The one effective restriction was that it could not be used when the action of trespass was available. However, around the end of the 17<sup>th</sup> century, for a variety of procedural reasons, litigants began to try to push its boundaries so as to extend it into the domain of trespass.<sup>66</sup> Formal limits were imposed, but only for a brief period from 1794 until the decision in *Williams v Holland* in 1833 did these present any real check on the substantive nature of the claims that could be brought within case.<sup>67</sup>

After *Williams v Holland* any claim based on negligent conduct could be framed within the action on the case.<sup>68</sup> It was here, around the middle of the 19<sup>th</sup> century, that the substantive tort of negligence began to crystallise. That it was case that provided the formal shell of the action is important: right from the start there were no inherent boundaries as to what constituted a recoverable loss. Nor were any provided by the Natural law writers whose works provided the intellectual background to the common law developments. In practice, no doubt, limitations were imposed by the 19<sup>th</sup> century judiciary's manipulations of the duties of care,<sup>69</sup> but there was nothing within the tort itself that necessitated this:<sup>70</sup> especially when coupled with the emulsification of the particulate duties of care into a single generalised duty of care in the middle of the 20<sup>th</sup> century, there was nothing to hold in check any shift in judicial inclinations towards the victims of negligent conduct,<sup>71</sup> nothing to restrain the urge to move from the proposition that a person has suffered loss from the negligence of another to the conclusion that the loss ought to be compensated.

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65 Ibid 95–125.

66 Ibid 156–7.

67 *Day v Edwards* (1794) 5 TR 648; 101 ER 361; *Williams v Holland* (1833) 2 LJCP (NS) 190; 131 ER 848. Ibid 159–63.

68 Technically, the rule was that where the claim was for directly caused negligent injury, the action might be framed either as trespass or as case; where the injury was caused indirectly it had to be framed as case.

69 Below 510.

70 The principal textbooks of the law of torts show a near-cavalier disregard for the question. Those who favoured an expansive approach to the law, Sir Frederick Pollock and Sir Percy Winfield, wrote simply of a general principle of liability for unjustifiably causing 'injury' or 'harm'; the scope of liability was held in check by the requirement that it had been caused unjustifiably rather than by any further definition of 'harm' or 'injury'. The more conservative Sir John Salmond gave no greater definition. There was a requirement of 'damnum'; but what this was was left undefined, subject only to what we would regard as three policy-oriented limitations (the law might disregard *damnum* if there was some counterbalancing public interest; the law might disregard *damnum* if it was trivial or unacceptably difficult to prove; or it might be inexpedient to give a civil remedy rather than, say, a criminal one).

71 As for example in *White v Jones* [1995] 2 AC 207, especially 260, where the disappointed beneficiary was granted an action in negligence against the solicitor who had negligently failed to draw it up before the death of the testator. Without such an action the person who had suffered loss would have been without remedy. See generally Stephen Waddams, *Dimensions of Private Law* (2003) 47–56.

### III FAULT AND LIABILITY

The second feature of the development of negligence liability was the move towards the analysis of civil liability by means of an evaluation of the defendant's conduct. There might be a moral dimension to this, but there need not have been: from at least the 13<sup>th</sup> century it is possible to find approaches which we cannot but regard as policy-oriented. The evaluation might take the form of saying that the defendant had not lived up to some specific standard of conduct, but again it need not have done so: it might merely have involved an assessment that in the circumstances of the case the defendant was to blame.

#### A The Ancient Near East

Notwithstanding the specificity with which wrongs are described in the legal texts of the Ancient Near East, we may draw some general conclusions about the way in which responsibility was conceived. In ordinary situations of causing injury by one's own act, the legal collections point to liability being based primarily on bringing about the result, with no suggestion that any additional element of fault or blameworthiness might be required.<sup>72</sup> Typical are the principal provisions relating to personal injury in the *Laws of Eshnunna*:

- (42) If a man bites the nose of another man and thus cuts it off, he shall weigh and deliver 60 shekels of silver; an eye – 60 shekels; a tooth – 30 shekels; an ear – 30 shekels; a slap to the cheek – he shall weigh and deliver 10 shekels of silver.
- (43) If a man should cut off the finger of another man, he shall weigh and deliver 20 shekels of silver.
- (44) If a man knocks down another man in the street [?] and thereby breaks his hand, he shall weigh and deliver 30 shekels of silver.
- (45) If he should break his foot, he shall weigh and deliver 30 shekels of silver.
- (46) If a man strikes another man and thus breaks his collarbone, he shall weigh and deliver 20 shekels of silver.
- (47) If a man should inflict [?] any other injuries [?] on another man in the course of a fray, he shall weigh and deliver 10 shekels of silver.
- (47A) If a man, in the course of a brawl, should cause the death of another member of the *awilu*-class, he shall weigh and deliver 40 shekels of silver.<sup>73</sup>

The fact that the primary focus of the rules was on the causation of the appropriate harm does not mean that there was no room for gradations of responsibility. The reference to killing in a brawl in § 47A, the only case of

72 See especially Dieter Nörr, 'Zum Schuldgedanken im Altbabylonischen Strafrecht' (1958) 75 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 1, and G Cardascia, 'Le Caractère Volontaire ou Involontaire des Atteintes Corporelles dans les Droits Cunéiformes' in *Studi in Onore di Cesare Sanfilippo* (1985) vol VI, 163.

73 Translation from Roth, above n 1, 65–6; for discussion, see Reuven Yaron, *The Laws of Eshnunna* (1988) 285–91. The provisions of the *Laws of Hammurabi*, §§ 196–208, are very similar in their structure, as are the earlier (and briefer) *Laws of Ur-Namma* §§ 18–23. We have no such clear evidence from early Greece, but the early fifth century Cretan laws of Eltynia seem to take this form: Effenterre and Rudé, above n 1, vol II, 290–3.

homicide expressly dealt with in the text,<sup>74</sup> seems to demand a contrast with cold-blooded killing on the one hand and accidental killing on the other. Such a distinction seems to have been drawn in Hittite law, where there is a gradation between killing deliberately, killing without premeditation in the course of a quarrel, and striking someone in such a way that death (accidentally) results;<sup>75</sup> and in the later version of the text of the Hittite Laws the same trichotomy is carried across into cases of blinding.<sup>76</sup> Similarly in the *Hebrew Covenant Code* the distinction is drawn between premeditated killing and killing on a chance meeting.<sup>77</sup> A generalised approach to this type of case, more sophisticated and more revealing, is found in the *Laws of Hammurabi*. While the normal approach to personal injury in the text is to prescribe retaliation or the payment of a fixed penalty, injuries brought about in the course of a quarrel are treated more leniently:

If a [man] should strike another [man] during a brawl and inflict upon him a wound, that [man] shall swear, 'I did not strike him intentionally (*idû*),' and he shall satisfy the physician (ie pay his fees).<sup>78</sup>

Other texts enable us to bring the sense of *idû* into sharper focus: its principal concern is with the actor's knowledge. The physical act might be done quite deliberately, but in ignorance of some crucial fact;<sup>79</sup> the same language could be used to describe a person walking around 'in a daze', without knowing what he was doing.<sup>80</sup> It is this latter usage that is perhaps closest to that found in the quoted provision: the man who wounded another in hot blood might equally be described as not knowing what he was doing.

In contrast with these situations, whose primary focus is on the bringing about of a result and where gradations of responsibility seem to have been related to the defendant's knowledge or awareness, there is a different strand in which liability is implicitly or explicitly dependent on negligence. Most revealing are the provisions dealing with situations where one person has control over another's property and the property is destroyed, lost or damaged. The paradigm case is the death of a hired ox. The very earliest texts, Sumerian laws dating from around 2000 BC, approach the matter casuistically: where the ox is killed by a lion the

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74 Given the nature of the texts, the omission of other situations is not in itself a matter for surprise: see above n 15. For brawling, see Jonathan R Ziskind, 'When Two Men Fight: Legal Implications of Brawling in the Ancient Near East' (1997) 44 *Revue Internationale des Droits de l'Antiquité* (3rd series) 13–42.

75 *Edict of Telipinu*, § 49 in Roth, above n 1, 237; *Hittite Laws* §§ 1–4, III, 174. See the discussion by Harry A Hoffner, *The Laws of the Hittites* (1997) 165–70, and the same author's more extended treatment in 'On Homicide in Hittite Law' in Gordon D Young et al, *Crossing Boundaries and Linking Horizons: Studies in Honor of Michael C Astour on His 80<sup>th</sup> Birthday* (1997) 293.

76 Hittite Laws V–VII (cf §§ 6–7). Confer also *Middle Assyrian Laws* § A8 (woman crushing a man's testicle or testicles in the course of a quarrel).

77 Holy Bible, *Old Testament*, Exodus xxi 12–13.

78 *Laws of Hammurabi* § 206 in Roth, above n 1, 122.

79 This is clearly the sense of the word in *Laws of Hammurabi* § 227, where a barber who has shaved off a slave's hairlock (the sign of servile status) is able to excuse himself by swearing that he did not act *idû*.

80 *Chicago Assyrian Dictionary*, sub verb '*idû*' (3).

hirer is free from liability, but where it is simply lost the hirer must replace it.<sup>81</sup> Similar casuistic provisions are found in the *Laws of Hammurabi*: the hirer will not be liable if the ox is killed by a lion in open country or if it is struck dead by a god.<sup>82</sup> Here, though, these are accompanied by a more general rule expressly formulated in terms of the hirer's negligence:

If a man rents an ox and causes its death either by negligence or by physical abuse, he shall replace the ox with an ox of comparable value for the owner of the ox.<sup>83</sup>

A near-identical division is found relating to the liability of shepherds: if the animals are killed by a lion or die as a result of an epidemic, the loss is borne by the owner of the animals; but if the animals die from mange attributable to the shepherd's negligence, then it is he or she who is liable.<sup>84</sup> So too with boatmen: a casuistic treatment in the Sumerian texts<sup>85</sup> is superseded in the *Laws of Eshnunna* and *Hammurabi* by a more general principle:

If the boatman is negligent and causes the boat to sink, he shall restore as much as he caused to sink.<sup>86</sup>

If a man gives his boat to a boatman for hire, and the boatman is negligent and causes the boat to sink or become lost, the boatman shall replace the boat for the owner of the boat.<sup>87</sup>

Close attention needs to be paid to these texts and to the idea that lies at their heart, expressed in the Babylonian word *egû* and its derivative forms.<sup>88</sup> The core sense of this is the failure to do what one ought to do, something close to the modern English 'neglect'. Outside the legal corpus, for example, it is used to describe an individual's failure to perform obligations towards a god.<sup>89</sup> But the failure to do one's duty shades into the failure to take due care, just as neglect shades into negligence: we are very close, perhaps astonishingly close, to the classical English usage underlying the tort of negligence.

Though the nature of the evidence does not allow complete precision, it does point to an underlying bipolarity in the attribution of responsibility for harm. Where the harm was caused by the wrongdoer's own act, liability stemmed simply from the causation of the result, with gradations of responsibility

81 *Sumerian Laws Exercise Tablet* §§ 9, 10; *Laws about Rented Oxen* §§ 7, 8. The precise interpretation of the *Sumerian Laws Exercise Tablet* § 10 is uncertain. Roth, above n 1, 44 treats it as dealing simply with the loss of the ox; Saporetti, above n 1, 136, 145 sees it as covering the situation where the ox is lost through the act of another animal.

82 *Laws of Hammurabi* §§ 244, 249. See also *Hittite Laws* § 75 (death by act of God contrasted with attack by wolf).

83 *Laws of Hammurabi* § 245 (translation from Roth, above n 1, 127).

84 *Laws of Hammurabi* §§ 266–7.

85 *Laws of Lipit-Ishtar* § 5; *Sumerian Laws Exercise Tablet* § 3. The same approach is taken in the later *Middle Assyrian Laws*, §§ M1, M2a.

86 *Laws of Eshnunna* § 5 (translation from Roth, above n 1, 60).

87 *Laws of Hammurabi* § 236 (translation from Roth, above n 1, 126); the same generalisation is found in § 237 (boat or cargo lost). See also § 238 (no explicit reference to fault) and § 240 (concrete situation deriving from general principle).

88 There is a useful, if legally reductionist, discussion of the question in G R Driver and J C Miles, *The Babylonian Laws* (1952–95), vol 1, 461–6.

89 *Chicago Assyrian Dictionary*, sub verb 'egû'. So too in the epilogue of the *Laws of Hammurabi* (here adopting the translation of Driver and Miles, above n 88): 'I have not been negligent nor let my arm drop'.

reflecting different states of knowledge on the part of the actor. In other situations liability was based on negligence, or more generally on the failure to carry out one's duty properly.

## B The Hellenistic World

Though the early Greek evidence is far too slender for us to be able to draw any firm conclusions, it is at least consistent with the bipolarity visible in the Near Eastern sources. The fragmentary code from Eltynia in Crete deals with assaults in much the same way as those of Eshnunna and Hammurabi, listing injuries and providing the appropriate penalty for them,<sup>90</sup> and in some cases responsibility is seen to depend on the state of the wrongdoer's knowledge.<sup>91</sup> Indicative of the opposite pole is a Cretan fragment of the early fifth century BC providing that a penalty should be paid by a landowner by whose *ameleia* water was allowed to flow, presumably onto the land of a neighbour<sup>92</sup> (a provision almost identical in substance to rules found in the *Laws of Hammurabi*<sup>93</sup>). Like the Babylonian *egû*, the focal sense of *ameleia* is the neglect of duty (it is the word used by Plato to indicate the failure to perform obligations towards a god), but again it has strong overtones of the failure to take due care. We do not go too far wrong if we follow the modern editors and translate it as 'negligence'.

While we cannot treat Aristotle's philosophical writings as indicative of what the law was, they perhaps give some indication of contemporary ideas of the nature of responsibility. Of central importance for him, explored in the *Nicomachean Ethics*, was the state of the actor's knowledge: a person who acted in a state of ignorance or under a misapprehension was in principle not culpable.<sup>94</sup> This raised difficulties in cases where the defendant was acting in a temper (the sort of case which would have been treated in the *Code of Hammurabi* as a situation of reduced culpability<sup>95</sup>); for Aristotle such acts were to be treated as voluntary.<sup>96</sup> More generally, in the *Eudemian Ethics*, the version of his ethical theory that was best known in the ancient world,<sup>97</sup> he takes the

90 Effenterre and Rudé, above n 1, vol II, 290–3. The same is true of the treatment of sexual offences in the rather less fragmentary *Code of Gortyn*, II, 292–8.

91 Effenterre and Rudé, above n 1, vol I, 342–7 (B, 4–8), 366–70 (B, 6–27). Both are very peripheral to our present concerns, the former dealing with the knowing breach of temple ceremony, the latter with the harbouring of people known to be brigands or pirates. Note might also be made of the threefold division of homicides made by Plato in the idealised system described in his *Laws* (866D–869E, especially at 867B–867C), inserting killings in a state of passion into the normal Athenian division into voluntary (or intentional, or knowing – the Greek is not translatable by a single English concept) and involuntary killings. There are hints of similar thinking in Aristotle, see below n 96), where voluntary acts are subdivided into those which are premeditated and those done in a temper.

92 Effenterre and Rudé, above n 1, vol II, 322. The reference to *ameleia* involves a conjectural reconstruction of the text, but it is generally accepted. Confer Demosthenes, *Against Callicles* LV, 11, a case involving the escape of water: the defendant refers to flooding caused by the *ameleia* of his father's predecessor in title.

93 *Laws of Hammurabi*, §§ 53, 55.

94 Aristotle, *Nicomachean Ethics*, III, 1.13–20 (1110b(19)–1111a(24)).

95 See above n 78.

96 Aristotle, *Nicomachean Ethics*, V, 8.8 (1135b(25)–6)).

97 Anthony Kenny, *Aristotelian Ethics* (1978) 1–49.

position that if a person, as a result of *ameleia*, either does not have knowledge that he or she might or should have had or does not use knowledge that he did have, then he or she is treated as acting with the requisite knowledge and hence as acting voluntarily.<sup>98</sup> The result of this, at least from a theoretical perspective, was that the failure to take due care might be relevant to apparently straightforward situations where the defendant had directly caused the prohibited result.

There is one topic on which we do have a good deal of further information: the law of homicide in classical Athens, a favourite subject of the orators of the fifth and fourth centuries BC.<sup>99</sup> Jurisdictional factors made it essential to distinguish between those homicides which were intentional, those which were unintentional, and those where the accused admitted the killing but argued that he had acted lawfully; these considerations determined which court was appropriate to hear the case.

The first distinction was that between intentional and unintentional killings, originally expressed in terms of premeditation (*pronoia*). In developed law, the difference between the two was that the former were acts done with full knowledge while the latter were acts done under some misapprehension.<sup>100</sup> We may probably see in this a version of the Aristotelian distinction mentioned above.

Second was the distinction between unlawful killings and lawful ones. Although there was no fixed list of lawful excuses, Demosthenes gives a partial one, to which further examples drawn from other sources may be added: killing one's opponent accidentally in the course of a boxing or wrestling bout; killing a person wrongly believed to be an enemy in the course of a battle; killing an exile found in Athenian territory; a doctor unintentionally killing his patient; killing in self-defence or in defence of one's property; parrying the attack of a highwayman; killing a thief caught in the night; killing an adulterer or fornicator caught in the act with a wife, mother, sister or daughter; and perhaps killing a person trying to set up tyranny or to overthrow democracy.<sup>101</sup>

Thirdly, behind this categorisation, it was essential to show that it was *the defendant* who had killed the victim; this led to discussions of causal responsibility. The most important treatment of this is in the *Second Tetralogy* of Antiphon.<sup>102</sup> Youths were practising throwing the javelin, under the instruction of their trainer. One threw his javelin just at the moment that another ran out into

98 Aristotle, *Eudemian Ethics*, II, 9 (1225b). See Robert Heinaman, 'The Eudemian Ethics on Knowledge and Voluntary Action' (1986) 31 *Phronesis* 128, 132–6.

99 From the extensive literature, see especially Douglas M MacDowell, *Athenian Homicide Law in the Age of the Orators* (1963), and Michael Gagarin, *Drakon and Early Athenian Homicide Law* (1981). See too the brief discussion in Todd, above n 17, 271–6. There is good reason to believe that the Greeks' discussions of this were to be very important in the later development of Roman law.

100 See generally W T Loomis, 'The Nature of Premeditation in Athenian Homicide Law' (1972) 92 *Journal of Hellenic Studies* 86.

101 MacDowell, above n 99, 73–9. MacDowell also includes the unintentional killing by a javelin thrower, but the examples cited do not support the classification of this as an excusable killing; the situation is discussed immediately below.

102 See the commentary in Michael Gagarin (ed), *Antiphon: The Speeches* (1997) 144–60.

the field to pick up those that had previously been thrown; the javelin hit him, causing his death, and the person throwing it was prosecuted for unintentional homicide. The issue in the case was whether the killing had been done by the boy who had thrown the javelin or by the victim himself.<sup>103</sup> Central to the defendant's argument is the presupposition that the identity of the killer is to be discerned by seeing which of the two boys was to blame (*aition*) for the death.<sup>104</sup> This is the important point: the defendant is not saying that he killed but that he should be excused because of his lack of blameworthiness; he is saying that his lack of blameworthiness means that he did not kill at all.

### C Roman Law

There is not a lot of evidence about the approach to responsibility found in early Roman law, but such as there is points towards it not having been substantially different from the approach found in other early legal systems. Both in the *Twelve Tables* and in the *lex Aquilia*, liability is expressed in straightforward result-oriented terms. It is easy to suppose that their primary concern was with the deliberate infliction of the relevant harm,<sup>105</sup> but the centrally important feature is that there was no such limitation expressed in the texts themselves. In this respect they parallel exactly the 'codes' of the Ancient Near East and (so far as we can tell) the equivalent Greek provisions. However, again paralleling the earlier systems, there is some evidence, discernible as early as the *Twelve Tables*, of the need to distinguish between superficially similar situations of bringing about loss. Such a distinction is visible in Table VIII, 13, 'If a weapon has escaped his hand rather than he has thrown it, [a ram is to be offered in substitution],'<sup>106</sup> seemingly differentiating between the penalty for deliberate and non-deliberate killings.<sup>106</sup>

As enacted, the *lex Aquilia* imposed liability when killing or damaging had been done *iniuria* (wrongfully). While this represented an advance on the earlier legal systems which had simply defined liability in terms of the bringing about of some result, it was not a huge step.<sup>107</sup> The thrust of the law was still result-oriented, but it was recognised that in certain circumstances the person who did the act might be excused. It was, for example, not unlawful to kill a thief caught

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103 A third possibility, that the responsible party was the master in charge, was also lightly touched upon. Confer Plutarch, *Pericles*, XXXVI, 3 (B Perrin trans, 1916 ed): '[A] certain athlete had hit Epitimus the Pharsalian with a javelin, accidentally, and killed him, and Pericles, Xanthippus said, squandered an entire day discussing with Protagoras whether it was the javelin, or rather the one who hurled it, or the judges of the contests, that "in the strictest sense" ought to be held responsible for the disaster.'

104 Antiphone, *Second Tetralogy*, II, 6, IV, 5–7. The prosecutor, father of the victim, gets close to admitting the same presupposition at III, 6.

105 Crawford and Lewis, above n 23.

106 Ibid. Other editions number this clause Table VIII, 24. It may not be too far-fetched to see an idiomatic parallel with the Hittite 'sins of the hand': cf Hoffner, above n 75, 170.

107 The Romans were not the first to take the step: it was already visible in Greek homicide law. See above n 101 and accompanying text.

in the night;<sup>108</sup> a person who killed a slave in such circumstances would therefore not be liable under the first chapter of the *lex* since he would not have killed ‘wrongfully’. For Gaius, in the middle of the second century AD, this had been transformed into a rule that the act should not have been done deliberately (*dolo*) or in a blameworthy manner (*culpa*):

A person is understood to kill wrongfully when it occurs by his deliberate act or his fault. And loss caused without wrongfulness is not condemned by any other *lex*; hence a person who causes some loss without fault or deliberate intent, but by accident, is not punished.<sup>109</sup>

Gaius was by no means the first jurist to refer to *culpa* as a determinant of liability under the *lex Aquilia*; the same idea is found as early as the first century BC attributed to Quintus Mucius Scaevola and Alfenus Varus,<sup>110</sup> and it continues to feature in juristic writings in the century or so before Gaius.<sup>111</sup> The significant feature to note about Gaius’ text is that for him the analysis was sufficiently deeply embedded that *culpa* (in conjunction with *dolus*) had come wholly to displace *iniuria* as the test of whether or not the person who brought about the harm should be liable under the *lex*.

It is not at all clear how this transformation occurred. Two significant factors may have combined to bring it about. First of all, we know that in some of the early texts *culpa* is being used to break through issues of causal ambiguity in the same way that the equivalent idea was used in the Greek law of homicide.<sup>112</sup> Hence, in D 9.2.11.pr, Ulpian refers to the opinions of the early imperial jurists Mela and Proculus:

Mela writes:

some people were playing ball; one of them hit the ball firmly and it knocked the hand of a barber, with the result that a slave who was being shaved by the barber had his throat cut by the razor being jerked against it. In such a case whichever of them is at fault is liable under the *lex Aquilia*.

Proculus says that the barber is at fault, and clearly it should be imputed to him if he was shaving where games were customarily played or where people frequently passed to and fro; though it has been sensibly said that a person who goes to a barber who has his chair in a dangerous place has only himself to blame.

On the bare facts of the case it is quite impossible to say whether the boy or the barber has caused the death of the slave. Mela does not purport to resolve the problem, but contents himself with saying that the answer to the question is to be found by looking at which of them was to blame; the slightly later Proculus does resolve it, though it is not until Ulpian that we find any reason given why

108 *Twelve Tables*, Table I, 17 in Crawford, above n 1, vol II, 609–612 (numbered as Table VIII, 11 or Table VIII, 12 in other editions). For a similar rule in Greek law, attributed to Solon, see Demosthenes, *Against Timocrates* XXIV, 113.

109 G 3.211. See also D 9.2.5.1 and D 47.10.1.pr, which refer to the *lex Aquilia* as providing a remedy for *damnum ‘culpa’ datum* (loss caused blameworthy).

110 D 9.2.31 (Paul, citing Quintus Mucius); D 9.2.52.1, 4 (Alfenus).

111 See, eg, D 9.2.5.2 (Ulpian, citing Pegasus); D 9.2.29.2 (Proculus); D 9.2.57 (Javolenus, citing Labeo), D 9.2.11.pr (Ulpian citing Mela and Proculus); D 47.10.15.46 (Ulpian citing Labeo).

112 Antiphon, above n 102 and accompanying text.

responsibility should be affixed to one party rather than another. Alfenus Varus (around 50 BC) used the same approach in discussing the question of liability when a shopkeeper injured a thief in a scuffle: unless the injury had been done deliberately by the shopkeeper, the fault (*culpa*) lay with whichever of them had started the fight.<sup>113</sup> So too, perhaps, in an opinion attributed to Quintus Mucius a generation earlier. A pruner lopping off a branch let it fall, killing a slave walking beneath; Mucius is said to have held that the *culpa* might lie with the pruner even if the tree was on private ground.<sup>114</sup> The situation is not in any meaningful way different from the types of case discussed by Antiphon: to identify who has caused the death recourse is had to the whereabouts of fault.

Secondly, by the last century of the Roman Republic, there are texts which show the operation of a duty to take appropriate (or reasonable) care in the context of certain specific relationships, particularly contracts. Ulpian refers to the opinion of Quintus Mucius that the borrower of goods was liable for *culpa*,<sup>115</sup> and according to Alfenus Varus the vendor of a house was required to show *diligentia* before conveyance, and should he fail to do so he was guilty of *culpa*.<sup>116</sup> The rules of contractual liability could be formulated at a basic level in terms of a threefold framework of *dolus*, *culpa* and *casus*: deliberate wrongdoing, blameworthiness and accident. It was precisely this trichotomy that was being applied by Gaius in his analysis of the *lex Aquilia*.<sup>117</sup>

There was, no doubt, a seductive attractiveness in the use of blameworthiness as a general test for liability under the *lex Aquilia*; it may be too that Aristotle's treatment in the *Eudemian Ethics* had some part to play.<sup>118</sup> It was hardly a big step to move from saying that a barber setting up his stall in the forum was liable for the death of the slave he was shaving because it was his fault, rather than that of the boys playing ball, to a statement that a person causing injury was only liable under the *lex* if he was at fault. It may not have been a big step, but it had a crucial effect in transforming the nature of liability. It was not enough simply to show that the defendant had brought about some prohibited result (or, more accurately, brought it about without lawful excuse); it was necessary to show that he was at fault, and that the injury caused was not simply an accident. Hence, in another late-Republican text of Alfenus Varus:

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113 D 9.2.52.1

114 D 9.2.31 (below n 182). See also D 50.17.203 (Pomponius): a person who suffers loss through his own *culpa* is understood not to suffer loss at all.

115 D 13.6.5.3.

116 D 18.6.12.

117 Especially noteworthy is that Gaius refers specifically to both *dolus* and *culpa* as relevant to the *lex Aquilia*. In fact, *dolus* had no part to play: all cases of deliberate wrongdoing inevitably fell within *culpa*. See also D 9.2.30.3 (Paul).

118 See above n 98.

Some people were playing ball; one of them pushed a little slave-boy who was trying to pick up the ball. The slave fell down and broke his leg. It was asked whether the owner of the little slave-boy could bring an action under the *lex Aquilia* against the person whose push had caused him to fall. I answered that he could not, since it appeared to have been done by accident (*casu*) rather than by his fault (*culpa*).<sup>119</sup>

In exactly the same way, it could be said that sailors would be liable for damage caused by their ship, or a rider for injury caused by his horse, if it had been done by their fault.<sup>120</sup>

It was not only in the removal of liability for accidents that the shift of focus towards blameworthiness narrowed down liability. In addition, it meant that persons with diminished mental capacities should be exonerated. A madman could not be liable, it was said, since no blame could attach to a person who was not in his right mind.<sup>121</sup> The same would apply to a very young child who did not know what he or she was doing, though where the damage was done by a rather older child the question of responsibility became more problematic.<sup>122</sup>

Within the framework of the *Institutes* of Gaius, *culpa* totally eclipsed the function of *iniuria*.<sup>123</sup> If it was the case that *iniuria* was interpreted to mean *dolo* or *culpa*, as Gaius says, it followed that if a person killed in self-defence, for example, whether they were liable or not depended solely on the question whether they were to blame. There would be no separate question whether they had acted wrongfully. The *Institutes* of Justinian are not so clear-cut. Here, *iniuria* is explained as meaning acting without right, so that the person who kills a robber will not be liable, provided that the danger could not otherwise have been averted;<sup>124</sup> it is only after this has been said that it is stated that the *lex* only applies where the killer has been at fault.<sup>125</sup> In retaining an independent function for *iniuria*, and not subsuming it within an all-embracing concept of blameworthiness, Justinian is not reverting to a pre-Gaius state of the law, but is rather following a classical line of argument more sophisticated than that found in Gaius' *Institutes*. The example of the non-wrongful killing of the robber is adapted from Ulpian, for example,<sup>126</sup> and the same jurist analyses the case where a person pulls down a house in order to stop a fire spreading as another example of a case where the act was not done wrongfully.<sup>127</sup> In the same way a text of Paul explains the non-liability of a person acting in self defence on the grounds that it is permitted – ie, not unlawful – to use force to protect oneself.<sup>128</sup> Clearly

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119 D 9.2.52.4.

120 D 9.2.29.3, 4 (Ulpian); D 9.2.57 (Javolenus).

121 D 9.2.5.2 (Ulpian, approving Pegasus).

122 Ibid (citing Labeo).

123 G 3.211, above n 109. For the relationship between *culpa* and *iniuria*, see B Beinart, 'The Relationship of *Iniuria* and *Culpa* in the *Lex Aquilia*' in *Studi in Onore di Vincenzo Arangio-Ruiz* (1953) vol I, 279.

124 J 4.3.2.

125 J 4.3.3.

126 D 9.2.5.pr.

127 D 9.2.49.1; D 43.24.7.4; D 47.9.3.7.

128 D 9.2.45.4. As the text stands the point is made even more strongly, seemingly saying that a person who causes loss *culpa* is not liable if the act was done in self-defence; but there are real difficulties with the Latin and in this respect the text may be corrupt.

wrongfulness did retain an independent role in the developed Roman law on the *lex Aquilia*; but equally clearly, as witnessed by Gaius' treatment, there was the potential for it to be blotted out completely by a wide application of the concept of blameworthiness.

The principal aspect of the expanding significance of *culpa* was that attention was shifted away from the act and onto the actor. It was no longer sufficient to look at the causation of harm and its normative context, ie whether the act was permitted by law or not; attention had to be paid to whether the person who did the act was blameworthy, guilty of *culpa*. But *culpa* itself was never tightly defined.<sup>129</sup>

### D The *Ius Commune*

Unsurprisingly, given their reverence for the text of Justinian, the medieval glossators and commentators did not advance significantly beyond Roman law.<sup>130</sup> Canon law may have been slightly more generalised: on the one hand the *Decretals* retained the unfocused catalogue of types of fault,<sup>131</sup> but on the other hand there was no place for an independent requirement of wrongfulness – a person who killed in self-defence was not responsible because he or she was not to blame.<sup>132</sup>

By the time of Grotius in the early 17<sup>th</sup> century, the generalisation of the test of *culpa* was firmly embedded: a wrong could be defined in the simplest terms as a fault, either of commission or omission.<sup>133</sup> As with the generalisation of the loss-condition, there were two independent roots of this: the Protestant humanist tradition, particularly in France, and the writings of the Spanish neo-Scholastics. As far as the humanists are concerned, the generalisation was unquestioned for the leading figures of the second half of the 16<sup>th</sup> century, Cujas, Hotman and Donellus: in the *lex Aquilia*, *iniuria* meant no more and no less than *culpa*.<sup>134</sup> It was no less fundamental for the Neo-Scholastics. This is unsurprising for those whose starting point was the *Summa Theologica* of Thomas Aquinas,<sup>135</sup> but it was just as marked in those more firmly rooted in the legal tradition. For Luis de Molina, the most legally inclined of them, cases that would once have been explained in terms of a lack of wrongfulness (such as killing in the course of a just war) were coming to be explained in terms of a lack of blameworthiness.<sup>136</sup> It

129 G D MacCormack, 'Aquilian *Culpa*' in Alan Watson (ed), *Daube Noster* (1974) 201.

130 Winiger, above n 2, 77.

131 X, 5.36.9, referring to *culpa*, *imperitia* and *negligentia*.

132 *Gl Si culpa ad X*, 5.36.9.

133 Grotius, *De Jure Belli ac Pacis* II, 17.1, quoted above n 53.

134 Cujas, *Opera Omnia* (1658) 480; Hotman, *In Quatuor Institutionum Iuris Civilis Libros Commentarii, ad Inst IV*, 3 in *Opera Omnia* (1599) vol II, col 744C; Donellus, *Commentariorum de Jure Civili*, Book 15, ch 27 s 2 in *Opera Omnia*, above n 47, vol IV, col 235. See Winiger, above n 2, 77–82.

135 *Secunda Secundae*, q 62 art 4. Covarruvias, *De Matrimoniis*, II, 6.8 nos 14, 15, *Relectio I* [2 § 7 no 9] in *Opera Omnia* (1627) vol 1, 172, 431; Soto, above n 50, Lib 4 Quaestio 7 § 3 Arg 1; Lessius, above n 50, vol II, 7.6.

136 Molina, above n 51, Disputation 697 no 4, 54; but cf no 10, 57, where the same case is explained in terms of its lack of wrongfulness. The dominance of *culpa* is implicit in Navarrus, above n 50, Book V, *De Usuris*, Cons IV § 10.

is not difficult to see why these two different schools should simultaneously have come to the same conclusion about the function of fault: common to their approaches was that they were not hidebound by Justinian's texts, and once freed from this it was very easy to take the step to an analysis wholeheartedly based on *culpa*.

Grotius may have been the most important figure in the generalisation of liability for fault, but his position – with significant variations – was virtually axiomatic for all the Natural lawyers who followed in his wake.<sup>137</sup> From here it passed into the common currency of the lawyers of the 18<sup>th</sup> and 19<sup>th</sup> centuries, to take its place in all the major European codifications and their derivatives.

## E England

The law of civil wrongs in medieval England was bipolar, divided between trespass and case.<sup>138</sup> Apparently straightforward situations of liability were dealt with by the action of trespass, whose focus was simply on the causation of some wrong to another; fault had no necessary part to play; but defendants could excuse or justify their acts by raising defences. More complex situations fell within the action on the case; in these, fault of some sort seems to have always been necessary.

### 1 *The Action of Trespass*

By the 14<sup>th</sup> century the writ of trespass was clearly divided into three strands: trespass to land, trespass to the person, and trespass to goods. Common to all of these was the fact that the defendant was alleged to have committed an invasive interference against the victim. As a matter of pleading form it needed to be alleged that the defendant had acted by force of arms in breach of the King's peace, but so little weight was attached to these allegations that they can safely be left on one side as pleading fictions.<sup>139</sup> Liability in trespass was essentially result-oriented:<sup>140</sup> the only allegation of substance that had to be made and proved was that the defendant had done the act complained of. This does not mean that the defendant was automatically liable, for there was a whole range of defences available to a person who admitted to having done the act but who claimed to have had some lawful excuse. *Prima facie*, if they had done the act complained of they had acted wrongfully; it was for them to justify by showing that in the circumstances of the case they had had a right to act as they did. These defences served to delimit the scope of civil liability for wrongs, determining for example exactly when it was permitted to use force in defence of one's own

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137 For the different nuances in the function of *culpa* in the various writings of the Natural law school, see Ibbetson, 'Harmonisation of the Law of Tort and Delict: A Comparative and Historical Perspective', in R Zimmermann (ed), *Grundstrukturen des Europäischen Deliktsrecht* (2003) 83, 86–93.

138 Above 477.

139 Ibbetson, above n 6, 41.

140 Looking backwards, we would say that it was strict, but this carries too heavy an overtone that it was not based on fault, as if to be fault-based was the norm.

property.<sup>141</sup> In the main, though, they did not go substantially to the heart of the idea of wrongdoing. Their primary focus was not so much on whether the defendant had acted wrongfully as on whether he or she had acted rightfully.

A second, more categorical, line of defence was simply to deny that one had done the act or brought about the result complained of. Such a denial might raise nothing more than a question of identity – Was it me or my twin brother who hit you? – but it might go beyond this. Perhaps there was no dispute that the defendant's fist had come into contact with the claimant's nose, but the defendant might want to argue the claimant had head-butted his fist, that a third party had got hold of his fist and hit the claimant with it, that his hands were flailing about after he had been blown off his feet in a freak gust of wind. All of these would raise the question whether it was the defendant who was the true cause of the injury. In Roman law such issues of causal ambiguity were dealt with by asking where *culpa* lay;<sup>142</sup> English law used essentially the same approach, though the rules of pleading mean that it is not always obvious to the legal historian.<sup>143</sup> Sometimes, though, these causal questions were raised directly on the pleadings, with the language of fault coming into play. An allegation that the defendant's horse had knocked over the claimant could be met by a plea that she had leaped out in an attempt to stop it running away, so that the injuries she had suffered were the result of her own foolishness and fault (*stultitia et defectu*);<sup>144</sup> a claim that a man had stabbed a woman could be met by a plea that she had unexpectedly jumped in front of him, so that her injuries were the result of her own negligence and foolishness and were her own act rather than his (*necligencia, stultitia et facto suo proprio*);<sup>145</sup> an action based on being run over by the defendant's plough could be met with a plea that the victim had grabbed hold of the horse's reins in an attempt to stop the plough, and that she had been hurt by her own fault and act (*in defectum et facto proprio*).<sup>146</sup> Cases where the defence might have been expressed in terms of act of God were perhaps particularly susceptible to reformulation in terms of lack of fault. When a gun just went off in the defendant's hand, for example, it might stretch credulity to say that God had pulled the trigger; by the 17<sup>th</sup> century defendants in such cases

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141 YB 19 Hen VI 31, YB 9 Edw IV 28; *Seaman v Cuppledick* (1614) Ow 150; 74 ER 966; *Wright v Ramscott* (1667) Saund 82; 85 ER 92; *Green v Goddard* (1705?) 2 Salk 641; 91 ER 540.

142 See above n 108 and accompanying text.

143 The question would normally arise behind a general denial, not guilty, and the legal record would normally disclose no more than this. The legal historian with no source beyond the record will rarely be able to penetrate behind these bland words.

144 *Goodson v Walklin* (1376) in Morris S Arnold, *Select Cases of Trespass from the King's Courts 1307–1399* (1985) vol 1 (Selden Society vol 100) 18 pl 2.18. Similarly in *Weaver v Ward* (1616) Hob 134; 80 ER 284 it was said that a person sued for shooting another might raise a defence that the defendant had run in front of him while he was shooting, giving sufficient facts to enable the court to see that the injury was inevitable and that the defendant had committed no negligence to give occasion to the hurt.

145 *Wade v Spragg* (1374) in Arnold, above n 144, 21 pl 2.21.

146 *Ibid* 16 pl 2.16. Similar fault-based language might be used in justificatory defences. A defendant pleading self-defence, for example, might say that the victim had started the fight so that the injury suffered was his own fault or folly: Ibbetson, above n 6, 60.

were focusing on their own lack of (causal) responsibility by stressing that the event which had occurred had done so ‘utterly without his fault’.<sup>147</sup>

## 2 The Action on the Case

The action on the case, by contrast, was inherently fault-based. Leaving aside the specific wrongs which crystallised before the early years of the 16<sup>th</sup> century, it has been seen that it had two main strands, conveniently divided into relationship-based and non-relationship-based claims.<sup>148</sup> Typical of the first strand were claims against bailees who had damaged goods. In *Coggs v Bernard*,<sup>149</sup> for example, the defendant had undertaken to carry and deliver the claimant’s barrels of brandy; in the course of delivery he

so negligently and improvidently managed the said casks of brandy in laying them down in the cellar last mentioned, that for want of the good care of the said William, his servants and agents, one of the same casks of brandy was then and there staved, and a great quantity, to wit, 150 gallons of brandy in the said cask by that means was spilled upon the ground and lost.<sup>150</sup>

Analogous claims against bailees alleging the ‘negligent’ performance of their task can be found as far back as the 14<sup>th</sup> century,<sup>151</sup> and the standard forms found in the printed *Register of Writs* are identical.<sup>152</sup> Exactly the same form of words is found in actions against householders for the escape of fire.<sup>153</sup> Though ‘negligence’ is commonly alleged, it cannot be assumed that the word had the precise meaning that it was to have in the 19<sup>th</sup> and 20<sup>th</sup> centuries; but, accompanied as it commonly is by allegations of improvidence, incautiousness and the like, it is not difficult to get the general gist of it. The second strand, again traceable back to the 14<sup>th</sup> century but only just properly coming into its own at the end of the 17<sup>th</sup>, consisted of cases where there was no antecedent relationship between the parties, but where the defendant’s prima facie lawful behaviour had resulted in loss to another.<sup>154</sup> So, in *Mitchell v Allestry* the claimant alleged that she had been injured as a result of the defendant’s having exercised wild and unruly horses in Lincoln’s Inn Fields ‘improvidently, rashly

147 *Weaver v Ward* (1616) Hob 134; 80 ER 284; cf *Dickinson v Watson* (1682) T Jones 205; 84 ER 128. A very good example of the plea is in R Vidian, *The Exact Pleader* (1684) f 37v: an action against common watermen for the loss of goods was met with a plea that the boat in which the goods were being carried was sunk by a great tempest by the sole act of God and without any fault, negligence or blame (*absque aliquibus defectu, negligencia sive culpa*) on the part of the defendants or their servants.

148 See Ibbetson, above n 6.

149 (1703) 1 Com 133; 92 ER 999; 2 Ld Raym 909; 92 ER 107; 3 Ld Raym 163; 92 ER 622; 1 Salk 26; 91 ER 25; 2 Salk 735; 91 ER 613; 3 Salk 11, 268; 91 ER 660, 817; Holt KB 13, 131, 528; 90 ER 905, 971, 1190.

150 (1703) 3 Ld Raym 163; 92 ER 622.

151 *Lampen v atte Ford* (1320) in Arnold, *Select Cases of Trespass* (1987) vol II (Selden Society vol 103) 416 pl 39.1; *atte Childershouse v Laverock* (1354) *ibid* 417 pl 39.2; *Gardiner v de Burgh* (1382) *ibid* 418 pl 39.4; *Abbot of Forde v Blike* (1387) *ibid* 419 pl 39.5; *Ward v Seman* (1389) *ibid* 420 pl 39.7.

152 *Registrum Omnium Brevium* (1687) ff 105v, 106, 108, 110v.

153 Baker and Milsom, above n 62, 557–61. Typical is *Beaulieu v Finglam* (1401) YB P 2 Hen IV 18.

154 M J Prichard, ‘*Scott v Shepherd* (1773) and the Emergence of the Tort of Negligence’ (Speech delivered at the Selden Society, Old Hall of Lincoln’s Inn, 4 July 1973) (Published by Selden Society, 1976); A K R Kiralfy, *The Action on the Case* (1951) 102–3.

and without due consideration of the unsuitability of the place for the purpose'.<sup>155</sup> In the 18<sup>th</sup> century an analogous form of count became very popular in the context of road accidents: the claimant commonly alleged that the defendant had driven 'improvidently and carelessly' or 'in a negligent and careless manner', as a result of which he or she had been injured.<sup>156</sup>

Many actions in the second strand – unlike those in the first – might easily have been framed in trespass rather than case, but from the end of the 17<sup>th</sup> century the action on the case was becoming a more attractive choice.<sup>157</sup> The increasing popularity of the action on the case in this type of situation meant that more actions were now being brought in which the claimant pointed to the defendant's careless or negligent act as the basis of the claim. There was a shift of focus away from the result-oriented action of trespass towards the fault-oriented action on the case, with the result that fault of some sort came to occupy a dominant position in the law of tort.

### 3 *Roman Law, Natural Law, and the Reorientation of Tortious Liability*

It was in this context that the common law of tort experienced a substantial Romanisation. There were two sources of this: Roman law itself playing on the first strand of the action on the case, and the highly generalised form of liability which had been developed out of the *lex Aquilia* by the Natural lawyers, particularly by Grotius and Pufendorf, playing on the second strand and to a limited extent also on the action of trespass.<sup>158</sup>

So far as the action on the case is concerned the change at this level was not especially significant – liability in case had always been fault-based<sup>159</sup> – but it is noteworthy that in the second half of the 18<sup>th</sup> century we begin to find specific reference to the action on the case for negligence. Probably the first treatment of this is in Sir John Comyns' *Digest* (1762),<sup>160</sup> but it is in Richard Wooddesson's *Lectures on the Law of England* (1792, based on lectures given from 1777) that we find the term being used in something like its modern sense:

Another class of actions on the case is founded on negligence; where the act is generally lawful in itself, but done in an improper place or manner, or without sufficient care, whereby the plaintiff hath sustained damage.<sup>161</sup>

The shift was more significant in trespass, as the courts began to come to grips with the question of the relevance of fault to liability here. As early as 1695 a

155 (1676) 3 Keb 650; 1 Vent 295; 86 ER 190; 2 Lev 172. For the pleadings and a further manuscript report of the decision, see Baker and Milsom, above n 62, 572.

156 J Mallory, *Modern Entries* (4<sup>th</sup> ed, 1791) vol I, 158 (quoted by Prichard, above n 154, 18. The case extracted by Mallory dates from 1732.

157 See Ibbetson, above n 6.

158 On the influence of Natural law in England at this time see Ibbetson, 'Natural Law and Common Law' (2001) 5 *Edinburgh Law Review* 4.

159 More important was the tendency to concretise exactly what was meant by fault: see below n 202 and accompanying text.

160 Comyns, *A Digest of the Laws of England* (1762), *Action upon the Case for Negligence*. This title follows immediately after *Action upon the Case for Misfeasance*; the focus of Comyns' treatment is very clearly liability for omission or neglect.

161 Lecture 49 (2<sup>nd</sup> ed, 1834) III, 110.

link was being made between the defendant's lack of fault (or negligence) and an inevitable accident,<sup>162</sup> but until 1891<sup>163</sup> it remained unclear whether a defendant could avoid liability simply by showing that he or she was not at fault if the injury could not be said to have been caused by an inevitable accident.<sup>164</sup>

## IV FAULT AS NEGLIGENCE

It has been seen that in the Ancient Near East, and probably also in Greece, outside the simple cases where responsibility could be expressed in result-oriented terms, an individual's liability might be dependent on the failure to take the care that was due in the circumstances.<sup>165</sup> While this was not in itself a concrete standard – it does not tell us what any particular circumstance demanded – it was more than a simple evaluative test of blameworthiness. A greater degree of concretisation was found in Roman law, albeit of limited application; this was elaborated upon by the Natural lawyers, and from their writings, together with direct borrowing from Roman law, it entered the common law in the 18<sup>th</sup> century.

### A Roman Law

By the last century of the Roman Republic there are texts which show the operation of a duty to take appropriate (or reasonable) care in the context of certain specific relationships, particularly contracts. According to Alfenus Varus, possibly reporting or commenting on an opinion of his teacher Servius Sulpicius Rufus, the seller of a house might be liable to the buyer if the house was burned down before conveyance: he was required to show *diligentia*,<sup>166</sup> the care that would be taken by an honest and careful man, in looking after the building, and if he failed to do so he was to blame for its damage or destruction.<sup>167</sup> Similarly, Ulpian refers to the opinion of Quintus Mucius that the borrower of goods was liable for *culpa*.<sup>168</sup> The usufructuary, typically the life tenant of land, was required to exercise *diligentia* in her management of the land;<sup>169</sup> and Cicero hints that a tutor was required to exercise the same standard of *diligentia* in

162 *Gibbons v Pepper* (1695) 1 Lord Raymond 38; 91 ER 922 (Darnall Sjt). It was held that such a defence could be raised on the general issue but not specially pleaded: the special plea would have confessed that a battery had been done, and here the defence was that there was no battery in the first place.

163 *Stanley v Powell* [1891] 1 QB 86.

164 See especially *Knapp v Salisbury* (1810) 2 Campbell 500; 170 ER 1231; *Wakeman v Robinson* (1823) 1 Bing 213; 130 ER 86; *Cotterill v Starkey* (1839) 8 C & P 691; 173 ER 676; *Hall v Fearnley* (1842) 3 QB 919; Bac Abr, Trespass I, 3.2.1, 2 (7<sup>th</sup> ed., 1832) 705, 706.

165 Above 490.

166 For the sense of *diligentia* in non-legal usage at the end of the Republic, see the references in P Voci, “*Diligentia*”, “*Custodia*”, “*Culpa*”. *I Dati Fondamentali* (1990) 56 *Studia et Documenta Historiae Iuris* 29, 33–6. As a public virtue it was said by Cicero *De Oratore* (55BC) II, 35.150 to encompass carefulness, mental attention, reflectiveness, vigilance, persistence and labour; as a private virtue, as a characteristic of the good paterfamilias, it was linked with sobriety, vigilance and industriousness (*Pro Caelio* XXXI, 74).

167 D 18.6.12.

168 D 13.6.5.3.

169 D 7.1.65.pr (Pomponius). It is not clear how old this rule is.

administering the affairs of his ward, though there are no legal texts to this effect until around 100 AD.<sup>170</sup> By the time of Gaius it could be said that a person holding property of another might sometimes be liable only if he or she was guilty of deliberate wrongdoing; sometimes liability might arise if he or she failed to satisfy an appropriate standard of reasonable care (typically the care that would be taken by a reasonable person, sometimes the care that was habitually taken in the management of his or her own affairs); only very rarely would there be liability for accident.<sup>171</sup>

In classical law the normal standard of care required of a contracting party was that of the *diligens paterfamilias*, the Roman equivalent of the reasonable person in the common law. There was room for flexibility, though. A contracting party who was gaining no benefit (such as the gratuitous lender of a piece of property) would only be liable for deliberate wrongdoing, or conduct so reckless that it could be treated as deliberate wrongdoing. In some contracts – most clearly the contract of partnership – the parties were required to exercise the same standard of care as they normally showed in their own affairs, so that a deposittee would be relieved from liability for the loss of the property if it was shown that his or her own property had been lost at the same time.<sup>172</sup> It was also always open to the parties to the contract to make an express agreement that a different standard of care should be applied.

This level of concretisation is only found in the law of contract, or more generally where there was some particular relationship between the parties. Within the law of delict there was a strong tendency to treat the matter casuistically, saying simply that on a particular set of facts the actor was or was not to blame.<sup>173</sup> The same usage is found, more revealingly, in the law of quasi-delict, where there was no apparent awkwardness in describing situations of strict liability and then saying that the defendant was liable because *culpa* attached to him or her:<sup>174</sup> it meant little more than that in the circumstances they were responsible. Alongside this in later classical law, especially in texts attributed to Paul, there are attempts to subdivide it into a number of different forms: it includes excessive chastisement by a teacher,<sup>175</sup> playing a dangerous game,<sup>176</sup> failing to foresee what a diligent person would foresee,<sup>177</sup> lack of the necessary strength to do some task<sup>178</sup> and lack of professional skill (*imperitia*).<sup>179</sup> However, no precise definition of *culpa* itself is given anywhere. Nor, unlike in the law of contract, is there any relevant gradation of different levels of *culpa*. At one point

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170 Cicero, *In Verrem Oratio* II, 1.51 § 135. See G D MacCormack, 'Liability of the Tutor in Classical Roman Law' (1970) 5 *Irish Jurist (New Series)* 369.

171 See the examples given by G D MacCormack, '*Culpa*' (1972) 38 *Studia et Documenta Historiae et Iuris* 123, 157–72.

172 D 17.2.72 (Gaius).

173 MacCormack, above n 129.

174 D 9.3.1.4; J 4.5.3.

175 D 9.2.6.

176 D 9.2.10.

177 D 9.2.31. Paul attributes this to Quintus Mucius.

178 D 9.2.8.1 (Gaius).

179 D 9.2.8.1, D 50.17.132 (Gaius).

Ulpian says that liability stems from a very slight degree of blame, *culpa levissima*;<sup>180</sup> though this text was to generate a good deal of heated debate in the 16<sup>th</sup> to 19<sup>th</sup> centuries,<sup>181</sup> he is probably most straightforwardly interpreted as saying that under the *lex Aquilia* there is no differentiation of levels of *culpa*, but that any *culpa* whatsoever suffices to ground responsibility.

One text perhaps disturbs this picture, suggesting that in the late Republic blameworthiness was being given a precise definition, not dissimilar from that used, or coming to be used, in the law of contract:

If a pruner throws down a branch off a tree or a man in a scaffolding kills a passing slave, he is liable only if it falls on to a public place and he failed to call out in order to avoid the accident. But Mucius said that even if it occurred on private land, an action could be brought on the grounds of his fault (*culpa*); he said that it was blameworthy where something that could have been foreseen by a diligent man had not been foreseen or where the warning was given at such a time that the danger could not be avoided.<sup>182</sup>

The text is ascribed to Paul, and there is little reason to see anything wrong either in his use of *culpa* as the touchstone of liability or in his giving some explanation as to why *culpa* was to be found on these particular facts. It is more difficult to accept it at the hands of a jurist like Quintus Mucius, writing around 100 BC, and many scholars have argued that the text has undergone some alteration in the course of transmission.<sup>183</sup> This may be right – there are inelegancies in the Latin syntax which point in the direction of some interference – but there is no necessity to be in too much of a hurry to treat the text as corrupt. It is not utterly improbable that Quintus Mucius might have treated the lack of foresight as a form of *culpa*, or evidence of a lack of *diligentia*, in a contractual context: as has been seen above,<sup>184</sup> he is said to have held that this was the appropriate touchstone for the imposition of liability on the borrower of goods. It is only if we assume that the use of *culpa* to solve the question of liability under the *lex Aquilia* and the characterisation of the lack of foresight as *culpa* were linked together by Quintus Mucius, that any difficulty arises. But there is nothing at all to require us to think this: the syntax of the second sentence of the text clearly separates the reported views of Quintus Mucius into two parts, when it would have been quite easy to run them together as a single train of thought if he had done so himself. That said, we must still conclude that for Paul there was no difficulty in transferring a sense of *culpa* found in the law of contract into the context of the *lex Aquilia*.

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180 D 9.2.44.pr.

181 Ibbetson, 'The Law of Business Rome: Foundations of the Anglo-American Tort of Negligence' [1999] *Current Legal Problems* 74, 100–2, with further references.

182 D 9.2.31.

183 The modern views are collected in Winiger, above n 29, 31 fn 44; for Winiger's own view, preserving the substance of the text as it stands, see Winiger, above n 29, 117–19.

184 See above n 115.

## B The *Ius Commune*

Neither the glossators and commentators nor the medieval Canon lawyers made any attempt to go further than Paul had done in elaborating the notion of *culpa* in the *lex Aquilia*. Bartolus' treatment is especially revealing: in his commentary on the contract of deposit he provided a substantial analysis of the nature of *culpa* and of the various standards of care that might be imposed, whereas his commentary on the *lex Aquilia* is utterly devoid of any reference to *culpa* at all.<sup>185</sup> It might have been different. Around 1200, Hagiotheodoretta, a Byzantine lawyer commenting on the *Basilica* (a 10<sup>th</sup> century version of Justinian's *Corpus Iuris Civilis* in Greek), discussed the case of the barber found in D 9.2.11.pr.<sup>186</sup> He gave two reasons why the barber should have been liable for the death of the slave: it was wrong that the slave's master, who was wholly innocent, should bear the loss; and it was important to deter barbers from this sort of conduct.<sup>187</sup>

By the 16<sup>th</sup> century lawyers were looking to identify the true essence of *culpa* rather than simply giving examples of it. Within the humanist tradition, the Swiss Zasius was at the start of the movement, taking issue with the conventional divisions which had been described and elaborated by Bartolus,<sup>188</sup> and half a century or so later Donellus described the question of the meaning of *culpa* as the greatest source of controversy amongst writers on the *lex Aquilia*.<sup>189</sup> We can, though, discern a gradual shift towards a definition based on that of Quintus Mucius, quoted by Paul in the *Digest*: failing to foresee something which could have been foreseen by a diligent person.<sup>190</sup> Donellus himself gives something like this as his definition of *culpa*, referring to other *Digest* texts simply as examples;<sup>191</sup> and Francis Hotman describes it as failing to avoid something which could and should have been avoided.<sup>192</sup> The same development can be seen in the writings of the neo-Scholastics, most sophisticatedly in the *De Iustitia et Iure* of Leonard Lessius. Noting that the lawyers' interpretation of *culpa* differed from that of theologians (for whom it meant no more than *peccatum*, sin), he defined the sort of *culpa* on which liability to compensate could be grounded as 'the lack of that diligence and circumspection which people in the same position normally show'. Lessius based this proposition on the moral principle that no-one was bound to take greater care not to injure another in the prosecution of his own

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185 Bartolus, *In Primam Digesti Veteris Partem Commentaria, ad D 16.3.32*; note especially no 7, where *culpa* is defined as 'a deviation from that which is good, which could be foreseen by a diligent person'. The only text in D 9.2 dealing with *culpa* on which Bartolus gives any commentary at all is D 9.2.11.pr (the case of the barber (above n 102 and accompanying text)), which he treats exclusively in terms of ambiguous causation.

186 See above n 102 and accompanying text.

187 Hagiotheodoretta, *Schol ad Bas XI, 3*, translated in F H Lawson, *Negligence in the Civil Law* (1950) 180–3.

188 Zasius, *Singularum Responsorium* 1, 2 in *Opera Omnia* (1550) vol V, 32.

189 Donellus, *Commentaria ad Tit D ad Legem Aquiliam* 1, 5 in *Opera Omnia*, above n 47, vol X, col 3.

190 D 9.2.31 (see above n 182).

191 Donellus, *Commentariorum de Jure Civili* Book 15, ch 27 s 2 in *Opera Omnia*, above n 47, vol IV, col 235; *Commentaria ad Tit D ad Legem Aquiliam* 1, 9 in *Opera Omnia*, above n 47, vol X, col. 5.

192 Hotman, above n 134, *ad Inst IV, 3*, col 745; the definition of Quintus Mucius is quoted at col 746.

affairs than people in a similar situation normally did. Moreover, he stressed that so far as the law was concerned this was an objective, external standard: whereas a person who was by nature thoughtless or forgetful would not be liable in conscience, he would be liable in law.<sup>193</sup>

Central to this development was the assimilation of delictual liability to contractual.<sup>194</sup> This was neither a necessary nor an obvious step to take.<sup>195</sup> Though Grotius was to build on the humanist and neo-Scholastic traditions, his original text of the *De Jure Belli ac Pacis* contains very little hint that he was following them in this respect: *culpa* was left substantially undefined. A note to the 1642 edition, though, equating *culpa* to the Greek *ameleia* (whose sense was very close to the failure to take reasonable care),<sup>196</sup> suggests that he was not wholly immune to the assimilation. So too with Pufendorf. Though never quite saying that liability is based on a failure to take the care of a reasonable person (or *diligens paterfamilias*), his framework for the analysis of degrees of responsibility is borrowed directly from the Roman law of contract, and he recognises both that liability stems from a failure to take care and that the degree of care that has to be taken varies according to the circumstances.<sup>197</sup>

### C English Law

It was in the early 18<sup>th</sup> century that English lawyers began to give definition to their standard of care, particularly when dealing with the action on the case. Two different routes can be traced: for relationship cases the principal source was Roman law, for non-relationship cases Natural law thinking played the more significant part.

So far as relationship cases were concerned, the change was heralded by the decision of the Court of King's Bench in *Coggs v Bernard*.<sup>198</sup> The defendant carrier, it was said, had treated the claimant's casks of brandy so negligently and improvidently that 150 gallons of the brandy had been spilled and lost. In the course of his judgment in the case, Holt CJ brought into the common law of bailment the principles which had been developed in Roman law.<sup>199</sup> The standard of care required of the bailee depended on the type of bailment. A depositee was

193 Lessius, above n 50, vol II, 7.6.pr, 1.

194 This is clearly visible, for example, in Zasius's approach, where topics specifically appropriate to delict (for example the liability of lunatics) are treated within a general structure which is a critique of Bartolus' analysis of contractual standards of care (*Singularum Responsorium* I, 2, above n 188). So too Lessius: though his approach is more subtle, he none the less assumes that delictual responsibility fits somewhere into the gradations of contractual standards (*De Iustitia et Iure* vol II, 7.6.pr, 1, above n 50).

195 Christian Thomasius, for example, clearly distinguishes between contractual and non-contractual fault: *Institutiones Iurisprudentiae Divinae* (1730; reprinted 1994) vol II, 5.34, 35.

196 Pufendorf, *De Jure Belli ac Pacis*, above n 58, II, 17.1, note. For the Greek *ameleia*, see above n 98 and accompanying text.

197 Pufendorf, *De Officio Hominis et Civis*, see above n 58, I, 6.9; *De Iure Naturae et Gentium*, see above n 58, III, 1.6.

198 (1703) 1 Com 133; 92 ER 999; 2 Ld Raym 909; 92 ER 107; 3 Ld Raym 163; 92 ER 622; 1 Salk 26; 91 ER 25; 2 Salk 735; 91 ER 613; 3 Salk 11, 268; 91 ER 660, 817; Holt KB 13, 131, 528; 90 ER 905, 971, 1190 (see above n 149). On what follows see in particular P Birks, 'Negligence in the Eighteenth Century Common Law' in Schrage, above n 2, 173, especially at 191–6; Ibbetson, above n 181, 80–4.

199 See above n 115 and accompanying text.

required to exercise the same care that he took in his own affairs; a gratuitous borrower, holding under a contract of *commodatum*, for example, was bound to the strictest care and diligence and liable for the least neglect; and the hirer of goods, holding under a contract of *locatio conductio*, was required to take the care that would be taken by the ‘most diligent father of a family’.<sup>200</sup> *Coggs v Bernard* was not a case in which Roman law was crudely adopted to displace earlier common law rules; it was rather used by Holt CJ to provide a framework within which he could try to make sense of the thicket of prior common law authority. Forty years later *Coggs v Bernard* was cited, together with Jean Domat’s *Civil Law*, in discussing the responsibility of trustees, further strengthening the bonds between English law and Roman law without going quite so far as to treat them as the same.<sup>201</sup> Forty years after that, though, a more substantial assimilation took place in Sir William Jones’ *Essay on the Law of Bailments*.<sup>202</sup> Jones was a polymath, with an extraordinary linguistic grasp and a wide knowledge of different legal systems; he was also a syncretist, more inclined to force different sets of rules into the same framework than to explore the differences between them. Hence, building on *Coggs v Bernard*, he recrafted the common law into a strongly Roman mould.<sup>203</sup> Liability was based on the failure to live up to the standard of care appropriate to the specific relationship in issue: ‘the omission of that care, which even inattentive and thoughtless men never fail to take of their own property’; ‘the want of that diligence which the generality of mankind use in their own concerns; that is of ordinary care’; ‘the omission of that care which very attentive and vigilant persons take of their own goods, or, in other words, of very exact diligence’.<sup>204</sup> Jones’ work was soon being cited in case-law when questions as to the appropriate standard of care arose.<sup>205</sup>

It took rather longer for this degree of definition to be accepted into the non-relationship cases. The general principle to be applied here, fairly clearly borrowed from Natural law – probably from Pufendorf, though we cannot be sure

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200 (1703) 2 Ld Raym 909, 913–16; 92 ER 107, 109–12. Note the quotation from Justinian’s *Institutes* at 915.

201 *Charitable Corporation v Sutton* (1742) 9 Mod 349; 88 ER 500; 2 Atk 400; 26 ER 642. See especially 9 Mod 355; 88 ER 503 (the reference to Domat is to *The Civil Laws in their Natural Order* (1722) II, 3.1, 2); see also, in different contexts: *Knight v Cambridge* (1724) 8 Mod 230; 88 ER 165; *Belchier v Parsons* (1754) 1 Keny 38, 46; 96 ER 908, 911; *R v Corporation of Wells* (1767) 4 Burr 1999, 2007; 98 ER 41, 46; *Russell v Palmer* (1767) 2 Wils 325, 328; 95 ER 837, 839; *Pitt v Yalden* (1767) 4 Burr 2060, 2061; 98 ER 74, 75; *Vallezjo v Wheeler* (1774) Lofft 631; 98 ER 836.

202 Sir William Jones, *Essay on the Law of Bailments* (1781). For Jones’ influence, see Birks, above n 198; Ibbetson, above n 181.

203 More accurately, perhaps, a Romanised mould. His analysis of Roman law was refracted through the commentators of the 16<sup>th</sup> and 17<sup>th</sup> centuries.

204 Jones, above n 202, 5–9. All of this is derived from the standard commentary on Justinian’s *Institutes* by the 17<sup>th</sup> century Dutchman Arnold Vinnius: *Institutionum Imperialium Commentarius, ad Inst III, 15*.

205 See, eg, *Shiells v Blackburne* (1789) 1 H Bl 158, 160; 126 ER 94, 95; *Crook v Wright* (1825) Ry & M 278; 171 ER 1020; *Doorman v Jenkins* (1834) 2 Ad & El 256; 111 ER 99. See also its adoption by Edward Christian in his editions of *Blackstone’s Commentaries* (from the 12<sup>th</sup> ed 1793) vol II, 453. A very good example of the adoption of the standards of care in relation to bailments, though without express reference to Jones, is *Broadwater v Blot* (1817) Holt 547; 171 ER 336.

of this – first appeared in Francis Buller’s *Introduction to the Law of Trials at Nisi Prius* in 1767:

Every man ought to take reasonable care that he does not injure his neighbour; therefore when a man receives hurt thro’ default of another, tho’ the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover damages for the injury so sustained.<sup>206</sup>

Such an approach to liability was very close, though not quite identical, to that found in the relationship cases from *Coggs v Bernard* onwards. By 1837, the non-relationship cases were coming to be explicitly assimilated to those based on relationships: in *Vaughan v Menlove*<sup>207</sup> liability for escape of fire was treated as exactly analogous to liability arising out of a bailment, with liability depending on the failure to observe the standard of care of the reasonable man. This was locked into English law by its elevation to definitional status by Alderson B in *Blyth v Birmingham Waterworks*:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.<sup>208</sup>

There was to be no going back: the English tort of negligence was firmly based on the failure to take reasonable care.

## V THE DUTY OF CARE

The final element in the common law tort of negligence is the duty of care: liability is analysed as depending not simply on the careless causation of loss, but on the existence of an antecedent duty to take care, which duty had been breached by the defendant. The first writer to elevate the duty to take care into a central position was Samuel Pufendorf, and it was largely through him that it came into English law. Once there, it took on a very different hue.

### A Roman Law

The duty to take care had no part to play in the Roman law of delict, apart from the merest hint in the text of Quintus Mucius quoted above.<sup>209</sup> This does not mean that Roman law was oblivious to the idea: it had a central role in the law of contract and in various other situations where there was a relationship between the parties.<sup>210</sup> A usufructuary might be liable for deterioration of the usufructed property: she was required to undertake to look after the property in such a way

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206 Francis Buller, *Introduction to the Law of Trials at Nisi Prius* (1767) 24 (35 of the more common edition of 1768); see also J H Burns and H L A Hart (eds), *Jeremy Bentham: Introduction to the Principles of Morals and Legislation* (1970) 90, 92 (‘person of ordinary prudence’).

207 (1837) 3 Bing NC 468; 132 ER 490.

208 (1856) 11 Ex 781, 784; 156 ER 1047, 1049.

209 See above n 182.

210 Confer W W Buckland, ‘The Duty to Take Care’ (1935) 51 *Law Quarterly Review* 637, 639, making the general point of the irrelevance of the idea to Roman law without reference to its importance outside the law of delict.

as would satisfy the judgment of an impartial arbiter, *virī boni arbitrātū*.<sup>211</sup> A tutor might be liable for inattention to his ward's affairs: he was required to exercise the same care as he showed in his own, *diligentia quā in suis rebus*.<sup>212</sup> More generally, a person holding another's property under a contract might be liable should the property be damaged, but only if the requisite degree of care had not been not taken: what the requisite degree was depended on the nature of the contract and the precise terms agreed between the parties.<sup>213</sup> No doubt it was possible in these situations to speak simply of fault or carelessness, but it was a good deal more natural to identify exactly what the duty was: the Romans regularly used the language of *diligentia*, to identify what the defendant ought to do, not simply the language of *culpa* to say what he or she ought not to have done.

## B The *Ius Commune*

The convergence of contractual and delictual liability in the writings of the neo-Scholastics provided a channel through which the Roman approach to the law of contract came to apply to the analysis of delictual liability. The defendant's liability is increasingly explained in terms of a falling short from some specified level of carefulness, rather than by reference to any positive quality of the act.

It is especially clear in the *De Iustitia et Iure* of Leonard Lessius, for whom *culpa* was defined as the omission of the requisite degree of *diligentia*.<sup>214</sup> Alongside this, the 16<sup>th</sup> century Humanists began to generalise from Quintus Mucius' explanation of fault in terms of the failure to foresee what a diligent person would foresee,<sup>215</sup> turning this into something like a definition of *culpa* and leaving the other texts in the *Digest* as examples of its operation in practice.<sup>216</sup>

Neither of these lines was picked up by Grotius, and Pufendorf's adoption of the duty of care as a central plank in his analysis marks an essentially new start.<sup>217</sup> Pufendorf was primarily a moral philosopher, whose primary concern was how people, as social animals, ought to behave. They ought, for example, to keep their promises, from which it followed that they should compensate for loss caused by a failure to do so. So too they ought not deliberately to injure others, and should take care that they not do so unintentionally: 'It is no inconsiderable part of Social Duty to manage our conversation with such caution and prudence

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211 D 7.9.1.pr (Ulpian).

212 D 27.3.1.pr (Ulpian).

213 J 3.14.2, 3, 4.

214 Lessius, *De Iustitia et Iure*, above n 50, vol II, 7.6: '*omissio alicuius diligentiae unde sequitur aliquod incommodum*'.

215 D 9.2.31, above n 182.

216 Zasius, *Paratitla in Primam Digesti Veteris Partem*, ad D 9.2 n 5 in *Opera Omnia*, above n 188, vol I, 208; Hotman, *In Quatuor Institutionum Iuris Civilis Libros Commentarii*, ad Inst IV, 3 in *Opera Omnia*, above n 134, vol II, col 744C; Donellus, *Commentariorum de Jure Civili*, Book 15, ch 27 s 2 in *Opera Omnia*, above n 47, vol IV, col 235.

217 Pufendorf's originality in this respect is stressed by B Kupisch, '*La Responsabilità da Atto Illecito nel Diritto Naturale*', in Vacca, above n 2, 123.

that it do not become terrible and pernicious to others.<sup>218</sup> The lawyers' primary concern, in what circumstances liability should be imposed, was for Pufendorf parasitic upon this: the duty would be practically devoid of content if there was no sanction imposed for its breach.<sup>219</sup> Though the duty to take care was pivotal to his theoretical enterprise of deducing norms of human behaviour from basic facts of human nature, from a legal point of view it made no difference whether one said that liability stemmed from the breach of a duty of care or that liability stemmed from causing loss by careless conduct. Analytically speaking, it was an unnecessary tool in the lawyer's armoury.

### C England

Analytically unnecessary though it was, the duty of care did no actual harm and it was easily assimilated into English law. Francis Buller's *Introduction to the Law of Trials at Nisi Prius*, the earliest clear statement in such terms has already been quoted.<sup>220</sup> From the Natural lawyers' starting point that 'every man ought to take reasonable care that he does not injure his neighbour', Buller moves to the provision of a remedy for harm caused deliberately or through 'negligence or folly'. Buller's approach was complemented by that of Sir William Jones in his *Essay on the Law of Bailments* (1781), where (following Roman law) the liability of the bailee for damage to the goods was treated as the corollary of the duty to look after them with a degree of care proportional to the type of bailment.<sup>221</sup> Though each of these uses the idea of the duty of care – Buller more clearly than Jones – it does not have any useful function for either of them, and there is nothing in their writings to hint that any thought had been given to its playing an important role in legal analysis. By the middle of the nineteenth century there was no such reticence: in the second edition of Charles Greenstreet Addison's *Wrongs and Their Remedies* (1864) liability in negligence is described starkly in the dualist terms of duty of care and breach of duty.<sup>222</sup>

Two principal factors combined to bring this about. First of all, the language of duty was convenient. The substantive categories in terms of which English law was coming to be organised cut across the forms of action, generating a need for some terminology in order to discriminate between distinct situations falling within the same form of action. Within the action on the case, a particular need arose to separate claims in contract and claims in tort, and this was easily achieved by saying that the former involved the breach of a duty imposed by the act of the parties, whereas the latter involved the breach of a duty imposed by the law. Secondly, a division between duty and breach fitted naturally into the two-part structure of the action on the case, where the claimant began by setting out

218 Pufendorf, *De Iure Naturae et Gentium*, above n 58, III, 1.6; to the same effect, *De Officio Hominis et Civis*, above n 58, I, 6.9.

219 Pufendorf, *De Iure Naturae et Gentium*, above n 58, III, .1.2; *De Officio Hominis et Civis*, above n 58, I, 6.4.

220 Buller, above n 206.

221 Jones, above n 202, 5.

222 C G Addison, *Wrongs and Their Remedies* (2<sup>nd</sup> ed, 1864), 13–16. The passage does not appear in the first edition (1860).

the circumstances lying behind the claim and followed on by alleging the way in which the defendant had wrongfully caused loss. The first part, it might be said, outlined why the defendant was under a duty while the second part fixed on the breach. This had one very important consequence: whether the circumstances set out in the first part of the pleadings revealed a cause of action – ie, if there was a duty-situation – was a question of law falling within the province of the judges, whereas whether the defendant had wrongfully caused the damage alleged – ie, if the duty had been breached – was a matter for the jury to decide. As 19<sup>th</sup> century judges began to take more control over the outcome of lawsuits, greater and greater weight came to be placed on the question of duty rather than the question of breach. The tort of negligence, described by one commentator as the most uncultivated part of the ‘wilderness of single instances’ of which the common law consisted,<sup>223</sup> grew up in the 19<sup>th</sup> century through the progressively more detailed specification of the circumstances in which a duty to take care arose.

## VI JUDGE, JURY, AND THE STRUCTURE OF THE TORT OF NEGLIGENCE

It was the division of function between judge and jury which gave to the common law tort of negligence its characteristic shape. Essentially, whether there was a duty situation was a matter for the judges to decide, while other questions were in principle matters for the jury. This had two significant consequences: the effective neutralisation of the reasonable person test in so far as this purported to involve the application of factual standards (ie, did the defendant do what would normally be done in the circumstances?) rather than normative evaluations (ie, did the defendant do what reasonable people would think was sufficient?); and the tendency to load contentious questions about the scope of liability into the duty of care, where they could be decided by judges.

The primary responsibility of the jury, of course, was to apply the law to the facts of the case as they found them, but in doing this they had inevitably to apply open-ended standards as well. So far as the tort of negligence is concerned, the principal question falling to be decided by them was whether the defendant was in breach of duty, whether he or she had behaved as a reasonable person.<sup>224</sup> At the time that negligence was settling down as an independent tort, there was some ambiguity as to whether the jury was supposed simply to ask how people would normally behave in these circumstances and then assess the defendant’s conduct in the light of this, or to look at the defendant’s behaviour and ask whether they thought it was reasonable. Was it a question of what the reasonable person would do, or of what the reasonable person would think the defendant ought to do? In the developed tort it was clearly the former,<sup>225</sup> though in reality

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223 ‘The Duty of Care Towards One’s Neighbour’ (1883) 18 *Law Journal* 618, 619.

224 For the balancing of the roles of judge and jury in this regard, see especially *Bridges v North London Railway Co* (1871) LR 6 QB 377, LR 7 HL 213; Ibbetson, above n 6, 174–6.

225 *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, 784; 156 ER 1047, 1049; cf *Daniels v Potter* (1830) 4 C & P 262; 172 ER 697.

the difference between the two approaches was more verbal than substantial. A jury faced with a typical case of an injury caused in a railway accident would hardly be in a position to assess what railway companies normally did, and in any event the fact that the defendant had done something out of the ordinary would not in itself determine whether the care that had been taken was greater than the norm or less than the norm. In practice, the jury would (nearly) always be making a normative assessment, though the form of words used might largely conceal this. In terms of the core of liability, there was little to distinguish between the common law tort of negligence and the Roman principle of liability for *culpa*.<sup>226</sup>

Since juries were not simply neutral fact-finding bodies, it might appear that they would have retained the whip hand in the determination of the incidence of legal liability. That they did not do so was the result of judicial manipulation of the duty (or duties) of care. The more precisely this could be formulated, the more the judges could control the scope of liability. The judicial function might operate in two different ways. In formal terms a positive finding that there was a duty of care simply allowed the case to go before the jury; the judges' holding that the defendant might be liable in no way concluded that he or she actually was liable, though it might inevitably have had some influence on the ultimate verdict of the jury and in an extreme case it might open a verdict to being overturned on the grounds that it was perverse. On the other hand, a negative decision, that there was no duty of care in the circumstances alleged, resulted in the claim being withdrawn from the jury, whether they would have thought there should be liability or not. As a consequence, the real power of the judges was the power to decide that there was no duty, not the power to decide that there was. As well as giving a sharply defined form to the operation of the tort of negligence, therefore, the duty of care functioned primarily as a constraint on the potential expansiveness of the tort.<sup>227</sup>

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226 It is not the purpose of the present article to discuss the modern law; but, at least from an English perspective, it appears that this has become ever clearer since the effective abolition of the civil jury. In so far as the reasonable person appears in contemporary case law, in the guise of the traveller on the London Underground, the question asked is what he or she thinks should be done rather than what he or she would in practice do in the defendant's position.

227 This would be yet more clearly the case if, as was generally believed at the time, judges tended to be less favourably inclined towards plaintiffs than juries were, especially where the defendant was a railway company or the like.

It is, perhaps, this shift of weight on to the duty of care that has brought about the final twist in the shape of the tort of negligence. For the 19<sup>th</sup> century judges, supported by an individualist ideology which could be called on to justify a narrow approach to legal responsibility, the duty could hold negligence in check. By the late 20<sup>th</sup> century, with its far more victim-oriented culture, the duty was not so effective. With so much loading on the question of duty, it was all too easy to shift from the statement that a person ought to have taken care to the conclusion that they should pay money to anyone who suffered a loss or failed to make an expected profit as a result of their failure to take care. The utter formlessness of liability and the tendency to equate legal responsibility with moral shortcoming, two central features that were immanent in Roman law, find their place in the common law of the 21<sup>st</sup> century.