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THE LIMITS OF *CULPA LEVISSIMA*

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1. Introduction

It is a well known fact that of the many thousands of texts included in the Digest only a few thousand are used in the study of Roman law. Among these, there are a small number of texts that are frequently quoted. One of these popular texts is D. 9.2.44 pr. containing the following sentence by Ulpian: '*In lege Aquilia et levissima culpa venit*', 'Under the *lex Aquilia* even the slightest degree of fault counts'. On the basis of this phrase, it is assumed that *culpa levissima* was sufficient for liability under the *lex Aquilia*. The sentence is regarded as a general rule referring to the word *iniuria* in that law.[1]

So far, only one Romanist namely MacCormack has interpreted this phrase in a narrow sense by linking it with the following section, D. 9.2.44.1. Here, Ulpian states: '*Quotiens sciente domino servus vulnerat vel occidit, Aquilia dominum teneri dubium non est*', 'Whenever a slave does a wounding or killing with his master's knowledge, the master is without doubt liable under the *lex Aquilia*.' According to MacCormack, there was only *culpa levissima* when a master knew that his slave was going to kill or wound

[1] For the older literature, see J.Ch. Hasse, *Die Culpa des römischen Rechts*, 2nd edition revised by M.A. von Bethmann-Hollweg, Berlin 1838, p. 65 and E. Grueber, *The Roman Law of Damage to Property*, Oxford 1886, p. 223. For the more recent literature, see, for instance, M. Kaser, *Das römische Privatrecht*, 2nd edition, Munich 1971, p. 504 with note 9; R. Villers, *Rome et le droit privé*, Paris 1977, p. 415; B.W. Frier, *A Casebook on the Roman Law of Delict*, Atlanta 1989, p. 40; H. Hausmaninger, Das *Schadenersatzrecht der lex Aquilia*, 4th edition, Vienna 1990, p. 25; R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford 1996, p. 1014; and A. Borkowski and P. du Plessis, *Textbook on Roman Law*, 3rd edition, Oxford 2005, p. 324.

somebody else's slave or animal and made no attempt to stop him.[2] He published his view well over thirty years ago, but somehow failed to influence the current view.

I think MacCormack was right. There are three reasons why Ulpian's statement must have had only limited validity. First, it would have been a very impractical rule. It would have made daily life in Rome utterly impossible. Anyone could be blamed for any damage. Second, if such a drastic rule actually had been applied, other legal and particularly literary sources would have referred to it. There are none. Third, the Roman jurists would not have bothered so often to explain the meaning of *culpa* if *culpa levissima* would have been sufficient anyway. In my view, *culpa levissima* was not a general ground for liability under the *lex Aquilia*, but referred to the liability of a master for delicts committed by his slave.

In classical Roman law, there were two clear rules about the liability of a master for delicts committed by his slave. The first rule was that, when the master did not know what his slave was going to do, he was noxally liable.[3] This type of liability included the option of handing over the slave to the plaintiff instead of paying the penalty. The second rule was that, when a master had ordered his slave to commit a delict, the master was liable in his own name, as if he had committed the delict himself; he was directly liable and could only be sentenced to paying the penalty.[4] Ulpian's text deals with the grey zone between these two rules: what is law when a master knows what his slave is about to do and is able to stop him but does not do so? Should this master be put on a par with the master who had ordered his slave to commit a delict, or with the master who did not know what his slave was about to do? According to Ulpian, he was regarded as a master

[2] According to G. MacCormack, *Aquilian Culpa*, in: Daube Noster. Essays in Legal History for David Daube, ed. A. Watson, Edinburgh-London 1974, p. 204, Ulpian discussed the problem whether the *dominus sciens* was directly liable or only noxally liable; he opted for the former. MacCormack concludes that, in this context, it makes good sense for Ulpian to state generally that the slightest fault is enough to incur liability. In the same vein, earlier but hesitatingly, S. Schipani, *Responsabilità "ex lege Aquilia". Criteri di imputazione e problema della "culpa"*, Turin 1969, p. 445.

[3] Gaius, *Inst*. 4.75.

[4] Ulp. D. 9.4.2 pr.

who had issued the order.[5] He introduced his view by remarking that, under the *lex Aquilia*, even the slightest fault counted. It is clear that his qualification refers only to the case of the *dominus sciens*.

Six years after MacCormack published this interpretation, the subject of *scientia domini* was taken up again by another Romanist, Gimenez-Candela, who apparently did not know of MacCormack's paper. She took the current view as a starting point and presented the following theory.[6] In the *lex Aquilia*, *scientia domini* was not the *scientia dolosa* corresponding with the phrase *sciens dolo malo* but the *scientia culposa* that was sufficient for (direct) liability under the *lex Aquilia*. In other delicts, there was only liability if *dolus* was involved. There, *scientia domini* could not lead to direct liability. There, the master who 'knew' and could stop his slave but did not do so, was still only noxally liable. There are two texts by Ulpian and Paul stating that, in all noxal actions, *scientia domini* leads to direct liability. According to Gimenez, both these texts have been interpolated.

About ten years ago, I also wrote a paper on the subject in *Tertium datur*, the third collection of studies in honour of Hans Ankum, but since it was written in Dutch it was probably not read by many people outside the Netherlands.[7] In this paper, I am going to challenge the current view on *culpa levissima* once again.

I will first deal with Gimenez' theory on *scientia dolosa* and *scientia culposa* which is based on the assumption that *culpa levissima* was a general ground for liability under the *lex Aquilia*. Then, I will discuss Ulpian's words in their context and I will show that they applied only when a master knew his slave was going to commit *damnum iniuria datum* and did nothing to stop him.

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[5] I will not deal with the question of whether *scientia domini* was already included in the *lex Aquilia* as a procedural clause or whether it has been elaborated by the jurists. In this connection, see M. F. Cursi, *Iniuria cum damno. Antigiuridicità e colpevolezza nella storia del danno Aquiliano*, Milan 2002, p. 218-219.

[6] T. Gimenez-Candela, *Sobre la "scientia domini" y la acción de la ley Aquilia*, in Iura 31 (1980), p. 122-123.

[7] O.E. Tellegen-Couperus, *Culpa levissima en de onrechtmatige daad*, in Tertium datur. Drie opstellen aangeboden aan Prof. Mr.J.A. Ankum, O.E. Tellegen-Couperus, P.L. Nève, and J.W. Tellegen (eds), Tilburg 1995, p. 89-118.

My conclusion will be that – as Ulpian and Paul stated – in all delicts, *scientia domini* led to direct liability of the master and that Ulpian's sentence 'In lege Aquilia et levissima culpa venit' served only to introduce a case of *scientia domini* and was not meant to constitute a general rule.

2. *Scientia domini* in Connection with Noxal Actions

In the Digest, title D. 9.4 deals with noxal actions. Except for the very first text, the first part of the title is about the effect of *scientia domini* on noxal actions. The eight texts in question all stem from Ulpian and Paul. The first one is about the *lex Aquilia*, but the other seven deal with noxal actions in general, without focusing on a particular delict. In D. 9.4.3, Ulpian makes a general statement about the interpretation of *scientia domini* in connection with noxal actions. I will quote the text with the translation by Kolbert in Watson's edition and translation of the Digest:

> *Ulpianus libro tertio ad edictum. In omnibus noxalibus actionibus, ubicumque scientia exigitur domini, sic accipienda est, si, cum prohibere posset, non prohibuit: aliud est enim auctorem esse servo delinquenti, aliud pati delinquere.*
>
> Ulpian in book 3 on the edict. In all noxal actions, wherever knowledge on the part of the master is required, 'knowledge' must be understood to include instances where he could have prevented the slave but did not do so. It is, however, one thing to instigate the commission of a delict by a slave and quite another to allow him to commit one.[8]

In the first sentence of this text, the words *scientia domini* are explained: a master is regarded as 'knowing' when he did not prevent his slave from committing a delict although he was able to do so. The second sentence is not so clear. Here, Ulpian makes a contrast between the master as *auctor* of a delinquent slave and the master who tolerates the actions of a delinquent slave: the words '*aliud … aliud'* indicate that the two cases refer to two basically different situations. It is clear that the words '*pati delinquere*' in the second case refer to the master who knew what his slave was up to but did nothing to

[8] *The Digest of Justinian*, Th. Mommsen / P. Krüger / A. Watson (eds), Vol. I, Philadelphia 1985, p. 297. In my view, this translation is not quite correct; first, I would not render 'exigitur' by 'is required' but rather by 'is claimed' or 'is investigated'; second, the words 'auctorem esse' cannot mean 'to instigate' here. Below, I will discuss the translation of these words.

stop him; they summarize the explanation of *scientia domini*. However, it is not quite clear how the words '*auctorem esse*' in the first case must be interpreted.

In Romanist literature as well as in the translations of the Digest, the words '*aliud est enim auctorem esse servo delinquenti*' are consistently understood to refer to the master who orders his slave to commit a delict, the *dominus iubens*.[9] Apparently, it is assumed that Ulpian makes a distinction between the *dominus iubens* who is directly liable for all delicts committed by his slave, and the *dominus non prohibens* who is directly liable because he could stop his slave but did not do so.

One Romanist thinks that this text has been interpolated, namely Gimenez-Candela whom I mentioned earlier.[10] She also thinks that Ulpian distinguishes between the *dominus iubens* and the *dominus non prohibens*, but in her view it is impossible that he was referring to all noxal actions. Under the *lex Aquilia*, *culpa* or *iniuria* was sufficient for liability. *Scientia domini* was a form of *culpa*, although it was merely *culpa levissima*. For other delicts, *dolus* was required. Therefore, *scientia domini* was only relevant in connection with the *lex Aquilia*. In the case of other delicts, *scientia domini* did not lead to direct liability. It was only in Justinian's time that this type of *scientia*,

[9] For the translations, see C.E. Otto, B. Schilling, and K.F.F. Sintenis, *Das Corpus iuris civilis (romani) ins deutsche übersetzt*, Vol. I, Leipzig 1839 (rpt. Aalen 1984): 'Dem Sclaven die Veranlassung zur Verbrechen geben'; S.P. Scott, *The Civil Law*, Vol. III, Cincinnati 1932 (rpt. New York 1973): 'to cause a slave to commit an offence'; A. D'Ors et al., *El Digesto de Justiniano*, Vol. I, Pamplona 1968: 'que autorice al esclavo delincuente'; and J.E. Spruit, R. Feenstra, and K.E.M. Bongenaar (eds.), *Corpus iuris civilis, Tekst en vertaling*, Vol. II, Zutphen 1994: 'Het aanzetten van een slaaf tot het plegen van een delict'. In the new German translation, there is hardly a contrast between the two *aliud*-phrases, see O. Behrends, R. Knütel, B. Kupisch, and H.H. Seiler (eds.), *Corpus Iuris Civilis. Text und Übersetzung*, Vol. II, Heidelberg 1995: 'Denn es ist etwas anderes, [durch Unterlassen] verantworlichrer Urheber des Sklavendelikts zu sein als das Delikt nur machtlos zuzulassen'. For Romanist literature, see B. Albanese, *Sulla responsabilità del "dominus sciens"*, BIDR 3rd series 9 (1967), p. 152, and G. Tilli, *"Dominus sciens" e "servus agens"*, Labeo 23 (1977), 19. Dom. A. Mignot, *Le maître complice de l'esclave aux Antilles*, RHD 84 (2006), p. 265 seems to ignore the words 'auctorem esse' by rendering the comparison as follows: 'qu'une chose est l'acte de l'esclave délinquant, autre chose est la position du maître qui s'est borné à la non-prohibition.'

[10] Of the older Romanists, only M. Pampaloni, *La complicità nel delitto di furto (furtum ope consilio)*, Studi Senesi 16 (1899), p. 36-37 regards the words 'in omnibus noxalibus actionibus' as interpolated. See E. Levy and E. Rabel, *Index interpolationum quae in Iustiniani Digestis inesse dicuntur*, I, Weimar 1929, p. 118.

that Gimenez qualifies as 'dolosa', became relevant. By adding the words 'In omnibus actionibus noxalibus', the compilers made the text applicable to all delicts committed by slaves.

However, I do not think that the sentence 'aliud enim auctorem servo delinquenti' refers to the *dominus iubens*, nor do I think that the text has been interpolated. To begin with the latter: Gimenez' interpretation is based on her theory that the Roman jurists distinguished between *scientia dolosa* and *scientia culposa*. However, the sources do not provide any evidence of such a distinction. In connection with delicts committed by slaves, there is only one *scientia domini*, that is his 'knowing' and being able to stop the slave who wants to commit a delict but taking no action. It is described in terms of *non prohibere*, *pati*, *patientia*, and so on. The words *dolus* and *culpa* are not used in this connection except in one case, that of *culpa levissima* in D. 9.2.44 pr. Moreover, it is rather difficult to understand a concept like '*scientia dolosa*'. It seems that the master and the slave are being confused. *Dolus* and *culpa* were qualifications of the deed, they referred to the person who committed the delict, i.e. the slave, not his master. Therefore, there is no point in constructing such a kind of liability in Justinian law, and, consequently, there is no point in assuming that this text was interpolated. The same holds for the other text about *scientia domini* in connection with noxal actions, but I will not discuss it here.[11]

Next, I come to the phrase '*aliud est enim auctorem esse servo delinquent*i' in the second sentence of D. 9.4.3. It is usually taken to refer to the *dominus iubens*. However, if that were correct, the phrase would not really fit the text. Ulpian deals with noxal actions in which the plaintiff claimed that the defendant knew what his slave was about to do. In this connection, referring to the *dominus iubens* does not make sense because the noxal action does not apply to him. Moreover, the key word of the text is *scientia*, knowledge. The words '*auctorem esse*' will have to fit that context.

[11] The other text is Paul. D. 9.4.4 pr.

I think it may help to have another look at the word '*auctorem'*. The word *auctor* usually does mean 'instigator', 'Urheber',[12] but it cannot have this meaning here. If it were used in that sense, there would be no difference between the first and the second case. They would both refer to a *dominus sciens*. Moreover, the *dominus iubens* of the first case and the *dominus non prohibens* of the second case would both be directly liable. A second reason why 'auctorem' cannot be taken to mean instigator here is that, when used in that sense, it is always connected to a word in the genitive, for instance, *auctor pacis*, or *auctor legis*. In this text, it is connected to '*servo'*, therefore to a word in the dative.

However, the word *auctor* has other meanings as well. In legal texts, it is sometimes used for the seller who warrants the right of possession of the thing to be sold, an authority.[13] It is also used in other senses, for instance, supporter, witness, a person with a title to take action, a guarantor, and it is then connected with a word in the genitive or dative.[14] In my view, the word '*auctorem'* in D. 9.4.3 must also be translated in this sense: as the person who is legally responsible for somebody else, in this case for his slave. If the phrase '*aliud enim auctorem esse servo delinquenti*' is translated as 'it is one thing to be liable for a slave who commits a delict', then it refers to a master who is only noxally liable and it forms a contrast to the other *aliud*-phrase about the master who is directly liable. The first part of the comparison is about the normal situation of a master who did not know that his slave was going to commit a delict, the second part is about the special situation of the master who knew but did not stop his slave from committing a delict. In this way, the comparison turns on the concept of knowledge and fits perfectly in with the first part of the text.

This text shows that s*cientia domini* was an element in noxal actions that led to the exclusion of *noxae deditio* as a way of limiting liability. It had nothing to do with the *dolus* or *culpa* that was required for the various delicts.

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[12] See C.T. Lewis and C. Short, *A Latin Dictionary*, Oxford 1969, p. 198-199, and K.E. Georges and H. Georges, *Ausführliches Lateinisch-Deutsches Handwörterbuch* Vol. I, 4th edition, Hannover 1976, p. 703-705.

[13] For instance, in Scaev. D. 19.21.52.3 and Ulp. D. 21.2.4 pr. See C.T. Lewis and C. Short, *A Latin Dictionary*, Oxford 1969, p. 199.

[14] See P.G.W. Glare, *Oxford Latin Dictionary*, Vol. I, Oxford 1968, p. 205 sub 12.

3. D. 9.2.44 pr. in Context

When Ulpian wrote his famous line, it probably formed an integral part of a larger text. However, the text that has come down to us is rather short, it consists of two lines only. It may have been shortened by the compilers in the sixth century when they included it in the Digest, or perhaps this happened earlier.[15] Yet, it was the glossators who divided the Digest texts into smaller sections and numbered them. In D. 9.2.44, they separated the first line from the second one and they called the second sentence section 1. The oldest manuscript of the Digest, the *Codex Florentinus*, shows that, originally, the two sentences were not separated, even by a space.[16] In my view, it is only possible to understand the first sentence properly if we connect it again with the second one. D. 9.2.44 runs as follows:

> *Ulpianus libro quadragensimo secundo ad Sabinum. In lege Aquilia et levissima culpa venit. (1) Quotiens sciente domino servus vulnerat vel occidit, Aquilia dominum teneri dubium non est.*
> Ulpian in book 42 on Sabinus. Under the *lex Aquilia*, even the slightest degree of fault counts. (1) Whenever a slave wounds or kills with his master's knowledge, the master is without doubt liable under the Aquilian law.

The text deals with a case where a slave has killed or wounded someone else's slave or animal and his master 'knew'. Therefore, the legal question refers to the grey zone between the direct liability of a *dominus iubens* and the noxal liability of the master who did not know what his slave was about to do. According to Ulpian, the master is liable under the *lex Aquilia*. Making someone directly liable for a delict committed by his slave – only for 'knowing' – is rather a radical step. That is why Ulpian introduced his opinion by stating that, in connection with the *lex Aquilia*, even the slightest fault counts.

In modern Romanist literature, this opening sentence is regarded as giving a general rule: *culpa levissima* was sufficient for liability under the *lex Aquilia*; in other

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[15] Some Romanists have regarded the text as interpolated, for instance, V. Arangio-Ruiz, *La responsabilità contrattuale in diritto romano*, 2nd edition, Naples 1958, p. 232-234 and F.H. Lawson, *Negligence in the Civil Law*, Oxford 1950 (rpt. 1955), p. 40.

[16] See *Justiniani Augusti pandectarum codex Florentinus* I, A. Corbino and B. Santalucia (eds), Florence 1988, p. 153v.

words, *culpa levissima* referred to *iniuria* of the delict *damnum iniuria datum*.[17] This interpretation is not new, it dates from the time of the glossators.

According to Hoffmann in his book on 'Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte', the glossators used *culpa levissima* as a general criterion not only for liability under the *lex Aquilia*, but also under the law of contracts.[18] They rejected the idea of liability without fault and, instead, developed a triple grade system of liability consisting of *culpa lata*, *culpa levis* and *culpa levissima*. The commentators followed in their wake, and so did the jurists of the *usus modernus pandectarum*. In the 18th century, the triple grade system was codified in the Prussian *Allgemeines Landrecht*, but not in the later civil codes. There, a general concept of fault was used. Nevertheless, in modern legal practice, the concept of *culpa levissima* still turns up occasionally. Perhaps it is under the influence of this practice that the Romanists still regard liability for *culpa levissima* as a normal feature of classical Roman law.

However, the context of the sentence '*In lege Aquilia et levissima culpa venit*' makes it clear that it was not meant to be a general rule. It refers to the second sentence of the text about the slave who killed someone else's slave or quadruped, '*sciente domino*', with the master's knowledge.[19] In the following text, the compilers answer the question of how this 'knowing' by the master has to be understood.

> D. 9.2.45 pr.
>
> *Paulus libro decimo ad Sabinum. Scientiam hic pro patientia accipimus, ut qui prohibere potuit teneatur, si non fecerit.*
>
> Paul in book 10 on Sabinus. We accept knowledge here as including sufferance, so that he who could have prevented harm is liable for not having done so.

It is striking that Paul does not mention the *lex Aquilia*; however, it is very likely that he had this law in mind, for all the other texts in his tenth book on Sabinus are about questions in connection with the *lex Aquilia*.[20] In D. 9.2.44, Ulpian applied the same

[17] See above, note 1. A number of Romanists have argued that *culpa levissima* is used in a non-technical sense, for instance, Th. Mayer-Maly, *Die Wiederkehr der culpa levissima*, AcP 163 (1964), p. 124 with note 77.

[18] H.-J.Hoffmann, *Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte*, Berlin 1968, p. 35-38. For the later development of *culpa levissima*, see the same, *passim*.

[19] In fact, the slave who intended to commit *damnum iniuria datum* had *dolus*.

[20] See O. Lenel, *Palingenesia iuris civilis*, Vol. I, Leipzig 1889 (rpt 1925), p. 1279-1280.

interpretation of *scientia domini*. In his reasoning, a master who knew the intentions of his slave and could stop him but did not do so was directly liable although his fault was very slight.

In this text, the words *culpa levissima* do not refer to the person who committed the delict, that is, the slave. Therefore, they do not refer to *iniuria* in the wording of the *lex Aquilia* either. They indicate that the master's fault consisted only of not preventing his slave from causing unlawful damage and that therefore the master's fault could be qualified as 'slightest'.

4. Conclusion

There is no doubt that, in D. 9.2.44, *culpa* is used in the technical sense of fault. However, it is used only in the context of *scientia domini* and only in this particular text by Ulpian. Therefore, there is no justification for making *culpa levissima* a general criterion for the *lex Aquilia*, nor is it possible to deduce from this text that it was only in the case of the *lex Aquilia*, that *scientia domini* led to direct liability and that in other delictual actions the 'knowing' master was only noxally liable. I think *aequitas* would imply that the master was directly liable in all cases of *scientia domini*.

Summary

In D. 9.2.44 pr., Ulpian states that, under the *lex Aquilia*, even the slightest fault (*levissima culpa*) counts. Since the time of the glossators, this phrase has been regarded as a general rule. Only one Romanist, MacCormack, has interpreted the phrase in a narrow sense: in his view, *culpa levissima* only referred to the case of *scientia domini* mentioned in section 1 of Ulpian's text. Later, Gimenez-Candela has argued that *scientia domini* led to direct liability only in case of *damnum iniuria datum*. The author aims to prove that *culpa levissima* only referred to *scientia domini* but that, on the other hand, *scientia domini* led to direct liability in all delicts.