CAUSATION AND CONFESSIONS
IN THE LEX AQUILIA

by

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We all pay lip-service to the pragmatic approach of the Roman jurists and the slip-shod methods of the compilers; yet we are all inclined to look for some system that will rationalise or reconcile the texts. More often than not the search is fruitless. It is the purpose of this article to suggest that in two related cases the best that we can hope for is some explanation of the confusion.

In classical law there were separate provisions of the lex Aquilia for killing and for merely wounding. We should therefore expect to find that where one person (A) wounds the victim and another (B) kills him, A will be liable under chapter 3 for wounding and B will be liable under chapter 1 for killing; and it is at least understandable that that distinction should still apply even where A’s wound would have been fatal if it had not been for the intervention of B. And in fact that was the law according to two of our texts.

D. 9, 2, 11, 3 (Ulpian 18 ad edictum):

Celsus scribit, si alius mortifero vulnere percusserit, alius postea examinaverit, priorem quidem non teneri quasi occiderit, sed quasi vulneraverit, quia ex alio vulnere perit, postierorem teneri, quia occidit. Quod et Marcello videtur et est probabilius.

The text has been criticised by Albanese 1). The delicts have no object and perit no subject. More importantly for our purposes he would exclude sed quasi vulneraverit, on the grounds that it is not relevant in a discussion of chapter 1, and as he emphasises frequently later on, damages would be impossible, or too difficult, to assess. But it must be very common for a writer who says that in a certain case there is no remedy under the rule of law that he is discussing, to make a cross-reference to some other rule which

1) Annali Palermo 21 (1950) 5 at 147.
does apply. And the difficulty in assessing damages does not seem to have deterred the Romans on other occasions 2); in any case there is no reason to suppose that Celsus confused the issues of liability and measure of damages. He could easily have said that there was liability in principle, but that in fact it was impossible to assess damages so that in the result the plaintiff lost the case. Otherwise the text seems to have been accepted as a substantially genuine of Celsus’ views. The result is reasonable, and we see no reason to doubt it.

D. 9, 2, 15, 1 (Ulpian 18 ad edictum):

Si servus vulneratus mortiferè postea ruina vel naufragio vel alio ictu maturius perierit, de occiso agi non possit sed quasi de vulnerato; sed si manumissus vel alienatus ex vulnere periit, quasi de occiso agi posse Juliana ait. Haec ita tam varie, quia verum est cum a te occisum tunc cum vulnerabas, quod mortuo eo demum apparuit: at in superiore non est passa ruina apparere an sit occisus.

This text reaches the same result: A will be liable for wounding under chapter 3, even though the wound would have been fatal if it had not been for some intervening event or the act of B. No doubt the text is not in order: in particular we have ruina vel naufragio vel alio ictu at the beginning, and only ruina at the end. But we should not give up in despair, like Albanese 3); we cannot accept the imaginative revision of the text by Schindler 4); nor can we dismiss it as irrelevant, like Beinart 5). The conclusion is quite reasonable and agrees with our first text. It seems likely that the present state of our text is due to a telescoping of the original passage and not to any substantive alteration by the compilers 6).

2) Cp. D. 9, 2, 23, 4, where damages are wholly speculative.
3) Loc. cit., p. 168: „al di fuori dell’ affermazione di un vastissimo rimaneggiamento giustinianeo dell’ originario testo ulpianeo noi non siano in grado di accertare altro circa D. 9, 2, 15, 1“°. He does not even suggest why the compilers should have perpetrated „un vastissimo rimaneggiamento“.
4) ZSS 74 (1957) 201 at 223.
5) Butterworths SALR, 1956, 70 at 75, n. 52.
6) That was a great point of Buckland’s: see Harvard L.R. 54 (1941) 1273 at pp. 1309—1310.
The substantial genuineness of both passages is confirmed by the reasons given. For Celsus, A is liable only for wounding 'because the victim died from a different wound'; for Julian, he is only liable for wounding 'because it was not clear that he had killed, because of the collapse of the house'. Now we know that Julian and Celsus differed about the date of the killing for the purpose of assessing damages under chapter 1:

D. 9, 2, 21, 1 (Ulpian 18 ad edictum):

Annus autem retrorsus computatur, ex quo quis occisus est: quod si mortifiere fuerit vulneratus et postea post longum interval lum mortuus sit, inde annum numerabimus secundum Julianum, ex quo vulneratus est, licet Celsus contra scribit.

This is the only text in the dispute that has escaped unscathed from the attentions of the interpolation-hunters. If the victim was wounded on Monday and died from that wound on Wednesday, then according to Celsus he was killed on Wednesday when he actually died. That is comparatively straightforward, though the defendant might be heard to object that he had not done anything to the victim on Wednesday. According to Julian he was killed on Monday when the wound was actually inflicted. That is more difficult. Clearly Julian would not say that he had been killed at all until Wednesday when he actually died; but then he would say that he had been killed on Monday: that is, you killed him on Monday, but that only became clear on Wednesday 7). Now suppose that between Monday when A inflicted the mortal wound, and Wednesday, when the victim would otherwise have died, on Tuesday B wounded and killed him. B of course would be liable under chapter 1; A would be liable under chapter 3, but the jurists

7) That is consistent with the school-dispute about specificatio. According to the Proculians it is the end-product that matters and the manufacturer becomes owner. So here it is the final state that matters: the victim was killed when he actually died. According to the Sabinians it is the substance that matters and the owner of the materials remains owner of the final product, quia sine materia nulla species effici possit. So here it is the original wound that matters; the victim was killed when he was mortally wounded, “because without the wound he would not have died”. Cp. D. 41, 1, 7, 7.
would have given different reasons. If the victim had died from A’s wound on Wednesday, Julian would have said that he had killed him on Monday; but in fact because of B’s intervening act, it never became clear that A had killed on Monday 8). Celsus would have said that A had killed him on Wednesday, but in fact he could not say that, because he was killed by B on Tuesday, ‘he died from a different wound’. If you are deemed to have killed the victim at the time when he died from your wound, you cannot be said to have killed him at an earlier date if he died then for some other reason 9). Both reasons fit.

In general the differences between Julian and Celsus should not be overemphasised. Classical Roman Law was a practical system of case-law. While we have no doubt that they did differ on some points of substance, it seems likely that far more often they reached the same conclusion by different routes. English appeal cases frequently suffer from a similar confusion. It does not follow, as Albanese thinks, that because Julian and Celsus differed in h.t. 21, 1 they must also have differed as to the outcome in h.t. 11, 3 and 15, 1. And Schindler’s suggestion of personal enmity seems wholly unfounded.

On the other hand, where the victim is fatally wounded by A and killed by B, distinctions may be difficult and undesirable. A may be just as much at fault as B, or more so; and he has almost certainly caused more loss than B, for the value of a mortally wounded slave is negligible. There are clear arguments of public policy for holding both equally liable for killing. And that is the view taken by our third text:

D. 9, 2, 51 (Julian 86 digestorum):

Ita vulneratus est servus ut eo ictu certum esset moriturum: medio deinde tempore heres institutus est et postea ab alio ictus decessit: quaero an cum utroque de occiso lege Aquilia agi possit. Respondit: occidisse dicitur vulgo

8) Pace, Beseler, Beiträge, vol. 3, p. 9: „nein, Unterbrechung des Kausalzusammenhanges”.

9) On re-reading I see that this last sentence must be interpolated: „der plötzlich auftauchende ‘tu’ verrät Paraphrastenhand”: Beseler, loc. cit.; Cp. Albanese, loc. cit., 166: „il brusco passaggio alla seconda persona”.
quidem qui mortis causam quolibet modo praebuit: sed lege Aquilia is
demum teneri visus est qui adhibita vi et quasi manu causam mortis praebuisset,
tracta videlicet interpretatione vocis a caedendo et a caede. Rursus
Aquilia lege teneri existimati sunt non solum qui ita vulnerassent ut con
festim vita privarent, sed etiam hi quorum ex vulnere certum esset aliquem
vita excessurum. Igitur si quis servo mortiferum vulneris infligerit eundemque
alius ex intervallo ita percusserit, ut maturius interficeretur quam ex priore
vulnerare moriturus fuerat, statuendum est utrumque eorum lege Aquilia
teneri.

1. Idque est consequens auctoritati veterum, qui, cum a pluribus idem
servus ita vulneratus est ut non appareret cuius iuctu perisset, omnes lege
Aquilia teneri iudicaverunt.

2. Aestimatio autem perempti non eadem in utriusque persona fiat:
nam qui prior vulneravit tantum praestabit quanto in anno proximo homo
plurimi fuerit repetitis ex die vulneris trecentum sexaginta quinque diebus,
posterior in id tenebitur quanti homo plurimi venire poterit in anno proximo
quo vita excessit, in quo pretium quoque hereditatis erit. Eiusdem ergo servi
occisi nomine alius maiorem alius minorem aestimationem praestabit, nec
mirum, cum uterque eorum ex diversa causa et diversis temporibus occi
disse hominem intellegatur. Quod si quis absurde a nobis haec constitui
putaverit, cogitet longe adsurdius constitui neutrum lege Aquilia teneri aut
alterum potius, cum neque impunita maleficia esse oportet nec facile con
stitui possit uter potius lege teneatur. Multa autem iure civili contra rationem
disputandi pro utilitate communi recepta esse innumerabilibus rebus probari
potest: unum interim posuisse contentus ero. Cum plures trabem alienam
furandi causa sustulerint quam singuli ferre non possent, furti actione omnes
teneri existimantur, quamvis subtili ratione dici possit neminem eorum
teneri, quia neminem verum sit eam sustulisse.

There are several points to be noted about this text. The *principium*
and s. 2 are part of a continuous passage, and s. 1 is a rather
unhappy insertion. That in itself is suspicious and should put us
on our guard. Then, Julian's decision in the *principium* is very
fully and closely argued, emphasising the importance of the phy
sical contact (*adhibita vi et quasi manu*). Detailed explanation was
certainly required for his view that liability arises only at the
time of the death but is then referred back to the date of infliction
of the fatal wound 10). But, after such a full discussion, he conclu-

10) Hence we can see no reason for following Lawson, *Negligence in the Civil
Law* (1950) 129 who condemns the passage *occidisse ... caede* as "a not very
intelligent gloss".
des perfunctorily statuendum est utrumque eorum lege Aquilia tene-rī. As it stands the text does not exclude the possibility that the defendant may be liable under chapter 1 for inflicting a fatal wound, even though the victim has not yet died 11); nor does it deal with the argument that it may not be clear that A has killed because of the intervention of B. We cannot believe that a passage that is otherwise so thorough, can have ended so weakly and briefly in this way without dealing with those further points, especially as the conclusion does not necessarily follow from the premises and conflicts with the view attributed to Julian elsewhere. We suggest therefore that these last seven words are not genuine 12); and that Julian originally went on in detail to reach the same basic conclusion as in h.t. 15,1. His discussion has been cut short and his conclusion altered by Justinian for reasons which are perfectly understandable on grounds of public policy. That will account for the insertion of s. 1 in what was originally a continuous passage. Justinian realised that his amendment required further support and therefore invoked the authority of the veteres for a similar proposition. The liability of simultaneous wrong-doers under chapter 1 does not necessarily entail the same liability for consecutive wrong-doers, but the cases are sufficiently close for the purpose and the underlying reason is the same.

When we come to s. 2 we are confronted by a considerable difficulty. As it stands the text lays down the measure of damages appropriate to the conclusion reached in the principium as it has been transmitted to us. We have attributed that conclusion to a reform of Justinian’s: if this passage is genuine, how are we to explain it? If it has been altered by Justinian, what did Julian’s original text say? We can see no intrinsic reason to doubt the genuineness of the passage at any rate down to occidisse hominem intellegatur. It contains the same full and careful discussion which we found in the principium. In particular we see no reason to suspect the clause repetitis ex die vulneris trecentum sexaginta quinque

12) Beseler, Beiträge, vol. 4, p. 193, for the wrong reason: cp. n. 8 supra. Albanese, loc. cit., 160 recognises that statuendum est is compilatorial.
diebus. A separate clause is needed to emphasise the relevance of the date of A's wound. '365 days', instead of 'one year', increases the emphasis: it follows naturally after the reference to the day of the wound; and stylistically it is much happier than a second use of 'one year' in the same sentence 13). But if the text is genuine, what has happened? The answer must be that there are some circumstances in which A and B are both liable for killing, and for such cases the measure of damages in s. 2 is appropriate. We cannot tell exactly what circumstances entailed such liability: perhaps it applied where A acted maliciously and not merely negligently; perhaps it only applied where A and B acted in concert. For our present purpose it does not matter as long as such liability did sometimes arise 14). We suggest therefore that Julian's original text began by giving the general rule: A is liable for wounding; B is liable for killing: and the appropriate measure of damages for that case. His argument was probably an expanded version of the reasons preserved in h.t. 15, 1. Then he went on to say that in certain special circumstances A and B were both liable for killing, and explained the appropriate measure of damages for that case. If the compilers wished to amend the law so that both parties would always be liable for killing, this was an ideal text to use. All that they had to do was to alter the conclusion in the general rule, statuendum est utrumque eorum lege Aquilia teneri; to suppress the reasons and the relevant measure of damages for that rule, and the special circumstances in which both would be liable for killing in classical law; and to apply to their new rule the measure of damages which in classical law had been appropriate to the special case. Their reform was then supported by an appeal to the authority of precedent, which was inserted as s. 1; and an elaborate argument from principle, which is the second half of s. 2, quod si quis absurde a nobis haec constitui putaverit, referring back to the last words of the principium. We have no confidence in the genuineness of any of this passage, except that the example of

13) Pace, Beseler, loc. cit.: „wer frei stilisierend den Jahresbegriff ausdrucken will, sagt Jahr".

14) That may explain et est probabilius in h.t. 11, 3. In most cases A would only be liable for wounding but he might be liable for killing.
theft of a beam is presumably drawn from some classical source 15). It need not detain us here.

In our submission, therefore, when the victim was fatally wounded by A and killed by B, the general rule in classical law was that A was liable for wounding under chapter 3, and B was liable for killing under chapter 1, though the jurists reached this conclusion by different lines of argument. Justinian wished to make both liable for killing under chapter 1, for reasons of public policy, but overlooked two conflicting texts which still contain the original classical rule. This intended reform by Justinian has important repercussions on the rules governing confessions, to which we must now turn.

Chapter 1 of the lex Aquilia contained an express provision for double damages if the defendant denied liability 16); but it did not lay down any rule about when confessions were binding, so that the law on that point was left entirely to jurisprudence. We should expect to find that an admission of occidere was not binding. If the defendant could prove that the victim was still alive, or had died a natural death, or had been killed by a third party, he should cease to be liable. And we should expect, or at least not be surprised, to find that an admission of injuria was binding. If after the fatal accident the plaintiff says, ‘I am sorry. It was my fault’, he should not be allowed to re-open that issue. Such an admission is very strong evidence against him, and on such an impressionistic issue there are good reasons for making it conclusive. Now the most remarkable thing about our texts as they stand is that they completely ignore the question of injuria. The next is that a confession was apparently binding even if the defendant could prove that a third party was responsible for the killing. A small alteration will dispose of both difficulties:

D. 9, 2, 23, 11 (Ulpian 18 ad edictum):

Si quis hominem vivum falsa confiteatur <injuria> occidisse et postea paratus sit ostendere hominem vivum esse, Julianus scribit cessare Aqui-

16) D. 9, 2, 2, 1.; cavetur shows that it was an express provision.
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The text is still not quite in order 17), but as it stands eum has to carry an emphasis which is quite impossible for such an unemphatic word 18). If the compilers had had a free hand they could have expressed the point much better: it seems more likely that they took a genuine clause and adapted it for their purpose by suppressing injuria. This reconstruction draws some support from the Collatio heading, Ulpian 18 ad edictum, sub titulo si fatebitur injuria occidisse esse in simplum et cum diceret 19). And it brings the law into line with common sense 20).

Why should the compilers have altered such a satisfactory system? To answer that question we must consider the circumstances in which false confessions are likely to be made. In general we assume that a false confession is highly improbable unless the defendant knows that he has seriously injured some slave or animal. Then there are two possibilities. The owner of a different slave (or animal) which has been killed, may decide to bring an action, and the defendant may admit liability because slaves (and animals) look very much alike: he knows that he has killed one but cannot tell whose. That seems most implausible. Alternatively,


18) The emphasis is well noted by Monro, Lex Aquilia (Cambridge 1898) 87, but he fails to appreciate the difficulty. The F reading, reum for eum, would be easier, and the possibility of error in docere reum is obvious.

19) Coll. 12. 7. 1.

20) With one reservation. The effect of the rule about double damages must be to encourage the defendant to admit liability in all doubtful cases and then to try to establish his innocence. That means that the burden of proof will fall on the defendant to establish that the victim is still alive, or died a natural death, or was killed by a third party. But those facts are likely to be peculiarly within the knowledge of the plaintiff, and it is difficult to find any ground of public policy for reversing the normal burden. Nevertheless that seems to have been the position and we must look for the answer in the historical evolution of the statute.
the true owner of the victim may wish to pull a fast one on the defendant. Although the victim was very seriously wounded he did not in fact die, or he died from other causes, or he was killed by a third party. The defendant should therefore only be liable for wounding under chapter 3; but, perhaps in order to claim much higher damages because of the retrospective year under chapter 1, the plaintiff has sued under that chapter, and the defendant, reasonably assuming that the victim did in fact die from the injury he inflicted, has admitted his liability.

This is where our discussion of the texts on causation becomes relevant. If A inflicted a fatal injury and B actually killed the victim, we have suggested that in classical law A was liable for wounding under chapter 3 and B was liable for killing under chapter 1. In the same way we suggest that in classical law if A had admitted his liability for killing that admission would not be binding if he could prove that the death was due to B (Unexpected recovery and death from other causes raise no problems: the texts are clear that the defendant is only liable for wounding and that a confession of killing is not binding). But Justinian intended to provide that in such circumstances A and B should both be liable for killing. That means that A will be liable for killing even though he can prove that the death was due to B: in that case a confession of killing will be effective even though the victim was killed by a third party. And the compilers have altered the text accordingly 21).

D. 9, 2, 24 (Paul 22 ad edictum):

Hoc apertius est circa vulneratum hominem: nam si confessus sit vulnerasse nec sit vulneratus, aetestationem cuius vulneris faciemus? vel ad quod tempus recurramus?

As far as I know this text has always been accepted as genuine. But that cannot be right. First, circa vulneratum hominem is understood to mean ‘in the case of (a false confession under) chapter 3’, and that translation is made necessary by what follows. But it

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21) And D. 42, 2, 4.
cannot mean that: it says ‘in the case of a man who has been wounded’. Secondly, *si confessus sit vulnerasse nec sit vulneratus* is clumsy and involves an awkward change of subject. The point could have been made much more conveniently had it been originally intended. Thirdly, the sequence of tenses is impossible: *sit . . . faciemus . . . recurramus*. And finally the problem *ad quod tempus recurramus?* is no clearer under chapter 3 than it is under chapter 1. Either we take the date on which the defendant falsely admitted that he had committed the delict, or we have no *dies vulneris* at all: but the problem is exactly the same in either case. We suggest that Paul’s original text said

\[ \text{Hoc apertius est circa vulneratum hominem: nam si nec sit vulneratus, ad quod tempus recurramus?} \]

‘This is clearer in the case of a man who has been wounded; for if he has not been wounded, what is the relevant date for the retrospective assessment of damages?’ Paul had probably laid down the classical rule that an admission of killing is not binding if, among other things, the victim was killed by a third party. We have seen that such a false confession is most unlikely to occur unless the defendant has wounded the victim very seriously, but in theory the principle applies equally whether the defendant had actually wounded him or not. In practice, however, if he did not wound him there can be no liability because there is no *dies vulneris* in fact and therefore it is impossible to assess damages. (That is an understandable, though not a necessary, rule). Hence, said Paul, the operation of the rule about confessions is more clearly seen in circumstances in which it would make a difference to the final outcome of the case.

In our submission, the compilers at first adopted the text without alteration, since it applied just as well to their new rule. Confessions are binding even if the victim was killed by a third party. That will not matter if the defendant did not wound the victim at all, for in that case there will be no liability in practice because damages cannot be assessed. Hence, in this case as well, the operation of the rule about confessions is more clearly seen when it would make a difference to the final outcome of the case. But the
text was important to the compilers, not only because it provided a clear illustration, but also because it showed the limits of the rule itself. The alteration of h.t. 23, 11 was intended simply to bring the law on confessions into line with the new principles of causation; but it was wide enough to cover the case in which the defendant had not wounded the victim at all, and it was important to show that the new rule did not extend that far.

We are inclined to attribute the final state of the text to the compilers, perhaps in the joint session of the E, S and P committees. By two hasty insertions, which offend against sense, style and grammar, they have made the text apply to false confessions under chapter 3, which admittedly provides a clearer example of a case in which the assessment of damages is impossible. But it now appears that the defendant will be bound by a false confession under both chapter 1 and chapter 3, even though he can subsequently prove that he had never had anything to do with the victim at all and that a third party was responsible for the death or wounding. Such a rule would be intolerable and can hardly have been what the compilers intended; but it is the natural inference from our texts as they stand.

The speed with which the compilers worked is wellknown; they had no time to fit the law into a coherent system: but here they have excelled themselves. They reformed the law on causation by altering one text, but overlooked two conflicting decisions. And they made a corresponding amendment to the law of confessions and then confused the issue by hasty last-minute revision. As a result all attempts to fit the texts into general theories governing causation and confessions are in our opinion misconceived.