The slave who was slain twice: 
causality and the *lex Aquilia* 
(Iulian. 86 dig. D. 9,2,51)

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**Summary**
D. 9,2,51, in which a slave is slain twice and dies, and where Julian considers both assailants equally liable for killing, has been interpreted in the context of *causa superveniens*. In that case Julian's opinion becomes contradictory. It is argued that the text should be read in the context of the Stoic theories on causality as current among the jurists in the first centuries AD. In these theories there existed no *causa superveniens* as of the modern causality theory. As such its application is ill at place here. Instead, in applying these Stoic theories Julian's view can be explained as his attributing a *causa antecedens* to the first assailant, with full imputation of the effect of the subsequent *causa principalis* to him, and attributing a *causa adiuvans* to the second assailant, while valuing at the same time the latter not just as a reinforcing cause but also as a *causa mortis* and a full effective cause. For other jurists the latter evidently went too far.

**Keywords**
*Lex Aquilia*, Stoa, causality, *causa superveniens*, *vis maior*, attempt, consequential damages

1. – The way Julian deals with causality in D. 9,2,51 is enigmatic. The case is one of A wounding mortally a slave, after which B slays the slave, who subsequently dies. One would expect only B to be liable under chapter 1, and A under chapter 3 for wounding, but according to Julian both are liable for killing under chapter 1 of the *lex Aquilia*:

D. 9,2,51pr. (lul. 86 dig.):

*Ita vulneratus est servus, ut eo ictu certum est 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 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 vulnerasset, ut confestim vita privarent, sed etiam hi*

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quorum ex vulnerare certum esse tali quum vita excessurum. Igitur si quis servo
mortiferum vulnus infligeret eundemque alius ex intervallo omni peressurit, ut
maturius interficeretur, quam ex priore vulnerare moriturus fuerat, statuendum est
utrumque eorum lege Aquila teneri.
1. Idque est consequens auctoritatii veterum, qui, cum a pluribus idem servus ita
vulnerare esset, ut non appareret cuius ictu perisset, omnes lege Aquila teneri
iudicaverunt.
2. Aestimatione autem perempti non cadem in utriusque persona fint: nam qui prior
vulneravit, tantum praestabat, quanto in anno proximo homo plurimi fuerit repeti-
titis ex die vulneris trecentum sexaginta quinque diebus, posterior in id tenebitur,
quantum homo plurimi venire poterit in anno proximo, quo vita excessit, in quo
pretium quoque hereditatis erit. Eiusdem ergo servi occasi nomine alius maiorem,
alis minorem aestimationem praestabat, nec mirum, cum utque eorum ex
diversa causa et diversis temporibus occidisse hominem intellegatur.
Quod si quis absurde a nobis haec constituiri putaverit, cogit iter longe absurdius
constituit neutrum lege Aquila teneri aut alterum potius, cum neque impunita
maleficia esse oporteat nec facile constitutionem possit, uter potius lege teneatur.
Multa autem iure civili contra rationem disputandis pro utilitate communis recepta esse
innumerabilibus rebus probabi potest, unum interim posuisse contentus ero. Cum
plures traham alienam furandi causa sustulerint, quam singuli ferre non possent,
furti actione omnes teneri existimabantur, quamvis subtili ratione dixi possit
neminem eorum teneri, quia neminem verum si eam sustulisse1.
A slave who had been wounded so gravely that he was certain to die of the blow
was appointed someone's heir and subsequently died, struck by the blow from
another (assailant). The question is whether action under the lex Aquila lies
against both (assailants) for killing him. The answer was given as follows: A person
is generally said to have killed if he furnished a cause of death in any way whatever,
but a person is as the lex Aquila is concerned only held liable who furnished a
cause of death by some application of force, done as it were by one's own hand,
for the meaning of the word derives from "to slay" and "manslaughter". Furthermore,
it is not only those who wound so as to deprive at once of life who will be
liable for a killing in accordance with the lex but also those who inflict a wound
by which somebody will certainly die. Accordingly, if someone wounded a slave
mortalily and then after a while someone else slew him so, that as a result he died
sooner than would otherwise have been the case on account of the first wound,
it is clear that both assailants are liable under the lex Aquilia.
1. This rule has the authority of the ancient jurists, who decided that, if a slave
were injured by several persons but it was not clear which blow actually killed
him, they would all be liable under the lex Aquilia.
2. But in the case that we are considering, the assessment of the dead slave will
not be made in the same way for each person. The person who struck him first
will have to pay the highest value of the slave in the preceding year, counting back
three hundred and sixty-five days from the day of the wounding; but the second
assailant will be liable to pay the highest price that the slave would have fetched
had he been sold during the year before he departed this life, and, of course, in

1 Translations are based on the The Digest of Justinian, ed. A. Watson, Philadelphia 1985.
this figure the value of the inheritance will be included. Therefore, for the killing of this slave, one assailant will pay more and the other less, but this is not to be wondered at because each is deemed to have killed him by a different cause and at different moments.

But in case anyone might think that we have reached an absurd conclusion, let him ponder carefully how much more absurd it would be to hold that neither should be liable under the lex Aquilia or that one should be held to blame rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide if one is more liable than the other. Indeed, it can be proved by innumerable examples that the civil law has accepted things for the general good that do not accord with pure logic. Let us content ourselves for the time being with just one instance: When several people, with intent to steal, carry off a beam which no single one of them could have carried alone, they are all liable to an action for theft, although by subtle reasoning one could make the point that no single one of them could be liable because in reality he could not have moved it unaided.

Julian also expresses here the consequences of his view regarding the calculation of the compensation for the slave. A should pay the highest value reckoned over the year previous to the day of the wounding, since this wounding counted for him as a killing. B had to pay over the year previous to the day of the actual death.

The other view regarding causality in this case, as formulated by Celsus and approved by Marcellus and Ulpian, viz. that A can be sued under chapter 3 and B under chapter 1, is found in D. 9.2.11.3.

D. 9.2.11.3 (Ulp. 18 ad ed.):
Celsus scribit, si alius mortifero vulnere percussert, alius postea examinaverit, priorem quidem non teneri quasi occiderit, sed quasi vulneraverit, quia ex alio vulnere perit, posteriorem teneri, quia occidit. Quod et Marcello videtur et est probabilis.

Celsus writes that if one attacker inflicts a mortal wound on a slave and another person later finishes him off, he who struck the earlier blow will not be liable as is the case if he killed, but as is the case if he wounded, since he [the slave] actually perished as the result of another wound. The later assailant will be held liable because he did the killing. It seems thus to Marcellus and it is the more likely.

\[1\] J.-F. Gerkens, Aequae perituris, Liège 1997, p. 159–163, who rejects the emendations proposed in the literature and assumes, with Kunkel and Schindler, that the two quasi should be read as ‘du point de vue’, as H. Ankum previously did: Das Problem der ‘überholende Kausalität’ bei der Anwendung der lex Aquilia im klassischen römischen Recht, in: De justitia et iure, Festgabe für Ulrich von Lübrow zum 80. Geburtstag, hrsg. M. Harder, G. Thielmann, Berlin 1980, p. 325–358, here p. 328. I agree with this, reading quasi as ‘weil angeblich’ as in K.-E. Georges, Ausführliches lateinisch-deutsches Handwörterbuch, Leipzig 1913. Since the application of the chapters 1 and 3 of the lex Aquilia is straightforward, there is no reason to assume fictions in the formula here.
Gaius expresses the same opinion, be it for the case that the same person wounds and kills:

D. 9,2,32,1 (Gai. 7 ad ed. prov.):
Si idem eundem servum vulneraverit, postea deinde etiam occiderit, tenebitur et de vulnerato et de occiso: duo enim sunt delicta. Alter atque si quis uno imperu pluribus vulneribus aliquem occiderit: tunc enim una erit actio de occiso.

If the same person wounds and then afterward kills the same slave also, he will be held liable for both a wounding and a killing; for there are two delicts. It is otherwise when one kills by many wounds delivered in the same attack; for then there will be but one action for killing.

The fact that the wounds are delivered almost simultaneously, apparently precludes here to assume that two separate delicts are committed. The wounds are in that case considered as elements of the killing. Thus a certain time span was required to distinguish the delicts.

It is clear that causality, if not concerning the simple case that somebody forcibly killed a slave straightaway, posed problems. Another text testifies to this. It is D. 9,2,15,1 and in it Julian is cited as well:

D. 9,2,15,1 (Ulp. 18 ad ed.):
Si servus vulneratus mortifere postea ruina vel naufragio vel alio ictu maturius perierit, de occiso agi non posse, sed quasi de vulnerato, sed si manumissus vel alienatus ex vulnere perierit, quasi de occiso agi posse Julianus ait. Haec ita tam varie, quia verum est eum a teoccisum tunc cum vulnerabas, quod mortuo eo demum apparuit; at in superiore non est passa ruina apparare an sit occisus ...

If a slave who has been mortally wounded has his death accelerated subsequently by the collapse of a house or by shipwreck or by some other sort of blow, no action can be brought for killing, but only for his being wounded; but if he dies from a wound after he has been freed or alienated, Julian says an action can be brought for killing. These situations are so different for this reason: because he was actually killed by you when you were wounding him, which only became apparent later by his death; but in the former case the collapse of the house did not allow it to emerge whether or not he was killed ...

Where it concerned the assessment of the damage, Ulpian, notwithstanding his siding with Celsus in D. 9,2,15,1, followed Julian:

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1 The following is not of interest here: 'Sed si vulneratum mortifere liberum et heredem esse iusseris, deinde deceperit, heredem eius agere Aquilia non posse' (D. 9,2,16 Marcian. 4 reg.) 'quia in eum casum res pervenit, a quo incipere non potest' — 'But if you order him, after he has been wounded mortally, to be free and your heir, his heir will not be able to sue under the lex Aquilia [16] because in this case matters have reached a point where an action cannot arise'.
D. 9,2,21 p.r. – 1 (Ulp. 18 ad ed.):

At lex: ‘quanti is homo in co anno plurimi fuisset’. Quae clausula aestimationem habet damnii, quod datum est. 1. Annus autem retrorsus computatur, ex quo quis occisus est: quod si mortifere fuerit vulneratus et postea post longum intervallum mortuus sit, inde annum numerabimus secundum Julianum, ex quo vulneratus est, licet Celsus contra scribit.

The lex Aquilia states: ‘to whatever was the highest value of the slave in this year’. This clause contains the assessment of the damage that has been done. 1. Now the year is reckoned backward from the time when the slave was killed; but if he was mortally wounded and later died after a long interval, we shall reckon the year, according to Julian, from the time he was wounded, though Celsus writes to the contrary.

Celsus’ opinion is not rendered elsewhere but it fits his views on causality as expressed in D. 9,2,11,5, viz. that only the moment of actual death counted for chapter 1 of the lex Aquilia.

2. – These texts thus seem to present a clear contradiction within Julian’s opinion and between Julian and Celsus, and, but not always, between Julian and Ulpian, and it is not surprising that various scholars have tried to explain this. Several articles have appeared in the last fifty years. Most of these (Beinart, Schindler, Röhle, Pugsley, Von Lübtow) have received ample treatment in the contribution of Ankum of 1980, who after careful analysis had to reject their arguments. In view of Ankum’s thoroughness I have nothing to add to this, I completely agree with him here. As to his own analysis and conclusion, I shall return to this after having mentioned some other authors, since Ankum’s treatment of the problem is the most acute.

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4 Gerken, Aequae priorius (supra, note 2), p. 161–163, who assumes (p. 162, note 10) there are no interpolations in the text, in line with, i.a., Schindler and Ankum. There is in my opinion indeed no interpolation present here.

5 See in general on causality in Roman law H. Honsell, Th. Mayer-Maly, W. Selb, Römisches Recht, Berlin etc. 1987, p. 228–233, and p. 364–367 specifically on the lex Aquilia; but without reference to this problem. More with M. Kaser, Das römische Privatrecht, Vol. 1. München 1971, p. 502–505, particularly p. 503, note 2 on contributory causation and the causa supervenient (‘überholende Kausalität’). According to Kaser the jurists decided in controversial casuistry, referring to D. 9,2,11,3, D. 9,2,15,1; D. 9,2,21 p.r. – 2. I hope to demonstrate in the following that this was not the case.

Not mentioned by him is MacCormack. MacCormack rejects the reading ab alio iecta in D. 9,2,51 pr. and further mentions that the texts have commonly been discussed in terms of causation. According to him it is assumed that a chain of causation was started by the first assailant, to be interrupted or terminated by the second assailant. In this view Julian must have held that the chain was not broken whereas Celsus thought it was. Thus two opinions co-existed. MacCormack does not add anything to this statement which aligns with previous views in the literature, viz. that it concerns a case of causa supervenientis7. Later authors are Zimmermann, Gerkens and Kortmann. Zimmermann thinks the jurists decided the case according to their understanding of the word occidere, which does, apparently, not apply in case of indirect killing according to Celsus. As such this opinion does not differ from previous authors8. According to Gerkens (who also provides a survey of the literature)9 those who see a contradiction between D. 9,2,15,1 (where a mortally wounded slave dies subsequently on account of vis maior and not due to his wound; see above at note 3 and below, nr. 7) and D. 9,2,51 make an error in the way they consider the problem. They consider it from the perspective of interruption or overtaking of causality, and very often their discussion is limited to three texts (D. 9,2,51, D. 9,2,15,1 and D. 9,2,11,3). From that point of view it seems illogical to assume, as Julian does, that the causality between the mortal wounding and death can be interrupted by the collapse of, e.g., a house and not by a second, mortal blow by another assailant. Gerkens thinks that the last, however, pushes logic too far. After all, Julian himself says that according to logic neither of both assailants would be liable: the first, since he could argue that the second had actually killed the slave, the second that the slave would have died anyway and that therefore his act did not change the outcome (such a solution is given in D. 43,24,7,4 in the case of setting fire to a house that would be burned down anyway)10. Taking up an argument by Favre, Gerkens first concludes that Celsus and Julian agree in denying both the second assailant the excuse that the slave would have died anyway. The difference is that force majeure removes the causality of the first assailant, whereas that cannot be the case with a second human act. For Julian that is unacceptable. The result is that now both assailants are liable due to their causing death. Celsus, on the other hand, finds that also unacceptable, but he reduces the liability of the first assailant to wounding. Why this difference? Gerkens thinks that where one leaves the domain of strict application of rules for reasons of public utility, legal incongruities can be mended in different ways. Julian did not find a way why one

assailant should be preferred over the other, Celsus followed effective causality here⁷. Gerkens’ treatment is ingenious, but there are problems. First, neither Julian nor Celsus raises the argument that the act of the second assailant did not have any effect on the outcome because he would have died anyway. D. 9,2,15,1 and D. 9,2,51 pr. speak of maturius, ‘sooner than otherwise’, thus that the slave died quicker (‘prematurely’, one might say). It is not said that the second act did not matter because the slave would have died anyway. This of course does not have to mean that it may not have been the thought behind it, but the mention of maturius in both texts suggests that something else must have been important here for Julian; I shall return to this. Further, the argument drawn from D. 43,24,7,4 does not convince. A fire threatens to extend to neighbouring houses and in order to prevent this, the owner of one such house takes down the house between his house and the fire. He is not liable for wrongful damage⁸. According to Gerkens this is since the fire would have destroyed the house anyway. But this is not said so in the text. The reason is that he wanted to protect his house from the danger of the fire. That is an accepted justification, for which it is only required that it happens openly and that the fire would otherwise have reached the (saved) house. I cannot see a parallel with the mortally wounded slave. He did not pose a threat to the second assailant, the second assailant had no excuse to kill him. To say that he is excused because the slave would have died anyway means that the neighbour could tear down any neighbouring house that is going to collapse. But that is not allowed: required is always a threat to one’s own house. Such a reason lacks in D. 9,2,15,1. Thus I cannot agree with Gerkens as to his suggestion. But with his observation that others wrongly applied a modern causality concept I can agree (see below).

Kortmann, who has most recently written on this text, suggested that the second assailant did not kill the slave at once, but wounded him too, after which the slave died. It was now unknown whether the death was due to the first or the second wound. As such both the first and the second assailant could have been the cause of death and we would be confronted with a case of alternative causation⁹. It is an ingenious interpretation for which the texts

⁸ D. 43,24,7,4 (Ulp, 71 ad ed.): ‘Est et alia exceptio, de qua Celsus dubitat, an sit obicienda: ut puta si incendii arcendi causa vicini aedes intercedi et quod vi aut clam mecum agatur aut damni iniuria. Gallus enim dubitat, an excipi oportere: “quod incendii defendendi causa factum non sit?”’. Servius autem ait, si id magistratus fecisset, dandam esse, privato non esse idem concedendum: si tamen quid vi aut clam factum sit neque ignis usque eo pervenisset, simili litem aetiam ad mandam: si pervenisset, absolvit eum oportere. Idem aut ait, si damni iniuria actum fore, quoniam nullam iniuriam aut damnum dare videtur aequa perituris aedibus. Quod si nullo incendio id fecerit, deinde postea incendium orum fuerit, non idem eum dicendum, quia non ex post facto, sed ex praesenti statu, damnum factum sit nec ne, aestimari oportere Labeo ait’.
allow to some extent (the slave died sooner than otherwise, so the second blow had some effect; but the second blow does not have to have killed the slave instantaneously as D. 9.2.11,3 suggests). Yet one would expect in that case that Julian would have considered only one person liable in the end and not both; or else an alternative has no meaning. To consider both liable is an implicit denial of alternative liability. True, D. 9.2.51,1 seems to suggest an alternative liability, but since all were liable, even if one paid, it is a cumulative liability. And it is true too, that Julian suggests in the following that none might be held liable, which suggests in its turn that both were equally liable and could blame the other. But in that case the choice was the plaintiff's. Therefore this possibility must be rejected.

Hart and Honoré deepen the question of multiple causes by mentioning modern cases where the causality is problematic. I shall use their formulation of causa supervenientes as 'overtaking cause'. In Dillon v. Twin State Gas & Electricity Co. the court appeared, so they suggest, to follow the same decision as Celsus in D. 9.2.11,314. But D. 9.2.15,1 appears to them to be rather a problem of evidence. As to the case of D. 9.2.51pr., they mention two cases where a mortally wounded victim committed suicide. In the first case the court found this an overtaking cause, in the second they found the mortal wounding a contributory cause, which did not release the assailant from liability for manslaughter. In a case where a second assailant wounded a mortally wounded victim, one judge argued that by wounding he had accepted ('ratified') the previous injuries, hence had become responsible for these as well. But as to the Roman jurists, Hart and Honoré assume that Julian and Celsus/Ulpian held different views15.

as 'he died having been hit by someone else'. His argument rests upon the assumption that if it were the second blow which killed, one would expect ab alto ictu. Hence Julian would have had a case in mind in which it could not be ascertained who killed, in the sense of the statute, the slave.

14 Dillon v. Twin State Gas & Electricity Co, 5 April 1933, 85 N.H. 44 449, 164 A. 111. Boys were used to walk on the railings of a bridge over a railroad. Alongside the bridge hung a high-voltage electricity cable for a light which was normally during daytime switched off. One boy while walking on the railing lost balance and to avoid falling down on the railroad grabbed the cable. Unfortunately, a current ran through it and killed him. The boy would have fallen if he had not taken hold of the cable. The court argued that the boy would have been dead or maimed due to the fall and that his grabbing would not have altered the outcome. The defendant's duty consisted not in preventing him from falling but from exposure to the wire. So if he would have been dead, the company might only be liable for suffering due to shock, but not for loss of income since his life expectancy would have been too short for that. If he would have been injured or maimed only, the defendant would have been liable for the loss incurred since the electrocution would have deprived him of that. The question of culpable negligence or occasioem praestare (cfr. D. 9.2.30,3) was indeed discussed here in the context of whether the defendant owed a duty of care to the victim.

15 H.L.A. Hart, A.M. Honoré, Causation in the law, Oxford 1985 (2nd. ed.), p. 242-245 on the problem, with reference also to Celsus and Julian. The South-African judge in the last case would better have founded his opinion on Labeo in D. 9.2.7,5, according to whom the killer
Ankum first surmises that Ulpian must have related in D. 9,2,11, between § 2 and § 3, to Julian’s view on the case of § 3, or else the word *probabilitius* would refer to nothing. The compilers would have left this reference out since it was to be related fully later on in D. 9,2,51 pr. What further pleads for this is the identity between § 2 of the fragment, where Ulpian mentions Julian, and D. 9,2,51,1. I agree and it seems to me that Ulpian must have had the corresponding part of Julian’s Digest before him. In § 2 the case is treated of a death, in which more than one has participated, while it is unknown whether one killed and the others merely wounded. Julian’s view as we know from D. 9,2,51 pr. is, that a *causa mortis* sufficed, and that was apparently the reason behind assuming the liability of everyone. Applied to a case of death after two blows by different people, it would also lead to the liability of both if it was not known whose blow was deadly or if both blows were mortal. As such § 3 follows logically after § 2, but we miss indeed something like: ‘and the same applies to blows delivered by more persons in sequence, so Julian, but’ and then Celsus’ distinction follows with Ulpian’s appreciation of it. Regarding the authenticity of D. 9,2,51 pr., Ankum points out that otherwise § 2 of this fragment would have been senseless.

After these preliminaries Ankum distinguishes several cases: one series with one wrongdoer and one series with two wrongdoers. In the first series the question focuses on the moment from which the amount of the *litis aestimatio* is estimated. According to Julian in D. 9,2,21,1 it is the moment of wounding if the slave later on dies, according to Celsus it is the moment of actual death. Ulpian follows Julian and apparently it was the rule. The same applies if the slave had been freed after the wounding.

But the crux lies in the second series, the four cases of overtaking cause. The first case is that of the slave, mortally wounded by A and after that slain by B (D. 9,2,11,3; D. 9,2,51 pr. and D. 9,2,15,1). Celsus (and Marcellus, and Ulpian) considers B to be the perpetrator in the sense of chapter 1 of the lex Aquilia, Julian A. According to Ankum Julian’s argumentation was that a) *occidere* in chapter 1 should be interpreted narrowly: only death by violence counts here. Both A and B did so and therefore both are liable. But Julian further said that b) *occidere* must also be interpreted widely, so that also somebody who wounds a slave mortally is liable. We would expect that this

takes his victim as he finds him, a good authority in the Roman-Dutch law. The solutions the authors give for the first two cases is that the deadly wounding was the reason for the suicide and not an intervening cause. For further cases and a more detailed discussion see A.M. Honore, *Causation and remoteness of damage*, International Encyclopedia of Comparative Law, Vol. XI, Ch. 7, Tübingen—Paris—New York, p. 82–89.


18 Ankum misses the opinion of Celsus on this and assumes that he would not have given the former owner an action since he was no longer owner in the moment of death. This seems indeed to me the case.
applies to B (and, actually, to A also), but Ankum does not say so. Yet, if both were liable under a), why then the second interpretation? Julian cannot be understood otherwise as that one interpretation applied to the one assailant, and the other to the other assailant; and this would then be resp. B and A. After that Ankum states that for Julian the moment of a mortal wounding was decisive, for Celsus the moment of death19. This, however, seems to me to be in contradiction with D. 9,2,51 pr., where Julian formulates two possibilities: occidere and causam mortis praebere. Then, in this section, both are liable according to him, evidently for different reasons. The question cannot, therefore, be reduced to a clear-cut difference in opinion between Julian and Celsus. I shall return to this.

Ankum further observes that Julian's view on the mortal wound, viz. that the moment of wounding counts as the moment of death, does not really hold for D. 9,2,51 pr. since the slave does not die from this but from the later slaying. Thus A should not be liable20. This application of the principle formulated in D. 9,2,21,1 is indeed consequential as we shall later see. However, as regards the cause of death, the text says first decessit, which Julian later on specifies as 'ut maturius intercercetur, quam ex priore vulnere moriturus fuerat' – 'that as a result he died sooner than would otherwise have been the case on account of the first wound'. Julian does not say that the second blow interrupted the dying process. He merely says that the dying process as a consequence of the first blow was accelerated. Accelerated is not the same as interrupted, although it is true that the slave died so to speak 'before his time', due to the second blow. But this does not have to mean that according to Julian the effect of the first blow was interrupted. Here I come to a point where I think previous authors have concluded too quickly that this fragment concerns a causa superveniens, i.e., a cause which interrupts the ongoing cause and its effect (overtaking cause). Ankum says that Julian can only be right if the slave indeed dies as a result of the blow of A, what Ankum considers not to be the case here. The text, however, leaves open by the word maturius that the slave died as a result of the first blow, be it now quicker. I shall return to this below and then also deal with D. 9,2,15,1 where a mortally wounded slave dies maturius, now by a collapsing house or the like; and where it is not the first blow which is the assumed cause of death. But I need to say at this moment that the argument of Julian only applies in cases where an act has an irreversible effect and where the subsequent act would have had the same effect and would be done on purpose. Consequent from his point of view, Ankum then points out that such an illogical view (A being liable notwithstanding B's intervention) can be acceptable on ground of public policy. I agree with that, but I see this

19 Ankum, Das Problem der 'überholende Kausalität' (supra, note 2), p. 349.
20 Ankum (supra, note 2), p. 349. Ankum evidently does not adhere to the idea, later submitted by Kortmann (see note 13), that it was not clear which wound was deadly and that it concerns an alternative cause. See below.
argument of Julian as a second line of defence for his views. Ankum does not find these arguments very convincing\textsuperscript{21}. They indeed lean heavily on the reductio ad absurdum and are certainly alien to the point in discussion, causality.

As already indicated above, D. 9.2.15,1 is the crux. Why does according to Julian a collapsing house (I leave the other possibilities aside since they are similar) remove by killing a mortally wounded slave liability from the assailant for a certain death and make him merely liable for wounding (thus in line with Celsus), when a slaying by a second assailant (see D. 9.2,51pr.) does not? And why does Julian think it is different when there is not a collapsing house, but a manumission? Read in this way the text indeed reveals a contradiction in Julian’s statements, as Ankum says (in line with many before him). He changes therefore the interpunction, by which the first part (\textit{si servus \ldots vulnerato}) becomes a statement, not connected with Julian and in line with Ulpian’s view in D. 9.2,11,3 as regards the liability of the (first) assailant who wounded mortally. The second part (\textit{sed si \ldots ait}) is by that lifted out of the context, thus removed from the question of causality, and aligns now with D. 9.2,21,1 and again Ulpian’s view. The \textit{et Julianus ait} refers to this concurrence of causes\textsuperscript{22}. The difference is that the collapsing house has made it impossible to attribute the death to the wound, whereas that is possible in the other case\textsuperscript{23}. Ankum puts forward as main argument for this that all Digest editions previous to Mommsen’s have this punctuation\textsuperscript{24}. But, though it is true that the punctuation is at the discretion of the editor, this only proves that before Mommsen all editors apparently interpreted the text in this way. The Gloss solves the question by assuming that the lethality was assumed but not certain, by which this text was not in contradiction to D. 9.2,51pr., and the punctuation completed this rather easy solution\textsuperscript{25}. Since we do not know how the original punctuation was (if there was any), all rests on interpretation.

Ankum further mentions two other texts in support of his interpretation, D. 9.2,36,1 and D. 9.2,30,4. I shall deal with these texts afterwards. They are not essential to Ankum’s viewpoint. It will have become clear in the foregoing that I agree in part only with his analysis, which is much deeper than others and makes matters more evident. Yet the problem remains and is not satisfactorily resolved. As indicated, the crux lies in the fact that all authors consider the second slaying in D. 9.2,51pr. to be a \textit{causa superveniens} which interrupts the chain of causation, and put this on the same level as the collapsing house in D. 9.2,15,1 (and the second blow in D. 9.2,11,3). Both represent the opinion of Julian. Put next to D. 9.2,11,3, where the same case is given but with Celsus’ different answer to which Ulpian adheres, it cannot but result in a difference of opinion between Julian and Celsus (which also

\textsuperscript{22} Ankum (supra, note 2), p. 352–354.
\textsuperscript{23} Ankum (supra, note 2), p. 354.
\textsuperscript{24} Ankum (supra, note 2), p. 352.
\textsuperscript{25} Gloss mormifere: ‘Ut putabantur, non tamen erat certum, et sic non est contra [D. 9.2,51pr.]’.
in my view is correct to assume), but also cannot but result in a contradiction with Julian himself (which in my view is incorrect to assume).

3. – It is in the line of this that I would like to put forward another explanation. I return to D. 9,2,15,1 for an analysis in comparison with D. 9,2,51pr.26 Here somebody wounds a slave mortally. Before death could occur, an event, not caused by human hand but an Act of God (vis maior), took place and finished the slave’s life. The person who wounded can only be sued for wounding (‘If a slave who has been mortally wounded has his death accelerated subsequently by the collapse of a house or by shipwreck or by some other sort of blow, no action can be brought for killing, but only for his being wounded’). This is in agreement with D. 9,2,11,3 and D. 9,2,32,1: there is no one who can be sued for actually causing death, since it did not appear whether the wound really led to the slave’s death. But if the slave had been mortally wounded, then freed, and after this had died, the person who wounded him could have been sued for having killed him (‘but if he dies from a wound after he has been freed or alienated, Julian says an action can be brought for killing’). This is not what we would expect. At the moment of death, decisive for a law suit under chapter 1 of the lex Aquilia, the slave was no longer owned by anybody and his former owner could only sue on account of the wound, since that had happened while he was owner27. The explanation, given by Ulpian but I assume representing Julian’s argument as approved by Ulpian, is that the mortal blow was equal to a killing. That it was a killing became evident, however, later on. This argument implies that for a wound to be considered lethal, it must be a wound which one may expect to be lethal, hence must be possible. But in that case, what difference made the collapse here? Was death here not to be expected as well? Apparently expectancy was not the criterion. This leaves as only difference between D. 9,2,51pr. and D. 9,2,15,1 the difference between a human act and vis maior. What is the relevance of this difference for Julian’s view that a mortal wound equals a killing in the first but not the second case? His motive to do so set aside for a moment, what argument is there to defend this? The reasons Julian brings forward in D. 9,2,15,1 reveals it. The text has: *Haec ita tam varie, quia verum est eum a te occisum tunc cum vulnerabas, quod mortuo eo demum apparuit: at in superiore non est passa ruina apparere an sit occisus* – ‘These situations are so different for this reason: because he was actually killed by you when you were wounding him, which only became apparent later by his death; but in the former case the collapse of the house did not allow it to emerge whether or not he was killed [scil. by you]’ [my italicising, AJBS].

26 For the text, see at note 3.
27 In the case the slave was alienated, presumably sold, it will have been done as ‘wounded but recovering or recovered’. The buyer would have returned the dead slave and received the price paid.
First, Julian looks at the possible future consequences of the wounding of the body in order to decide whether it is indeed to be considered lethal or not. Second, the future consequence is presented as something that will become apparent in due time as a normally inevitable result. Third, the collapse of the wall is an event that prevents the possible and otherwise expected effect to become apparent. Four, this consequence removes the qualification of lethality in the proposition about the wounding of the body. By that the wounding is removed as cause of death.

Is it possible to see this as a case of *causa supervenien*. The modern doctrine of causality in law is based on early nineteenth century theories which, following Kant’s separation of objective causality and subjective imputation, developed for criminal law the doctrine of conditional causality, to which was added the theory of adequate causality. This combination was later on applied to private law, with some refinements. In this doctrine all events (acts) without which the event in question could not exist, are considered equally causal. The causes formulated as conditions, it is the concept of the *conditio sine qua non*. By means of the theory of adequacy is next the cause selected which is probable (or more probable) to have caused the event, that is, which interrupted the otherwise and normally expected course of events. It is based on the causality theories developed for physics, which rejected the antique idea of the essential cause (i.e., that a cause has a force of itself). Whether there is a relation between two events in the sense that one is the condition for the existence of the other, is established by experience, which recognises regularities in relation between events. Such regularities make predictions possible what course of events may be expected. An event or act which interrupts such a regularity is a cause. Every effect is in itself a condition/cause again, in an endless chain of cause and effects (see also nr. 7). This is an idea of causation, completely different from the ancient idea. Looking at the case with modern eyes, we would say that the collapse disturbed the normal course (viz., that the slave would slowly die) and removed the wound as *a conditio sine qua non* (assuming that the wound was not a reason for dwelling in the house): we can imagine death occurring while leaving out the wounding. Thus the collapse is a true *causa supervenien*: it overtakes the other cause.

But we do not see such a formulation here. Julian does not say that the second event removed the first event. It stopped us from seeing what the outcome of the wound would be, viz. whether it was really lethal. That means that for him a wound being lethal had to be lethal in the end to be lethal after all. The predicate (‘lethal’) thus depends on the outcome and if so, then

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we may even say that the killing took place in the moment of wounding (as we saw before proposed by him, D. 9,2,21,1). But the second event took away the possibility of checking this. Consequently Julian redefines the statement about the wound. Since the qualification of lethality cannot be checked, the lethal wounding turns into a mere wounding and is so removed as the cause of death. Probability does not play a role here: the wounding is not the cause amongst all conditions because it was probable that the slave would die from it, but could be the cause (of course in view of its severeness) if he had died from it. If that cannot be established, it cannot be a cause of death. Julian does not use as argument that the collapse has replaced it as cause. Obviously Julian had a view on causality, different from the modern legal one.

4. – This brings us to the question, which views Julian (and Celsus) may have had concerning causality and fate. As Julian himself explains, originally chapter 1 of the lex Aquilia was based on a rather simple view of causality: if somebody slew a person and killed him by that, he was the perpetrator and liable. The slaying was immediately connected with the death and was its cause. Later on causality was extended with the concept of causa mortis praestare.

Nörr has ventured into the question, whether and, if so, which concepts of causality were current among the Roman jurists. His research covered causality in the area of the cautio damni infecti and in this context the views of the early jurists, particularly Labeo. He concludes that Labeo distinguished between several causes: a causa extrinsecus as opposed to a cause, found in the behaviour of the wrongdoer. The approach of the jurists and Labeo show a parallel with the causality discussion regarding the lex Aquilia. Yet, though we see with Labeo a terminology of rhetorical-philosophical nature invading the discussion, Nörr thinks that in the end it was the question of immediacy (ob ea ipsa re, per quam ... damno quis adfectus est) which formed the basis of the discussion and not more. Nörr’s research certainly holds for the cautio damni infecti texts and the period taken, but it is also restricted to this and does not cover, e.g., the lex Aquilia or the question of the causa superveniens. It may well be that the jurists did not feel the need to go deeper for the usual problems, but with the latter, where it seems that two causes follow each other, it may have been different. To some extent Servius and Labeo also addressed this question when dealing with the collapse of a building by a sudden flooding or by slow penetration of water (D. 39,2,24,5). Labeo thought that in the latter case the cautio applied, and drew a parallel with the Aquilian case of the already weakened slave who was killed (see below). But the penetration, as the weakening, was considered by him as a natural cause, not as

an effect caused by human acting. I therefore think it useful to extend this research to the question of subsequent causes.

Causality concepts in the early empire were basically Aristotelian as subsequently developed in the Stoa. Aristotle devised causality as a means to explain how the world had come to be as it was. Everything presupposes a cause by which it came into being, nothing is created by accident. To know the cause of something means to know why it is thus and not something else: it is a 'because' (ὅτι τι) which has effected and at the same time defines the something. Contrary to modern theories his theory is not meant to be predictive. The Stoic philosophers developed this view in various ways, but unfortunately their views have to be reconstructed from fragments as far as is possible. They assumed that a cause was a body which caused upon another body an effect which in its turn was incorporeal (and therefore could not be a cause itself, as a result of which a chain of causes was impossible). This something incorporeal was phrased as a predicate in a proposition. Thus a knife which cuts flesh is the cause to the body being cut. Further, causes were causes to each other, not of each other. As a consequence the cosmos seems to have been an intricate structure of reciprocal influences, united by cosmic sympathy: a divine pneuma permeated all. The question which arose was, of course, whether in such a system there was room for a free will, and Chrysippus, e.g., tried to allow for this, as Cicero underlined in his De fato (see note 40).

Several distinctions of causes existed. One scheme which would leave room for a free will summed up four causes. One cause can only initiate an effect without any further influence on it (the prokatartikon); another cause can regulate the entire process of effect, without any need from outside, it is autarchic (or autonomous) (the synektikon). The example given by Chrysippus is the drum on the top of the hill. It needs a little push (the prokatartikon), but after that, because of its shape, will roll out of itself downwards off the slope (the synektikon). Another cause is the contributory cause (the synaition)

32 Apart from the articles mentioned below, see in particular the most recent and extensive work on the Stoic views on causality and fate: S. Bobzien, Determinism and free will in Stoic philosophy, Oxford 1998.
34 That is, not based on established regularities of phenomena in combination with the probable interrupting effect on these by another event or human action; see supra, note 29.
35 S. Sauvé Meyer, Chain of causes, What is Stoic fate?, in: R. Saller, God and cosmos in Stoic philosophy, Oxford 2009, p. 74–77. This seems to imply that the knife stays as cause and the being cut also, as a new cause, in a reciprocal relationship.
37 See also the survey with Nörr, Kausalitätprobleme (supra, note 30), p. 134–140.
which can only work in combination with other causes. The adiuvatory cause (the *synergon*) intensifies only the effect of the *synectikon*¹⁹. I keep to this categorisation, which is also Stoic or at least close to it. Notwithstanding Bobzien's impressive application of modal logic (see note 32), it seems to me that the Roman jurists will have rather relied on the terminology as used and popularised by Cicero.

Cicero relates in his *De fato* 41 a distinction which may derive from Chrysippus. According to Cicero causes could be independent (*causa principalis*) or conjoined, or could merely reinforce another (*causa adiuvatoria*)⁴⁰. Thus with him the *synectikon* seems to have become a *causa perfecta et principalis*, the *synergon* a *causa adiuvans et proxima*, the *prokatartikon* a *causa adhibens praecursionem* (or *causa antecedens*). Regarding fate, not all causes are *principales*, many are auxiliary and *proximae* and man's will may influence these. But if man's will was not concerned, such causes were *principales*. Though cause and effect not being a succession of events, it was possible that something happened which had an effect, in time, which was connected to that as to a cause, which is for that reason called the antecedent cause. Thus fate is a system of antecedent causes and it can even be said that something at present has already its effect in the future⁴¹: *Itaque non sic causa intelligi debet, ut, quod cuique antecedat, id ei causa sit, sed quod cuique efficienier antecedat* — 'Accordingly "cause" is not to be understood in such a way as to make what precedes a thing the cause of that thing, but what precedes it effectively' (Cic. *De fato* 34)⁴². But only in the course of time it is revealed what has been established long before. Thus possibility exists only to the extent that men are ignorant of the future, and they recognise as possible anything of which

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²⁰ See Gould, *The Stoic conception of fate* (supra, note 36), p. 29. The source for this: Cic. *De fato* [41]: 'Chrysippus autem cum et necessitatem inprobaret et nihil vellet sine praepositionis causis evenire, causarum genera distinguuit, ut et necessitatem effugiat et retineat futurum. *Causarum enim*, inquit, *aliae sunt perfectae et principales, aliae adiuvantes et proximae. Quam ob rem, cum dicimus omnia fato fieri causas antecedentibus, non hoc intelligi volumus: causas perfectis et principalibus, sed causas adiuvantibus et proximis* — 'But Chrysippus, since he refused on the one hand to accept necessity and held on the other hand that nothing happens without fore-ordained causes, distinguishes different kinds of causation, to enable himself at the same time to escape necessity and to retain fate. 'Some causes', he says, 'are perfect and principal, others auxiliary and proximate. Hence when we say that everything takes place by fate owing to antecedent causes, what we wish to be understood is not perfect and principal causes but auxiliary and proximate causes' (translation H. Rackham).


²² Also Cic. *Topica* [67]: 'Contingens huic causarum loco ille locus est qui effectur ex causis. Ut enim causa quid sit effectum indicat, sic quod effectum est quae fuerit causa demonstrat. Hic locus suppeditare solet oratoribus et poetis, saepse etiam philosophis, sed eis qui ornate et copioso loqui possunt, mirabili copiam dicendi, cum denuntiante quid ex quaque re sit futurum. Causarum enim cognitionem eventorum facit'.
they have no reason for knowing that it is impossible. Thus a proposition about the future is at once true or false but we are ignorant of this as long as the outcome is unknown. The Stoic was popular with the Romans. Even if the above ideas were not accessible to them in their Greek originals, they could have been known to them through popularising works, such as Cicero’s *Topica* or *De fato*.

Applied to our case, we could say that it is the wound which is cause to the body being wounded, and a deadly wound (vulnus mortale) which is cause to the body being dead (occisus) in the end due to a wound by violence. This cause has been provided by the person who hit and so we can say that he provided the cause to the death: *causam mortis praebebat*. For a wound to be deadly, it has to be of a nature that it can lead to death on its own, but this proposition has also to be true. It seems true as long as the future does not prove it to be wrong, which means that until the person dies of the wound we are ignorant of whether it is, in reality, true or not. If he dies, it was true, if not, it was false.

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43 See Long, *Freedom and determinism* (supra, note 38), p. 189. Long cites Diogenes Laertius, VII.75: ‘The possible is that which admits of being true if externals do not prevent it from being true’. The Stoics discussed fate in terms of true or untrue statements.

44 Cic. *Topica*, 58: ‘Causarum enim genera duo sunt; unus, quod vi sua id quod sub eam vim subjectum est certe efficit, ut: ignis accendit; alterum, quod naturae efficiendi non habet sed sine quo effici non possit, ... [59] ... Arque ut earum causarum sine quibus effici non potest genera divisi, sic etiam efficiendum dividi possunt. Sunt enim aliae causae quae plane efficient nulla re adiuvante, aliae quae adiuvari velint, ut: sapientia efficit sapientes sola per se; beatos efficiat necne sola per sese quaestio est’ – 58: ‘There are, then, two types of causes: one which by its own force brings about with certainty the result that is subject to this force; e.g. fire ignites; the other which has not the feature of being (fully) efficient, but without which an effect cannot be brought about ... [59] ... And just as I have distinguished types of those causes which cannot be brought about without an effect, so various types of efficient causes can be distinguished. For there are some causes which are straightforwardly efficient without anything assisting them, and others which like to be assisted, ...; 63: ‘Perspicuae sunt quae appetitionem animi judiciumque tangunt; latent quae subjectae sunt fortunae. Cum enim nihil sine causa fiat, hoc ipsum est fortuna, qui eventus obscura causa et latenter efficiatur ... – 63. ‘Manifest are those [causes] which involve an impulse of the mind and a judgement; hidden are those [causes] which are subject to fortune. ... (translations: T. Reinhardt, *Cicero’s Topica*, Oxford 2003).

45 Cic. *De fato* 34: ‘Quosdi concedatur nihil posse evenire nisi causa antecedente, quid proficiatur, si ea causa non ex aeternis causis apra dictur? Causa autem ea est, quae id efficit, cuius est causa, ut vulnus mortis, cruditas morbi, ignis arderis. Itaque non sic causa intelleget debet, ut quod cuique antecedat, id ei causa sit, sed quod cuique efficienter antecedat, ...’ – 34. Even if it be admitted that nothing can happen without an antecedent cause, what good would that be unless it be maintained that the cause in question is a link in an eternal chain of causation? But a cause is that which makes the thing of which it is the cause come about – as a wound is the cause of death, failure to digest one’s food of illness, fire of heat. Accordingly ‘cause’ is not to be understood in such a way as to make what precedes a thing the cause of that thing, but what precedes it effectively ...’.
Regarding the application of the lex Aquilia, the first chapter originally required a direct act, by a body to a body (corporum corpori), which was of course already implicit in the verbs occidere, urere, frangere and rumpere. The effect would be immediate in the case of killing. We may assume that the legislator had a plain non-philosophical understanding of causality here. Julian on the other hand phrases this original and restrictive application of the lex in D. 9,2,51pr. in a more elaborate way: ‘qui adhibita vi et quasi manu causam mortis praebisset, tracta videlicet interpretatione vocis a caedendo et a caede’ – ‘who furnished a cause of death by some application of force, done as it were by one’s own hand, for the meaning of the word derives from “to slay” and “manslaughter”’. Thus originally the direct act of slaying would have been the cause of the body being dead, resulting from the will to strike or slay with a deadly effect. But Julian widens the application of the statute by equalising with the direct act the concept of mortis causam praebere, which allows for bringing under it ways of causing death not by slaying yet still in an unnatural way. In theory other related ways were open by a wider grammatical interpretation of occidisse or by application of a fiction, but we do not see any trace of this; apparently the Romans dealt incidentally with it by actiones in factum. Yet there evidently was a desire to deal in a more regular way with cases in which unnatural death occurred and which could not be interpreted in such a way (like administering a poison as if a medicine) as to be brought under the application of the lex Aquilia. Here the concept of mortis causam praestare or praebere offered a solution. The philosophical views on causa provided here the means to fit these categories of killing methodically into the application of the statute.

The concept of mortis causam praebere provides also a solution for cases of accessiory to killing, of indirect killing, of setting out to the danger of dying, and of delayed dying. In these cases a cause should be provided which in itself, independently of the antecedent cause, could by its nature be the cause to the victim being dead in the end (occisus) or contributing in some way to this. The death should not be a natural one (mortuos), since such a death belied the lethal nature of the cause (it proved, in the end, not to be lethal and so not a causa mortis). If we understand the Stoic view here well, the antecedent cause, viz. the act which provided, coexisted all along with the cause itself. If so, he who did it could be identified as the person who had killed (occidisse) in the moment of death, but also already in the moment of acting 46. A strong argument that Stoic views are present in the discussion on the causality is, as already indicated, D. 9,2,15,1, where the future is something which must be revealed in due before it can be said that a cause had its effect: ‘Haec iia tam varie, quia verum est eum a te occasum tunc cum vulnerabas, quod mortuo eo demum apparuit: at in superiore non est passa ruina apparere an sit

46 D. 9,2,25pr. This construction follows the example provided by Chrysippus, see Meyer, Chain of causes (supra, note 35), p. 75–76.
occisus' – 'These situations are so different for this reason: because he was actually killed by you when you were wounding him, which only became apparent later by his death; but in the former case the collapse of the house did not allow it to emerge whether or not he was killed'. The phrasing fits the Stoic view on causality and fate.

5. – In this way Stoic views, combined with the concept of causam mortis praebere, would have provided a doctrine of causality which could solve legal problems of imputation too. For example, the case that two persons cooperated in the killing of a slave:

D. 9.2.11.1 (Ulp. 18 ad ed.):
Si alius tenuit, alius interemit, is qui tenuit, quasi causam mortis praebuit, in factum actione tenetur.

If one man holds a slave while another kills him, he who did the holding will be liable to an actio in factum because he furnished a cause of death.

Here the delict was committed in cooperation. The man who held, actually an accessory, provided a causa mortis, while the other did it (synectikon, causa principalis). Applying the lex Aquilia, only the killer fitted the statute and against him the actio directa would be granted. The accessory could be considered a causa antecedens (prokatarktikon), which would be sufficient for a causa mortis, since due to him the other could proceed unhindered. This led to an actio in factum.

Similarly the concept could be used in the case that several persons could have killed a slave but nobody could be pinpointed as the actual killer:

D. 9.2.11.2 (Ulp. 18 ad ed.):
Sed si plures servum percusserint, utrum omnes quasi occiderint teneantur, videamus. Et si quidem apparat cuius ictu perierit, ille quasi occiderit tenetur: quod si non apparat, omnes quasi occiderint teneri Julianus ait, et si cum uno agatur, cetero non liberantur: nam ex lege Aquilia quod alius praestitit, alium non relevat, cum sit poena.

But if several people beat a slave to death, let us see whether they are all liable as for killing. If it is clear from whose blow he perished, that person is liable for killing; but if it is not clear, Julian says that all the assailants are liable as if they all killed; and if the action is brought against one of them, the others are not released; for under the lex Aquilia what one pays does not release another, as it is a punishment.

D. 9.2.11.4 (Ulp. 18 ad ed.):
Si plures trabem deiecerint et hominem oppresserint, aeqve veteribus placet omnes lege Aquilia teneri.
(...) If several people throw down a beam and thereby crush a slave, it seemed right to the ancient jurists that they should all be liable in the same way under the lex Aquilia.

In § 2, which deals with the same case as D. 9,2,51,1, two possibilities are distinguished. First, if it is known by whose blow the slave perished, it is obvious who must be sued. But for the solution in the second case, when no individual can be pointed out, two arguments can be adduced. First, all might be considered as having contributed to the death and as such be *synaistia* (contributory causes), thus liable under chapter 1; second, all might be considered liable since otherwise all would go free, which would be unacceptable from the point of view of public policy. It is this latter argument which Julian brings up in D. 9,2,51,2 *in fin.* for the case of two stealing a beam, too heavy for each of them, in case one does not agree with his previous argument. But here Ulpian deals systematically with causality. First, if there is a direct cause of death, it is this cause which leads to the liable person (and to the *actio directa*). Second, if there is none, a solution offered by Julian is liability on basis of a contributory cause. If one does not know the person who gave the mortal blow, then in any case all others would have equally contributed to the effect, which was the common result. That would suffice for Julian to hold them liable. This contributory causality would not be lifted by taking one slayer and condemning him, since he would be condemned for contributing to the death, not for having given the mortal blow. Julian does not say whether the *actio directa* or an *actio in factum* was granted here but it is likely the latter. The phrase *nam ... poena* does not fit this, but it does not fit the entire text. The penal character of the lex Aquilia has indeed this effect, but the explanation given does not tell why all are held liable in the first place. It only gives an argument why the condemnation of one does not relieve the other assailants.

Another case is that of the indirect cause of death. It cannot be subsumed directly under chapter 1 of the lex Aquilia since it is not a case of straight *occidere*. Hence the resort to the wider concept of *causa mortis* and to the *actio in factum*. What the perpetrator does is in Stoic terms a *prokatarktikon* (*causa antecedens*), which in its turn brings about a cause which operates towards its effect independently from the perpetrator, i.e., a *synektikon* (*causa principalis*):

D. 9,2,7,6–7 (Ulp. 18 *ad ed.)*:
Celsus autem multum interesse dicit, occiderit an mortis causam praestiterit, ut qui mortis causam praestitit, non Aquilia, sed in factum actio ne tenetur. Unde adiert eum qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium portexit: nam nec hunc legi Aquilia teneri, sed in factum. 7. Sed si quis de ponte aliquem praecipitavit, Celsus ait,
Celsus says it matters a great deal whether one kills directly or brings about a cause of death, because he who furnishes a cause of death is not liable to an Aquilian action, but to an \textit{actio in factum}, wherefore he refers to a man who administered poison instead of medicine and says that he thereby brought about a cause of death in the same way as one who holds out a sword to a madman; and such a man is not liable under the lex Aquilia but to an \textit{actio in factum}. 7. But if a man throws another off a bridge Celsus says that regardless of whether he is killed by the impact or merely drowns at once or whether he perishes from exhaustion because he is overcome by the force of the current, there is liability under the lex Aquilia, just as if one throws a slave-boy against a rock.

The poisoning case is another example of a wrongful death committed \textit{non corpore non corpori}, for which the concept of \textit{causa mortis} is used, with an \textit{actio in factum}, the formal fulfilment of the requirements for an \textit{actio directa} lacking. What kind of cause would the Stoics have considered this? It seems to me to be a combination of \textit{prokatartikon (causa antecedens)} and \textit{synektikon (causa principalis)}: the giving of the poison sets off an effect upon which the actor has no control: the body is now being poisoned, and this leads autonomously to the lethal end. Such a \textit{causa antecedens} is considered by Celsus sufficient for an \textit{actio in factum}, evidently in combination with the subsequent cause and effect set off by it; but not for an \textit{actio legis Aquiliae directa}.

In the case of the death by the fall of the bridge or the drowning by exhaustion Celsus considers, however, the direct action applicable. Why does Celsus, who apparently excluded from the \textit{actio legis Aquiliae directa} cases where the defendant was merely a \textit{causa antecedens} and therefore resisted an extension of cause along Stoicist views, make this distinction between the first and second example? Presumably because in the first case it is the victim himself who is in a state of being poisoned, which state leads on its own to his death. In a way he is his own cause of death, as is the madman with the sword. Contrary to this the man who administered the poison did not act violently and so did not comply with the letter of chapter 1 which required an \textit{occidisse}. Celsus thus kept to a strict grammatical interpretation of the statute. In the second example the victim would normally not have been his own cause of death: he may try to save himself but he is overcome by the fall or by subsequent circumstances, as is somebody who directly falls against a rock. There is no autonomous cause of death effective in him and the throw, a violent act, thus did not bring about in him a cause of death but was the cause of death itself. Compared to the first case he is a direct victim of the act of the man who threw him.

In the above cases D. 9,2,11,1 and D. 9,2,7,6–7, a \textit{causa mortis} led to an \textit{actio in factum}. We see that Celsus keeps this cause separated from the true
cause which qualifies for a *directa*; but Ulpian too seems to keep to this
distinction in D. 9,2,11,1.

Then D. 9,2,36,1 (Marcellus 21 dig.), which deals with a lethally wounded
slave who has been instituted heir by his owner. After his death his heir
Maevius would like to sue the perpetrator for damages. According to Marcellus
Sabinus rejected this since what had not been possible for the deceased, could
not pass onto the heir. Apparently the owner would not have been able to
raise the *actio legis Aquiliae*, consequently the slave would not have disposed
of this and so neither Maevius. As Ankum remarks, the question would only
arise if the moment of wounding could have been considered as the moment
of death. But in that case the slave would have become entitled, in his dying
moment, to an action for himself as an already dead slave, which is illogical
according to Sabinus, Marcellus and, most likely, other jurists. Rather than
assuming that this interpretation of the mortal wound was a feature of the
Sabinian School, I would suggest that it was the application of Stoic views
and shared by both schools.

In D. 9,2,21,1 Ulpian reports as the current view that in the case of a
deadly wound, the year may be counted from the moment of wounding
backwards. D. 9,2,21,1 Ulp. (18 ad ed.): *Annus autem retrorsus computatur,
ex quo quis occisus est: quod si mortiferi fuerit vulneratus et postea post longum
intervalum mortuis sit, inde annum numerabimus secundum Julianum, ex quo
vulneratus est, licet Celsus contra scribit* – ‘Now the year is reckoned backward
from the time when the slave was killed; but if he was mortally wounded and
later died after a long interval, we shall reckon the year, according to Julian,
from the time he was wounded, though Celsus writes to the contrary’. This
assumption can be explained by the Stoic view of the cause which operates
autonomously with the antecedent cause running along, and the fact that
Julian was acquainted with this. Compared with the basic case of *occidisse*,
here the moment of slaying and of death lie apart and perhaps even wide
apart. A strict application of chapter 1 of the *lex Aquilia* must lead to the
moment of actual death as the point from which to reckon. The slave would
certainly have been worth less and the period might have been long too,
which would be to the disadvantage of the owner, and an undeserved advan-
tage for the delinquent. The solution, however, does not tally with a strict
interpretation of chapter 1. Only if we interpret the situation in terms of the
Stoic view on causality it makes sense. The assailant has slain a slave, but the
resulting wound in itself is, like poison, out of any human control. It will
inevitably lead to death, notwithstanding proper care. The end proves this to
be right. Thus the wound is the *synektikon* (*causa principalis*), and the assailant
the *prokatarktikon* (*causa antecedens*). He has provided a *causa mortis* and is

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47 Ankum, *Das Problem der 'überholende Kausalität'* (supra, note 2), p. 345–347, referring on
p. 347 note 74 to D. 9,2,36,1.
liable. But as a consequence of this constellation the moment of providing the *causa* may be taken as the moment of death and so as the moment from which to reckon backwards. This interpretation was in favour of the owner, because the year covered the period in which the slave had not yet been wounded, and would explain its later general acceptance, with the exception of Celsus here. Why he thought so here is not transmitted, but he apparently rejected here also the idea of the *prokatarktikon (causa antecedens)* as sufficient for liability by an *actio directa* under chapter 1, as we have seen before in D. 9.2,7,6–7. The consequence is that would have comprised the period of the lethal wound as well. The slave would certainly have been worth less and the period might have been long too. On the other hand, in this case an inheritance or legacy, opening after the wounding, would be available for his owner. Celsus may have answered that the owner could sue both under chapter 1 and 3 (see D. 9.2,32,1), but by that he would only have recovered as an extra the costs of medical care.

This interpretation tallies with a recent article by Armgardt on the retrospective effect of conditions in Roman legal literature and Stoic determinism. Armgardt points out, on the basis of an analytic approach and several Digest texts (not including texts on the lex Aquilia), that a condition which does not have to realise necessarily *ex ante*, yet if it realises, it is treated as having been necessary from the beginning and thus as existing at the beginning; the qualification ‘retrospective’ does not apply here. But this goes only, of course, for pending conditions. Armgardt refers to Chrysippus, whom he also thinks leading for the Roman jurists due to Cicero. Bijnkershoek had already said the same in 1710 on the effect of conditions, without reference, however, to Chrysippus or the analytical method applied by Armgardt, basing himself on several Stoic authors and interpreting in this sense Modestinus (8 reg., D. 45,1,100), while rejecting Cuiacius’ interpretation of D. 5,1,28,5. His

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65 C. van Bijnkershoek, *Observationum Juris Romani libri quatuor*, IV.15, *De fato*, Leiden 1752 (3rd ed.), p. 400–404, here p. 402–403: ‘Quapropter, quamvis res futura naturaliter certa sit et immutabilis, attamen dilatio requiritur, usque dum per eventum liqueat id, quod futurum fuit’ – ‘For that reason, although a future event is by its nature certain and unchangeable, is a delay nevertheless required, until it becomes clear by the outcome what had been in store’. Bijnkershoek links the Roman jurists with the philosophy of their times, referring to Cicero *De divinatione*, c. 125; *De fato* 13, 17 and 18; Seneca *Epist.* 101, and the Stoic. He argues in this essay against Cuiacius, of whose opinion in this matter he says: ‘et sic abis plus incertior,
conclusion stands the scrutiny of the modern scholarly standard, set by Armgardt. Armgardt’s conclusions, though restricted to conditions, concur with what I analysed on the overtaking causality. We are dealing here with statements which are true or untrue. One can approach the question as one of cause or, in the context of statements, as of condition and the one about a lethal wound is such a statement.

But what is mortifere? When is a wound deadly and has the assailant caused death? It is discussed in D. 9.2.7.5 (Ulp, 18 ad ed.): ‘Sed si quis servum agrorum leviter percussit et is obierit, recte Labeo dicit lege Aquilia cum teneri, quia alius alii mortifera esse solet’ – ‘But if someone gives a light blow to a sickly slave and he dies from it, Labeo rightly says that he is liable under the lex Aquilia; for different things are lethal for different people’50. The predicate ‘deadly’ of the effect is related to the victim. The possibility that somebody cannot survive such a blow (or likewise a fall, or swim against the current) is therefore a quality of the victim which comes for the risk of the assailant. We nowadays would say: you take your victim as you find him.

Finally D. 9.2.30.4 (Paul 22 ad ed.): ‘Si vulneratus fuerit servus non mortifere, negligenter autem perierit, de vulnerato actio erit, non de occiso’ – ‘If a slave has been wounded, though not mortally, but he shall have died because of negligence, there will be an action on account of wounding, not of killing’. Here a slave is wounded but not mortally, but no attention has been paid to the wound and the slave dies as a result. Paul says that his owner cannot sue on basis of his death, but only for his slave being wounded. If Paul had adhered to Celsus’ view, the insertion of non mortifere would have been superfluous, so Ankum, since in all cases a law suit only on ground of the wound would have been possible. It is therefore likely that he followed Julian51. If the neglect is considered as interrupting the event, it would fit.

The text occurs in a sequel on culpa, after Paul has dealt with occidere in D. 9.2.30 pr. – 1. Although the question is one about liability, the underlying problem is whether one has to take proper care of a wound and whether that

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50 The reference to Labeo is retained in D. 39.2.24.5. See also Norr, Kausalitatsprobleme (supra, note 30), p. 117–188 and 131.

has any use. The latter is a variation of the so-called Idle Argument, viz. the argument that if something is fated to be so and so, it does not matter whether one does something about it or not\textsuperscript{52}. Such a conclusion goes of course against common sense and it will not surprise that this argument was considered a sophism. Chrysippus and Cicero, i.a., maintained that one could do something, thereby restoring the efficacy of the free will\textsuperscript{53}. One way to solve the problem was to rephrase the argument in the sense of a necessary condition in a proposition about the future\textsuperscript{54}. It would here have run as follows: A non-lethal wound is indeed non-lethal, if and only if you take proper care. As Bobzien formulates it in general: the act is a necessary condition of the preservation of a qualitative state (and thus the absence of some change), viz. here: taking proper care so that the wound will heal as it should. Thus the act is a causally relevant condition and as such co-fated\textsuperscript{55}. Not taking such care means that the condition is not fulfilled and the quality lost, i.e., the wound turns into a lethal wound. The cause for this lies with the slave or his owner, not with the person who wounded. Therefore the owner could sue him only for the damage caused by the wound. On the other hand, it implies that a lethal wound was one which even proper care could not heal. The idleness (neglegentia) displayed by the slave or owner, which rendered the condition unfulfilled, is attributable to the slave or his owner: this attribution is the culpa. Perhaps it is in more cases possible to connect culpa and neglegentia with the concept of idleness regarding causation.

Further, it indeed follows that Paul adhered to not only Julian's but also Ulpian's view, that if the wound had been lethal it would have been possible for the owner to sue for occidere and not for wounding.

Another case of Julian's discriminating judgment is D. 9,2,11,5 (Ulp. 18 ad ed.): 'Item cum eo, qui canem irritaverat et effecerat, ut aliquem morderet, quamvis eum non tenuit, Proculus respondit Aquiliae actionem esse: sed Julianus eum demum Aquilia teneri atit, qui tenuit et effecit ut aliquem morderet: ceterum si non tenuit, in factum agendum' - 'Again, Proculus gave an opinion that the Aquilian action lies against him who, though he was not in charge of a dog, annoyed it and thus caused it to bite someone; but Julian says the lex Aquilia only applies to this extent that it applies to him who had the dog on a lead and caused it to bite someone; otherwise, if he were not holding it, an actio in factum must be brought'. The basis for Julian's differentiation will have

\textsuperscript{52} It could be phrased as follows: If it is fated that this wound is lethal, then regardless of whether you take proper care or not, it will not heal. If it is fated that this wound is non-lethal, then regardless of whether you take proper care or not, it will heal. But in both cases it is fated that it will not heal or heal. Therefore it is futile to take proper care of the wound.

\textsuperscript{53} Bobzien, Determinism and free will (supra, note 32), p. 181ff.

\textsuperscript{54} Bobzien (supra, note 32), p. 194ff.

\textsuperscript{55} Bobzien (supra, note 32), p. 222-223. The other possibility is: the action is a necessary condition of obtaining the change in a qualitative state insofar as it is a necessary part or trigger of an instance of causation by which that change is brought about.
been that in the first case the dog did what the man wanted and was instrumental, so that the *actio directa* applied. In the second case the man merely provoked the dog, while once provoked the dog was a cause of its own: a *prokatarktikon* (*causa antecedens*) and a *synektikon* (*causa principalis*). The first drew an *actio in factum*. What is important here, as before, is not so much that an *actio in factum* is granted, but that the theory on causes provides the basis for holding the man liable.

In the above cases the Stoic views on causality provided a means to frame causality in the context of the *lex Aquilia*. It evidently was more complicated when two events happened subsequently to the same body. Here the peculiarities of the Stoic views reveal themselves since time, and by that their views on fate, plays a role.

6. – With this we are back at D. 9,2,51*pr*. After first having formulated liability based on a strict textual application of chapter 1 of the *lex Aquilia*, Julian’s response contains a second ground for liability under chapter 1: *'Rursus Aquilia lege teneri existimati sunt non solum qui ita vulnerassent, ut confestim vita privarent, sed etiam bi, quorum ex vulnere certum esset aliquem vita excessurum'* – ‘Furthermore, it is not only those who wound so as to deprive at once of life who will be liable for a killing in accordance with the *lex* but also those who inflict a wound that is certain to prove fatal’. The problem here is that the second blow precluded the certainty that the deadly wound was, in the end, indeed deadly. *Maturius* means the same as in D. 9,2,15,1, where *vis maior* prevented to know the outcome: ‘sooner’, ‘accelerated’, thus before the expected time. Julian there agreed with it. Since he wants to hold here the first assailant A liable for killing he uses an argument, formulated in D. 9,2,21,1, that in the case of death due to a lethal wound the year may be counted from the moment of wounding to turn the wounding by A into a killing by A. He does not say here that death was, eventually, due to A’s wounding, but that death was certain to happen (*ex vulnere certum esset aliquem vita excessurum* – ‘a wound by which somebody will certainly die’). It is a different formulation, though; I shall return to this.

This is as regards the retrospective effect in line with what he himself says in D. 9,2,15,1 in the phrase ‘... *quia verum est eum a te occisum tunc cum vulnerabas, quod mortuo eo demum apparuit: at in superiori non est passa ruina apparere an sit occisus ...*’ – ‘... because he was actually killed by you when you were wounding him, which only became apparent later by his death; but in the former case the collapse of the house did not allow it to emerge whether or not he was killed. ...’. Julian maintains in the preceding that in the case of enfranchisement the former owner can sue under chapter 1 of the *lex Aquilia*, since the slave ‘was killed when you wounded him’, but that this was the case became only apparent when he died. This can only be said if the underlying idea is, that the assailant delivered a cause which out of its own
worked towards its effect: a synektikon (causa principalis). Fatal as it is considered, this effect is possible at its beginning but will only reveal itself in time as certain, as with events in history. A human event can interrupt or influence this case: as somebody might jump into the river and save a drowning man, then, humans have their responsibility according to the Stoas. But it may also be that fate (fortuna) has so to speak its own plan which is hidden for us but which confronts us with its effect, such as a shipwrecking or the collapse of the house which kills the persons in it. It is such an event that prevents from knowing the outcome of other acts. Here the external force makes what was possible (death as result of the blow) impossible to ascertain and by that the statement about the body of the victim being mortally wounded (a quality of the body) appears to be untrue. Thus it becomes impossible to state in the end that the lethal wound was lethal. It appears to have been a mere wound after all. No liability can be attributed to the collapse, this being vis maior.

Ulpian had evidently no problems in D. 9,2,15,1 with this view since he did not disapprove of it and, as said before, he likely reproduced Julian’s view here. There is no reason why Celsus would not have agreed too.

It was different, however, in the case of D. 9,2,11,3 and 9,2,51. In D. 9,2,51 pr. Julian himself rephrases the cause in the sense that already in case of a wound ‘by which somebody will certainly die’ liability for killing is established, regardless apparently of the actual outcome. That is not in accordance with the Stoic views. Julian bases here liability, it would seem, on probability (which gives it a modern look). It is evident from the remaining text of D. 9,2,51 that Julian was unhappy with the current solution of the case of D. 9,2,51 as rendered in D. 9,2,11,3, viz. that the second assailant was liable for killing and the first only for wounding, though the wound would have been proven deadly if the second blow had not occurred. Now A would have to pay much less, perhaps nothing, whereas his conduct had been highly reproachable. If there had existed a doctrine of attempt as nowadays is usual, A would certainly have been liable in criminal law. But here, by saying that the slave would certainly die, A would have caused his death and be liable.

But did Julian really introduce a new concept of causality, based on the probability that a cause would have this or that effect? It does not seem so: Julian does comply with the current Stoic views in other texts. Probably Julian’s statement must be read in context and is certum, ‘certainly’, to be understood in context with the case, viz. that the slave died anyway of the wound. Perhaps he read such an outcome, death as a result of A’s wounding, in the word maturius – quicker than otherwise, but, as is arguable, still as a result of A’s slaying. However, if the situation is interpreted as such, it also implies that B’s slaying was only adjuvatory: it intensified the ongoing process, hastened (maturius) death, but was not necessary for it. As such it was insufficient to change the first cause in the sense that the body of the victim
was now something else than being deadly wounded: it did not change the predicate. In other words: the first cause of death remained the sole cause and the second assailant merely assisted to it. Both causes ran parallel.

However, Julian also sees B's blow as cause of death, since B slew in conformity with the wording of the lex Aquilia as he defined it in D. 9,2,51pr. For this interpretation he might have cited D. 9,2,11,3 and D. 9,2,32,1. The word \textit{maturius} could also be interpreted in this sense, viz. as indicating that the hit was sufficient for death in its own. Hence the owner of the slave could sue B as well.

By using these two arguments at the same time (interpreting B's act both as an adiuvatory and a principal cause) and A's act as a cause of the killing (Celsus in D. 9,2,11,3), Julian could have argued, applying, as I would surmise, the Stoic categories of causality, that both assailants are fully liable under chapter 1 of the lex Aquilia, \textit{ex diversa causa et diversis temporibus}, 'by different causes and at different moments'. To achieve this, he interprets the first and second blow in different ways as regards their qualification as cause, on the different moments. At the moment of the first blow: A as \textit{causa antecedens = causa mortis}, followed by a \textit{causa principalis}, and B as \textit{causa adiuvatoria}; at the moment of the second blow: B as \textit{causa principalis = causa mortis}, while A becomes a cause for wounding. In this way he could consider both assailants fully liable. So B's act was at the same time a \textit{causa adiuvatoria} and a \textit{causa mortis} too. Regarding the moment of death, important for the calculation of the value of the slave, the outcome of the two statements led to the moment of wounding for A, and to that of death for B.

7. — In modern terms there would have been a multitude of causal chains leading to the situation that the slave is wounded by A. Each of these is necessary. Before the wounding the slave may have been sent on an errand by his master what made him meet with A, whom he might not have met otherwise. A may have found that morning the knife with which he will wound the slave, without which he might have hurt but not deadly wounded the slave, the knife may have been bought a year ago by C, etc. etc., going back infinitively. All these causes are necessary conditions (\textit{sine qua non}) and all are equally important (equivalent). How to make a choice between these? Because not all are to the common sense relevant for the slave's death. The solution is to consider what the normal cause of events would have been. The regular or normal course of events in human experience will be, that he goes on his errand and returns home. It may happen that on the way home he is hit by a roof tile, blown off a roof by an unexpected hard wind. Such an accident is part of life's risk ('Lebensrisiko'). That too is a regular course of events. This course has a scientific foundation: on basis of experience it is the most probable combination of subsequent events and implies both normativity
and predictability. But the wounding by A was not in the normal course of events and interrupted it. For that reason it is distinguished from the other causes (which we call therefore conditions) and considered the (relevant) cause of the slave’s death. But more is needed. It must also have increased the probability of the slave’s death. For that one must compare the probability of the slave being killed otherwise. Since this was very low or nil in the normal course of events, we assume that A’s act was an adequate cause of the slave’s death. So much for the objective aspects. Whether this can be imputed to A is another question. Here his mental state has a role. If he intentionally did it, it can be fully imputed to him (if capable of distinguishing between right and wrong). If he was negligent, a duty of care has to be present. In both cases the question is: what was the probable (foreseeable) consequence? Was it objectively foreseeable that the slave would die? As the text says, it was. So A was liable for the slave’s death. But now B enters and he kills the ailing slave in one blow. It is evident that although the slave would die anyway, it shortened his life considerably. What about B’s act? This interrupted again the course of events as a result of A’s wounding; it was not foreseeable. We cannot attribute this event to A’s act. Hence we consider it an overtaking cause. As to B, his act is a necessary condition for the slave’s death (if we eliminate it, the slave would be alive for at least the moments after) and it was foreseeable that the slave would die instantaneously. So, in modern theory, we consider this the adequate cause now. And since the slave would be dead anyway even if we eliminate A’s act, A’s act turns into a condition and is no longer an adequate cause. It is overtaken. Applied to the case of D. 9,2,15,1, the falling wall would be the adequate cause and be part of life’s risk. Further, D. 9,2,11,3 fits the outcome.

The Stoic approach would have been different. In so far as we can reconstruct it, the starting point was not a multitude of causes of which the relevant cause had to be selected, nor chains of causes, but the event itself and the immediate

[57] It would be different, of course, if A’s act would raise the possibility that somebody else would kill the slave, e.g., if the wound made the slave remain in a place where he would be exposed to violence, or that he foresaw B’s act. In that case A’s act would remain the cause.
[58] This exposition is rather schematic. In the various continental and common law systems all kinds of refinements have been introduced. But the main scheme remains nowadays the combination of Equivalence (conditio sine qua non) and Adequacy theories. See for the overview H.L. Hart, A.M. Honoré, Causation in the Law, Oxford 1985 (2nd ed.), p. 431–497 for the continental theories on causation, relevant here since almost all authors on this aspect of the lex Aquilia argue from a continental view point.
[59] But the basis, the normal course of events, creates its own problems. If A intentionally harms another, and objectively could have foreseen the consequences, why should he then be relieved partly or wholly from the liability for this because B provided an interruption in the chain of consequences? Modern theories indeed stumble at this point: see Honoré, Causation and remoteness of damage (supra, note 15), p. 82–89.
causes. A cause is not defined by being an interruption of the normal course of events. A cause is defined by its capacity to change the quality of a body and its effect is considered a body itself. The outcome makes clear whether this quality was present or not at the beginning. If not, there was never a cause. To expect a future outcome of something was of course not alien to the Romans and other peoples in Antiquity but it was not elevated to a scientific concept of a 'normal course of events' with an objective, normative and predictable character. Causes can operate independently from another. If one cause prevents the outcome of another cause, the other cause has never existed: it turns up that the course of events was, after all, another than expected. In that sense there is no interruption of a normal course and so there cannot be an overtaking cause.

8. — Julian must have anticipated objections to his argument in D. 9,2,51pr. Evidently the idea that both were liable now under chapter 1 was the main objection, since he mentions the case of multiple assailants in D. 9,2,51,1 (a case also dealt with in D. 9,2,11,3; see above).

For the case his reasoning on the causality did not suffice to convince his readers, Julian relied also on a reductio ad absurdum. He says: 'Quod si quis aburde a nobis haec constituti putaverit, cogitet longe absurdus constituti neutrum lege Aquila teneri aut alterum potius, cum neque impunius maleficia esse oporteat nec facile constitui posit, uter potius lege tenetur' — 'But in case anyone might think that we have reached an absurd conclusion, let him ponder carefully how much more absurd it would be to hold that neither should be liable

See Honoré (supra, note 15), p. 87–88. Where we treat causes as objective facts, the Stoics dealt with them within a framework of statements. It does not surprise that von Bar, who dedicates several pages to these texts, has to interpret them in a different way in order to make them acceptable to his views and rejects Julian's view in D. 9.2.51: Von Bar, Die Lehre vom Kausalzusammenhang (supra, note 28), p. 23–25, p. 23: 'Die Schwierigkeit lässt sich einfach dadurch, daß der Tod, welcher einer Stunde später eingetreten sein würde, nicht derselbe Erfolg ist, welcher nach dem ersten Handeln erwarten werden müsse. Der frühere Tod ist nur durch den zuletzt Handelnden herbeigeführt, der spätere gar nicht eingetreten. ... L. 11. §. 3. D. ad leg. Aquil. 9.2. ... Die Römer suchen, wie aus einer anderen Stelle hervorgeht, den Grund dieser Entscheidung in der Beweisfrage'; p. 24: 'Wollte man den Begriff der Ursache davon abhängen lassen, ob nicht später unabänderlich ein Ereignis eintreten würde, das uns mit dem wirklich eingetretenen Ereignisse von gleicher Bedeutung und Wirksamkeit erscheint, so würde es unmöglich sein, für die Zerstörung eines Gegenstandes irgend eine spezielle Ursache anzugeben. Denn: "Alles was entsteht, ist unwirklich, daß es zu Grunde geht"'. Here we see the fundamental difference with the Stoic views, and it comes as no surprise to read on p. 25: 'Wirklich verlassen wird das richtige Prinzip dagegen in L. 51. pr. ad leg. Aquil. (Julian)'. The citation is from Goethe's Faust, 1st. Part: (Mephistopheles) 'Ich bin der Geist, der stets verneint! Und das mit Recht; denn alles was entsteht; ist unwirklich, daß es zugrunde geht; Drum besser wärs wenn nichts entstande. So ist denn alles, was ihr Sünde, Zerstörung, kurz das Böse nennt, Mein eigendiches Element' (I am the spirit, that ever denies' And rightly so: since everything created, in turn deserves to be annihilated: Better if nothing came to be. So all that you call Sin, you see, Destruction, in short, what you've meant By Evil is my true element).
under the lex Aquilia or that one should be held to blame rather than the other. Misdeeds should not escape unpunished, and it is not easy to decide if one is more liable than the other. I already dealt with the public policy argument and this is valid here as well.

But interesting too are his words on the absurdity. Why would Julian think that his arguing could be considered illogical? His argument that the first assailant was fully liable implied that the second assailant’s act, an adiuvatory cause, merely intensified the first assailant’s act. Thus the second assailant could not be liable. To make him liable Julian had to consider his contribution as a cause sufficient for killing, thus as a causa mortis, by the original restricted definition, and based on the same word maturius. By that, however, the same act was interpreted in two different ways: both insufficiently and sufficiently effective. An adiuvatory cause was valued as much as a principal cause. And since both the first and the second blow would have been sufficient in themselves as ground for liability, it would have been impossible to consider them contributory or conjoint causes. All this is, indeed, illogical and may have been the reason why Julian was not followed for this special case (see also nr. 9).

Julian’s suggestion, that neither of the two might be considered liable, or that one might not be able to choose between them, may have been founded on the same consequence of the different appreciation of cause. If B’s blow could be considered on one hand as sufficient to make the outcome of A’s blow uncertain, and on the other hand not sufficiently strong enough to have killed the victim on its own, the word maturius allowing for both interpretations, one could say that no conclusion was possible and that it was impossible to say which statement was true, or which one was more likely to be true. In that case liability might solely rest upon the force of convincing.

Yet, one can understand Julian’s frustration. If the lex Aquilia meant to penalise wrongful killing, such an outcome would not be in line with the tenor of the statute. It would be strange to sue the second assailant for killing and the first assailant for wounding, when the first wound was at first sight mortal and, if the second assailant had not appeared, would have proven to be lethal and thus led to liability of the first assailant. Hence probably Julian’s formulation of the lethal wounding as ‘ex vulnere certum esset aliquem vita excessurum’ – ‘a wound by which somebody will certainly die’. The certum (certainly) is not in accordance with the view that it is the outcome that decides whether the wound was deadly. Likewise it is questionable to consider the second blow merely as an adiuvatory cause, insufficient for the killing as such, if this blow was lethal in its own right. If it was to be regarded as mere wounding under chapter 3, the second assailant might equally get off lightly by that, if ever condemned. It is apparently Julian’s motive to set out a reason to sue him for killing too, as it is likely a motive behind the liability of the multiple assailants.
9. — We return to D. 9,2,11,3 and Celsus' view. Why would Celsus have opposed Julian's view, and why would Ulpian have agreed by calling Marcellus' and Celsus' view more probable?

An objection to Julian's view in this constellation of killing was evidently, as follows from his own defence strategy, that now two persons were fully liable under chapter 1, and from Celsus' response it seems most probable that this argument indeed reflected Celsus' objection. And we can, basing on several texts with Celsus views, mention some arguments supporting this.

First, it was possible to apply the first chapter of the lex Aquilia: there was a slaying and death followed at once or soon but in any case in an attributable way as we see defined by Julian in D. 9,2,51 pr. in explaining occidisse: 'if the death resulted from some application of force, done as it were by one's own hand, for the meaning of the word derives from "to slay" and "manslaughter". The immediacy could be deduced from the (quicker) dying. A strict application of the text of the statute should always have priority over an extended interpretation, since the latter is meant precisely to overcome the restraints of the first barring a wider application. Thus if a strict application is possible, there is no reason to go beyond this. Second, to the potential argument that the slave was already mortally wounded and that B's blow might not have been sufficient in itself to effect death on its own, Celsus could have replied that one takes his victim as one finds him (D. 9,2,7,5)61, as Labeo did before (D. 39,2,24,5). Third, Celsus may have argued that an actio directa, if possible, was to be preferred over an actio in factum, since the latter was normally only used if the actio directa was not available; which was possible, see above. By this, declaring B to be the killer and defining his act as equal to a synektikon (causa principalis), there remained only the wounding to sue A. Then, by declaring the blow by B to have been the cause of death, the quality of lethality was taken away from A's wounding.

Marcellus considered Celsus' opinion correct. Ulpian thought it more probable, i.e., a more probable analysis of the causality for this case than Julian's. One can see their point. If B wounded an already mortally wounded man and accelerated his death, it was, combined with the accepted extension of causality to include the condition of the victim (which could turn an insufficient cause to be considered as a sufficient one), more probable that his act was a principal cause of death – fitting so the text of chapter 1 – than an adiuvatory cause. The consequence that the first assailant could only be sued for wounding may perhaps have been felt unsatisfactory. But if so, it was for Celsus, and Marcellus and Ulpian, evidently less unsatisfactory than having the same conduct interpreted in two contradictory ways and to assume

61 D. 9,2,7,5 (Ulp. 18 ad ed.): 'Sed si quis servum aegrotum leviter percusserit et obieriit, recte Labeo dicit lege Aquilia eum teneri, quia alius ali mortiferum esse solevit' – 'But if someone gives a light blow to a sickly slave and he dies from it, Labeo rightly says that he is liable under the lex Aquilia; for different things are lethal for different people'.
that a statement about the future is true regardless of whether it proves to be true after all. Repression of wrongful doing was a goal and might lead to more than one person being obliged to compensate, but only – so Julian, with the apparent approval of Ulpian – if it could not be established who precisely had killed (D. 9,2,11,2). But that was not the problem here: B’s act could be interpreted as fitting the strict circumscription of chapter 1 and as in D. 9,2,11,2 there was no reason then to look for more. Further, in Celsus’ view everything befalling the wounded slave after the wounding, such as an inheritance, would have been included in the calculation anyway, whereas in Julian’s construction it would only have been included in the calculation of the second assailant, i.e., after the second blow. As such one might consider Celsus’ solution more elegant and more in the interest of the slave’s owner, although the period of the year before included the time the slave suffered from wound. But here this time was very short62.

Evidently not only Celsus, Marcellus and Ulpian, but also other jurists disagreed with Julian in this point (Ulpian’s statement implies general approval) and apparently it was still the case in Byzantine times. This would explain why Julian’s view was not included in D. 9,2,11, between § 2 and § 3, as indicated by Ankum. That part dealt with causality and it might have been causing confusion. Included at the end, in fragment 51, it would have been less confusing since the end of a title usually served for the compilers as receptacle for different opinions.

10. – Notwithstanding the resistance of Celsus, Marcellus and Ulpian to Julian’s application of Stoic ideas in this particular case, Stoic views were evidently not shunned though neither intensively applied. The interpretation of the causal nature of a mortal wounding as a synektikon (causa principalis) was followed for the case of only one assailant in order to determine the start of the retrospective year for calculating damages. Ulpian reports Julian’s view in D. 9,2,21,1 as the standing rule, notwithstanding that here also Celsus was of a different view. Celsus thought that it was to be calculated from the moment of death (see above, nr. 5).

Also in D. 9,2,15,1 Ulpian accepts this argument of the fatal cause for the case of one assailant (the case of manumission of a mortally wounded slave). Thus here too the Stoic view of a synektikon (causa principalis) was accepted. It means that as such Julian applied an acknowledged criterion. It also means that in this respect there was no difference of opinion between Julian and Ulpian. The part aestimatio ... intellectur in D. 9,2,51,2 fits D. 9,2,21,1 and

62 That was, actually, already a disadvantage of Julian’s view in D. 9,2,21,1. But apparently this disadvantage weighted less for the other jurists than that the year before the death would otherwise include the period of suffering from the wound, which might be long. The chance of an inheritance was evidently not considered so high. Julian, on the other hand, avoided all this by holding both liable in D. 9,2,51.
makes it understandable why the compilers wanted to retain at least this part. They may then have wanted to keep the setting as well: the *principium* to make the statement understandable, § 1 since it was in line with D. 9,2,11,2, and the remainder since its argumentation was not unacceptable. As to the difference in starting point in D. 9,2,51,2, this logically follows from Julian's assumptions. For A it is reckoned from the moment of wounding, since it was an effective lethal wounding; for B only the moment of death came into consideration, since at that moment and not before his contribution became effective.

11. – Did Celsus adhere to the Stoic views? From D. 9,2,7,6–7 it appears that Celsus did distinguish between being a direct cause and providing a cause (*occiderit an mortis causam praestiterit* – 'whether one kills directly or brings about a cause of death') and so he worked with this distinction. But it was in the way of application that he was of another opinion. In D. 9,2,7,6–7 he excludes the combination of the defendant providing a *causa antecedens* of a *causa principalis* from the application of the *actio legis Aquiliae directa*. Likewise he rejects in D. 9,2,21,1 the *causa antecedens*, and in D. 9,2,11,3 (read in combination with D. 9,2,51) the *causa antecedens* and the *causa adiuvans* as sufficient for liability under chapter 1. Thus this text should better be read as: 'Celsus writes that if one attacker inflicts a mortal wound on a slave and another person later finishes him off, he who struck the earlier blow will not be liable as if he killed, but because he apparently wounded [him], since he [the slave] actually perished as the result of another wound. The later assailant will be held liable because he did the killing. It seems thus to Marcellus and it is more likely.' The first *quasi* would, in retrospect, be a reference to the idea of the *causa antecedens* as sufficient for the killing and be, for Celsus, a mere 'as if', not a 'because'.

Consequently it is certain that Celsus resisted the idea of an extensive interpretation of *occiderit* in chapter 1 of the *lex Aquilia* in the sense that a *causa antecedens* or *adiuvans* was accepted as equal to a direct act of killing. If a *causam praebere* (or *praestare*) was acceptable within the context of the *lex Aquilia*, it could only lead to an *actio in factum* (D. 9,2,7,7), with the disadvantages of this (no litiscrecence with its probable advantage for the plaintiff regarding evidence; extinction after a year). Similarly where damage cannot be considered to be a *corrumpere*, Celsus does not allow an *actio legis Aquiliae* but only an *actio in factum* (D. 9,2,27,14); but where it can be interpreted as such, he grants an *actio legis Aquiliae directa* (D. 9,2,27,15: *"quia etiam effusum et acetum factum corrupti appellatione continentur"* – 'because even pouring it away or making it sour are comprised within the term "spoil"').

So for chapter 3 also he will have resisted any interpretation beyond the accepted grammatical one for the direct action, and thus resisted the application of at least the cited Stoic concepts of cause to the application of the *actio directa*. 
12. – Julian’s interpretation of causality in D. 9,2,51 pr. as a combination of synergon (causa adiutoria) and synektikon (causa principalis) would also have solved the aforementioned cases, reported by Hart and Honoré, of the mortal wound followed by suicide of the victim. The suiciding victim would have merely intensified the ongoing cause and its effect, not changed, less interrupted it, and so the person who wounded would remain fully liable for the death. The victim had, after all, intended to hasten or cover up his death. The conundrum the case presents is due to our modern concept of causality, which is based on different criteria. In the mentioned cases it narrowed down to the question, whether the conditio sine qua non criterion still applied to the act of wounding or not. And if it did not, the perpetrator would go off free (see also nr. 7).

13. – Attempt and consequential damages. Partly connected with the causa superveniens is, in modern doctrine, the concept of attempt. An attempt is, in abstracto, the beginning of the execution of all elements which define a delict or crime, which, however, is not or only partially completed. It may be that it did not have the intended result, or that one or more of the conditions for the delict was not met with, or that a circumstance beyond the control of the perpetrator prevented the completion, etc. In the latter case also a second cause intervenes, but now it prevents the effect of the first cause and this remains an attempt. The doctrine distinguishes several cases of attempt, but in all cases the basis of the assessment is the expectation that the attempt would lead, objectively, to the result and be a cause. At the basis the modern concept of causality lies, viz. the idea that normally the act would have lead to the probable effect: attempt is defined by external factors which disturb this expectation and the justification for the punishment is this ‘objective’ expectation. But in the Stoic views the fact that the result is not attained alters everything. In the case of the ‘intervening’ act it implies that the first cause appears, after all, to be the cause of a different result, or to have not existed (it is a ‘because’) and therefore the first person can only be charged for that or for nothing at all. In the case of D. 9,2,15,1, comparable to a case of attempt, it was only for wounding under chapter 3. But if a delict or crime did not cover such acts, there was no possibility to sue under the modality of attempt. In case conditions were not met with, it is the same. In case another result as intended came about, perhaps something else might be imputed, but not that what the delinquent had intended. The Stoic views, as far as known, do not accommodate an analysis of attempt. Perhaps this explains why we do not find indications that the jurists tried to theorise on attempt as such, as a construct, in the texts on delicts or crimes unless the

63 Cfr. the German Strafgesetzbuch, § 22: ‘Eine Straftat verursacht, wer nach seiner Vorstellung von der Tat zur Verwirklichung des Tatbestandes unmittelbar insetzt’. See also nr. 7.
64 It leaves of course open the possibility of an actio in factum, an action on the case.
law covered that form expressly. For example, the extension of *furtum* to the phase of asportation as a criterion would theoretically have reduced the case of being caught *flagrante delicto* to attempt, but we do not see that: both cases are fully *furtum*. Perhaps we have to attribute this to the introduction or underlining of *contractatio* as alternative element of *furtum* to this.

What consequential damages are depends on the definition one uses, but it concerns in any case damages beyond the actual damage done to the object itself and as such. Behind it is the idea of the causal chain: the wrongful act causes damages, and in the course of this other damages are generated, etc. Gaius in 3, 212 states ‘sed sane si servio occiso plus dominus capiat danni quam pretium servii sit, id quoque aestimatur’ – ‘for if the owner of the deceased slave sustains greater damage than the value of the slave, this also is estimated’. But the examples he gives are rather limited and represent in any case losses which can equally be said to have been suffered at the moment of death, and do not have to be future losses. One can call the loss of an inheritance, due to the fact that somebody’s slave was instituted but killed before he could accept the inheritance (Gai 3, 212; D. 9,2,23pr.), consequential damages. But the inheritance is already included in the value of the slave, since one could, after acceptance, sell him. If the killed slave or animal formed part of an ensemble (Gai. 3, 212), the depreciation in value of the entire ensemble can also be attributed to the killed slave or animal alone, since the depreciation is tied to their death. As such it is part of their value when killed. The other cases mentioned in D. 9,2,23,1–6 deal with an inheritance (§ 1, 2), the higher price in the preceding year (§ 3, 5, 6) and the value the slave has as *noxa* (§ 4). We miss here a *lucrum cessans* and therefore damages are, if consequential at all, consequential in a very restricted sense. Even the end of D. 9,2,33pr., ‘et amisisse dicemur, quod aut consequi potuisse aut erogare cogimur’ – ‘and we say we have lost, what we could gain or what we are obliged to spend’ is not so decisive as it seems. It is said in the context of the killing of a slave who was dear to his owner, viz. because he was his natural son. The text says that the increase in value to the master, in consequence of the emotional factor, is not to be included. The cited phrase follows after this and therefore must be read in connection with the preceding: the owner gets as much as

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65 Gai 3, 212: ‘eo amplus id quoque computatur, quod ceteri quia supersunt depretiati sunt’ – ‘not only is the value of the one killed estimated, but the estimated depreciation in the value of the remainder is also calculated’.

66 Any component of the ensemble can be considered to have two values: one as a single individual outside of the ensemble, and one as a component of it. The extra value of the ensemble can be seen as concentrated in any of its components since, when a component dies, the loss consists of the value of the individual and at the same time the extra value of the ensemble inherent in it as component. But if after the first member another component is killed, there is no extra value present anymore and therefore only the value of the individual can be claimed. It is therefore right to claim the extra value as part of, or included in the value of the first component killed.
he would have got on the market or what he normally would have to pay for
the slave on the market, and he does not get a higher price, or has to pay
more for him, if the value was to him much higher on account of his feelings
towards the slave. The *amississe* refers only to this and means that the loss is
the market value. It cannot be interpreted as a general statement on cons-sequent
losses (it on the contrary denies consequential losses) or as a hint
at a 'Differenztetheorie'. Likewise does the next text, D. 9.2.33.1, not extend
the range of repairs by way of an *actio in factum*, but merely states that where
causality is not direct, an *actio in factum* will remedy.

The value of a slave provided in the loss of earnings because with the price
one could buy a slave of the same qualities. The same goes for the depreciation
of a slave under chapter 3: one could sell the depreciated slave and together
with the indemnity the total could provide for a new slave, equivalent to the
wounded one before the wounding. With free persons it was different but
the lex Aquilia was not written for them. Here the relatives could sue under
the lex Cornelia and with this they could coerce the perpetrator to a com-
pen'sation, which indeed might include loss of earnings; as is the case in
D. 9.2.7 pr. for the cobbler's apprentice who was free. Free men one could
not replace like slaves.

To speak of an 'entgangener Gewinn' or 'Vermögensschaden'° is therefore
certainly too wide. Perhaps a reason for not extending the statute here as
elsewhere (causality, *culpa*) may have been that in the Stoic views on causality
the effect of a cause was not a cause again of future effects. The consequences
of an act were those which were effected immediately upon the cause (with
of course the possibility of an antecedent cause and principal cause).

14. — D. 9.2.51 pr. has been read with regard to the second assailant as a
case of *causa supervenientia*, i.e., as a case in which one course of events is
interrupted by another event. If done so, it must necessarily lead to amazement
about Julian's opinion that the first assailant remained nevertheless fully
liable, because in another text on a case (D. 9.2.15.1), from that viewpoint
similar, Julian holds the first cause (an assailant) not liable. In another text
(D. 9.2.11,3), again similar, Celsus holds the subsequent assailant liable.
Ulpian seems to agree with the solution chosen in both the latter two cases.
To solve this problem, it is surmised that the jurists applied Stoic ideas
concerning causality and fate which differed from the modern ideas on this.

° Thus P. Jörß e.a., *Römisches Recht*, neu bearb. von H. Honsell, Th. Mayer-Maly, W. Selb,
1971, p. 621 expresses himself diffusely: 'seit Julian eine Annäherung des Maßstabs an den
individuellen Schaden des Verletzten'. But also already von Bar (supra, note 28), p. 135, where
he says that the effect of an act touches the entire fortune of the victim, and cites D. 9.2.22
and 25 pr. for this. The case of D. 9.2.7 pr., where the compensation includes the future earnings
of the son may perhaps not be included in this discussion since it concerns a free person in
potestate.
In the modern doctrine of causation it is possible to speak of a *causa superveniens*, an overtaking cause. It is possible because the concept of the normal course of events allows for an interruption. Since the Romans had a different view on causality, it is useless to discuss the opinions of Celsus, Julian or Ulpian on ‘überholende Kausalität’, ‘verdrängende Verursachung’ or *causa superveniens* (see notes 58 and 60). The Stoic views were not based on a predictive normal course of events, nor meant to be predictive. That makes the concept of *causa superveniens* inapplicable. The best thing one might do is to examine whether in practice situations arose which indeed were similar to the modern case of *causa superveniens*. But as we have seen, such cases, which we consider cases of overtaking causes, are not perceived by them as such: the temporally precedent cause changes contents or becomes a statement which cannot be verified. The case of the collapsing house is a case in which *vis major* prevents from verifying whether the statement that the wound is mortal is true or not. It is likely that in Stoic philosophy such a *vis major* was considered part of the divine design (they assumed that a divine breath, *pneuma*, was present in everything and every event) and as a true Act of God (*theou bia*) was predetermined. Thus it remains impossible to say that the collapse removed a previous cause of death: it was, evidently, predetermined that this was not the cause of death, and that is what is implied in Julian’s remark and what the other jurists accept. The other case, slaying an already wounded slave (D. 9,2,11,3), is the same constellation of events. If Ulpian had indeed Julian’s writing before him, the text here (exanimaverit) would probably also have implied a *maturius* dying. But though likely, we have to keep all possibilities open now. If the second strike alone sufficed to kill it would be an overtaking cause in our eyes. For the Roman jurists, although this was not an Act of God but a human act, it prevented, as in D. 9,2,15,1, from finding out whether the statement about the first strike being lethal was true or not. What was possible, however, was to state that the first strike had wounded. Celsus and the other jurists could live with that. The second assailant would have taken his victim as he found him and be fully liable for his death. The statement about the first assailant was true as regarded wounding. Both true statements sufficed for liability on ground of the lex Aquilia, under respectively chapter 1 and 3. Julian, on the other hand, tried a different approach by applying the concept of *causa mortis*. He may have wanted to retain the idea that the moment of a lethal wounding should be taken as the moment of killing and by that retain the first assailant as killer. At the same time he interpreted the conduct of the second assailant also as a *causa mortis*, qualifying him by that also as killer. The result was that

68 In any case it was an event of which the cause was unknown or not attributable to a living being or which could not be prevented. In our eyes this may seem strange but although we may explain, e.g., a tsunami by reference to tectonic activity, we cannot predict its occurrence nor prevent it, and are, as such, in exactly the same position as the Stoics.
there were now two persons fully liable. But in the eyes of the other jurists he must have extended this concept too much and applied it illogically.

The result of this research would match Nörr’s research. He concluded that under Labeo ideas about causality were current but not yet developed, although Labeo already used the philosophical terminology. It further matches Armgardt’s conclusions about the application of Stoic ideas on conditions in the early Principate. It appears that later in that period some more sophisticated philosophical concepts were indeed applied to solve some persistent problems of causality in the application of the lex Aquilia.