POLICY DIFFERENCES IN REMOTENESS OF DAMAGE

‘Remoteness of damage’ was not an expression used by the Romans; which may be indicative of their wisdom. It is a creature of the common law, though even here it is hardly a term of art – save perhaps in that of confusion. Its main sphere of relevance lies in the law of negligence where it describes indiscriminately different ingredients of this tort. There are four indispensable requirements of liability with two additional considerations coming into play once initial liability has been established. First, as a matter of law there must be shown to exist a primary ‘duty of care situation’, which means that the particular careless method of inflicting damage, the nature of the damage itself and the categories into which the plaintiff and the defendant respectively fall have to be recognized at law; secondly, the defendant must be shown to have behaved carelessly; thirdly, there must be reasonable foreseeability of harm from such careless behaviour to the plaintiff in the case and also of the ‘kind’ of damage of which he complains (the damage in suit); fourthly, the carelessness must be shown to have caused that damage. If all these conditions are satisfied, the defendant is liable in negligence. Then and only then do the next two considerations come in: fifth, the extent of the damage for which the defendant has to answer; and, finally, the quantification of that extent of damage in money.

The term ‘remoteness’ is applied in different contexts to the first, third, fourth and fifth of the above points. Sometimes it connotes the primary ‘duty of care situation’ in the sense that a defendant is said not to be liable because the damage itself is too remote in law to be recognized as ‘legal damage’; at other times it connotes foreseeability of harm to the plaintiff or of the kind of damage in suit in the sense that either of these is said to be too remote if unforeseeable; at yet other times it connotes causation in the sense that the harm is said to be too remote if it was not caused by the defendant’s carelessness; and, finally, it connotes the extent of the harm attributable to the defendant.2 Judges themselves are very much aware of these variations. Thus, Denning LJ (as he was at the time) once remarked that the common element of foreseeability makes duty of care, breach and remoteness ‘different ways of looking at one and the same problem’3 Theisiger J expressed the same idea when he said, ‘In order to limit liability . . . courts sometimes say either that the damage claimed was “too remote” or that it was not “caused” by the defendant’s carelessness or that the defendant did not “owe a duty of care” to the plaintiff’.4 More recently, in considering whether purely economic loss was a kind of damage cognizable at law (whether, in other words, there is a ‘duty of care situation’), Lord Denning MR said: ‘The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: “There was no duty”. In others I say “The damage was too remote”. So much so that I think the time has come to discard these tests which have proved so elusive. It seems to me better to
consider the particular relations in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not.\textsuperscript{5}

Since Roman law had no term corresponding to 'remoteness', any comparison has to proceed on the basis of the four applications of it in English law. The first of these, namely, the primary duty of care situations, will be excluded since I have dealt with the Roman and English law elsewhere.\textsuperscript{6} Accordingly, this paper will address itself to remoteness as meaning foreseeability, causation and extent of damage.

The next and more important preliminary is to decide on the method of approach. A meaningful method of comparative study is that of policy, since similar policies yield similar rules while dissimilar policies produce divergence. It happens, too, that similarity of underlying policy will bring about similar results even with the aid of superficially dissimilar rules.\textsuperscript{7}

The English law of torts is now almost entirely compensatory, the penal policy having been channelled into criminal law centuries ago. There is, it is true, a trace of a penal element in tort in the form of punitive damages, but this element, at no time large, has been considerably circumscribed after Lord Devlin's speech in\textit{Rookes v Barnard}.\textsuperscript{8} The Roman law of delict rested on the twin bases of the\textit{lex Aquilia} and the\textit{actio injuriarum}. The latter can be dismissed from consideration as it dealt with contumelious behaviour. An important clue to the understanding of Aquilian liability is that it was both penal and compensatory even though it is generally classed as penal. Justinian, for instance, in his\textit{Institutes} 4.6.19, classified the action as\textit{mixta}. The penal aspect of the\textit{lex} sought punishment for wrongdoing, which is why, as Gaius 3.202 observes, under it even negligence was punished: \textit{etiam culpa puniatur}.\textsuperscript{9} Interwoven with penality, however, there was the compensatory element, stressed in 47.10.7.1, which says that the Aquilian action sought compensation for the loss to the owner quite apart from disapproving of the wrongful act. Penal actions were not allowed between spouses, but the Aquilian was an exception: C 5.21.2; 9.2.27.30, 56. This, it is suggested, reflects its compensatory aspect. Again, penal actions did not lie against the defendant's heir, but the Aquilian did to the extent of enrichment: 9.2.23.8; J 4.12.1. The highest value in the past year or thirty days payable respectively under Chapters I and III of the\textit{lex Aquilia} suggested a penal element; but if the object had not changed in value during those periods, the action gave no more than compensation. It is, therefore, a fair general statement that English law is compensatory whereas Roman law was both penal and compensatory.

A subtler and more important policy point than the penal/compensatory one is whether the system under review approaches liability with more concern for the plaintiff's interests or the defendant's i.e from the plaintiff's or defendant's point of view. For even within a compensatory policy a system that favours the plaintiff's point of view will seek to compensate the victim as fully as possible regardless of the fact that in so doing it may make the wrongdoer pay more than his degree of guilt merits; whereas a system that favours the defendant's point of view will tend to compensate the victim only to the extent of the wrongdoer's degree of guilt regardless of the fact that the
innocent victim may have to shoulder the rest of his loss. So put, the statement is an oversimplification; indeed, both English and Roman law evolved subtleties in detail which shade into each other to produce similar results. The broad thesis of this paper, however, is that the Roman approach to remoteness reflected the plaintiff's point of view, the results of which were further boosted by its penal classification; whereas English law has moved very considerably over to the defendant's point of view and is concerned to minimize his liability. This is because it is thought unfair to 'punish' him by making him pay beyond his deserts. The result is paradoxical: the tort of negligence, which is civil and compensatory, has covertly adopted a characteristic of a penal approach, namely that of making compensation akin to punishment which has to fit the crime. The Roman delict, on the other hand, which was civil, compensatory and overtly penal, reached different results. It is superficial to ascribe these differences to the penal or compensatory classification of the actions in the two systems; the crucial difference lies in the fact that Roman law adopted the plaintiff's point of view, whereas English law has come to adopt the defendant's point of view. In arguing this thesis in a short paper it is clearly not possible to set out the detailed rules of each system, but aspects of Roman law will be given more extended treatment where necessary than English law.

The history of legal policy shows that early systems begin by adopting the plaintiff's point of view, and this is true of English and Roman law. In order to persuade victims of wrongdoing to forgo self-help, early law had to win their confidence in a peaceful way of settling disputes and, with that end in view, regarded liability very much from their point of view. Not that the need to establish fault in defendants was ignored; this was necessary, but the burden of proof on a plaintiff was lightened in that he could make out a prima facie case merely by showing that the defendant inflicted the harm. Fault was implicit in the fact of the deed; the onus was on the defendant to prove absence of fault. The number of defences was limited and a narrow view was taken of them. The point is illustrated by the early writ of Trespass. Where the wrongdoing was obvious on the face of the deed, there was no need to specify that the doing had been wrongful. Therefore, Trespass simply asserted that the deed had been done *vi et armis* and *contra pacem* (these allegations being necessary in order to bring the matter before the Royal courts). Later the *vi et armis* element became fictitious with the result that by about the sixteenth and seventeenth centuries the form of the writ, which simply asserted the deed without more, came to be rationalized as asserting strict liability. All that this meant was that fault was not specifically alleged on the face of the writ; but it was implicit. Where the wrongdoing was not obvious, the writ had to specify the nature of the wrong by asserting some right which had been infringed. It lay for rights which were readily established, such as franchises. For the violation of wholly new rights the plaintiff had to make out a special case, and this came to be known as Case. Originally Case may or may not have alleged that the defendant had acted *contra pacem*, but again it was later rationalization that came to associate Trespass
with contra pacem and Case with its absence.\textsuperscript{10} Omissions were not actionable because in the absence of a duty to act a mere omission was not wrongful. Therefore, actions on the case for omissions had to specify the duty to act.\textsuperscript{11} Failure to perform a duty created by promise gave rise to the law of contracts via Covenant and Assumpsit. In their early forms Trespass and Case did not distinguish between direct and indirect infliction of damage; it was later rationalization that associated Trespass with direct and Case with indirect infliction of damage.

With regard to defences, act of God, involuntariness, act of plaintiff and self-defence were obvious and were about as far as the early lawyers went. Chok CJ said in The Case of Thorns:\textsuperscript{12} 'and, Sir, if the thorns or a great tree had fallen on his land by the blowing of the wind, in this case he might have come on to the land to take them, since the falling had then been not his act, but that of the wind.' The narrowness with which defences were viewed may be gathered from a dictum of Brian in the same case: 'So, too, if a man makes an assault upon me and I am not able to avoid him, but he wishes to beat me and I in defence of myself raise my stick to strike him, and one is at my back, and in raising my stick I hurt him, in this case he will have an action against me, and yet the raising of my stick was lawful in defence of myself and I hurt him against my will (me invito).'</p>
The same example and the same decision is to be found in the later case of Lambert v Bessy:\textsuperscript{13} 'If a man assault me and I lift up my staff to defend myself and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason is because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there "actus non facit reum nisi mens sit rea".' If I had hit my assailant, self-defence would have been open to me, but this does not avail me against the bystander who was not attacking.\textsuperscript{14} In other words, the civil law, looking at the matter from the plaintiff’s point of view, called for compensation, and the defendant had to pay since the special excuse of self-defence did not apply vis-à-vis this plaintiff. The criminal law, looking at the matter from the defendant’s point of view, rightly insisted that there should be no punishment of one who was morally guiltless.

In the early days there was also readiness to admit new forms of wrongdoing. At this point some mention should be made of negligence liability, since problems of remoteness have arisen chiefly in this connection. Negligence connotes failure to take care, which associates it with omissions. Since these are not actionable unless there is a duty to act, so there arose the idea that negligence is not actionable unless there is a duty to take care. Even so, what was admitted was failure in the course of some larger activity, which makes it a bad way of performing it as distinct from a total failure to do something. In the seventeenth and eighteenth centuries the position was that actions on the case lay for careless misconduct even apart from tenure and common callings,\textsuperscript{15} but not for total omissions.\textsuperscript{16} In the eighteenth and nineteenth centuries, especially after the Industrial Revolution, actions on the case for carelessness became popular. For instance, Govett v Radnidge,\textsuperscript{17} a case involving carelessness, was essentially one of Assumpsit. Lord Ellenborough,
however, allowed the plaintiff to declare at his option either in contract or in tort for the breach of an independent duty. Also, by this time Trespass was very much associated with the direct infliction of harm and Case with indirect, and it was a matter of individual opinion on which side of the line a given set of facts fell. In *Dodwell v Burford*, for instance, striking a horse and so causing it to throw its rider was held to be a direct application of force to the rider and thus constituted a battery. It is equally arguable that the direct application of force was to the horse and that the injury to the rider was indirect and consequential. There was a procedural bar to joining Trespass and Case as alternatives, and injustice lay in the fact that in matters of opinion so evenly balanced as this plaintiffs often lost their suits simply because they chose the wrong writ. Tindall CJ took the step in *Williams v Holland* of allowing plaintiffs to recover in Case even though the harm had been inflicted directly but negligently.

The shift to the defendant’s point of view required plaintiffs to prove fault as part of the prima facie case. Fault was no longer presumed from the mere fact of the deed; there had to be an averment and evidence that the doing was wrongful. Three further developments added momentum to the shift to the defendant’s point of view. The first was that early in the nineteenth century there was need to limit the overwhelming tide of cases arising out of highway collisions. A special rule grew up that in highway cases even in actions of Trespass to the person the mere assertion that a defendant inflicted harm did not establish a prima facie case, but a plaintiff was required to allege and prove fault. This made it more difficult for plaintiffs to succeed. By the end of the century this rule was generalized from highway cases to all cases of Trespass to the person, which thus ceased to be strict and came to rest squarely on fault.

Secondly, there was a tendency not to countenance new forms of liability and to restrict the ambit of the duty of care. Lord Ellenborough’s view in *Govett v Radnidge* was disregarded, and a doctrine grew up that where there was a contract the duty in tort was owed only to the other contracting party — a fallacy which was exploded only in 1932 in *Donoghue v Stevenson*.

Thirdly, two further devices were evolved which favoured defendants, namely, the need to establish foreseeability of harm to the particular plaintiff and also foreseeability of the particular kind of damage in suit. As will be argued later, both these are limitations on actionability by plaintiffs and do not relate to the blameworthiness of defendants. They are particularly involved in questions of remoteness, but before examining them the development of Roman policy has to be considered.

In early Roman law, as in the English, blameworthiness was recognized as being implicit in the deed. Different penalties were prescribed where there was actual evidence of a difference in the degree of blame. In 47.9.9 we are told that a person who burned a house or heap of corn was to be bound, scourged and burned to death provided he did it knowingly and consciously (*si modo scient prudensque*); but that if he did it accidentally, that is, by
neglect (casu, id est neglegentia), he had to make good the loss or be
punished lightly.\textsuperscript{23} Again, Pliny says that the XII Tables had a rule that an
adult who secretly and by night let his animals graze on another’s land was to
be capitally punished, but that an impubes was to be whipped at the
discretion of the magistrate.\textsuperscript{24} The fact that many early forms of liability were
strict and superficially independent of blame need not militate against its
implicit relevance. For, as with Trespass, it was a matter of proof to assist
plaintiffs. Where the wrongdoing was obvious it was not necessary to allege it
specifically, and it is this form in which rules were stated that gave rise to
strict liability. The inference of strictness was drawn by Cicero, who said:
‘since you refer me to the XII Tables, who is there who should be excused
more than one who slays another unwittingly (imprudens). I think no one.
Yet in this case the ancients showed no mercy; for the rule in the XII Tables ran: “si telum manu fugit magis quam jecit...”\textsuperscript{25} This certainly shows that the
ancient lawyers distinguished between an intentional and an unintentional
propulsion of a weapon, but that even the latter was not excused. Besides,
Cicero, like the sixteenth and seventeenth century English lawyers, may have
been rationalizing the outward form of the early rule.

In penal actions fault was essential to liability, and Hadrian is quoted in
48.8.14 as having said, in maleficiis voluntas spectatur non exitus; but the
manner in which this may have been recognized seems to have corresponded
with the idea that the fact of the deed implied blame, thereby casting on
defendants the onus of disproving it. In the lex Aquilia the vital word is that
loss had to be inflicted injuria, which may refer (a) simply to the absence of a
recognized defence the burden of proving which lay on defendants, or (b) to
proof of blameworthiness by plaintiffs. In 9.2.3 Ulpian draws attention to
injuria as an essential condition of liability, but in the context it could mean
either (a) or (b). So also 9.2.49.1. I have contended elsewhere that (a)
represents the original meaning and that liability was strict in the sense
described, and that (b) was a later development through interpretation.\textsuperscript{26}
Even so, both meanings are found throughout Roman law. Thus, Justinian
reflected the original meaning in J 4.4 pr when he said, generaliter injuria
dicitur omne quod non jure fit, that is, in the absence of specific legal
justification; and in J 4.3.2 a killing is said to be ‘injurious’ when done without
justification. (See also Coll 7.3.1–2; 9.2.4 pr and 5 pr.) Reasonable self-
defence was an obvious justification: 9.2.4 pr; 5 pr; 45.4; 49.1 (defence
of property). One was allowed to kill a slave taken in adultery: 9.2.30 pr.
Necessity was a defence and damage so inflicted was not ‘injurious’: 9.2.49.1;
43.24.7.4; 47.9.3.7. One was also justified in slaying a nocturnal thief or an
armed thief by day, provided the fact is publicized by an outcry: XII Tab
8.12.13; 9.2.4.1; 47.2.55.2. Nor was it an ‘injurious’ infliction of damage to
exercise self-help to drive away trespassing animals: 9.2.39 pr and 1; or to
recover a chattel: 9.2.52.1; or in the exercise of a public right: 47.10.13.1; or
in the course of a public contest: 9.2.7.4; or in the course of reasonable
official action: 9.2.29.7.

The strictness of the law lay also in the narrow limits within which these

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defences were allowed. In 9.2.45.4 the defendant in self-defence threw a stone at his assailant, but hit a passing slave instead. He was held liable for injury to the slave. This parallels the dicta in The Case of Thorns and Lambert v Bessey quoted earlier. As in English law, the point appears to have been that self-defence would not avail vis-à-vis the slave, who was not attacking. With this text should be contrasted 47.10.4, where I aimed a blow at my own slave, but unwittingly struck you instead; I am not liable to an actio injuriarum. The obvious distinction is that the question of liability here concerned insult, not damage, and I clearly had no intention to insult you. However, had I unwittingly struck your slave, would I have been liable under the Aquilian?

It was probably juristic interpretation that made injuria mean fault and so made an overt allegation of fault necessary to establish a prima facie case. A clear example of such interpretation is 47.9.9, previously mentioned, where Gaius says that a person who burned a house by 'accident, that is, by neglect' (casus, id est neglegentia) remains answerable. It is inconceivable that the XII Tables, whence the rule came, contained an explanatory gloss such as this, and it is clearly juristic interpretation that utilized casus for the purpose of shifting the burden of proof to the plaintiff. 9.2.5.1 also indicates the interpretative process. Ulpian explains that we must now understand injuria to mean something done not according to law, that is contrary to law, in other words where a person kills in a blameworthy manner. Injuriam autem hic accipere nos oportet suggests interpretation: whatever the word may have meant formerly, we ought now to take it as meaning so and so. Once injuria came to mean blameworthiness, pure accident was not 'injurious': 9.2.52.4.

**REMTENESS AS FORESEEABILITY**

The recognition of fault as essential to prima facie liability was undoubtedly a move towards alleviating the position of defendants, but because of its concern for plaintiffs the Aquilian never moved quite as far in this direction as English law has done. Once a defendant was proved to have been at fault, he had to pay. Fault was determined in a very general way as failure to act as a bonus paterfamilias, and the standard in each case was based on the likelihood of harm to someone or other; it was quite unnecessary to determine whether harm to the particular plaintiff was foreseeable, or whether the kind of harm sustained was the same as that which was foreseeable. In short, the policy of Roman law dispensed with these further limitations on actionability which play so prominent a part in the English law of remoteness.

Each of these two prongs of the foreseeability requirement needs illustration. As to foreseeability of harm to the particular plaintiff, the best cases are the American Palsgraf v Long Island Railroad Co and the Scottish Bourhill v Young. In the former it was held that knocking a parcel out of a person's hands might injure him or his parcel, but could not conceivably affect the plaintiff, who was seated a considerable distance away. When, therefore, the parcel exploded and the concussion overturned a weighing machine on to the plaintiff, it was held that she had no action in negligence. In the latter case a
careless motor cyclist collided with a car. Injury was foreseeable to the owner of the car and possibly to immediate bystanders; but none was foreseeable to the plaintiff, who at that moment was alighting from a tramcar a considerable distance away and had the vehicle between her and the collision. She, too, had no action. Other cases of the highest authority have endorsed this rule.\textsuperscript{30}

As to foreseeability of the particular kind of harm, the chief authority is \textit{Wagon Mound (No 1)},\textsuperscript{31} in which a quantity of furnace oil was carelessly allowed to spill overboard into the waters of a harbour. The spillage accumulated around the plaintiff’s dock where they were conducting repairs involving welding. On being reliably informed that there was no danger of fire, they continued their welding. An extensive fire did develop, which destroyed a considerable portion of their property. The Judicial Committee of the Privy Council held that, although damage by fouling the property might have been foreseeable, fire damage was not and that, therefore, the defendants were not liable. The earlier case of \textit{Re Polemis and Furness, Withy & Co}\textsuperscript{32} was disapproved. Here a plank, which had been carelessly dropped into the hold of a ship, unforeseeably started a fire which destroyed the ship. The defendants were held liable for the whole loss. It is arguable that damage to the ship, whether by scratching its paintwork or by fire, is still damage of the ‘same kind’, namely, ‘property damage’; but it was held in \textit{Wagon Mound (No 1)} that \textit{Polemis} was wrong in that damage by scratching (and in the instant case damage by fouling) and by fire are ‘different kinds’ of damage. Unfortunately what was left unspecified is in what sense and why they are ‘different’ and what is now meant by ‘kind’ of damage. Far from simplifying the law, the decision has bedevilled English law with a complication that has still to be resolved. The only solid point that can be extracted from \textit{Wagon Mound} is that damage from impact and damage by fire are ‘different’. Even so, it leads to an interesting question. Suppose that a defendant carelessly drops a plank into the hold of a ship in which to his knowledge the plaintiff is working. The foreseeable damage to the plaintiff is some injury from the plank hitting him. If, however, the plank misses him, but strikes a spark which ignites petrol vapour, and the plaintiff is burned in the ensuing fire, can he now recover? If damage by impact and damage by fire are different, he cannot recover; and if the law says that, then, as Mr Bumble declared with such feeling, ‘the law is an ass’. If he can recover, as indeed he should be able to, then we shall be back fairly and squarely on \textit{Re Polemis}.

Another unsettled point is whether damage must be foreseeable to the particular item of the plaintiff’s property which has been damaged. Suppose that, within the \textit{Wagon Mound} rule, a particular kind of damage was foreseeable to one item of the plaintiff’s property, but not to another item: may he recover in respect of the same kind of damage sustained by that other item? A clue might be found in the so-called ‘interest’ theory, which limits the foreseeability test even further to the particular interest which has been endangered, i.e the plaintiff’s interest in each separate item of property.\textsuperscript{33}

Foreseeability of harm to the particular plaintiff and of the ‘kind’ of damage
are limitations on actionability by the plaintiff and are not determinants of the careless quality of the defendant’s conduct. Carelessness is gauged with reference to the foreseeability of some harm to somebody. If a reasonable man would have foreseen any harm, he would have regulated his behaviour in such a way as to avoid causing it; the defendant, who failed to act as a reasonable man and so caused harm, is regarded as having acted carelessly. He did not think as he ought to have done. There has been a regrettable tendency in some quarters to argue that, although there may be foreseeability of harm of a particular kind or to a particular person, but no foreseeability of the kind of harm which did result, or foreseeability of harm to the particular plaintiff, then the defendant has not been negligent with regard to that kind of harm or that person. The further consequence of this way of putting it is to say that if a defendant ‘has not been negligent’, it is unjust to hold him responsible. This is reflected in Viscount Simonds’s statement in Wagon Mound (No 1) that ‘it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be “direct”’. This shows the extent to which the pendulum has swung over to the defendant’s point of view. In the face of such a resounding utterance it seems almost indecent to ask what justice there is in making the wholly innocent plaintiff shoulder the entire loss. Viscount Simonds’s concern is exclusively with the defendant even though, as he admitted, the latter had been careless at least in some degree.

The more accurate way of stating the matter is, not that the defendant has been blameless vis-à-vis this or that consequence, but that one or other of the necessary conditions of actionability by the particular plaintiff has not been met. It seems extraordinary to say that a defendant’s conduct may be careless with regard to X but not Y, or with regard to one kind of damage but not another, whereas in fact he has been equally unmindful of both. His conduct remains careless in that he failed to act as a reasonable man in the circumstances, and foreseeability of particular results cannot affect the careless quality of his conduct; it only relates to actionability by particular plaintiffs. Carelessness is gauged with reference to the likelihood of harm before it occurs; questions concerning harm to particular plaintiffs or of the kind of harm complained of can arise only after the event. Thus, the issues of carelessness and of foreseeability of the kind of harm or harm to the plaintiff are fundamentally different. The distinction can be illustrated in various ways. Suppose that a motorist turns into a main road without warning. His conduct is careless because he should foresee the likelihood of hitting someone, and this is so even though no one happens to be in the vicinity. He may be criminally liable for driving without due care and attention, but his conduct is not actionable in tort at the suit of anyone. Secondly, if the defendant’s conduct has set up a chain reaction, it may be that X is foreseeably endangered, but not Y. If it is Y who is injured, he cannot recover, but this is not because the defendant has not been negligent. In
Videan v British Transport Commission 37 X, a trespasser on a railway line, was injured by a carelessly driven trolley. It was held that the presence of a trespasser was unforeseeable and he failed to recover. Y, a rescuer, was killed in trying to save X and the defendants were held liable to his estate. This case proceeded on a particular view of the law with regard to trespassers according to which X failed, not just because he was a trespasser, but because there was foreseeability of injury only to persons who might be lawfully on the line. 38 However, the point is that in so far as someone might have been injured, the trolley driver's conduct was negligent; and if a person is in peril, an attempt at rescue is foreseeable, which entitled Y's estate to recover. Absence of foreseeability of the presence of a trespasser thus affected only his ability to sue. The foreseeability requirements should be appreciated for what they are, namely, manifestations of the policy swing towards defendants, and not be concealed behind spurious masks of 'no negligence' and 'justice'.

Because of its concern for plaintiffs Roman law did not enter into these refinements. The fact that a plaintiff might be unduly enriched as a by-product of punishing a guilty defendant was accepted. Blameworthiness was determined simply with reference to foreseeability of harm in a general way.39 There is no hint that either injury to the particular plaintiff or of the particular kind of damage had to be foreseeable.

REMOTE NESS AS CAUSATION

The differences between the English and Roman law do not stem from the dichotomy between the plaintiff's and defendant's point of view, but from differences in procedure and in the law itself. This topic, too, is distorted by terminology, namely, the word 'causation' itself. This has been borrowed from the physical sciences where it signifies the forward sequence from cause to effect. Law is concerned with ascription of responsibility; it starts with a result and works backwards to a just imputation of responsibility for it. Actual damage is a primary fact in the sense that it is objectively determined; it can be caused by some action, which also is a primary fact. If the law was concerned exclusively with acts, the language of causation would be meaningful. However, the law is not concerned with whose act caused the damage, but with whose carelessness caused it. Carelessness is an opinion based on evaluation and inference from primary facts. Therefore, the answer to the question: Did the defendant's carelessness cause the damage? must itself be evaluative. The point was best made by a Rhodesian judge: 'Lawyers who have closely investigated theories of causation have been obliged to recognize that in the final analysis the determination of legal cause whether in civil or criminal cases necessarily involves at some point the application of common sense and human experience to arrive at what is essentially a value judgment.' 40 For these reasons British judges have repeatedly urged that decisions are not to be reached on scientific or philosophical grounds, but on policy and common sense.41

Such an approach yields guidelines rather than rules. To begin with, there
has to be at least some prima facie connection between the alleged carelessness and the result.\textsuperscript{43} If it is clear that both parties were at fault in causing a collision, but not clear who was more to blame, then causal responsibility will be apportioned equally.\textsuperscript{45} If, of course, there is no evidence of blame, there is no liability.\textsuperscript{44} Subject to this, the first general step in the ascription of responsibility is to select those factors but for which the damage would not have been sustained, and then to pick out from among them the predominant factor. This so-called 'but for' test usually operates to exclude factors from consideration as having no causal connection with the result,\textsuperscript{46} though it could occasionally be used to impose liability.\textsuperscript{47} The 'but for' test, however, provides only a very rough guideline, for policy and common sense often dictate departures from it, as they do in cases of overlapping factors,\textsuperscript{48} mutually exclusive but equally possible factors,\textsuperscript{49} and cumulative factors.\textsuperscript{50}

An important aspect of causation is novus actus or nova causa interventi ens, the overall test of which is whether, as a matter of evaluation, the intervening event was so unreasonable in itself as to outweigh the defendant's original wrongdoing. As Cooke J put it: 'On general principles of causation, the question which the justices ought to have asked themselves was whether the intervening cause was of so powerful a nature that the conduct of the appellants was not a cause at all but was merely a part of the surrounding circumstances.'\textsuperscript{51} If such event was foreseeable, it is usually not a novus actus so much so that some contend that foreseeability is always the decisive criterion. It is, however, only an aspect of the overall test of reasonableness. For, if the event was foreseeable, the defendant's wrongdoing remains more unreasonable than the event itself since he ought to have provided against it. On the other hand, there are reasons why foreseeability should not be regarded as the sole test. First, the intervening factor may be unforeseeable, but not a novus actus because it was not sufficiently unreasonable in itself.\textsuperscript{52} Secondly, as Lord Reid has said, what matters is the degree of foreseeability; an intervening event will be a novus actus if there was only a mere foreseeable possibility of it, not if it was very likely or probable.\textsuperscript{53} If it was very likely or probable, the defendant's blameworthiness in failing to take account of it outweighs the event itself. Thirdly, the intervening factor may be foreseeable, but still be a novus actus if sufficiently unreasonable. This very situation obtained in Quinn v Burch Brothers (Builders) Ltd,\textsuperscript{54} where the defendant's foreman admitted in evidence that it was foreseeable that the plaintiff would do what he did, but the court held his action to be a novus actus since it was an extremely dangerous thing to have done. Salmon L J (as he was then) was moved to say: 'Although the foreseeability test is a handmaiden of the law, it is by no means a maid-of-all-work. To my mind, it cannot serve as the true criterion when the question is, how was the damage caused? It may be a useful guide, but it is by no means the true criterion.'\textsuperscript{55}

It will be evident, therefore, from this outline that the common law determines causal remoteness on an evaluative basis from start to finish.

Up to a point Roman law proceeded on similar lines, since liability under the lex Aquilia rested at bottom on whose culpa (blameworthiness) caused...
the damage. In 9.2.11 pr, for instance, a barber was shaving a slave near to some people who were playing ball. The ball hit by a player struck the barber’s arm and the slave’s throat was cut. The discussion revolves round the question whose blame caused the injury: was it the player’s fault, or the barber’s for setting up his chair in a dangerous place, or the slave’s for laying himself open to an obvious danger? In deciding such ascriptions of responsibility Julian anticipated British judges by observing that countless examples can be adduced to show that many legal solutions are reached, not according to logic, but on grounds of general policy, contra rationem disputandi pro utilitate communi: 9.2.51.2. There had of course to be prima facie evidence of cause and effect, which can be illustrated by the case of a false confession. Even if a person falsely admits to having killed or wounded a slave, when in truth he is neither dead nor wounded, or is dead without being killed, there can be no liability: 9.2.23.11, 24, 25 pr. A different example is to be found in 9.2.45.3, where two slaves, who were leaping over burning straw, collided and one of them was burned. No action can lie if it cannot be determined who collided with whom.

The problem of ascribing responsibility being broadly the same in all systems, it is not surprising that the approaches of English and Roman law thus far were similar. However, certain procedural requirements and the structure of the Aquilian delict introduced some refinements into Roman causation, which do not obtain in the common law. The first was the question whether the appropriate action to bring was the civil action under the lex Aquilia or a praetorian action (in factum or utilis). If the death of a slave or pecus (which fell under Chapter I of the lex), or any other injury (which fell under Chapter III), was caused directly by the defendant, the action was the actio legis Aquiliae; if it was caused indirectly, the action was praetorian. In this way the question of direct and indirect causation became a prominent issue, the parallel to which in English law is the long-defunct distinction between Trespass and Case. Whether a given result is to be regarded as direct or indirect is always a matter of opinion; and it is interesting to note that in 9.2.9.3 a person, who startled a horse so that it threw its rider, was held liable to a praetorian action for having caused the injury to the rider indirectly, whereas in Dodwell v Burford on similar facts the injury was held to be the direct result. Despite this element of opinion, the problem of direct and indirect causation imparted a dimension to Roman law which has disappeared from English law. The details of its development have been set out elsewhere, which makes it unnecessary to repeat it here.\(^{56}\)

Another refinement was whether an act could be said to have caused death or only a wound. This stemmed from the structure of the lex Aquilia, which prescribed a more severe penalty for killing a slave or pecus (Chapter I) than for wounding them (Chapter III). Therefore, if two persons independently struck a slave, who died in consequence, it became important to determine which of them killed and which one wounded.

If the operative agency was distinguishable, causative potency was attributed to it. In 9.2.7.5. X struck a sick slave and he died; X was liable for 204
killing since his blow was clearly the operative agency. *Culpa* must be understood; the context suggests a wilful blow. In 9.2.11.2 several persons strike a slave and kill him. The text says that if it is clear whose blow actually killed, then he has caused death and the others have only wounded. If it cannot be determined whose blow actually killed, all are regarded as having killed; and 9.2.51.1 says the same. 11.2 adds that where all are liable, payment by one does not release the rest *'cum sit poena'*. In 9.2.11.3 one person administers a mortal blow to a slave and another person finishes him off, *'exanimaverit'*. The latter has caused death, the former has only wounded. In 9.2.30.4 a wounded slave dies through neglect. The text assumes that neglect was the operative agency that caused death, so the striker was liable only for wounding.

9.2.15.1 and 16 pose different situations. A mortally wounded slave subsequently dies sooner than he would have done owing to the collapse of a building, a shipwreck or another blow. The party who inflicted the mortal wound is said not to have caused death and is liable only for wounding. The point is that the subsequent event does not merely hasten the death that would have ensued under the first wound, but finishes him off. The nature of the subsequent event clearly suggests this – collapse of a building or shipwreck – and the *'alio iactu'* must in the context refer to a blow with similar finality. The second case is where the slave of X is mortally wounded and is then alienated or manumitted by X and dies thereafter. Julian is quoted by Ulpian as holding the man who wounded liable for killing because he is deemed to kill at the moment of wounding and the death is related back to that moment: *a te occisum tunc cum vulnerabas*. There are two situations here which need to be distinguished, alienation and manumission. In the former, Julian’s reason would lead to the absurd result that X could sue for the killing, but not the new master. Perhaps, X would have to make over the damages to the latter. In the case of manumission, Julian’s reason would vest the action for killing in X and here it would make sense. Julian may have meant that once the slave dies we know that the original striker is going to be liable for killing and not just for wounding, i.e. the fact of death makes clear that the defendant’s liability is for killing: *quod mortuo eo demum apparuit*. This is independent of the question who is going to be plaintiff. Here the penal policy of the Aquilian manifests itself. The defendant has killed and has to be punished, but in order to do so a plaintiff has to be found in whom the right of action can vest. If there is no other person, it vests in the former master X. Julian’s reason may thus be a somewhat clumsy justification for a policy decision in the case of manumission; but it is inapplicable to the case of alienation. Alternatively, his view may result from a narrow view of what constitutes an *‘act’*; for him this is limited to the bodily action of striking and does not extend to include the consequence.

The slave of X is mortally wounded. X makes him his heir and dies, and then the slave dies. We are told that the slave’s heir has no action for a reason which is explained in 9.2.36.1, where the same situation is supposed. This is that the slave himself would have had no action and so his heir could
inherit none. The difficulty is that if, as Julian maintained, the killing is related back to the time of wounding, then the action for killing should be deemed to vest in X and be inherited by the slave as X's heir and pass in turn to his heir. A likely explanation is that the action does vest in X and is inherited by the slave, but this would mean in effect that the slave would sue for his own death; which is absurd. Therefore, the absurdity wipes out the action at that stage, and so there is no action that can be inherited by the slave's heir. This explanation is supported to some extent by Marcellus's words, 'nam sane absurdum accideri'; there is an absurdity, though not quite that which he may have had in mind.

If the operative agency that caused death is not distinguishable, 9.2.11.2 makes clear that all are equally liable. Thus, in 9.2.11.4 several persons drop a beam on a slave and all were held equally liable; so, too, in 9.2.51.1 where the decisive agency was not distinguishable. In 9.2.51 pr a slave was mortally wounded and certain to die; a second assailant struck another blow and the slave died. Both were regarded as having killed. The distinction between this case and 9.2.11.3 and 9.2.15.1 is that in those two texts the second blow actually finished off the slave, whereas in the present case the second blow combined with the first blow to bring about death sooner than under the first blow by itself. The wording of the three texts makes the point clear. The decisive nature of the second blow is brought out by the 'exanimaverit' in 11.3 and 'alio lctu maturius perierit' in 15.1. 51 pr says expressly that the second blow only hastened death under the first blow: 'ut maturius interficeretur quam ex priore vulnere moriturus fuerat.'

In connection with liability for novus actus interventiens the penal policy of Roman law was very marked. 57 The primary need to punish wrongdoers rather than simply compensate victims made the Romans go far in holding defendants liable even for the acts of third parties. In 47.2.50.4 a man waved a red cloth and stampeded a herd, intending them to fall into the hands of thieves, and he was liable in theft ope consilio. If, however, he did not so intend, he remains liable to an actio in factum since so reprehensible a prank ought not to go unpunished. There is something wrong in the text: it begins by saying that he acted in order that thieves should take the herd ('ut in fures incideret'), and then adds immediately 'if he acted dolo malo'. This may indicate abridgement, but the rule is probably unaltered. The need to penalize a reprehensible prank furnishes a clue to the Roman attitude. G 3.202 gives the same case. In discussing generally the liability of an accomplice to theft, he gives the example of one who deliberately scatters a herd in order that thieves should capture the animals. Gaius then adds that even if he did not do it with a view to aiding a thief, but 'per lasciviam', we need to consider whether an actio utilis ought to be given, since under the Aquilian even negligence is penalized: 'videbimus an utilis actio dari debat, cum per legem Aquiliam, quae de damno lata est, etiam culpa puniatur.' 58 Both texts make it clear that even when the act was not done with a view to aiding a theft, the party was liable for the intervening theft. It is arguable, perhaps, that the novus actus ought to have been foreseen, but the texts give no hint of this.
47.2.67.2 a man dishonestly (? without cause) summoned a muleteer to court. In the meantime his mules got lost or stolen. The ancient lawyers held the defendant liable in theft. In 47.2.37 my tame peacock escaped from my garden and you chased it until it got lost or stolen. You are liable in theft if in fact someone got hold of it. There is no suggestion that you acted in concert with a thief, but you are liable none the less.

For purposes of novus actus the principles of theft and damage were similar. Although the Romans carried liability very far, there were limits, as can be gathered from 47.2.39. A man broke down the door of a prostitute's house with a view to gratifying his lust. Thieves, not acting in concert with him, entered and made away with her property. He was not liable for the theft. He would of course be liable under the Aquilian for the damage to the door, but there is no suggestion that even under the Aquilian he would have been liable for the loss of the goods.

**REMTENESS AS THE EXTENT OF DAMAGE**

Lord Wright declared more than once that this question is determined 'not always according to strict logic'. There are dicta in Wagon Mound (No 1) suggesting that a defendant ought only to be answerable for the foreseeable extent of the damage. Suppose, so it was said, that the foreseeable result of his negligence is some trivial damage to Y alone, but damage of unforeseeable magnitude is sustained by Y and Z. It would be anomalous, said Viscount Simonds, that Y should recover in full and Z nothing, the implication of which is that it would be less anomalous if Y recovered only in respect of the foreseeable extent. He severely castigated Lord Sumner's earlier remark that foreseeability only 'goes to culpability, not to compensation', the implication of which again is that foreseeability should govern 'compensation', i.e. extent of damage, as well as initial liability.

The case-law has decisively rejected the above suggestion. In the light of this subsequent history the Wagon Mound principle may now be formulated as follows: as long as some damage of a particular 'kind' was foreseeable to the plaintiff, he can recover for the full extent of it, even though neither the extent nor the precise manner of its occurrence was foreseeable. Word for word this is a restatement of what used to be the old Polemis principle, the only difference being, as previously explained, that 'kind of damage' has to be understood more narrowly and obscurely than under Re Polemis.

In the first place, the courts have made it abundantly clear that as long as the 'kind of damage' is foreseeable, the extent need not be. With regard to personal injury, the point was established in Smith v Leech Brain & Co Ltd, the very first case after Wagon Mound, in which a foreseeable burn on the plaintiff's lip resulted in unforeseeable cancer and death and the defendants were held liable for the full extent of the injury. Interpreting the Wagon Mound principle, Lord Parker CJ said: 'The Judicial Committee were, I think, disagreeing with the decision in the Polemis case that a man is no longer liable for the type of damage which he could not reasonably anticipate. The Judicial Committee were not, I think, saying that a man is only liable for
the extent of damage which he could anticipate, always assuming the type of injury could have been anticipated.'

Wagon Mound has thus in no way impaired the 'thin skull' rule according to which a defendant has to take his victim talem qualem; he is answerable for the full extent of the injury flowing from the latter's unforeseeable weaknesses by way of an egg-shell skull, haemophilia or other susceptibility. This interpretation of Wagon Mound has been adopted in case after case the world over. There is nothing to suggest that the rule is otherwise with regard to property damage. Lord Parker CJ's dicta do not suggest any such distinction. In Vacwell Engineering Co Ltd v BDH Chemicals Ltd there was foreseeability of some damage to the plaintiff's premises as a result of a minor explosion. In fact the explosion was unforeseeably large and the greater part of the premises was destroyed. The court adopted Lord Parker CJ's observations and held the defendants liable for the full extent of the damage. In this case it was the unforeseeable magnitude of the occurrence (the explosion) which produced the unforeseeable extent of the damage. What if the extent of the damage results from some peculiar susceptibility in the property itself? There is no reason in principle for distinguishing between sensitive persons and sensitive things; it seems absurd, for instance, to treat injury to a haemophilic human being and a haemophilic horse differently.

Secondly, the precise manner of occurrence need not be foreseeable. 'I do not read the Wagon Mound (No J)', said Eveleigh J, 'as dealing with the extent of the original injury or the degree to which it has affected the plaintiff. Still less do I regard it as requiring foreseeability of the manner in which that original injury has caused harm to the plaintiff. Indeed the precise mechanics of the way in which the negligent act results in the original injury do not have to be foreseen.' This point, too, has been endorsed in a series of decisions.

Two cases appear to contradict the above proposition. In Doughty v Turner Manufacturing Co Ltd an asbestos cover was dropped into molten liquid by an employee of the defendants. The cover slid in obliquely from a height of only a few inches and in fact caused no splash. A few minutes later chemical changes inside the asbestos, induced by the high temperature, brought about an eruption of the liquid, which burned the plaintiff, who had just then entered the room. It was held that he could not recover. The decision could have been put either on the ground that no splash was foreseeable in the circumstances of dropping the cover, or that even if a splash had been foreseeable, that danger had ceased by the time the eruption occurred. The court, however, seemed to distinguish between burning by a splash and burning by an eruption as being different in 'kind'. The other case is Tremain v Pike, where the plaintiff contracted a rare disease, known as Weil's disease, by coming into contact with rats' urine. He alleged that his employers had been negligent in allowing rats to infest the buildings in which he worked. The court held that they had not been negligent, but went on to state obiter that he would not have recovered anyway because, even if illness through rat-bites or food contamination might have been foreseeable, this rare
disease was different in 'kind' and unforeseeable. Both cases contradict the line of authority to the effect that the precise details of the way in which harm is sustained need not be foreseeable. To speak, as some do, in terms of 'risk' instead of 'kind' of damage is no more helpful, since everything depends on how 'risk' is formulated - a general risk of burning in the one case or of disease through rats in the other, or the specific risk of burning through an eruption or of Weil's disease? Tremain distinguishes between rat-bites and illness through food contamination on one hand, and Weil's disease on the other, and apparently it was not enough to foresee a general likelihood of illness through rats. Medically speaking, distinctions of this sort between 'kinds' of diseases are questionable, for they assume that diseases are separate 'entities'.

Cases such as these illustrate the uncertainty which the Wagon Mound interpretation of 'kind' of damage has introduced into the law. It is a significant fact that during the forty years of Re Polemis there were barely a dozen reported decisions on it, since litigants knew where they stood. In the sixteen years since Wagon Mound there have been twenty-five cases already, since the obscurity of its principle encourages litigation. This is comment enough on the pass to which an overweening concern for the defendant's point of view has reduced the law.

English law may also recognize wider liability than is foreseeable in another way, and this is through the dubious doctrine known as 'parasitic damage'. According to this, where the defendant's conduct produces an actionable item of damage as well as damage not actionable on its own, then in suing in respect of the actionable damage the plaintiff may recover in respect of the other as well. If such a doctrine does exist, it would only be an application of the principle that, granting some liability in a defendant, he may find himself liable to a greater extent than he might have expected. Its limits, however, are by no means clear. For instance, in a Polemis situation could a plaintiff bring an action in respect of the actionable (foreseeable) damage, namely for the scratched paintwork, and recover parasitically in respect of the non-actionable (unforeseeable) destruction of the property by fire? Clearly not, for it is unthinkable that any court would allow the Wagon Mound to be circumvented by such a ploy. On the other hand, cases before and since Wagon Mound appear to have gone far in allowing recovery in respect of non-actionable damage parasitically and there is no hint that such damage has to be of the same 'kind' as the actionable damage.

More recently, in Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd the doctrine was said by Lord Denning MR and Lawton LJ to be inapplicable in negligence and, indeed, it was wholly repudiated by the former, who said: 'I do not believe there is any such doctrine'. Unfortunately, this robust condemnation loses some of its force when it is realized that in their actual decision in this case both judges upheld an application of parasitic damages. It is a well-known rule that loss of profit is not actionable on its own; but as long as there is some actionable physical damage, then loss of profit arising immediately from it can be recovered. In Spartan Steel the defendants carelessly cut off the electric supply to the plaintiff's factory.
The latter had to pour out metal, which they were melting at the time, to prevent it from solidifying, and the metal depreciated in value by £368. The plaintiffs lost profit on it of £400. While the power remained cut off the plaintiffs could have completed four more melts and could have made a further profit of £1 767. It was held that they could recover £368 in respect of damage to the metal which had to be poured out, plus £400 loss of profit arising from that. The further loss of profit was not recoverable, since no other physical damage had in fact been inflicted. The decision is thus an application of parasitic damages, even though it was not called that. Therefore, the repudiation of the doctrine in the context and against the background of earlier authority leaves the whole matter in doubt. The most that can be said is that its survival is now doubtful and it will certainly not be extended.

Although pecuniary loss comes in ‘on the back’, so to speak, of physical damage to property, there is an important difference between them in relation to extent. With physical damage, as pointed out, a defendant is liable for the full extent even if this is unforeseeable. With pecuniary loss he is liable only to a foreseeable extent, a limitation which derives from *Liesbosch Dredger v SS Edison*. The defendants carelessly sank the plaintiffs’ dredger and were held liable for (a) the market value of the lost vessel; (b) the cost of adapting and transporting a substitute to the place of the sinking (and, although the point did not arise in this case, one should include damages for the loss of use of a thing while it is undergoing repair); and (c) the loss on the plaintiffs’ contract for a reasonable time (here, too, one should include other loss of profit arising immediately from the physical damage). The further loss on the contract, suffered through the plaintiffs’ poverty and consequent inability to procure a substitute dredger sooner, was rejected. Loss on the contract came in at all because, in the words of Lord Wright, a dredger is a ‘profit-earning machine’, ie contracts are made in connection with dredgers and anyone who damages such a ship must foresee loss on contracts. Granting, then, that some loss on the contract was foreseeable, why were damages not awarded for the full extent of such loss? If one takes one’s victim *talem qualem* should he suffer from an egg-shell skull or be a ‘bleeder’, why did these defendants not have to take their victims in their impecunious condition? No convincing reason was given, and the effect of the decision is to confine purely pecuniary loss to a foreseeable extent.

With regard to personal injury, pecuniary loss has to be distinguished from those considerations which arise out of such injuries. Thus, damages for injury to the person include sums in respect of the injury itself, pain and suffering, lost earnings, loss of earning capacity, loss of amenities, loss of expectation of life, medical expenses and possibly expenses voluntarily incurred by third parties to help the plaintiff, which he has refunded, though under no legal obligation to do so. These items are well established and present no difficulty.

In Roman law, as in English law, initial liability had to be established before questions of the extent of damage fell to be considered, and in cases
of negligence *culpa* was determined with reference to foreseeability of harm in a general way.\(^8\) Once initial liability was established, then with regard to physical injuries Roman law certainly carried liability to the full extent. Thus, in 9.2.7.5 the defendant struck a sick slave a light blow from which he died, and the defendant was answerable for his death. The position was no different with regard to injury to inanimate property. 9.2.27.8 shows that a man who burned down my house is liable to my neighbour if the fire spread and burned his house as well.\(^8\) Again, in *Collatio* 12.7.4–6, liability for the full extent is assumed, the question being only the procedural one as to whether the appropriate remedy is civil or praetorian.

It is in connection with the pecuniary considerations arising out of physical injuries that the influence of the policy difference between English and Roman law is most marked. The Roman concern for plaintiffs carried liability much further in some respects. The whole topic of remoteness is so closely knit that it is not possible to unravel rules which were similar and dissimilar to those of English law. A defendant was certainly 'punished' by having to pay the highest value of the property in the past year under Chapter I of the *lex Aquilia*, or thirty days under Chapter III: G 3.218; 9.2.23.3. Chapter III did not specify 'highest value', but this, we are told, was read into it: G 3.218; 9.2.29.8. Depreciation in the value of a thing at the time of injury did not relieve a defendant: 9.2.23.5 (See also 23.6 and 23.7). Also, somewhere in the *lex* the *duplex contra inferi* rule was inserted according to which a defendant, who disputed liability and lost, was condemned to pay double: 9.2.2.1; 9.2.23.10.

The assessment of damages included the plaintiff's *interesse*: 9.2.21.2. This covered lost earnings and earning capacity: 9.1.3. Expenses were another item. In 9.2.7 pr and 9.1.3 medical expenses were allowed, and in 9.2.27.17 (cf *Coll* 2.4.1) expenditure in restoring a slave to health was allowed. (See also 9.1.3; 9.2.33 pr.) 9.2.23.6 says that all circumstances that would make a slave more valuable enter into account and this brought in supervening loss, *damnum emergens*, and loss of certain profit, *lucrum cessans*. An example of the former is 9.2.22.1, which says that if one of a team was injured, the loss to the team as a whole could come in. (See also G 3.212; J 4.3.10.) *Lucrum cessans* is seen in 9.2.7 pr where a father was allowed to recover for the loss of profit from his son's services; and 9.2.33 pr (the end of the text) allowed that which he could have gained. In 9.2.23 pr a slave, who had been instituted heir, was killed, and the value of the lost inheritance came in. (See also G 3.212; J 4.3.10; 9.2.51.2.) All such loss must be of certain profit, not speculative: 9.2.29.3. Mere sentimental damages were not allowed: 9.2.33 pr.

9.2.23.1 created a difficulty. A slave was freed in a will and instituted heir. He was then killed. Although the text does not specifically say so, this must have been before the testator died. We are told that neither the substitute heir nor the intestate heir can recover the value of the inheritance, since the slave himself could have had no action for it: 'quae servo competere non potuit.' It might make better sense if these words were read as 'quae ero', i.e. the owner of the slave, for he obviously could not have included in his action the value

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of his own inheritance.\textsuperscript{83} Julian then says that the substitute heir will get only the value of the slave, but Ulpian doubts whether he will get even that, since if the slave had become heir he would have been free. Ulpian’s view cannot be correct for, in the first place, at the time of the killing the slave was still owned and the action vested in the owner and would have been inherited by the substitute heir. Secondly, a substitute did not take in succession to the first-named heir, but in place of him. So the fact that the first-named heir would or would not have been free was irrelevant. Nor, thirdly, was it necessarily true that if the slave had become heir he would have been free. G 2.188 shows that if a testator alienated his slave to \( X \) without altering his will, the slave would still have become heir but would not have become free, and \( X \) would have acquired the inheritance through him. \textit{Si heres esset si liber esset} is clumsy, and this, coupled with the suspect reason, has led to the belief that Ulpian’s view is an interpolation. In 9.2.23.2 I am instituted heir on condition that I free my slave \( S \). After the testator’s death \( S \) is killed. I can recover the value of the lost inheritance. If \( S \) was killed before the testator’s death, I recover only the value of \( S \). The point is that the conditional right to an inheritance did not vest (\textit{dies cedit}) until death, and the profit was certain to accrue only after that. Similarly, in 47.2.52.28 a stolen slave was instituted heir by someone else, and we are told that the value of the inheritance can be included in the \textit{actio furti} if the slave died before he could inherit.

Roman law went much further than English law in holding defendants liable for loss under existing obligations. In 9.2.22 pr you kill a slave whom I had promised to deliver under a penalty. I can recover the value of the slave or the penalty, whichever is greater. Professor Lawson points out the difficulty that if the subject-matter of a promise has been destroyed through no fault of mine, I am released from my obligation and from the penalty.\textsuperscript{83} The only escape is to assume that the promise of the penalty was somehow independent of the obligation to deliver. In 9.2.54 I promise to deliver an animal, but before I am in default on the promise, the promisee wounds or kills it. I have an Aquilian action because I remain owner until delivery.\textsuperscript{84} If he kills it after I am in default, I am released from the contract, but in this case I shall not rightly recover under the Aquilian: \textit{hoc casu non recte experietur}. Even though I am in default on the contract, I am still owner and should therefore have the action. The text does not deny this, for all it says is that the praetor will prevent me from recovering under the action which I have at law. The text creates no difficulty but for Professor Lawson’s explanation,\textsuperscript{85} which is that where a promisor is in default ownership must be deemed to have passed as between the parties. Not only was there no such doctrine in Roman law, but the explanation, if one may say so with respect, misses the point. So does his rendering of \textit{‘experietur’} as \textit{‘proceed’}. In 4.3.18.5 a third party kills a slave whom you had promised to give me. You are released from the contract and so the Aquilian will be refused to you. Once again, you being owner at the time of the killing should have the action, but the praetor will refuse to let you pursue it: \textit{ideoque legis Aquiliae actio tibi denegabitur.’} Hence, the difficulty alluded to by Professor Lawson of reconciling this with 54 does not
arise. 4.3.18.5 adds that I shall be allowed an actio doli instead. This, of course was given only when there was no other remedy available and none is open to me.

In 9.2.55 I promise to give either S, who is worth 10, or P, who is worth 20. The promisee kills S before I am in default. I can recover 20 since this now represents my loss as I am bound to deliver P. However, 30.47.3 says that if delivery of one alternative becomes impossible through no fault of the debtor, he is not bound to deliver the other but may tender the value of the one which he cannot deliver. As Professor Lawson points out, this text has clearly been interpolated on this point, so 55 probably represents Classical law. If so, as he further points out, the compilers ought also to have altered 55. Presumably, therefore, under Justinian I could recover only the value of the slave that was killed.

There was an additional complication that livestock, which has been injured, may already be the subject of delictual liability. For instance, in 9.2.37.1 an animal, in respect of which its owner was liable in pauperies, was killed. The killer was liable for the value of the animal plus what it would have benefited the owner to have surrendered it noxally rather than to have paid damages. With this should be compared 9.1.1.16, which allowed the owner to cede his own Aquilian action. The defendant remains liable to the same extent, since the cessionary will recover under the Aquilian the value of the loss to himself. The probability is that the animal was killed after litis contestatio, since in Classical law destruction of the offending animal before litis contestatio would have freed the owner from liability. This was because noxal liability attached primarily to the wrongdoing thing itself. The owner’s primary obligation was to surrender it to the victim though he was given the option of keeping it and paying damages instead; after litis contestatio his obligation was in the alternative, either to surrender or pay; and after condemnatio, which was always for a sum of money, his primary obligation was to pay with the option of surrender.

The destruction of receipts also concerned remoteness. 47.2.27 pr and 2 say that if a receipt is stolen, the thief is liable ‘in id quod interest’, which is explained as the value of the debt and not merely of the piece of paper. However, the debt does not come in if there is independent evidence. 9.2.41.1 and 42 say that erasing a document with intent to cause loss rather than to steal grounds only an Aquilian action, and the interesse is obviously the same.

Finally, with regard to what might be called ‘parasitic damage’ Roman law appears to have gone very far indeed. In 9.2.23.4 my slave had committed falsifications in my accounts. He was killed before I could examine him under torture with a view to extracting from him the names of his accomplices. In the Aquilian action against the killer I can recover the amount of my interest in discovering the frauds committed through him, and the implication of the text is that I can no longer sue the fraudulent parties in theft. If the slave had not been killed, I would have sued them and my slave would have been a witness. (Slaves could give evidence only under torture, or at least a pretence
of torture, which would explain the allusion.) The difficulty is that if the slave
has been killed, how do I know who his accomplices were, or whether he had
any at all? Perhaps, what may have happened is that he had previously
revealed their identities to me in private, or I may have some other indepen-
dent evidence, because we are told that I can aduce this evidence under the
Aquilian action to inflate the liability of the killer. If so, could I not utilize that
evidence, whatever it was, in an actio furti against the accomplices? The
explanation may lie in some rule of evidence whereby hearsay or indirect
evidence, such as my slave’s private confession, was inadmissible to estab-
lish liability under the actio furti, but such evidence may nevertheless have
been admissible to enlarge the extent of the defendant’s liability under the
Aquilian, which of course would be established by evidence of the killing. In
other words, the loss occasioned by the frauds, though no longer actionable,
could come in parasitically under the Aquilian to establish, not liability under
it, but the extent of it. In 9.2.40 a chirograph is erased in which it was
recorded that a debt was due to me under a condition. At that time I have
other witnesses to prove the debt. As Gaius says in G 3.131, a chirograph is
only evidence and alternative evidence was admissible. 40 goes on to say that
as these witnesses may not be available when the condition is fulfilled, I can
proceed forthwith under the Aquilian for the erasure and prove the value of
the conditional debt by means of their testimony. Judgment will include the
value of the debt as well as of the document itself, but execution (condem-
nationis exactio) will be deferred until the condition is fulfilled. Professor
Lawson, arguing from 49.4.1.5, objects on the ground that judgments could
not be conditional. But in 40 it is not the judgment, but execution that is
conditional, i.e., the condition relates to the extent of damages. When the
condition is eventually fulfilled, what is there to prevent me from suing for the
debt having already recovered under the Aquilian? There need be no
difficulty, since I could sue for the debt only if my witnesses are still available
and, if they are, they will no doubt testify that they have previously given
evidence of the debt in the prior action. My action on the debt would then be
stayed. In 47.2.32.1 a creditor loses his action of debt because someone has
erased his chirograph. At that time he had no other evidence of the debt, but
later he gets other evidence. In suing the destroyer of the chirograph in theft
he can aduce this new evidence to establish his interesse.

Lastly, there is 9.2.41 pr, which is a complex and difficult text. Marcellus
says that if a will has been deleted there is no action. Ulpian agrees as far as
the testator is concerned. Marcellus adds that an action does lie for the
deletion of a chirograph. The first question is: did the defendant deface the
will before or after the testator’s death? If before, the testator would at least
have had an action in respect of the document and his heir could have
continued it. If after, the testator no longer has an interesse, and if he has no
action, his heir could not have one. It would seem, then, that the deletion
occurred after the testator’s death. Ulpian implies that the heir or legatees, as
distinct from the testator, might have some basis for action. The heir having
entered would own the will and so have the Aquilian, but it is difficult to see
how the legatees would have it. Perhaps, the ‘in factum et injuriarum’ at the end may refer to an actio in factum, which was given to legatees: the heir would have the actio directa, the legatees would have the actio in factum, while both heir and legatees would have the actio injuriarum. It is possible also that the actio in factum may be a corruption for actio furti, which would lead on to what is said about furtum in 41.1. The real difficulty concerns proof. For, if the heir has entered, where is his loss? If he has not been able to enter, how does he know that he is heir since the will has been defaced? The explanation may again lie in a rule of evidence like that mentioned above. The heir is unable to claim the inheritance without producing the will, but he may have independent evidence of the fact that he is the scriptus heres. In the action for the inheritance, hereditatis petitio, he could not use extrinsic evidence, but had to produce the will. But under the Aquilian such evidence may have been admissible, not to establish liability, but the extent of it. This may be why a will is likened to a chirograph. 4.3.35 introduces a further complication. A person erases or defaces a will after the testator’s death. The heir and legatees are given the actio doli. The difficulty about proof remains, for in the actio doli the heir and legatees still have to prove that they were the beneficiaries. Once again, the difficulty appears to be overcome, presumably by the same method, namely, independent evidence which may have been admissible under the actio doli even though this was not admissible in claims under the will itself. The problem, however, is that the actio doli was not allowed if any other remedy was available. 41 pr gives the Aquilian action to the heir and, possibly, an actio in factum to the legatees, but the giving of an actio doli in 4.3.35 implies that they had no other remedy. There is thus a conflict between the two texts; both come from Ulpian and there is no satisfactory method of reconciling them.

CONCLUSION

If a lesson is to be drawn from a comparison of the English and Roman law of remoteness, it should be a lesson in what to avoid rather than what to adopt. The fault principle, which was a concomitant of the swing to the defendant’s point of view and which has profoundly influenced remoteness in English law, is shot through with fallacies and shortcomings. The very idea of liability for fault induces the fallacious belief that damages are not so much compensation for the damage suffered by the victim as punishment for the defendant’s wrongdoing and hence that a defendant should not have to pay more than his degree of guilt merits. This makes tort overlap with criminal law and leads to utterances like that of Viscount Simonds in Wagon Mound (No 1) quoted earlier. Emphasis on the defendant’s point of view has further extended the fault principle to include the requirements of foreseeability of damage to the particular plaintiff and of the particular ‘kind’ of damage, both of which are limits on actionability rather than on fault and go against the historic function of torts. On the other hand, fault is judged objectively so that a person may honestly think that he has been careful and yet be held to have been careless. Moreover, in a highly mechanized society momentary
lapses can lead to grave consequences and if such essentially human failings are treated as 'fault', then that word loses significance. Fault is abandoned in vicarious liability where a master, who is personally not at fault, is made answerable for the fault of his servant. An even more significant development is that of insurance, which enables even a party personally at fault to cast the economic burden of his wrongdoing away from himself and on to other shoulders.

Against the background of historical evolution, the conflict between the plaintiff's and defendant's point of view seems almost Hegelian in its dialectic. The obvious synthesis between them is a principle of automatic no-fault insurance, which would accommodate both points of view. The victim will get compensated regardless of the guilt or innocence of the party inflicting the damage, while the latter will not be financially crushed. Pressure for automatic insurance has been building up in recent years in many countries. The most far-reaching scheme in this direction hitherto has been the one put into operation in New Zealand by the Accident Compensation Act 1972 and the Accident Compensation Amendment (No 2) Act 1973, the working of which is naturally the subject of the closest attention. In Great Britain a Royal Commission on 'Civil Liability and Compensation for Personal Injury' was set up in 1974 to consider the introduction of a similar scheme and its report was originally due by the end of 1977. The terms of reference were limited to personal injuries and death, so that if the Commission does recommend a scheme of insurance comparable to that in New Zealand and if Parliament were to implement the proposal, then the law of torts, including the problems of remoteness and everything else, will be abolished with regard to personal injuries and death. Property torts, however, will remain unaffected. Wagon Mound, it will be remembered, was a case of damage to property; which means that this branch of the law of torts will continue to be saddled with the silliest decision on remoteness of recent years.

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NOTES AND REFERENCES

1 This paper is a developed and expanded version of a theme originally published in (1971) 2 Colombo Law Review 32. I am grateful to the editor for his kind permission to use that material.
2 For some examples of these uses in case-law, see Clerk & Lindsell on Torts 14 ed (1975) §§ 87, 880 (especially n 41). A comparison of standard treatises will likewise reveal these various applications between them. Not only the term 'remoteness', but 'duty of care', 'breach' and 'causation' similarly overlap with each other. Thus, the lack of foreseeability is sometimes described as 'no duty of care': Bourhill v Young [1943] AC 92; sometimes as 'no breach of duty': Glasgow Corporation v Muir [1943] AC 448, and Lords Russell and Porter in Woods v Duncan [1946] AC 401, 426–7, 437; sometimes as 'no causation': Viscount Simon and Lords Macmillan and Simonds in Woods v Duncan at 421, 431, 441–2; and sometimes as 'remoteness': King v Phillips [1953] 1 QB 429, 442.
For the Roman law, see "Obscurities in the Development of Damnum" 1958 Acta Juridica 203, contributed to a collection of papers in honour of Professor R W Lee and edited by Professor Beinart. The present paper is in a sense a belated sequel to it and, however late it may be, I am glad to be able to offer it now in honour of Professor Beinart. For the English law, see Clerk & Lindsell on Torts §§ 861–875. For a much earlier and now rather dated comparison of Roman, English and Roman-Dutch law on the topic, see "Duty Problem in Negligence" (1955) Camb LJ 198.

As pointed out in correspondence by Professor R A Newman of the University of California.

1 [1964] AC 1129; and see now Cassell & Co Ltd v Broome [1972] AC 1027.
2 In 9.2.11.2 Aquilian liability is explained cum sit poena; 9.2.30.3 says dolus et culpa punitur; 9.2.51.2 defends Aquilian liability on the ground that wrongdoing should not go unpunished: neque impunita maleficia esse oporteat, and the same is said in 47.2.30.4: non debetur esse lusus tam perniciosus.
4 They may be created by tenure, Humber River Wall YB [1965] 5 Ed 3 (RS) 86; common callings; failure to keep in fire, Beaulieu v Finglam (1401) YB 2 Hen 4 f 18 pl 6; and see now Goldman v Hargrave [1967] 1 AC 645.
5 [1466] YB 6 Ed 4 f 7 pl 18.
6 [1681] T Ray 421.
7 For further examples of the limited scope of recognized defences, see Weaver v Ward (1616) Hobart 134; Dickenson v Watson (1682) T Jones 215; Bazeley v Clarkson (1681) 3 Lev 337; Leame v Bray (1803) 3 East 593; Lotan v Cross (1810) 2 Camp 464.
8 Altham v Darknell (1628) Palmer 523; Coggis v Bernard (1705) 2 Ld Raym 909, where the defendant objected that the declaration did not allege that there was a common carrier or bailee for reward (Assumpsit), but judgment was nevertheless given for the plaintiff.
9 Else v Gatward (1793) 5 TR 143; Wilkinson v Coverdale (1793) 1 Esp 74.
10 [1802] 3 East 62.
11 [1670] 1 Mod 24; cf 9.2.9.3.
13 Stanley v Powell [1891] 1 QB 86, applying the misreport of Holmes v Mather (1875) 10 Exch 261, and not 33 LT 361; see P A Landon in Pollock on Torts 15 ed (1923) 132. The need for fault as part of the prima facie case has been endorsed in Fowler v Lanning [1959] 1 QB 426 and in Letang v Cooper [1965] 1 QB 232. A similar step was taken in trespass to goods in NCB v Evans [1951] 2 KB 861. It is probable that trespass to land will follow suit at the earliest opportunity.
14 Above, n 17.
16 This text refers to a form of liability in the XII Tables and its archaic 'aedes' and 'noxiam sacrare' may well have been reserved from the original. The 'id est neglegentia' is probably an interpretative gloss by the jurist. See also Cicero De Leg 2.24.6.
17 Nat Hist 8.3.12.
18 Pro Toll 21.51, quoting XII Tab 8.24.
20 Professor H Lawson's translation of culpa as 'negligence' (Negligence in the Civil Law 83) makes nonsense of the text. To say, as he does, that injuria is 'something that is done not according to law, in short, contrary to law, that is, if one kills negligently' would imply that a wilful killing is not 'injurious'. Culpa here means 'blame', which includes intention and negligence. So, too, his rendering of the last sentence as 'we shall therefore take injuria to mean here damage caused negligently (culpa) even by one who intended no harm' is tantamount to saying: damage is caused negligently even by one who acts negligently. What the text must surely refer to is damage caused in a blameworthy manner even by one who did not act wilfully. Lawson's persistent rendering of culpa as 'negligence', regardless of context, mars his presentation of the Title.
21 248 NY 339 (1928).
22 [1943] AC 92.
25 [1921] 3 KB 560.
33 Lord Wright in Burchill v Young [1943] AC 92, 108, and in 14 MLR 393, 398, 400; Machin 17 MLR 405.
34 eg Cardozo CJ in Palsgraf v Long Island Railroad Co 248 NY 339, 341 (1928); A L Goodhart Essays in Jurisprudence and the Common Law chap 7 passim.
36 For the various considerations to be taken into account, see Clerk & Lindsell on Torts §§ 899 et seq.
38 This view of the law has since been endorsed by the House of Lords in British Railways Board v Herrington [1972] AC 877.
39 9.2.30.3; 9.2.31; 9.2.52.2; J 4.3.4 (cf 9.2.9.4); J 4.3.5.
40 MacDonald JA in R v John 1969 (2) SA 560, 564.
41 eg Lord Wright in The Monarch SS Co Ltd v Karlshamns Oljefabriker [1949] AC 196, 228.
42 Metropolitan Railway Co v Jackson (1877) 3 App Cas 193; cf Wakelin v L & SW Ry Co (1886) 12 App Cas 41.
47 eg Baker v Willoughby [1970] AC 467, where the defendant injured the plaintiff’s leg, and the latter then sustained a second injury to the same leg, which necessitated its amputation. The House of Lords held the defendant liable for all the loss of use of the leg that would have resulted from the original injury, regardless of the fact that the plaintiff would have lost the use of it anyway as a result of the later injury. Clearly the ‘but for’ test was ignored here.
48 eg Oliver v Mills 144 Missouri 852 (1926) where two persons carelessly discharged their shot-guns and one pellet entered the plaintiff’s eye. Both were held liable. The ‘but for’ test was inapplicable here.
49 eg when two persons independently light matches in a gas-filled room and an explosion follows. The ‘but for’ test would lead to the absurdity that legally neither could be held responsible, since the explosion could be attributed to the other person’s action.
50 Impress (Worcester) Ltd v Rees (1971) 115 SJ 245.
51 Thus, a wrong action in a sudden emergency or dilemma will not be a novus actus if it was not unreasonable in the circumstances, not because it is foreseeable what people are likely to do in moments of crisis. For an example apart from emergency, see Philco Radio and TV Corporation of GB v Spurling [1949] 1 KB 33 (an extreme case).
52 Dorset Yacht Co Ltd v Home Office [1970] AC 1004, 1030.
54 At p 394.
55 (1670) 1 Mod 24.
57 R Powell ‘Novus actus interveniens in Roman Law’ (1951) 4 CLP 197.
58 Gaius does not actually say that there will be an actio utiles and postpones the answer. It would seem from 47.2.50.4 that there was.
59 This text creates a difficulty as to what constituted contrectatio for the purpose of futurum.
60 Grant v Australian Knitting Mills Ltd [1936] AC 85, 107; Liesbosch Dredger v SS Edison [1936] AC 449, 460.
64 pp 414-15.

60 [1971] 1 QB 88 (the appeal concerned damages and did not affect the remoteness point: [1971] 1 QB 111). See also Wagon Mound (No 2) [1967] 1 AC 617, which involved the same defendants as in Wagon Mound (No 1) but different plaintiffs, namely, the owners of the ships that were being repaired at the dock belonging to the plaintiffs in the first case. Unlike the previous case, in which fire was held not to be foreseeable at all from the oil spillage, the trial judge held here that the spillage did create a very faint risk of fire, which was so small that he felt entitled to ignore it. The Privy Council reversed him, saying that as long as fire was foreseeable as a kind of damage, then no matter how small the possibility the defendants were answerable for it. Thus, they fastened on this minute difference in the finding of fact in the two cases to reverse, in effect, their own previous decision. This raises the foresight saga to the height of fantasy.

61 Wieland v Cyril Lord Carpets Ltd [1969] 3 All ER 1006, 1009.


63 [1964] 1 QB 518.
64 [1969] 1 WLR 1556.

71 On which, see Dr F G Crookshank in Supplement II to C K Ogden and I A Richards The Meaning of Meaning 10 ed (1953).
73 eg Cock v Worthington (1736), 2 Selw (NP 10 ed) 1104 (action for trespass to land, but damages allowed for debauching plaintiff’s daughter although no loss of service was proved); Bracegirdle v Orford (1813) 2 M & S 77 (action for trespass, but damages allowed in respect of a statute-barred slander); Huxley v Berg (1815) 2 Stark 98 (action for trespass, but damages awarded for fright to plaintiff’s wife); Horton v Colwyn Bay and Colwyn UDC [1908] 1 KB 327 (action for obstructing light from windows in respect of which plaintiff had acquired a right included damages for windows in respect of which he had no right); Lampert v Eastern National Omnibus Co Ltd [1954] 1 WLR 1047 (action for personal injury, but (obiter) damages could include loss of husband’s consortium, which a wife cannot recover on its own); Wormald v Cole [1954] 1 QB 614, 625 (trespasser was held liable for personal injury as part of the damage for trespass to land). For cases after Wagon Mound, see Cutler v McPhail [1962] 2 QB 292; AMF International Ltd v Magnet Bowling Ltd [1968] 1 WLR 1028; SCM (United Kingdom) Ltd v W J Whittall & Son Ltd [1970] 1 WLR 1017, 1031 (affirmed, [1971] 1 QB 337).
74 [1971] 1 QB 27.
75 Weller v Foot and Mouth Disease Research Institute [1966] 1 QB 569.

78 British Celanese Ltd v A H Hunt (Capacitors) Ltd [1969] 1 WLR 959; SCM (United Kingdom) Ltd v W J Whittall & Son Ltd [1971] 1 QB 357; cf Electrochrome Ltd v Welsh Plastics Ltd [1968] 2 All ER 205 (no damage to any property of the plaintiff).
79 [1933] AC 449.


81 Thus, there was no infraction of loss in plucking ripe grapes: 9.2.27.25; or twigs ready for cutting: 9.2.27.26; or where the attack increased the value of the thing: 9.2.27.28 (castrating a slave).
82 eg 9.2.20.3 and 31 pr.
83 Cf Coll 12.7.3, which gives what appears to be the same case. This is a rare instance where the text in the Digest is preferable, since it makes clear that the defendant intended to burn down my house, whereas in the Collatio the ‘meam’ is missing; see Buckland 33 Yale LJ 353.
84 For the probability that ‘erus’ was the original term for ‘owner’ used in the lex Aquilia, see 9.2.11.6.
85 Op cit 96.
86 Cf 18.1.35.4, where a seller before delivery has the action since he is still owner and he can transfer this to the buyer. 9.2.11.7 says that after delivery the buyer is
owner. So if he intends to redhibit, he still has the action as owner, but must assign it to the seller under redhibition.
83 Op cit 134.
86 Op cit 135.
87 Cf deodands in English Law.
88 Op cit 123.
89 As to this, see 28.4.1 pr, where things deleted from a will could not be proved by a claimant under it.