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***IS INIURIA AUTEM OCCIDERE INTELLEGITUR, CUIUS DOLO
AUT CULPA ID ACCIDERIT. SOME REMARKS ON GAIUS
TEACHING TORT LAW***

Abstract. When it comes to teaching law in the ancient world, the name Gaius spontaneously comes to mind. Gaius was a classical jurist who probably lived in a province in the east of the Roman Empire. Since he had no *ius respondendi* and thus was not entitled to deliver juristic opinions under the authority of the emperor, he devoted himself primarily to teaching law. His textbook of *Institutes*, which Barthold Niebuhr discovered in a library in Verona in 1816, gives us a good insight into the didactic skills of Gaius. Moreover, they allow us to see how legal teaching must have proceeded in the second century AD. This article deals with the presentation of tort law in the *Institutes* and puts the *Institutes* in the context of other writings by Gaius.

Keywords: law of torts (Roman), illegality, fault, negligence, quasi-delict (Roman law).

***IS INIURIA AUTEM OCCIDERE INTELLEGITUR, CUIUS
DOLO AUT CULPA ID ACCIDERIT. KILKA UWAG O GAIUSIE
UCZĄCYM PRAWA DELIKTOWEGO***

Streszczenie. Gdy mówi się o nauczaniu prawa w świecie starożytnym, od razu przychodzi do głowy imię Gaiusa. Był on jurystą epoki klasycznej, który żył prawdopodobnie w prowincji, na wschodzie Cesarstwa. Ponieważ nie posiadał *ius respondendi*, a zatem nie był uprawniony do wydawania opinii prawnych w imieniu cesarza, poświęcił się przede wszystkim nauczaniu prawa. Jego podręcznik instytucji, który odkrył Barthold Niebuhr w bibliotece weroneńskiej w 1816 roku, daje dobrą możliwość przyjrzenia się pedagogicznym umiejętnościom Gaiusa. Co więcej, pozwala nam przyjrzeć się, jak wyglądało nauczanie prawa w II wieku n.e. W artykule omówiono sposób przedstawienia prawa deliktowego w *Institucjach*, a także omówiono je w perspektywie innych pism Gaiusa.

Słowa kluczowe: rzymskie prawo deliktowe, bezprawność, wina, niedbalstwo, rzymskie quasi-delikty.

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1.

Is iniuria autem occidere intellegitur, cuius dolo aut culpa id acciderit: A person kills wrongfully when it [the killing] happened by malicious intent or by fault. *Nec ulla alia lege damnum, quod sine iniuria datur, reprehenditur. Itaque impunitus est, qui sine culpa et dolo malo casu quodam damnum committit:* And there is no other statute which sanctions a damage that has been inflicted without any wrong. Thus, anyone who causes a damage accidentally without either fault or malicious intent remains unpunished (Gaius Inst 3.211).

With these words, Gaius explains to his students the first chapter of the *lex Aquilia*. This statutory regulation, as is well known, provides a sanction for the unlawful killing of another man's slaves or certain animals: *Ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto* (see e.g. Zimmermann 1990, 953 sqq.). The *iniuria*-element thus proves to be a central criterion for defining the plaintiff's as well as the defendant's position under the *lex Aquilia*. From the plaintiff's point of view, it is a matter of accusing the defendant of having unlawfully inflicted damage. From the defendant's point of view, however, the *iniuria*-criterion provides the chance to give reasons for his conduct in order to justify them (cf. MacCormack 1974, 201). Thus, the *iniuria*-criterion appears to be Janus-faced: on the one hand, it is a matter of establishing liability, especially since not every *occidere*, but only an *occidere* qualified as *iniuria*, will make the tortfeasor liable. On the other hand, it may also be a matter of discharging liability, especially if the defendant succeeds in justifying his conduct in the trial.

Gaius equates the *iniuria*-element, which is central to liability under the *lex Aquilia*, with *dolus* or *culpa*: only if one of these two qualifications is met, the defendant shall be condemned. On the other hand, the defendant will be acquitted if he did not act with *dolus* or *culpa*, but merely *casus* (chance) was the relevant impulse. Thus, Gaius on the one hand introduces *dolus* and *culpa* as prerequisites for liability (Schipani 1969, 251 sqq.). On the other hand, he marks the limit of liability with *casus*. As a rule, damages which occurred accidentally would not oblige to compensation under the *lex Aquilia* nor under any other statute.

Gaius presents his students a certain abstract guideline on how to approach a case involving the *lex Aquilia*. However, the passage drawn from his *Institutes* does not show how Gaius would further explain the question of liability. To gain a deeper insight, one must go a step further and consult the other writings of Gaius.

2.

In his commentary on the Provincial Edict, Gaius describes the following case:

Gaius (7 ad ed prov) D. 9.2.8.1 (= Lenel, Pal 185)

Mulionem quoque, si per imperitiam impetum mularum retinere non potuerit, si eae alienum hominem obriverint, volgo dicitur culpa nomine teneri. Idem dicitur et si propter infirmitatem sustinere mularum impetum non potuerit: nec videtur iniquum, si infirmitas culpae adnumeretur, cum affectare quisque non debeat, in quo vel intellegit vel intellegere debet infirmitatem suam alii periculosam futuram. Idem iuris est in persona eius, qui impetum equi, quo vehebatur, propter imperitiam vel infirmitatem retinere non poterit.

Furthermore, if a mule driver cannot control his mules because of weakness that he cannot hold back his mules – and it does not seem unreasonable that weakness should be deemed negligence; for no one should undertake a task in which he knows or ought to know that his weakness may be a danger to others. The legal position is just the same for a person who through inexperience or weakness cannot control a horse he is riding. (Watson 1985, 280)

A muleteer could no longer keep the animals entrusted to him under control. The mules broke free and trampled a slave to death. The muleteer attempted to excuse his behaviour with inexperience, but according to Gaius this defence will fail: *volgo dicitur culpa nomine teneri*. The same applies (as Gaius states) if the muleteer could not restrain the animals due to weakness. This seems in fact sensible: no one, according to Gaius, should undertake an activity if he knows or should know that his weakness could endanger others.

One may note that Gaius does not state that being weak or lacking experience would in any case provide negligence and thus make the tortfeasor liable; this would indeed result in some kind of strict liability. But the jurist makes clear that *imperitia* (inexperience) or *infirmitas* (weakness) cannot be used as a blanket excuse. It is true that the muleteer is not accused of being weak or lacking experience. But, he is accused of having undertaken an activity that he is not capable of despite his ignorance or weakness (Schipani 1969, 247 sq.; MacCormack 1974, 212; Tritremmel 2020, 135).

In other words: The fault does not lie in being weak or lacking experience. The fault lies in undertaking a dangerous activity that exceeds the person's strength and abilities (cf. Cardilli 2014, 326). One could call this figure by the German term *Einlassungsfahrlässigkeit* ("negligence in admission"). This does not only apply if the muleteer knows that he is not sufficiently skilled or strong. Rather, it already applies if the driver could have recognized that he does not have the appropriate skills. Thus, the concept of *culpa* shifts away from the individual abilities of the actual agent. It focuses on those abilities that, under an objective approach, would be required to perform such activities (cf. Jansen 2003, 254 sq.).

Gaius thus nominally remains on the basis of liability for *culpa*. When taking a closer look at the consequences, however, Gaius stresses the limits of this

model: *culpa* may lie even if the tortfeasor could not have acted otherwise in the specific situation. In this case, he is merely held liable for having brought himself in that situation without necessity. When Gaius recurs to *aequitas* in this context, he primarily argues that such an understanding of *culpa* does not seem unfair in respect to the tortfeasor: there is an objective defect in the tortfeasor's sphere, and so he is held liable if this defect has resulted in damage to third parties.

Of course, one may also see this the other way round from the injured party's point of view: why should, one is inclined to ask, the individual capabilities of the tortfeasor concern the injured party? If someone undertakes a certain activity, he must also guarantee that he has sufficient knowledge and skills. Such a guarantee may be obvious in contract law. Hence, this idea can also be fruitful in tort law. The tortfeasor is held liable for a lack of knowledge and skills not only vis-à-vis his partner in contract, but also vis-à-vis the public in general (cf. Jansen 2003, 254 sq.). This is intended to avoid endangering the public, especially in connection with activities involving enhanced risk.

3.

Let us take a closer look at the *Res cottidiane* of Gaius. Modern research considers the *res cottidiane* (*sive aurea*) to be an expanded and deepened version of his institutions (Nelson, Manthe 2007, 88 sqq.). It is therefore obvious that the *Res cottidiane* also serve primarily didactic purposes. In this work, Gaius presents a group of *obligationes quasi ex maleficio*. As a teacher, he summarizes a series of obligations that resemble torts, but in some respects deviate from the basic conception of the tort. A key to the understanding of the *obligationes quasi ex delicto* lies in *culpa*.

Gaius (3 rer cott) D. 44.7.5.5 (= Lenel, Pal 506)

Is quoque, ex cuius cenaculo (vel proprio ipsius vel conducto vel in quo gratis habitabat) deiectum effusumve aliquid est ita, ut alicui noceret, quasi ex maleficio teneri videtur: ideo autem non proprie ex maleficio obligatus intellegitur; quia plerumque ob alterius culpam tenetur ut servi aut liberi...

Also a person from whose upper floor (whether it is his own or a hired place or even one in which he is living rent free) something has been thrown or poured down with the result that it caused harm to another is regarded as liable in quasi-delict; but because generally here he is liable for the fault of another, either of a slave or a child, he is not properly considered to be liable in delict. (Watson 1985, 643)

According to this text, the person from whose apartment something has been thrown or poured out into the street, is liable under the *actio de effusis vel deiectis* regardless of whether or not he is the perpetrator (Wołodkiewicz 1968, 372; Wittmann 1972, 64). This decouples liability from any specific fault on the

part of the owner of the apartment. The person who lives in the apartment is liable solely because he exercises control over the apartment from which the danger arises (Zimmermann 1992, 313). It seems to be irrelevant whether he actually could have prevented the damage. On the contrary, it is irrefutably presumed that the person living in the apartment exerts a certain degree of control, and the blame is put on him for any deficiency of this control. In this respect, it seems justified to hold that person even liable for fault of a third party here. Elsewhere, Gaius explains this from the perspective of the injured party: *Cum sane impossibile est scire, quis deiecisset vel effudisset ...* In individual cases, it will be difficult to determine which person actually threw or poured something out of the window (Gaius [3 ad ed prov] D. 9.3.2 [= Lenel, Pal 135]). If one holds the person liable who actually controls the apartment, the injured party can determine the addressee of his liability claims rather easily (Ankum 2003, 18).

There is according to Gaius another quasi-delict which displays a similar legal conception:

Gaius (3 rer cott) D. 44.7.5.6 (= Lenel, Pal 506)

Item exercitor navis aut cauponae aut stabuli de damno aut furto, quod in nave aut caupona aut stabulo factum sit, quasi ex maleficio teneri videtur; si modo ipsius nullum est maleficio, sed alicuius eorum, quorum opera navem aut cauponam aut stabulum exerceret: cum enim neque ex contractu sit adversus eum constituta haec actio et aliquatenus culpa reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur.

The man who runs a ship or an inn or a stable is regarded as being liable in quasi-delict for damage or theft which has been committed on the ship or in the inn or stable, provided that there was no wrongful act on his part but on the part of one of the persons through whose work he ran the ship or the inn or stable; for since this action has not been established against him on the basis of contract, yet because he used the services of bad men, he is in some degree guilty of fault, and, consequently, he is held to be liable in quasi-delict. (Watson 1985, 643)

In the context of quasi-delicts, the recourse to *culpa* appears again in analogous actions for theft or damage to property against shipowners, innkeepers or stable owners. These entrepreneurs are held liable for such acts regardless of their own fault (cf. Gröschler 2002, 77 sqq.; Klausberger 2013, 207). Gaius justifies this with the fact that these entrepreneurs are, in a sense, charged with fault (*culpa*) because they use the services of bad people. Here, too, fault is irrefutably presumed in the quasi-delictual liability (Gröschler 2002, 111 sq.). Fault is somewhat typified, similar to the figure of *culpa in eligendo* (“fault of selection”; cf. MacCormack 1971, 525 sqq.; Tritremmel 2020, 150 sqq.) or *culpa in vigilando* (“fault in supervision”). That keeps liability in the common frames insofar as fault is not completely waived (cf. Mattioli 2010, 196 sqq.). When one looks at the consequences of this typified *culpa*, however, this goes far beyond individual *culpa*.

Regarding the social background, one will assume that shipowners, innkeepers and stable owners were of a dubious reputation in ancient times.

However, towards them or their staff the assets of the travellers were exposed and by this way an increased risk of theft or damage arose (Wicke 2000, 88; Mattioli 2010, 211). If a traveller's property gets harmed, he therefore should be able to claim directly against the entrepreneur and not have to settle for tort claims against the auxiliary person. Furthermore, it is the shipowner, innkeeper or stable owner who employs assistants. In doing so, he extends his economic radius of action, but also creates additional sources of danger for the property of the passengers. The entrepreneur, therefore, is not supposed to receive only the benefit of the use of assistants and pass on the risks to the public. Rather, these risks are absorbed in the quasi-delict liability and passed on to the entrepreneur.

These spotlights on tort law show Gaius stretching the concept of individual fault in several ways. Thus, a muleteer is not allowed to plead lack of knowledge or skill; rather, he is already reproached for having undertaken an activity which he is not capable to perform properly. An activity that is fraught with danger therefore also entails an increased standard of care. All this takes place within the interpretation of the *iniuria*-criterion of the *lex Aquilia*. In addition, the praetor reacts with the quasi-delicts to certain sources of danger (Zimmermann 1990, 17 sq.); here, in the final effect, an unconditional obligation to vouch for the behaviour of others is introduced. This approach can be explained by the special dangerous situation to which the praetor reacts by introducing special liability elements.

4.

Finally, let us take a look at contract law. In contrast to tort law, contract law has a specific structure insofar as only the contracting parties are bound to each other by the *vinculum iuris*. Torts, on the contrary, establish rules of behaviour vis-à-vis the general public. Moreover, in the *bonae fidei iudicium*, the concept of good faith (*bona fides*) is added as a general standard. Nevertheless, as we will see in a moment, there can be a reciprocal influence of contract and tort law.

In his commentary on the Provincial Edict, Gaius discusses a case related to the liability of the borrower:

Gaius (9 ad ed prov) D. 13.6.18.pr (= Lenel, Pal 208)

In rebus commodatis talis diligentia praestanda est, qualem quisque diligentissimus pater familias suis rebus adhibet, ita ut tantum eos casus non praestet, quibus resisti non possit, veluti mortes servorum quae sine dolo et culpa eius accidunt, latronum hostiumve incursus, piratarum insidias, naufragium, incendium, fugas servorum qui custodiri non solent. Quod autem de latronibus et piratis et naufragio diximus, ita scilicet accipiemus, si in hoc commodata sit alicui res, ut eam rem peregre secum ferat: alioquin si cui ideo argentum commodaverim, quod is amicos ad cenam invitaturum se diceret, et id peregre secum portaverit, sine ulla dubitatione etiam piratarum et latronum et naufragii casum praestare debet...

The standard of care to be adhered to in relation to things lent for use is that which any very careful head of family keeps in relation to his own affairs to the extent that the borrower is only not liable for those events which cannot be prevented, such as deaths of slaves occurring without fault on his part, attacks of robbers and enemies, surprises by pirates, shipwreck, fire, and escape of slave not usually confined. What is said about robbers, pirates, and shipwreck is to be understood as applying only to the case in which something is actually lent to someone to take to distant parts. It is different where I lend silver to someone because he says he is giving a dinner party for his friends, and he then takes it off on a journey. For in that case without a shadow of doubt, he must answer for disaster due even to pirates, robbers, or shipwreck. (Watson 1985, 406)

Someone has lent silver so that the borrower can use it at a banquet for friends. However, the borrower takes the silver on a journey. During the journey it is lost through shipwreck or robbery. At the beginning, Gaius mentions the general standard of liability in *commodatum*: the borrower is usually liable for the care of a *diligentissimus pater familias*. One may find the reason for this broad standard of liability on the part of the borrower in the fact that the borrower fully benefits of the use of the borrowed item without having to pay any fee in return. The borrower's liability gets limited only in cases of force majeure (Cardilli 1995, 502). That would be for instance the case of loss by shipwreck or robbery. Gaius nevertheless holds the borrower in this specific context liable for such events, which are generally assigned to *casus* (chance).

The reason for this lies in the contractual limitation to the right of use. If the borrower is only allowed to use the silver for hosting a banquet, taking it on a trip is not covered by the contract. In addition, the silver is exposed to a significantly higher risk compared to the use in accordance with the contract (Rundel 2005, 73 sq.). If this increased risk will strike, the borrower will be held liable.

For such a liability, the term *versari in re illicita* was established in the Middle Ages and in modern times. Whoever moves on forbidden grounds, all consequences of that forbidden behaviour are attributed to that person and will make that person liable (Altmeyden 2009, 13 sq.). This imputation also concerns events that seem accidental when considered isolated from the respective context. In this respect, the principle that there is no liability for accidental events seems to be broken.

The example of the borrower who takes the borrowed silver with him on a trip is brought into discussion by Gaius in another setting. In the *Res cottidianae* he states that the borrower is also liable for chance if fault (*culpa*) was involved regarding the chance:

Gaius (2 rer cott) D. 44.7.1.4 (= Lenel, Pal 498)

[...] *Sed et in maioribus casibus, si culpa eius interveniat, tenetur, veluti si quasi amicos ad cenam invitaturus argentum, quod in eam rem utendum acceperit, peregre proficiscens secum portare voluerit et id aut naufragio aut praedonum hostiumve incursum amiserit.*

But in the majority of cases, he is liable if negligence on his part occurs, for example, if, when proceeding abroad, he wished to take with him silver which he had received for the purpose that he shall be inviting friends to a dinner, and he lost it [the silver] either through a shipwreck or an attack by pirates or the enemy. (Watson 1985, 640)

He is also liable for occurrences which could not be prevented when it was his fault that the property was lost; for instance, if anyone, having invited his friends to supper, should borrow silverware for that purpose and then, having gone on a journey and taken the silverware with him, should lose it, either by shipwreck or by an attack of robbers or enemies. (Scott 1932, 76)

Watson translates *in maioribus casibus* with “in the majority of cases,” whereas Scott reads these words as an expression for force majeure. Considering the context, I think Scott is right here. When the borrower exceeds his right of use, this will as a rule fulfil *dolus* or at least *culpa*. In any case, he will be liable for any of those two criteria of liability. Having given a basis for liability, everything else seems to take place on the level of causality. If the loss of the borrowed object is the consequence of a corresponding breach of the borrowing agreement, the borrower will be held liable for that. Even if the loss is in the last consequence due to force majeure (*vis maior*), he will not be able to exonerate himself, because he is already charged with *dolus* or at least *culpa* with the transgression of his right of use beforehand (Cannata 1966, 117).

In addition, Gaius states in his *institutiones* that exceeding a contractually granted use may, at the same time, mean committing the delict of theft (*furtum*):

Gai. Inst. 3.196

Itaque si quis re, quae apud eum deposita sit, utatur, furtum committit; et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur, ueluti si quis argentum utendum acceperit, quasi amicos ad cenam inuitaturus, et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius aliquo duxerit, quod ueteres scripserunt de eo, qui in aciem perduxisset.

And so a depositee commits theft if he uses a thing deposited. A borrower of a thing for use commits theft if he puts it to another use. And so, it is theft if a person borrows silver saying that he wants it for a dinner for his friends and takes it off with him on a journey, or borrows a horse for a ride and uses it to go somewhere far away, as in the case in the old books of the horse borrowed and taken into battle. (Gordon, Robinson 1988, 379, 381)

Here, we encounter for the third time the example of the borrowed silver taken on a trip in the writings of Gaius. If someone has borrowed a thing for a certain purpose and uses this thing for another purpose, this excessive use fulfils the delict of theft (*furtum*). The borrower who exceeds his right of use is thus mentioned in the same breath with the bailee who puts the thing to unauthorized use.

If the borrower therefore commits a delict by exceeding his right of use, this may affect his contractual liability. If the borrower is liable as a thief under the *condictio furtiva* for the value of the object, irrespective of its existence, and if the *actio furti* can also be used to demand a fine for theft, it seems sensible to hold the borrower in

the same way contractually liable under the *actio commodati directa* for the value of the object as an alternative to the *condictio furtiva*.

The liability even for accidental loss of the borrowed object may thus also be explained by influences of tort law on contract law. If, in addition, the borrower's breach of contract also proves to be a delict (*furtum*), the consequences under contract law are adapted to tort law. Thus, the liability for accidental loss by the borrower also fulfils a somewhat penal function. This is intended to prevent a borrower from exposing the borrowed object to risks contrary to the contract. Here, too, the increased liability may be explained by aspects of enhanced risk.

5.

When we look back at the institutional passage cited just at the beginning, we can see that it has on the whole proved to be sensible. The principle that, as a rule, liability is only for malicious intent (*dolus*) and fault (*culpa*) would, however, tolerate exceptions. The same applies to the statement that damage inflicted without any wrong (*sine iniuria*) does not make one liable for compensation. This was not quite correct even in the time of Gaius. The noxal liability of the animal owner was later understood by Ulpian as liability without unlawful conduct (*sine iniuria facientis*). For, according to Ulpian: an animal cannot wrong itself because an animal cannot act rationally (Ulpian [18 ad ed] D. 9.1.1.3: *nec enim potest animal iniuria fecisse, quod sensu caret*; cf. Zimmermann 1990, 1097).

Why do not we find any references to this in the institutions? Apart from the problem of historical tradition, one must keep in mind the situation of Gaius as a teacher of law. In teaching law, students expect catchy statements rather than a casuistic thicket. Incidentally, this observation is not limited to the ancient world. Anyone who accompanies first-year students year in and year out through the introductory phase of their studies will experience this expectation permanently.

The at first sight categorical formulation *is iniuria autem occidere intellegitur, cuius dolo aut culpa id acciderit* ("he kills unlawfully, by whose *dolus* or *culpa* this has happened") must therefore be seen against the background of its didactic goal. The fact that Gaius himself saw the problem in a more differentiated way is evidenced by the other excerpts from his work. Thus, Gaius appears to be a role model even for our modern times: on the one hand, he proves to be a clear teacher, and, on the other hand, also a differentiating practitioner of law.

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