ABSTRACT. The analogy in Roman law is one of the instruments that have allowed the best adaptation of ‘rigid’ law to the new legal cases that appeared at first unregulated by the legal system and that needed protection. In particular, in matters of extra-contractual liability, the role of analogy has been central to the evolution of the application of the Lex Aquilia. The aim of the contribution is precisely to analyse the linchpin fragment through which it was extended the extra-contractual liability.

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The brief reflections made in this paper focus on the extra contractual liability, a broad topic that has become central in legal reflection. I will focus, in particular, on a text by the jurist Ulpiano, reporting a response of the jurist Bruto, on the subject of *Lex Aquilia*,¹ which strongly contributed to developing and extending the field of enforcement of this type of responsibility in the Roman legal system through the instrument of analogy.²

In D.9.2.27.22, in fact, an applicative criterion has been developed, the result of a new approach in the treatment of typical behaviour subject to liability as well as in the identification of the different kinds of goods subject to protection. In this way, protection has been extended to cases not directly covered by the legal text, but no less deserving of protection provided by judicial reflection.

In order to frame the context in which Bruto’s thought must be placed, as reported by Ulpiano, which we will shortly be examining, it is first useful to remember that the content of the Aquilia Law concerned cases of damage³ (or killing) supported by *iniuria*.⁴ This *lex* was structured in three parts: (i) the first one dealt with the subject found guilty of unjustly killing (use of the verb ‘*occidere*’) a slave or an animal belonging

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to someone’s herd, who was condemned to repay the respective owner the maximum value that the slave or the animal had reached during the same year in which the fact was committed; (ii) the second part provided, instead, for an action against the adstipulator, who, in fraud against the main stipulans, had a credit for a certain amount in its book of accounts; (iii) the third part, finally, concerns all the other cases of damage, including those unjustly caused to inanimate things, whose penalty provided that the damaging individual should be ordered to pay the same amount of the value of the res, determined not by the maximum quotation of that year but by the value of the res in the thirty days preceding the event of damage.\(^5\)

As we have already mentioned, the \textit{Lex Aquilia} concerned the repression of the \textit{damnum iniuria datum}:\(^6\) both the first and the third chapter,\(^7\) in fact, focus on the \textit{iniuria}, that is, they are related to the consequences of a behaviour not supported by a legally relevant justification.

The cases in question therefore determined the different methods for quantifying damages resulting from an injury to the individual property.

This fragment, which we will shortly analyze, therefore extends the protection to cases which would not otherwise have led to the restoration of the injury suffered.

It should be noted, in this regard, that it is from the original notion of Aquilian damage that the fundamental institution of compensable damage has developed, over time, up to the present day, which has also included kinds of damage other than just the financial one. In other words, the fortune of the configuration of the Aquilian damage, from the beginning, lies in its openness and thus in its interpretability, in an almost always extensive sense.

The mentioned fragment uses the extensive method in matters of non-contractual liability and this is testified by Ulpian, who reports a response of Brutus

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\(^7\) Schipani, \textit{Responsabilità ex lege Aquilia}, cit., p. 47.
(2nd century BC). In this case it can be clearly seen how an anti-legal situation in itself would risk going ‘unpunished’ if the instrument of analogy were not used, thus guaranteeing protection to those who suffer the damage:

D. 9.2.27.22-23 (Ulp. XVIII ad ed.): Si mulier pugno vel equa ictu a te percussa eiecerit, Brutus ait Aquilia teneri quasi rupto <fetu>. And if you mulum plus iusto oneraverit and aliquid members ruperit, Aquiliae locum fore.

In this case, in fact, the jurist Brutus says that, if a woman is beaten with a fist or a mare struck with a blow, expelling the fetus would represent, according to the lex Aquilia, a ruptio against the mother or the mare.

The solution granted appears to have been adopted in analogy to the action available on the basis of the Aquilia law, in the case a mule, loaded more than necessary, should have a limb broken, as witnessed by the exegesis of paragraph 23 of the fragment.8

The problem of interpretation arose from the circumstance that the foetus, in itself and for itself, was not included among the “goods” (slaves and cattle) considered for the purposes of the application of Chapter One of the Law in cases where the event of death occurred. Nevertheless, as Brutus pointed out, the phenomenon of ruptio9 is, however, the result of an individual activity that determines harmful consequences although variable: foetal death in the case of the slave and the mare and instead a broken limb in the case of the mule. In addition, it should be considered that the phrase ‘quasi rupto’ would require either a male noun or a neutral noun and is therefore not directly referable to the mulier or to the equa assuming the probable omission of the term fetu.

Fetu is taken into account as part of the female and therefore treated as if referring to a limb fracture.

In this case, in order to guarantee a more equitable result, the protection provided by the third chapter is used for cases of damages also to inanimate things (*ceterae res*) while the foetus, as not being an autonomous individual or animal, at least until birth, is considered as a member of the mare and the slave.

The foetus is thus considered both a part of the *pecus* and an identifiable entity and therefore subject to *ruptum* as an identifiable ‘thing’. At the time of the economic evaluation it will be possible, therefore, to measure the incidence that the loss of the *fetus* has had on the value of the *pecus*.

From these considerations, for which I feel like agreeing to the view given by an influential part of the doctrine,10 we come to the conclusion of the response that, despite the failure in recognizing the full value of the slave or animal, allows to subject the damaging party to the action provided by the *lex Aquilia* and to condemn it to a penalty equal to the loss produced to the goods. In my opinion, this appears to be the closest interpretation of the text, «in which the blow (*pugnus vel ictus*) and the abortion (*si eiecerit*) of the female (*mulier vel equa*) struck (*a te percussa*) are respectively identified as a harmful fact (cause) and effect (damage)».11 The phenomenon comes therefore in consideration like an element of the event that concerns the female.

In this regard, it is useful to focus the attention on the meaning of the verb *rumpere*, which is one of the verbs used in the third section of the *Lex Aquilia* to indicate a harmful behaviour.

The importance of this response lies also in the fact that from that moment on the verb *rumpere*, in the general sense of *corrumpere*, as confirmed by a response of Quinto Mucio12 (1st century BC), was used as a general interpretative principle whereby

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non-destructive damage could all be included in the third chapter as *corruptiones* and sanctioned on the basis of the damage produced.\(^{13}\)

Moreover, following the reconstruction made by Lenel in his *Palingenesi*, it is possible to refer to another passage of the Digest, always reported by Ulpiano, in which it is maintained that almost all the *vetere*, identified with the jurists of the Republican age, intended the verb *rumpere* in the sense of *corrumpere*.\(^{14}\)

\[\text{D. 9.2.27.13: } \text{Inquit lex "ruperit". } \text{Rupisse verbum fere omnes vetere sic intellexerunt "corruperit".}\]

From the *Palingenesi* we can see how this fragment is placed before the response given by Brutus, as demonstrated by the fact that Ulpiano, after having clarified in advance in § 13 that the Aquilian *rumpere* was intended in the sense of *corrumpere*, maintains this consideration also in the following paragraphs. It follows that it was now peaceful for him to be considered as the real point of reference for the application of the third section of the *Lex Aquilia*.\(^{15}\)

Moreover, the extensive reading of the sources of *rumpere* as *corrumpere* is testified in several fragments including a response provided by Celsus,\(^{16}\) and reported by Ulpiano, who equates the act of adulterating the wine with a damage punishable by the action of the Aquila Law.

What is also fundamental is the confirmation that comes from the *Institutiones* of Gaius (jurist of the second century A.D.) who in step 3.217\(^{17}\) shows us how the

\[\text{13 a. Corbino, } \text{Il danno qualificato e la Lex Aquilia, Padova, 2008, 102.}\]
\[\text{14 S. Galeotti, } \text{Ricerche sulla nozione di damnum. Il danno nel diritto romano tra semantica e interpretazione, I, Napoli, 2015, p. 20.}\]
\[\text{15 F. Musumeci, "Quasi ruperit", "Quasi rupto", in Studi in onore di A. Metro, IV, Milano, p. 358 et seq.}\]
\[\text{16 D. 9.2.27.15 (Ulp. XVIII ad ed.): } \text{Cum eo plane, qui vinum spurcavit vel effudit vel acetum fecit vel alio modo vitiavit, agi posse Aquilia Celsus ait, quia etiam effusum et acetum factum corrupti appellatione continentur. About this fragment: E. Fraenkel, Rupti appellatio, in ZSS, LXVII, 1950, pp. 612-614.}\]
\[\text{17 Gai. 3.217: } \text{Capite tertio de omni cetero damno causetur, itaque si quis seruam uel eam quadrupedem, quae pecudum numero est, uulnerauerit siue eam quadrupedem, quae pecudum numero non est, uelut canem, aut feram bestiam, uelut ursum, leonem, uulnerauerit uel occiderit, hoc capite actio constituitur. in ceteris quoque animalibus, item in omnibus}\]

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extension of the verb *rumpere* has been received by the system over the years so as to
give it as a general principle regarding the application of the third head of *Lex Aquilia*.

Therefore, the Ulpian commentary to the edict, that contains the fragment
from which we started, is a source of closure of this evolutionary line, even if it does so
by reporting a response of the previous centuries.

Let’s see, therefore, how the extension of protection determines the possibility
of quantifying the damage suffered for the loss of a good that, without the extension of
the same, would not have been considered as such. The interpretative reading of the
fragment derives from a response given by a jurist; this response is part of a custom
whereby, through the publication of the solutions presented by the jurists, the «proposal
for a method for the application of the *ius*, for the concrete determination of the *ita ius
esto*, was made concrete, and corresponds to the idea that this *ius* no longer lies in the
norms, but is implicit in any case and it is in the case that it must be found».18

It was therefore the interpretative activity carried out by the jurists (through their *response*) and the praetor, who transformed *Lex Aquilia*19 from a legislative measure
with punitive/sanctionary value into a measure with a pecuniary penalty aimed at
economic reintegration and the satisfaction of the interests damaged by the behaviour
of an individual.

All this considered, and I will conclude here, the brief analysis carried out
indicates that the fragment in question represents an example of the use of the
instrument of ‘analogy’ within the Roman legal system, aimed at guaranteeing
protection to a situation not expressly provided for in itself. Therefore, the analogical
instrument, as well as the *aequitas*, guarantee an extensive application of the *lex* to a
situation that appears to have all the characteristics provided for by the *lex* itself.

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