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THE ANALOGY IN THE LEX AQUILIA: D. 9.2.27.22**

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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** This article is based on the speech delivered in the framework of the PhD seminar '*La réparation du dommage*' held at the Università degli Studi Roma Tre - Dipartimento di Giurisprudenza with Faculté de Droit et des Sciences sociales Université de Poitiers (27 September 2018).

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

1 B. ALBANESE, *Studi sulla legge Aquilia*, in *Aupa*, XXI, 1950, p. 5 et seq.; C.A. CANNATA, *Sul testo della Lex Aquilia e la sua portata originaria*, in *Scritti scelti di diritto romano*, II, edited by L. VACCA, Torino, 2012, p. 173 et seq.; F.M. DE ROBERTIS, *Damnum iniuria datum. Extra-contractual liability in Roman law, with particular regard to the lex Aquilia de damno*, Bari, 2002, *passim*; G. VALDITARA, *Damnum iniuria datum*, Turin, 1996, p. 5 et seq.; L. DESANTI, *La Legge Aquilia. Tra verba legis e interpretazione giurisprudenziale*, Turin, 2015, p. 39; A. CORBINO, *Il danno qualificato e la Lex Aquilia*, Padova, 2008, p. 102; F. MUSUMECI, "Quasi ruperit", "Quasi rupto", in *Studi in onore di A. Metro*, IV, Milano, 2010, p. 358 et seq.

2 For further information on the theme of analogy: E. BETTI, *Forma e sostanza della interpretatio prudentium*, Milan, 1951, *passim*; EAD, *Interpretazione della legge e degli atti giuridici*, Milan, 1949, *passim*; N. BOBBIO, voce *Analogia*, in *Noviss. dig. it.*, I, Turin, 1957, p. 601 et seq.; E. MELANDRI, *La linea e il circolo. Studio logico-filosofico sull'analogia*, Macerata, 2005, p. 9 et seq.; A. MANTELLO, *L'analogia nei giuristi tardo repubblicani e augustei. Implicazioni dialettico-retoriche e impieghi tecnici*, in *Il ragionamento analogico. Profili storico-giuridici (Convegno. Como, 17-18 novembre 2006)*, edited by C. STORTI, Napoli, 2010, p. 3 et seq.; L. VACCA, *Metodo casistico e sistema prudenziale*, Padova, 2006, p. 39 et seq.; EAD., *Diritto giurisprudenziale romano e scienza giuridica europea*, Torino, 2017, p. 167 et seq.

3 G. VALDITARA, *Sulle origini del concetto di damnum*, Torino, 1998, 71; A.D. MANFREDINI, *Contributi allo studio dell'iniuria in età repubblicana*, Milano, 1977, p. 47 nt. 88.

4 B. BEINART, *The relationship of iniuria and culpa in the lex Aquilia*, in *Studi in onore di V. Arangio-Ruiz*, I, edited by M. Lauria, Napoli, 1953, pp. 279-303; S. SCHIPANI, *Responsabilità ex lege Aquilia. Criteri di imputazione e problemi della culpa*, Torino, 1969, pp. 51-86.

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 *Lex Aquilia* concerned the repression of the *damnum iniuria datum*:⁶ both the first and the third chapter,⁷ in fact, focus on the *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

5 G. LONGO, *Appunti esegetici e note critiche in tema di lex Aquilia*, in *Ricerche romanistiche*, Milano, 1966, p. 713 et seq.

6 C.A. CANNATA, *Per una storia della scienza giuridica europea*, I, Torino, 1997, p. 212; M.F. CURSI, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, Napoli, 2010, *passim*; I. PIRO, *Damnum corpore suo dare rem corpore possidere. L'oggettiva riferibilità del comportamento lesivo e della possesso nella riflessione e nel linguaggio dei giuristi romani*, Napoli, 2004, p. 188.

7 SCHIPANI, *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 *ruptio*⁹ 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.

8 P. ZILIOFFO, *L'imputazione del danno aquiliano tra iniuria e damnum corpore datum*, Padova, 2000, p. 57 *et seq.*; G. MACCORMACK, *Aquilian studies*, in *SDHI*, XLI, 1975, pp. 1-78; ID., *On the third chapter of the lex Aquilia*, in *The Irish Jurist*, V, 1970, pp. 164-178.

9 A. BIGNARDI, *Frangere e rumpere nel lessico normativo e nella interpretatio prudentium*, in AA. VV., *Nozione, formazione e interpretazione del diritto: dall'età romana alle esperienze moderne. Ricerche dedicate al Prof. F. Gallo*, I, Napoli, 1997, p. 54 *et seq.*

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 *foetus* 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

10 C.A. CANNATA, *Sul testo della Lex Aquilia e la sua portata originaria*, in *Scritti scelti di diritto romano, II*, edited by L. Vacca, Torino, 2012, p. 173 et seq.; L. DESANTI, *La Legge Aquilia. Tra verba legis e interpretazione giurisprudenziale*, Torino, 2015, p. 39.

11 CANNATA, *Sul testo*, cit., p. 173.

12 D. 9.2.39 pr.: *Quintus Mucius scribit: equa cum in alieno pasceretur, in cogendo quod praegnas erat eiecit: quaerebatur, dominus eius possetne cum eo qui coegisset lege Aquilia agere, quia equam in iciendo ruperat. If you wish to consult other people, please contact us.* About this fragment: B. ALBANESE, *Studi sulla legge Aquilia*, in *AUPA*, XXI, 1950, Palermo, pp. 5-349; K. VISKY, *La responsabilité dans le droit romain à la fin de la République*, in *RIDA*, III, 1949, pp. 437-484.

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 *Digesto*, always reported by Ulpiano, in which it is maintained that almost all the *veteres*, identified with the jurists of the Republican age, intended the verb *rumpere* in the sense of *corrumpere*.¹⁴

D. 9.2.27.13: *Inquit lex "ruperit". Rupsisse verbum fere omnes veteres 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 Ulpian, 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 Ulpian, 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 3.217¹⁷ shows us how the

13 A. CORBINO, *Il danno qualificato e la Lex Aquilia*, Padova, 2008, 102.

14 S. GALEOTTI, *Ricerche sulla nozione di damnum. Il danno nel diritto romano tra semantica e interpretazione*, I, Napoli, 2015, p. 20.

15 F. MUSUMECI, "Quasi ruperit", "Quasi rupto", in *Studi in onore di A. Metro*, IV, Milano, p. 358 et seq.

16 D. 9.2.27.15 (*Ulp. XVIII ad ed.*): *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.

17 Gai. 3.217: *Capite tertio de omni cetero damno cauetur. itaque si quis seruum 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*

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.

rebus, quae anima carent, damnum iniuria datum hac parte uindicatur. if this is not the case, then it is the case that we can only appeal to ruptum aut fractum fuerit, actio hoc capite constituitur, if only ruptum in omnes istas causas sufficere; ruptum enim intellegitur, quod quoquo modo corruptum est; unde non solum usta aut rupta fracta, sed etiam scissa et collisa et effusa et quoquo modo utiata aut perempta atque deteriora facta hoc uerbo continentur. About this fragment: S. SOLAZZI, *Appunti di critica gaiana*, in *Studi Arangio-Ruiz*, III, Napoli, 1953, pp. 89-113; B. BEINART, *Once more on the origin of lex Aquilia*, in *Butterworths South African Law Review*, Butterworths, 1956, pp. 70-80.

18 C.A. CANNATA, *Per una storia della scienza giuridica europea*, I, Torino, 1997, p. 212.

19 C.A. CANNATA, *Genesi e vicende della colpa aquiliana. Lettura di S. SCHIPANI, Responsabilità ex lege Aquilia. Criteri di imputazione e problema della culpa*, edited by L. Vacca, Torino, 1969, in *Labeo*, XVII, 1971, pp. 64-84.