ACTIO DE PAUPERIE: DAMAGES CAUSED BY DOMESTIC ANIMALS

ACTIO DE PAUPERIE: DAÑOS CAUSADOS POR ANIMALES DOMÉSTICOS

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ABSTRACT

This paper discusses how Roman law developed liability for damages inflicted by domestic animals. At the beginning of Roman legal history, the animal itself may have been regarded as the tortfeasor and therefore held liable. However, the introduction of the *actio de pauperie* (mentioned in the Twelve Tables) seems to have changed this concept of liability. From then on, owners were held liable for damages caused by their animals under a form of strict liability known as 'noxal liability'. The range of application was limited by classical jurists in several ways. For instance, the owner was only responsible for typical dangers resulting from keeping such animals. Furthermore, the owner could not be sued if a third party was liable for fault under the *lex Aquilia*. Additionally, the *actio de pauperie* was not applicable if the damage was caused by the injured party's own negligence. Lastly, the possibility of *noxae deditio* limited the owner's risk.

KEYWORDS

Civil liability: *actio de pauperie*; noxal liability.

RESUMEN

Este artículo analiza cómo el derecho romano desarrolló la responsabilidad por los daños causados por los animales domésticos. Al principio de la historia jurídica romana, es posible que se considerara al propio animal como autor del daño y, por lo tanto, responsable del mismo. Sin embargo, la introducción de la *actio de pauperie* (mencionada en las Doce Tablas) parece haber cambiado este concepto de responsabilidad. A partir de entonces, los propietarios eran responsables de los daños causados por sus animales en virtud de una forma de responsabilidad objetiva conocida como «responsabilidad noxal». Los juristas clásicos limitaron su ámbito de aplicación de varias maneras. Por ejemplo, el propietario solo era responsable de los peligros típicos derivados de la tenencia de dichos animales. Además, el propietario no podía ser demandado si un tercero era responsable de la falta según la *lex Aquilia*. Además, la *actio de pauperie* no se aplicaba si el daño era causado por la propia negligencia de la parte perjudicada. Por último, la posibilidad de *noxae deditio* limitaba el riesgo del propietario.

PALABRAS CLAVE

Responsabilidad civil; *actio de pauperie*; responsabilidad noxal.

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1. ORIGIN AND CONCEPT OF THE *ACTIO DE PAUPERIE*[1]

Roman law did not only establish the liability of the master for the offences of his slave or the liability of the father for the offences of his son in power as noxal liablity, but also the liability of the owner for damage done by his animals under the *actio de pauperie*.[2] In the late classical period, the jurist Ulpian still traced this remedy back to the Twelve Tables, expressing that it was in his view a rather old legal institution:

> D. 9.1.1 pr. (Ulp. 18. *ad ed.*) = XII Tab. 8.6: *Si quadrupes pauperiem fecisse dicetur, actio ex lege duodecim tabularum descendit: quae lex voluit aut dari id quod nocuit, id est id animal quod noxiam commisit, aut aestimationem noxiae offerre.*

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1 The expression *actio de pauperie* occurs only occasionally in the sources, such as *agere de pauperie* in D. 19.5.14.3 (Ulp. 41 *ad Sab*.), but is used in this paper for reasons of clarity. See also MÜLLER, L. Pauperies, in WISSOWA, G. MITTELHAUS, K. ZIEGLER, K. Pauly's Realencyclopädie der classischen Altertumswissenschaft vol. Suppl. 10 (Stuttgart 1965) 521.

2 By contrast, BIONDI, B. *Actiones noxales* (Cortona 1925) 1 sqq., argued that the *actio de pauperie* was not a noxal action in classical law, and that references to noxal liability on the part of the animal owner in the sources were the result of interpolations in post-classical times. There is, of course, not the slightest evidence for such far-reaching interpolations. LENEL, O. Das *Edictum Perpetuum* – Ein Versuch zu seiner Wiederherstellung[3] (Leipzig 1927) 2 sqq. already provided a comprehensive critique of Biondi, and for more recent criticism see e.g. ANKUM, H. L'*Actio de pauperie* et l'*Actio legis Aquiliae* dans le droit romain classique, in Studi in onore di Cesare Sanfilippo, II (Milano 1982) 14 in fn 4 and POLOJAC, M. *Actio de pauperie* and liability for damage caused by animals in Roman Law (Belgrade 2003) 76 sqq.; see further ONIDA, P.P. Studi sulla condizione degli animali non umani nel Sistema giuridico romano[2] (Torino 2012) 342 sqq.

> In cases where a four-footed animal is alleged to have committed *pauperies*, a right of action is derived from the Twelve Tables, which statute provides that that which has caused the offense (that is, the animal which caused harm) should be handed over or that pecuniary damages should be offered for the amount of harm done. (A. Watson)

According to Ulpian's report, already the Twelve Tables provided for a lawsuit if a four-footed animal had caused damage.[3] The *lex* ordered that either the animal causing the damage was to be handed over to the injured party (*aut dari id quod nocuit*) or the defendant was to pay the estimated damage to the injured party (*aut aestimationem noxiae offerre*). From the defendant's point of view, both alternatives – noxal surrender or compensation – were not based on his fault; the mere fact that a four-footed animal had harmed another was sufficient.

The original meaning of the term *pauperies* remains unclear. *Watson* has presented a convincing interpretation by translating the term as 'If a fourfooted animal caused the state of being unproductive'[4] or for short 'lack of productivity'.[5] Therefore, *pauperies* meant damage to the means of production, as indicated by the root of the word *pauper*.[6] In any case, it can be assumed that *pauperies* was a technical term for damage inflicted by animals.[7] The technicality of the term as used in legal sources also suggests that Roman jurists did not consider all cases of damage caused by animals to be *pauperies*. With the Twelve Tables referring to *quadrupes* as source of damage, the *lex* limited the scope of application to four-footed animals. Given the circumstances surrounding the introduction of the *actio de pauperie*,[8] it can be assumed that liability for animals was originally limited to damage caused by four-footed domestic and farm animals.[9] It is possible that the understanding was even narrower and limited to *res mancipi*[10] or *quadrupedes pecudes*. However, there is a lack of reliable evidence in favour of such an understanding.[11] Given that the legal sources are silent on this issue, it is of course impossible to provide a definitive answer.

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3 Contr. TALAMANCA, M. Delitti e pena privata nelle XII Tavole, in CAPOGROSSI COLOGNESI L., CURSI M.F. Forme e responsabilità in età decemvirale (Napoli 2008) 60 sqq.

4 WATSON, A. The Original Meaning of Pauperies, in Revue Internationale des Droits de l'Antiquité 17 (1970) 361 sq.

5 Op. cit. WATSON, A. (1970) 363 sq.

6 Op. cit. WATSON, A. (1970) 362; see also ZIMMERMANN, R. The Law of Obligations – Roman Foundations of the Civilian Tradition (Oxford 1996) 1096 sq.; op. cit. ONIDA, P.P. (2012) 323 sq.

7 Op. cit. WATSON, A. (1970) 360.

8 Cf. op. cit. ONIDA, P.P. (2012) 162 sq.

9 Op. cit. ZIMMERMANN, R. (1996) 1101; op. cit. ONIDA, P.P. (2012) 164 sqq; contr. GIANGRIECO PESSI, M.V. Ricerche sull'*Actio de pauperie* – dalle XII tavole ad Ulpiano (Napoli 1995) 144, who sees all quadrupeds covered.

10 WITTMANN, R. Die Körperverletzung an Freien im klassischen römischen Recht (München 1972) 70 fn. 40.

11 Op. cit. POLOJAC, M. (2003) 25 sqq.

The provision of the Twelve Tables is sometimes said to be modelled on a law attributed to Solon concerning damage inflicted by four-footed animals, as recorded by Plutarch (Solon 24).[12] According to this law, a dog that has bitten someone must be delivered to the injured party with a collar and a cord three cubit long, but the law does not provide for the compensation of damages caused. Delivering the biting dog to the victim was not intended to provide material compensation. Instead, it gave the victim the opportunity to take revenge on the animal that caused them harm.

By contrast, the Twelve Tables contain a compensatory element, in that they gave the defendant the option to compensate for the damage caused instead of surrendering the animal. However, it is remarkable that the wording prioritises the surrender of the animal, with compensation for damages appearing merely as an alternative option. Nevertheless, this represents a shift from seeking revenge to seeking compensation for the damage caused.[13]

2. THE CHANGE IN PERCEPTION REGARDING *NOXAE DEDITIO*: FROM ESTABLISHMENT TO LIMITATION OF LIABILITY

This goes hand in hand with the fact that, over time, Roman law no longer regarded *noxae deditio* as an instrument of establishing liability, but rather as a limitation of liability. Roman jurists carried out this development based on noxal liability for offences committed by slaves. For ancient Roman law, at least, one could argue that noxal liability was primarily intended to gain access to the direct perpetrator, thereby establishing liability.[14] Without noxal liability, offences committed by those in power, such as sons or slaves, would go unpunished. In the first instance, noxal liability made the perpetrator accountable to the victim. By contrast, limiting the owner's liability to the value of the slave who caused the damage by extraditing the perpetrator was perhaps less significant initially.

Unlike the *actiones adjecticiae qualitatis* for contractual and quasi-contractual obligations, noxal liability was not graded according to the owner's ability to exert influence on his slave doing business. If the owner himself was considered the

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12 DÜLL, R. Archaische Sachprozesse und Losverfahren, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 61 (1941) 2 sqq.; op. cit. MÜLLER, L. (1965) 523.

13 See also LITTEN, F. Beiträge zur Lehre von der Schadenszurechnung nach römischem und bürgerlichem Rechte, in Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts 49 (1905) 419.

14 Op. cit. ONIDA, P.P. (2012) 325 sqq.; SIRKS, B. *Noxa caput sequitur*, in: Tijdschrift Voor Rechtsgeschiedenis 81 (2013) 101; GRÖSCHLER, P. Considerazioni sulla funzione della responsabilità nossale in diritto romano, in RUSSO RUGGERI, C. (ed.) Studi in onore di Antonino Metro vol. 3 (Milano 2010) Rz 105.7.

perpetrator, for example because he ordered his slave to commit the offence (*dominus iubens*), or because he knew about his slave's actions but did not prevent them even though he could have done so (*dominus sciens*), then noxal liability did not apply. The owner was liable for his own wrongdoing and could not release himself from liability by handing over the slave.[15] Thus, noxal liability appears to be paradigmatic for the *dominus insciens*, i.e. a *dominus* that has not participated in the offence in a way that would hold him responsible on his own account. If one compares (limited) noxal liability with (unlimited) personal liability, it proves to be the milder form of liability. Consequently, Roman jurists view noxal liability as a privilege for the slave owner who was not involved in the tort itself.[16] Although the *dominus* was liable for the acts of his slaves regardless of fault, he could exempt himself by surrendering the perpetrator and thus limit his liability to the value of the slave:

> D. 9.4.1 (Gai. 2 *ad ed. prov.*): *Noxales actiones appellantur, quae non ex contractu, sed ex noxa atque maleficio servorum adversus nos instituuntur: quarum actionum vis et potestas haec est, ut, si damnati fuerimus, liceat nobis deditione ipsius corporis quod deliquerit evitare litis aestimationem.*
>
> Noxal actions are so called because they are instituted against us not out of contract but because of some damage (noxa) or misdeed committed by a slave. The force and effect of such actions is that if judgement is given against us we can avoid having to pay the amount of the condemnation by bodily handing over the wrongdoer. (A. Watson)

In his commentary on the Provincial Edict, Gaius described noxal actions as actions arising not from a contract but from a delict committed by a slave. The phrase *ex noxa atque maleficio servorum*, which at first glance seems redundant, is noteworthy.[17] *Noxa* primarily means the act of damage in the sense of a harmful act[18] and thus explains the concept of noxal liability etymologically. In this context, *maleficium* emphasises the tortious nature of liability more strongly. Gaius himself apparently used *maleficium* as a synonym for *delictum* elsewhere when he distinguished between obligations *ex contractu* and those *ex maleficio* in D. 44.7.1 pr. (Gai. 2 *aur.*).[19]

Gaius stated that, as a consequence of noxal liability, the convicted person was free to avoid paying the *litis aestimatio* by surrendering the direct perpetrator. This highlights

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15 HARKE, J.D. Sklavenhalterhaftung in Rom, in GLESS, S. SEELMANN, K. (ed.) Intelligente Agenten und das Recht (Baden-Baden 2016) 97 sq.

16 See also BENÖHR, H.P. Zur Haftung für Sklavendelikte, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 97 (1980) 274.

17 Cf. ARNESE, A. Maleficium. Le obbligazioni da fatto illecito nella riflessione gaiana (Bari 2011) 73 sq.

18 HEUMANN, H. SECKEL, E. Handlexikon zu den Quellen des römischen Rechts (Jena 1926) 374.

19 See KLAUSBERGER, P. Klagen aus Quasidelikten, in: BABUSIAUX, U. BALDUS, C. WRNST, W MEISSEL, F.S. PLATSCHEK, J. RÜFNER, T. Handbuch des Römischen Privatrechts vol. 2 (Tübingen 2023) Rz 96.1 sq. Op. cit. ARNESE, A. (2011) 77 ascribes a further meaning to *maleficium* in comparison with *noxa*.

the relationship between the obligation to pay the *litis aestimatio* and the possibility of *noxae deditio*, demonstrating that Gaius primarily viewed the *noxae deditio* as a limitation of liability. This aspect is emphasised even more strongly in the Institutions:

> Gai. 4.75: *Ex maleficio filiorum familias servorumque, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem sufferre aut noxae dedere. erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisue damnosam esse.*
>
> Noxal actions lie when sons in power and slaves commit a delict, for instance, theft or contempt. These actions allow the father or owner either to pay the damages as assessed in money or to make noxal surrender. For it would be unjust to allow the wickedness of sons or slaves to inflict on fathers or owners any loss beyond their own value. (W.M. Gordon/O.F. Robinson)

Gaius started with explaining how the noxal action works and mentions the legal consequence of the conviction as being the choice between paying the *litis aestimatio* and exemption by *noxae deditio*.[20] The jurist referred to *aequitas* as an explanation. It would be unjust to inflict harm on a father or owner by a son or slave that exceeds the value of their own bodies. Gaius elevated the limitation of the obligation to pay compensation for damage inflicted by a slave up to the value of the slave to the status of a principle of justice.

At the same time, this change in perception also signified a paradigm shift. Turning away from revenge and towards compensation placed noxal liability in a new framework. It no longer provided satisfaction to the victim of an offence, but rather compensation. Thus, noxal liability was developing towards 'strict liability': although slaves were able to act independently as animate objects, they could not be prosecuted in court for their actions due to their legal classification as objects. The mere existence of such objects posed a risk to the general public as slaves could perform harmful acts, yet their direct liability was negated by their status. Noxal liability compensated the injured party for the disadvantage of the injuring party being unable to be prosecuted due to their status.[21] The risk of a slave causing tortious damage to third parties was generally assigned to the owner, who could free himself from paying the penalty through *noxae deditio*. As far as *actiones mixtae* were concerned, the penalty included compensating the damage. In this context, noxal liability looks more like compensation than like a punishment.[22] Therefore, the owner's risk was limited to the value of his slave.[23]

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20 Op. cit. GRÖSCHLER, P. (2010) 196.

21 Op. cit. HARKE, J.D. (2016) 115 sq.

22 Even more strongly FINKENAUER, TH. Pönale Elemente der lex Aquilia, in GAMAUF, R. (ed.) Ausgleich oder Buße als Grundproblem des Schadenersatzrechts von der lex Aquilia bis zur Gegenwart (Wien 2017) 68 sq.

23 OP. cit. HARKE, J.D. (2016) 98.

Of course, one could counter that, according to the rule *noxa caput sequitur*, it was not the owner at the time of the damage that was liable, but the owner at the time when the action was brought. However, this objection does not prevail in classical law. The injured party must direct their claim against the current owner. In the case of acquisition by legal transaction, the latter could seek recourse from their predecessor. For example, Roman jurists considered slaves acquired by sale to be defective if they were burdened with noxal liability. In the context of the Aedilitian Edict, this was considered a *vitium*,[24] meaning that the *actio redhibitoria* and the *actio quanti minoris* would lie. However, these remedies were restricted to sales that took place on the market, but in the High Classical period, Roman jurists transferred these legal concepts to the *actio empti*.[25] This meant that the current owner may not be definitively encumbered with noxal liability. Instead, the current owner acted as a kind of 'settlement centre' for the injured party, sparing them the need to determine who actually owned the slave at the time of the damage. Thus, the old civil liability for damage was retained in classical law, but jurisprudence gave it a new character.

Even though these considerations emerged in the context of noxal liability for slaves, they can still be applied to the *actio de pauperie*. Originally, this action was probably intended to ensure that the animal that caused the injury was handed over to the injured party.[26] At this stage, the idea of revenge was still at the forefront.[27] As society shifted its focus from revenge to compensation for damages, the *noxae deditio* was also reinterpreted under the *actio de pauperie* as a limitation of liability. This meant that the owner of the animal would not be required to pay compensation that exceeded the animal's value.[28] However, the liability-limiting function had two flaws. Firstly, it was ineffective if a valuable animal caused minor damage. Secondly, from the injured party's perspective, *noxae deditio* resulted in inadequate compensation if a more or less worthless animal caused significant harm.[29]

3. THE *ACTIO DE PAUPERIE* AS EVIDENCE OF A TORTIOUS ACT BY THE ANIMAL ITSELF?

The structure of the *actio de pauperie* as a noxal action suggests that, at an early stage in the development of Roman law, animals were themselves held liable for

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24 D. 21.1.1.1 (Ulp. 1. *ad ed. aed. cur.*); D. 21.1.17.17 (Ulp. 1. *ad ed. aed. cur.*).

25 Op. cit. ZIMMERMANN, R. (1996) 319 sqq.

26 Op. cit. ONIDA, P.P. (2012) 327.

27 Cf. op. cit. ONIDA, P.P. (2012) 327 sq.

28 PENNITZ, M. Noxalhaftung, in BABUSIAUX, U. BALDUS, C. WRNST, W MEISSEL, F.S. PLATSCHEK, J. RÜFNER, T. Handbuch des Römischen Privatrechts vol. 2 (Tübingen 2023) Rz 105.7.

29 KLAUSBERGER, P. Vom Tierdelikt zur Gefährdungshaftung: Überlegungen zur Haftungsstruktur bei der actio de pauperie und dem edictum de feris, in Teoria e Storia del Diritto Privato 4 (2011) 20 sq.

torts,[30] but one must concede that there is no direct evidence from Roman antiquity to support such liability.[31] However, Festus recounted a *lex regia* attributed to Numa Pompilius, which stated that both the farmer and the team of animals used to plough the boundary between two fields should be subject to the deity's authority.[32] Although some would rather see that as a *piaculum* than a penal sanction,[33] this view did impose a certain responsibility on the animal itself, albeit under sacral law.

Traces of this archaic understanding can be found in noxal liability. In the case of a delict committed by a slave, noxal liability transferred responsibility for the offence to the slave's owner. Therefore, the prerequisite was that the slave had committed a delict for which they could be prosecuted if they were free. If this concept is transferred to the liability of the animal owner, it probably meant originally that the owner could be held responsible for a 'delict' committed by their animal.[34] Ulpian still associated the animal's harmful act with the term 'delictum':

> D. 9.1.1.1 (Ulp. 18 *ad ed.*): *Noxia autem est ipsum delictum.*
>
> The harm constitutes the delict itself. (A. Watson)

The term *noxia* referred to damage inflicted by animals, as mentioned by Ulpian (D. 9.1.1 pr.) in relation to the animal *quod noxiam commisit*. Although Ulpian still considered animals to somewhat be the actor committing the offence,[35] he immediately emphasised the unique characteristics of this 'delict':

> D. 9.1.1.3 (Ulp. 18 *ad ed.*): *Ait praetor «pauperiem fecisse». Pauperies est damnum sine iniuria facientis datum: nec enim potest animal iniuria fecisse, quod sensu caret.*
>
> The praetor says: "have committed *pauperies*." *Pauperies* is damage done without any legal wrong on the part of the doer, and, of course, an animal is incapable of committing a legal wrong because it is devoid of reasoning. (A. Watson)

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30 Cf. op. cit. KLAUSBERGER, P. (2011) 5 sqq.

31 Op. cit. MÜLLER, L. (1965) 524 sq. is therefore sceptical as to whether the idea of tortious liability of animals was anchored in ancient Roman law. Contr. DERNBURG, H. SOKOLOWSKI, P. System des römischen Rechts, 8th edition, vol. 2 (Stockstadt am Main 1911) 829. For Greek law, see op. cit. DÜLL, R. (1941) 5 sqq; DÜLL, R. Zum Anthropomorphismus im antiken Recht, in: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 64 (1944) 346 sqq.

32 Festus sv *termino*: *Denique Numa Pompilius statuit eum qui terminum exarasset, et ipsum et boves sacros esse.*

33 See MOMMSEN, TH. Römisches Strafrecht (Leipzig 1899) 822 fn. 2; in favour of a primarily sacral character, see also MONOSSOHN, S. Die *actio de pauperie* im System des römischen Noxalrechtes (Heidelberg 1911) 21; HAYMANN, F. Textkritische Studien zum römischen Obligationenrecht III – Zur Haftung für Tierschäden, in: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 42 (1921) 368; cf. also op. cit. DÜLL, R. (1941) 5.

34 Cf. op. cit. TALAMANCA, M. (2008) 61.

35 Cf. also op. cit. HARKE, J.D. (2016) 107.

The late classical jurist explicitly stated that *pauperies* refers to damage inflicted without *iniuria* on the part of the perpetrator. Although Ulpian still considered the animal to be the 'perpetrator', he also asserted that it cannot commit *iniuria* due to its lack of reason.[36] The term *sensus* appears in the sources in connection with mental illness when a person lacks it.[37] The lack of *sensus* was also used as an argument against acquiring ownership of an infant.[38] The phrase *quod sensu caret* is noteworthy because it equated *iniuria* with the capacity to tell right from wrong. This gave *iniuria* a distinctly subjective colouring, meaning that ultimately, the animal itself could not be held responsible.[39] Therefore, liability under the *actio de pauperie* was not necessarily based on the owner's fault[40] or the attribution of the perpetrator's fault to the owner. It was completely independent of fault.[41]

4. LIABILITY REQUIREMENTS OF THE *ACTIO DE PAUPERIE*

4.1. Ownership of the animal by the defendant

> D. 9.1.1.12 (Ulp. 18 *ad ed.*): *Et cum etiam in quadrupedibus noxa caput sequitur, adversus dominum haec actio datur, non cuius fuerit quadrupes, cum noceret, sed cuius nunc est.*
>
> And since the rule that liability for damage attaches to the physical corpus which caused the damage even in the case of animals, this action lies not against the owner of the beast at the time the damage was caused, but against whoever owns it when action is brought. (A. Watson)

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36 Op. cit. ZIMMERMANN, R. (1996) 1097; op. cit. ONIDA, P.P. (2012) 93 sq.

37 For example, D. 24.3.22.7 (Ulp. 3 *disp.*) on the question of whether a mentally ill spouse can send a valid letter of divorce, and D. 1.18.14 (Macer 2 *iud. publ.*) on the criminal liability of the *furiosus*.

38 See D. 41.2.32.2 (Paul. 15 *ad Sab.*).

39 Op. cit. GIANGRIECO PESSI, M.V. (1995) 30; CURSI, M.F. La *Lex Pesolania de cane*: un fraintendimento o una previsione specifica sui cani pericolosi?, in Index 45 (2017) 364 sq.; cf. also op. cit. HAYMANN, F. (1921) 371.

40 Op. cit. HAYMANN, F. (1921) 357; RODRIGUEZ-ENNES, L. Delimitación conceptual del ilícito edilicio «de feris », in IVRA 41 (1990) 75.

41 When compared with older ancient laws, such as the Code of Hammurabi or the Laws of Eshnunna, it is astonishing that the liability of animal owners is more firmly rooted in the concept of fault. For instance, §§ 54 sqq. of the Laws of Eshnunna and §§ 251 sqq. of the Code of Hammurabi provide that the owner is liable for an unruly ox or cow if they have been made aware of this circumstance but subsequently do nothing about it. NÖRR, D. Zum Schuldgedanken im altbabylonischen Strafrecht, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 75 (1958) 11 sqq., 19, 27, 30 views this as a deviation from the concept of strict liability, in that it establishes the liability of a non-direct perpetrator (i.e. the animal owner; the animal is to be considered the direct perpetrator) based on typified fault. However, HAASE, R. Die Behandlung von Tierschäden in den Keilschriftrechten, in Revue Internationale des Droits de l'Antiquité 14 (1967) 52, following op. cit. MÜLLER, L. (1965) 522, speaks of a weakened strict liability according to the principle of risk assumption following the ability to control the risk.

As a noxal action, the claim was brought against the owner of the animal. In accordance with the principle *noxa caput sequitur*, the ownership at the time the action was brought was relevant, not the ownership at the time of the damage.[42]

> D. 9.1.1.13 (Ulp. 18 *ad ed.*): *Plane si ante litem contestatam decesserit animal, extincta erit actio.*
>
> Clearly, therefore, if the animal dies before joinder of issue, the right of action dies with it. (A. Watson)

> D. 9.1.1.14 (Ulp. 18 *ad ed.*): *Noxae autem dedere est animal tradere vivum...*
>
> For noxal surrender is handing over the live animal. (A. Watson)

According to Ulpian, if the animal died before the *litis contestatio*, the *actio de pauperie* did not lie. The jurist immediately added that *noxae deditio* required handing the animal over to the injured party while it was still alive. However, if the jurist in D. 9.1.1.13 was referring to the time of the *litis contestatio*, it remains unclear what effect the animal's death during the trial would have. Conversely, one could conclude from D. 9.1.1.13 that the trial continued and that the defendant could be convicted. However, the defendant would then no longer be able to avoid paying compensation by surrendering the animal. He would have to pay in any case, and liability would no longer be limited to the animal's value.

Taking this understanding as a basis for the sources, the sentence *noxae autem dedere est animal tradere vivum* appears in a different light. It does not categorically restrict the *actio de pauperie* to the possibility of *noxae deditio* being open to the defendant until the delivery of the sentence. In fact, this option must only be available at the very beginning of the trial, and its shortfall later on does not affect the trial.[43] Thus, *noxae deditio* clearly proved to be in classical times an instrument that limited liability, ultimately benefitting the owner.[44] This should be considered when deciding who should bear the risk if the animal dies during the trial. Given that the *noxae deditio* primarily benefitted the owner by limiting their liability, it was reasonable to impose the risk on the owner.

As discussed above, the *actio de pauperie* differed from noxal liability for slaves in that it did not involve formally amending an action in tort; instead, it made the owner of the animal directly liable.[45] The owner could either pay compensation or surrender the

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42 Op. cit. POLOJAC, M. (2003) 63; see in general op. cit. HARKE, J.D. (2016) 100; op. cit. PENNITZ, M. (2023) Rz 105.3.

43 Op. cit. GIANGRIECO PESSI, M.V. (1995) 325; cf. also op. cit. ONIDA, P.P. (2012) 335.

44 In ancient times, however, the aspect of revenge and therefore the possibility of punishing the perpetrator might have been the primary scope of the action; cf. op. cit. ONIDA, P.P. (2012) 333.

45 See also op. cit. ANKUM, H. (1982) 14 sq. with fn. 4.

animal in lieu of damages. The formula of the *actio de pauperie* can be reconstructed with Lenel,[46] whom Mantovani essentially agreed with,[47] as follows:[48]

Si paret quadrupedem pauperiem fecisse qua de re agitur, quam ob rem Numerium Negidium Aulo Agerio aut noxam sarcire aut in noxam dedere oportet, quanti ea res est, tantam pecuniam aut in noxam dedere iudex Numerium Negidium condemnato, si non paret absolvito.

If it is proven that the four-footed animal in question caused the damage, Numerius Negidius must either compensate Aulus Agerius for the damage or surrender the animal. The judge shall order Numerius Negidius to pay Aulus Agerius an amount equal to the value of the damage caused, or to hand over the animal as compensation. If it is not proven, he should be acquitted.

4.2. Infliction of damage *contra naturam* or *commota feritate*

In addition to the liability requirements discussed so far, classical Roman jurists demanded that, as a further criterion, the damage caused by the animal must have been inflicted *contra naturam*. Although this requirement was not included in the claim formula, it was apparently added through classical jurists' interpretation. The *Glossa Ordinaria* added the phrase *sui generis* to *contra naturam* and interpreted the expression to mean that harm caused by a specific animal contrary to the custom of its species should be covered.[49] Some modern scholars associate the *contra naturam* criterion with aspects of fault: Due to the tendency of Roman jurists to base liability on subjective grounds of attribution, the introduction of the *contra naturam* criterion is seen as an attempt made by the classical jurists to conceptualise the 'fault' of the animal.[50] In contrast, others see the *actio de pauperie* as strict liability.[51] According to this concept,

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46 LENEL, O. Die Formeln der actiones noxales, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 47 (1927) 195.

47 MANTOVANI, D. Le formule del processo privato romano (Padova 1999) 62.

48 Contr. op. cit. BIONDI, B. (1925) 3 sqq., according to whom the *actio de pauperie* has no noxal character; critical on that point LENEL, O. Die Formeln der *actiones noxales*, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 47 (1927) 2 sqq.

49 See EISELE, F. Civilistische Kleinigkeiten – Ueber die Haftung des Eigenthümers für den durch sein Thier verursachten Schaden (actio de pauperie), in Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts 24 (1886) 481 sqq.; op. cit. LITTEN, F. (1905) 422 sqq.; op. cit. GIANGRIECO PESSI, M.V. (1995) 33 sq.

50 JHERING, R. Das Schuldmoment im Römischen Privatrecht (Gießen 1867) 43; op. cit. LITTEN, F. (1905) 419 f; see also op. cit. ONIDA, P.P. (2012) 364 sqq.; CURSI, M.F. Modelle objektiver Haftung im Deliktsrecht: Das schwerwiegende Erbe des römischen Rechts, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 132 (2015) 371; op. cit. CURSI, M.F. (2017) 499.

51 Op. cit. MONOSSOHN, S. (1911) 35 ff.

the *contra naturam* criterion determined the point at which the animal owner became liable for damage caused by the animal's positive and spontaneous actions.[52] In that respect, the *actio de pauperie* arose from the animal's harmful behaviour, unless it was just an adequate, natural, instinctive reaction to an external stimulus.[53]

The following examines the meaning of the *contra naturam* criterion on the basis of classical sources. This begins with a text from Ulpian, which most clearly expressed this criterion.

> D. 9.1.1.7 (Ulp. 18 *ad ed.*): *Et generaliter haec actio locum habet, quotiens contra naturam fera*[54] *mota pauperiem dedit ...*
>
> The general rule is that this action lies whenever an animal commits pauperies when moved by some wildness contrary to the nature of its kind. (A. Watson)

At the beginning of the passage, Ulpian stated that liability under the *actio de pauperie* always applied if an animal had gone wild and caused damage contrary to its nature. The phrase *et generaliter haec actio locum habet* alone has been enough for some modern scholars to regard the passage as interpolated.[55] However, there is no reason for this, especially since at least Ulpian's line of thought appears to be classical.[56]

The reference by Roman jurists to animals acting contrary to nature requires further clarification. The new German translation of the Digest interprets the phrase *contra naturam fera (feritate?) mota* as meaning that the animal has become wild, contrary to its tame nature.[57] The new Italian translation too understands the Latin phrase in a similar way.[58] This is justified by reference to D 9.1.1.10 (Ulp. 18 *ad ed.*), where Ulpian stated that the *actio de pauperie* is not applicable to wild animals.[59] This translation hypothesis will be analysed in more detail below, based on the sources. The text of Ulpian is consistent with other texts that focus on whether the animal was driven by savagery.

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52 Op. cit. EISELE, F. (1886) 498.

53 Op. cit. MONOSSOHN, S. (1911) 53.

54 HONORÉ, T. Liability for animals: Ulpian and the compilers, in ANKUM, H. SPRUIT, E. WUBBE, F. (ed.) Satura Roberto Feenstra (Fribourg 1985) 246 thinks that instead of *fera* it should correctly read *feritate*.

55 See for example op. cit. HAYMANN, F. (1921) 364 sq.; KERR WYLIE, J. Actio de Pauperie, in Studi in onore di Salvatore Riccobono vol. 4 (Palermo 1936) 487 and VON LÜBTOW, U. Untersuchungen zur lex Aquilia de damno iniuria dato (Berlin 1971) 155 sq.

56 Op. cit. HONORÉ, T. (1985) 243 fn. 25; op. cit. GIANGRIECO PESSI, M.V. (1995) 26 sqq.; op. cit. KLAUSBERGER, P. (2011) 13.

57 BEHRENDS, O. KNÜTEL, R. KUPISCH, B. SEILER, H.H. Corpus Iuris Civilis – Text und Übersetzung, vol. 2 (Heidelberg 1995) 730.

58 SCHIPANI, S. Iustiniani Digesta seu Pandectae. Digesti o Pandette dell'Imperatore Giustiniano.Testo e traduzione vol. 2 (Milano 2005) 233 sq.

59 Op. cit. BEHRENDS, O. KNÜTEL, R. KUPISCH, B. SEILER, H.H. (1995) 730 fn. 1.

> D. 9.1.1.4 (Ulp. 18 *ad ed.*): *Itaque, ut Servius scribit, tunc haec actio locum habet, cum commota feritate nocuit quadrupes, puta si equus calcitrosus calce percusserit, aut bos cornu petere solitus petierit, aut mulae propter nimiam ferociam:*[60] *quod si propter loci iniquitatem aut propter culpam mulionis, aut si plus iusto onerata quadrupes in aliquem onus everterit, haec actio cessabit damnique iniuriae agetur.*
>
> Therefore, as Servius writes, this action lies when a four-footed animal does harm because its wild nature has been excited, for example, when a horse given to kicking actually kicks someone or an ox likely to gore tosses someone or mules cause damage on account of some unusual vice. On the other hand, if an animal should upset its load onto someone because of the roughness of the ground or a mule driver's negligence of because it was overloaded, this action will not lie and proceedings should be brought for wrongful damage. (A. Watson)

Here, Ulpian referred to the Republican jurist Servius, who stated that the *actio de pauperie* lay whenever an animal's ferocity had caused damage. This statement was followed by several examples to illustrate it. The owner was said to be liable if a horse with a tendency to kick hits someone with its hoof. Similarly, liability existed if an ox, which has the tendency to attack with its horns, has injured someone. Finally, the *actio de pauperie* lay if mules became excessively furious and caused damage.

All of these examples have one thing in common: tame animals behaving unexpectedly.[61] Despite its tame nature, the animal's natural wildness has come to the fore and the animal has harmed an innocent bystander.[62] Even tame animals were at risk of undergoing a sudden change in character and revealing their 'original' temperament.[63] Such a risk typically stems from tame animals, as these behavioural shifts cannot be completely eliminated or managed.[64] In light of this, the requirement of damage inflicted *contra naturam sui generis* will be seen as an expression of the special danger posed by tame animals.[65]

It is unclear why the jurist specifically mentioned that the horse tends to lash out and that the cow tends to attack with its horns. These are clearly individual 'character defects' of the animal in question, and it is at first sight unclear whether they were relevant to liability under the *actio de pauperie*. A horse knocking someone out or cattle attacking may be seen as an example of the typical danger arising from such an animal, regardless of whether it has behaved in this way before. Ulpian may have wished to point out that liability under the *actio de pauperie* arose even if the sudden change in

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60 MOMMSEN, TH. *Digesta Iustiniani Augusti, Editio Maior*, I (Berlin 1870) 276 fn. 3 supplements *plaustrum in aliquem everterint* (vel tale quid).

61 See op. cit. MONOSSOHN, S. (1911) 39, who equates *commota feritate* with out of its animal nature.

62 Op. cit. LITTEN, F. (1905) 447.

63 Op. cit. LITTEN, F. (1905) 447; see also POLOJAC, M. (2003) 38.

64 Op. cit. ZIMMERMANN, R. (1996) 1103.

65 Op. cit. LITTEN, F. (1905) 449; HARKE, J.D. (2016) 108.

behaviour had become habitual and occurred more than once. This may not be obvious to the injured party, so it would be unfair to deny their claim just because the owner keeps a dangerous animal.[66]

In the final part of the passage, the jurist modified the case, ruling that damage cannot be attributed solely to the sudden manifestation of the animal's temperament; external influences must also be considered. If the mules were overloaded, the terrain was sloping, or the muleteer was otherwise at fault, the owner would no longer be liable under the *actio de pauperie* but the muleteer would be liable for their own fault under the *lex Aquilia*. Consequently, liability under the *actio de pauperie* was subsidiary to fault-based liability.[67] In this variant, the damage did not result solely from the danger posed by the animal. Rather, the cause of the injury was the muleteer's negligence, which triggered the animal's behaviour in the first place. Therefore, the negligent muleteer became the only addressee of liability claims, while the animal owner was exempt from liability.

Ulpian immediately added another example to that of the muleteer:

> D. 9.1.1.5 (Ulp. 18 *ad ed.*): *Sed et si canis, cum duceretur ab aliquo, asperitate sua evaserit et alicui damnum dederit: si contineri firmius ab alio poterit vel si per eum locum induci non debuit, haec actio cessabit et tenebitur qui canem tenebat.*
>
> Take the case of a dog which, while being taken out on a lead by someone, breaks loose on account of its wildness and does some harm to someone else: If it could have been better restrained by someone else or if it should never have been taken to that particular place, this action will not lie ant the person who had the dog on the lead will be liable. (A. Watson)

Someone was walking a dog on a lead. Due to its ferocity, the dog managed to get loose and caused damage to another person. Ulpian ruled against the *actio de pauperie*, deciding not to hold the owner of the dog liable, but rather the person who was leading the dog. This is based on the premise that someone else could have held the dog more securely, or that the dog should not have been led through this area at all.

Once again, it is clear that the liability of the owner under the *actio de pauperie* was subsidiary to liability based on fault.[68] As the focus was on whether someone else could have controlled the dog better than the handler involved in the case, the behaviour of the person in question was assessed against the behaviour of a reasonable person as the

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66 Op. cit. GIANGRIECO PESSI, M.V. (1995) 49 f.

67 Op. cit. HONORÉ, T. (1985) 239 sq.; POLOJAC, M. Actio de pauperie: anthropomorphism and rationalism, in: Fundamina 18 (2012) 130 sq.; cf. also op. cit. LITTEN, F. (1905) 443; op. cit. MONOSSOHN, S. (1911) 39; contr. op. cit. HAYMANN, F. (1921) 385, who puts forward arguments in favour of his point of view based on the theory of interpolation, which are no longer considered convincing today.

68 Op. cit. GIANGRIECO PESSI, M.V. (1995) 70; op. cit. POLOJAC, M. (2003) 39; op. cit. KLAUSBERGER, P. (2011) 12.

standard.[69] If the dog handler's behaviour deviated negatively from that of the standard figure, this deviation constituted fault, and the dog handler was liable to the injured party under the *lex Aquilia*. In this case, the *actio de pauperie*, which was not based on fault, did not lie.[70] The same applied if the dog should not have been led there at all, i.e. if leading the dog there was prohibited. Violation of such a prohibition was obviously an act of negligence in itself and lead to the dog handler's liability.[71] Whether a reasonable person could have restrained the dog in this situation seems irrelevant.

A similar reasoning can also be found in the second part of Ulpian (18 *ad ed.*) D. 9.1.1.7:

> D. 9.1.1.7 (Ulp. 18 *ad ed.*): *... ideoque si equus dolore concitatus calce petierit, cessare istam actionem, sed eum, qui equum percusserit aut vulneraverit, in factum magis quam lege Aquilia teneri, utique ideo, quia non ipse suo corpore damnum dedit. At si, cum equum permulsisset quis vel palpatus esset, calce eum percusserit, erit actioni locus.*
>
> Therefore, if a horse kicks out because it is upset by pain, this action will not lie, but he who hit or wounded the horse will be liable to an action in factum under the lex Aquilia because and to the extent that he did not do the damage with his own body. But if the horse kicked someone who was stroking it or someone who was patting it, this action will be available. (A. Watson)

Following the abstract guidelines discussed previously, which stated that the *actio de pauperie* lay if an animal had caused harm *contra naturam fera mota*, Ulpian provided a concrete example to illustrate this. A horse was irritated by someone using a sharp object. The horse then kicked out and injured an innocent bystander. Ulpian ruled that the owner of the horse was not liable, but that the person who had irritated the horse was. The injured party could sue this person using an *actio in factum* modelled on the basis of the *lex Aquilia*. However, the decision would be different if the horse hit the person who was merely stroking it with its hoof. In this case, the owner of the horse would be liable under the *actio de pauperie*.

Once again, the facts of the case demonstrate that liability under the *actio de pauperie* was subsidiary to fault-based liability.[72] As the injury to the third party was caused by the stimulation of the horse and not by the animal acting on instinct, the person who caused the stimulation was liable. In the absence of direct damage being inflicted, the perpetrator was liable under an *actio in factum* modelled on the *actio legis Aquiliae*.[73] However, this has no bearing on the outcome.

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69 Op. cit. LITTEN, F. (1905) 441.

70 Op. cit. EISELE, F. (1886) 485 f.

71 Cf. op. cit. LITTEN, F. (1905) 440, who in this respect equates acting against the prohibition with culpable.

72 Op. cit. GIANGRIECO PESSI, M.V. (1995) 72; op. cit. KLAUSBERGER, P. (2011) 12.

73 Op. cit. KLAUSBERGER, P. (2011) 13 sq.

The situation is different in the variant. Here, the animal's instincts were not triggered by external stimuli. Instead, the person who was injured had performed a perfectly normal action by stroking the animal.[74] The resulting damage can therefore be compensated for via the *actio de pauperie*.

In summary, it should be noted that Roman jurists asked whether the damage was due to the ferocity of the animal breaking through, or whether it was attributable to external stimuli.[75] One had to ask whether the ferocity of the animal was ultimately the cause of the damage, or whether the danger originated elsewhere. A similar distinction by spheres can be seen in the question of what applies when an animal attacks another animal.

> D. 9.1.1.6 (Ulp. 18 *ad ed.*): *Sed et si instigatu alterius fera damnum dederit, cessabit haec actio.*
>
> Moreover, this action will not lie if the savage animal causes any damage through the instigation of another. (Scott)
>
> Nor will this action lie if the animal did harm because someone provoked it. (A. Watson)
>
> Aber auch wenn ein Tier, weil es von einem anderen Tier gereizt worden ist, Schaden zugefügt hat, entfällt diese Klage. (O. Behrends/R. Knütel/B. Kupisch/H.H. Seiler; my translation into English: But this action will not lie if the animal did cause harm on the instigation of another animal.)

The correct interpretation of this passage depends on how the Latin phrase *instigatu alterius* is to be translated. Watson's translation suggests that the animal is attacked by another person, causing it harm. Scott leaves the question somewhat open when he translates the phrase as 'through the instigation of another', without clarifying whether he means another person or animal.[76] The new German[77] translation, on the other hand, interprets the phrase as meaning that one animal attacks another and that the attacked animal then causes harm. However, the text may have deliberately left this question open, as its core message applies to both possible readings: the *actio de pauperie* does not lie if the animal was driven to act by external stimuli, regardless of whether these were caused by human actions or the actions of another animal.

As I understand it, the text proves that if one animal attacked another, causing damage to a third party, the owner of the attacked animal cannot be held liable. The primary

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74 See op. cit. MONOSSOHN, S. (1911) 40, who argues that when stimulated by pain, a horse has a natural, instinctive and adequate reaction, but lashing out in response to stroking or light touching is not normal or natural.

75 Op. cit. CURSI, M.F. (2015) 370; op. cit. KLAUSBERGER, P. (2011) 11 sqq.; cf. also op. cit. EISELE, F. (1886) 490 with reference to a scholion of Cyrillus on Bas 60.2.1 and op. cit. HAYMANN, F. (1921) 358.

76 Similar op. cit. SCHIPANI, S. (2005) 233.

77 Op. cit. BEHRENDS, O. KNÜTEL, R. KUPISCH, B. SEILER, H.H. (1995) 730.

cause of damage was not the wildness of the attacked animal,[78] but rather the attack itself, which was instigated by another animal.[79] Therefore, the owner of the attacked animal was exempt from liability under the *actio de pauperie*. Who was responsible for compensating for the damage was specified in another text:

> D. 9.1.1.8 (Ulp. 18 *ad ed.*): *Et si alia quadrupes aliam concitavit ut damnum daret, eius quae concitavit nomine agendum erit.*
>
> And if one animal provokes another into doing damage, action must be brought on account of the one which did the provoking. (A. Watson)

In this text, Ulpian stated that the owner of the animal that provoked another animal was liable under the *actio de pauperie*. Consequently, the owner of the animal that set the causal process in motion was liable.[80] Therefore, the risk fell back on the owner of the animal from which the damage originated.

4.3. Contributory negligence

In this context, the relationship between liability under the *actio de pauperie* and any contributory negligence is also of interest.

> D. 9.1.2.1 (Paul. *22 ad ed.*): *Si quis aliquem evitans, magistratum forte, in taberna proxima se immisisset ibique a cane feroce laesus esset, non posse agi canis nomine quidam putant: at si solutus fuisset, contra.*
>
> If someone is fleeing from somebody, perhaps from a magistrate and rushes into the nearest shop and is there injured by a ferocious dog, some authorities maintain that action cannot be brought in respect of the dog, though they think otherwise if the dog were at large. (A. Watson)

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78 Following ASHTON-CROSS, D.I.C., Liability for Animals in Roman Law, in The Cambridge Law Journal 17 (1959) 192, '*fera*' should not be understood as meaning 'wild animal', but rather as meaning 'domestic animal that has become wild', as in D. 9.1.1.4 (Ulp. 18 *ad ed.*) 'commota feritate'.

79 Op. cit. HAYMANN, F. (1921) 360 f.

80 See also op. cit. GIANGRIECO PESSI, M.V. (1995) 114 on D. 9.1.1.11 (Ulp. 18 *ad ed.*): *cum arietes vel boves commisissent et alter alterum occidit, Quintus Mucius distinxit, ut si quidem is perisset qui adgressus erat, cessaret actio, si is, qui non provocaverat, competeret actio: quamobrem eum sibi aut noxam sarcire aut in noxam dedere oportere.*
Two rams or cattle are involved in a dispute, resulting in the death of one of the animals. The question is whether the owner of the surviving animal is liable. Quintus Mucius distinguishes between two scenarios: If the attacking animal is killed, the *actio de pauperie* does not lie. On the contrary, if the attacked animal is killed, its owner can successfully claim his damages with the *actio de pauperie*.
Therefore, if the attacking animal is killed, liability under the *actio de pauperie* does not apply, as the danger originated in the sphere of the owner of the deceased animal. Conversely, if the attacked animal is killed, it is precisely this danger that has materialised, leading to liability under the *actio de pauperie*.

Someone tries to avoid another person (who may be a public official) and dives into the nearest tavern. There, he is bitten by a wild dog.[81] Paul refers to the opinion of other unnamed jurists (*quidam putant*), who claim that the dog's owner is not liable for the bite. However, Paul adds that he believes the owner should be liable if the dog was not tethered.

According to what has been said, liability under the *actio de pauperie* can, in principle, be considered based on the facts of the case, given that the damage was caused by a four-footed animal, contrary to its otherwise tame nature. The text does not explain why the *quidam*, according to Paul's reasoning, deny the dog owner's liability here. Considering the facts of the case, it is likely that the injured party's carelessness was the decisive factor.[82] It may not be wise to rush into the nearest tavern to avoid an unpleasant person. Moreover, avoiding public officials may not necessarily be socially acceptable. The injured person's carelessness and their strange-looking flight may have been the deciding factor for the jurists in waiving the dog owner's liability.[83]

This view aligns with the texts previously discussed. If a third party or another animal intervenes, eliminating the owner's liability under the *actio de pauperie*, the same applies if the injured party's own carelessness provokes the realisation of the animal danger. Furthermore, contributory negligence may exclude liability under the *lex Aquilia*. If the victim's own carelessness can exclude the liability for another person's *iniuria*, this must also apply in cases where liability does not require *iniuria*, such as under the *actio de pauperie*.[84]

In his reasoning, Paul focuses on whether the dog was tied up or not. If the dog was not tied up, the owner should be held liable. In this case, not only was the injured party careless in their own affairs, but the dog owner can also be blamed for not adequately securing the animal. As it is not possible to apportion damages due to the structure of the claim formula, conviction or acquittal are the only alternatives. Therefore, responsibility for the damage is attributed exclusively to either the dog owner or the injured party.[85] In this case, ownership of the animal that caused the damage suggests that liability should be attributed to the dog owner, which would be sufficient in the context of *actio de pauperie*. Contrary to the facts of the case, contributory negligence is not considered here because the dog owner acted in a seriously careless manner. This makes the dog owner liable under the *actio de pauperie*, even though they are guilty of breaching their duty of care, which would make them liable under an analogous action under the

81 Op. cit. CURSI, M.F. (2019) 178 surmises that it may have been a guard dog.
82 Op. cit. ONIDA, P.P. (2012) 351; Op. cit. KLAUSBERGER, P. (2011) 17.
83 Op. cit. HAYMANN, F. (1921) 362; cf. also Op. cit. CURSI, M.F. (2019) 177 f.
84 Op. cit. KLAUSBERGER, P. (2011) 18 sqq.
85 Cf. HAUSMANINGER, H. Das Schadenersatzrecht der Lex Aquilia, 5th edition (Wien 1996) 29.

lex Aquilia.[86] The defendant's carelessness is more likely to be used as an argument to exclude any contributory negligence than to establish liability under the *lex Aquilia*.

Examining the texts on the requirement of a damage inflicted *contra naturam sui generis* reveals that Roman jurists used this criterion to attribute damages to the owner only if they were the direct consequence of a sudden change in the animal's nature.[87] This excluded cases where the animal's behaviour that caused the damage was provoked[88] by a third party,[89] another animal, or the injured party itself.[90] Consequently, the owner had to bear the risk of a tamed or domesticated animal occasionally acting on its original instincts and causing damage.[91] This risk remained despite taming or domestication and was attributed to the owner, who must compensate for any resulting damage. However, he could release himself from this obligation by choosing *noxae deditio* and therefore surrendering the animal.

As has been mentioned before, the *actio de pauperie* was not primarily about transferring the concept of fault to the behaviour of the animal.[92] Such anthropomorphism has become alien to classical law. Even if the idea that animals could commit crimes has survived in the concept of noxal liability, this only applies to the structure and not the content of the *actio de pauperie* in classical times. Furthermore, the idea that classical law judged animal behaviour in terms of culpability contradicts Ulpian's statement in D. 9.1.1.3 (Ulp. 18 *ad ed.*) *nec enim potest animal iniuria fecisse, quod sensu caret*, and is therefore incompatible with the classical sources. Bearing all that in mind, the idea that Roman law judged animal behaviour according to the same criteria as human behaviour cannot be accepted.[93] Rather, liability under the *actio de pauperie* focused on the issue of causation,[94] whereby the damage was assigned to the source from which it ultimately stemmed. The possible causes of damage were weighed up against the animal's wildness breaking through, so that any misbehaviour on the part of a human,[95]

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86 Cf. also op. cit. EISELE, F. (1886) 494 with fn. 6.

87 Op. cit. POLOJAC, M. (2012) 137; op. cit. CURSI, M.F. (2017) 498; cf. also GAMAUF, R. Pauperies, in CANCIK, H. SCHNEIDER, H. (ed.) Der Neue Pauly vol. 9 (Stuttgart/Weimar 2000) 441 sq., who refers to behaviour that is unusual for pets.

88 On provocation see ASHTON-CROSS, D.I.C. Liability in Roman Law for Damage Caused by Animals, in The Cambridge Law Journal 11 (1953) 401.

89 Cf. op. cit. EISELE, F. (1886) 498.

90 Op. cit. MONOSSOHN, S. (1911) 42.

91 See also op. cit. CURSI, M.F. (2015) 365 f.

92 Contr. op. cit. JHERING, R. (1867) 43; op. cit. LITTEN, F. (1905) 419 sq.; op. cit., POLOJAC, M. (2012) 139; op. cit. ONIDA, P.P. (2012) 366.

93 Contr. Op. cit. POLOJAC, M. (2012) 139.

94 Op. cit. GIANGRIECO PESSI, M.V. (1995) 51.

95 Cf. WILLVONSEDER, R. Die Verwendung der Denkfigur der *condicio sine qua non* bei den römischen Juristen (Wien 1984) 114.

an attack by another animal or contributory negligence could exclude liability under the *actio de pauperie*. Ultimately, the *contra naturam* criterion limited the liability of the animal owner to cases where no external influences on the animal could be identified, meaning that only animal danger has materialised.[96]

5. COVERED ANIMALS AND EXTENSION OF SCOPE BY ANALOGY

According to its formula, the *actio de pauperie* was designed for certain quadrupedal animals. This was also highlighted in a passage from Ulpian:

> D. 9.1.1.2 (Ulp. 18 *ad ed.*): *Quae actio ad omnes quadrupedes pertinet.*
>
> This action applied to all four-footed animals. (A. Watson)

Here, Ulpian stated that the *actio de pauperie* referred to all four-footed animals (*quadrupedes*). This statement of a late classical jurist is thus in continuity with the wording of the Twelve Tables (D. 9.1.1 pr., Ulp. 18 *ad ed.* = XII Tab. 8.6 '*si quadrupes pauperiem fecisse dicetur* ...'). *Pauperies* and *quadrupes* probably had a technical meaning already in this original context. Following that tradition, Ulpian did not refer to all four-footed animals, but rather to domestic and farm animals.[97] It is possible that the term *quadrupes* was gradually understood more broadly over time. However, it is unlikely that it was extended to include all quadrupeds, whether wild or tame.[98]

The original focus on four-footed animals may be related to the fact that the largest domestic animals in common use were *quadrupedes*. However, this could cause problems in individual cases if the damage was inflicted by a non-quadrupedal animal, such as a bird. In this respect, Paul favours an analogy:

> D. 9.1.4 (Paul. *22 ad ed*.): *Haec actio utilis competit et si non quadrupes, sed aliud animal pauperiem fecit.*
>
> This action is available as an actio utilis if it is not a four-footed animal, but some other kind, which committed *pauperies*. (A. Watson)

The *actio de pauperie* should also be applied as *actio utilis* if the damage was inflicted by an animal other than a quadruped. Adopting the *actio utilis* is an expression of analogy, achieved by adapting the formula of an existing action to make it fit the case. If the *intentio* of the *actio de pauperie* is *Si paret quadrupedem pauperiem fecisse* etc.,

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96 For the liability-limiting effect of the *contra naturam criterion*, see section 4.2. above.

97 Op. cit. GAMAUF, R. (2000) 441; contr. op. cit. KERR WYLIE, J. (1936) 471 sq. who considers the restriction to domestic or farm animals to be the work of the compilers.

98 Contr. WACKE, A. Der Vogel Strauß als frühes Beispiel für Gesetzesanalogie: Ein Phantasma? Grenzfragen bei der römischen Tierhalterhaftung, in Fundamina 20 (2014) 1022.

the modification as *actio utilis* dispenses with the requirement of a four-footed animal (*quadrupes*) having caused the damage.[99] The reason for the praetor's intervention may be seen in the fact that the animal dangers envisaged by the *actio de pauperie* were not necessarily limited to quadrupeds.[100] In light of this, it would be inappropriate to deny any legal protection simply because the damage was not caused by a quadruped. The praetor took account of this need for legal protection by granting an *actio utilis* and thus dispensing with the requirement of damage being caused by a quadruped.

As with the *actio de pauperie*, the analogous extension would also deal with damage caused by domestic or farm animals.[101] If the *actio de pauperie* focuses on those risks that could be traced back to a sudden change in the nature of tame animals, this would also have to be considered in the analogous extension to non-four-footed animals. The reason for the analogy is that animal hazards are not dependent on the number of feet an animal has. The fundamental aim of the action to legally apportion the animal risk in the case of domestic or farm animals is not called into question by the analogous extension of the *actio de pauperie*.

These approaches to an analogous extension of the scope of application also come up against limits resulting from the nature of *the actio de pauperie* as a noxal action:

> D. 9.1.1.10 (Ulp. 18 *ad ed.*): *In bestiis autem propter naturalem feritatem haec actio locum non habet: et ideo si ursus fugit et sic nocuit, non potest quondam dominus conveniri, quia desinit dominus esse, ubi fera evasit: et ideo et si eum occidi, meum corpus est.*
>
> But it does not lie in the case of beasts which are wild by nature: therefore, if a bear breaks loose and so causes harm, its former owner cannot be sued because he ceased to be owner as soon as the wild animal escaped. Accordingly, if I kill the bear, the corpse is mine. (A. Watson)

Ulpian stated that the *actio de pauperie* did not apply to wild animals, even if they were kept by humans. To illustrate the related problems, he gave the example of someone keeping a wild bear. The bear escapes and causes damage. Ulpian argued that the *actio de pauperie* no longer lies because the bear becomes *res nullius* again once it has escaped. Accordingly, Ulpian added that anyone who kills the escaped bear would acquire ownership of the spoils of the hunt.

As a noxal action, the *actio de pauperie* was to be directed against the person who owned the animal when the action was brought. If the animal had become ownerless in the meantime, however, the action was futile.[102] This lack of capacity to be made a defendant cannot be remedied by means of analogy.[103]

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99 Op. cit. WACKE, A. (2014) 1020 f.
100 Cf. op. cit. ONIDA, P.P. (2012) 174.
101 Op. cit. GAMAUF, R. (2000) 441.
102 Op. cit. KLAUSBERGER, P. (2011) 23.
103 Contr. op. cit. CURSI, M.F. 45 (2017) 501 sq.

Some modern scholars argue that, based on the second part of the passage, wild animals were subject to the *actio de pauperie* as long as they were owned by a human.[104] This reasoning is based on the idea that Ulpian's line of thought focused primarily on the fact that noxal liability presupposed ownership of the animal. In the case of an escaped wild animal that becomes *res nullius* again, noxal liability was ruled out due to the lack of an owner. However, this problem did not arise if the wild animal remained in captivity and was therefore owned by a specific person. Consequently, the *actio de pauperie* should also apply to the owner of a wild animal.

But this view is contradicted by the first sentence of the text, which states: *In bestiis autem propter naturalem feritatem haec actio locum non habet.* The wording is so absolute that it generally precludes the application of the *actio de pauperie* to wild animals.[105] Ulpian briefly justified this with reference to the natural wildness of a *fera bestia*. Such a view is consistent with the function of the *contra naturam* criterion. In the case of the *actio de pauperie*, the owner of an animal should be held liable for any damage caused by a tamed or domesticated animal suddenly becoming wild and acting contrary to its otherwise tame nature.[106] This concept did not apply to animals that were already wild by nature.[107] To stay with the example of the bear: it is already wild by nature, so inflicting harm based on the bear's wildness does not contradict its nature.[108] This also explains Ulpian's reference to natural ferocity (*propter naturalem feritatem*), with which he justified excluding the *actio de pauperie* in cases involving wild animals. Examining the classical sources confirms that the *actio de pauperie* was not applicable to wild animals, as the Digest only mentions cases in which it was granted for damage caused by domestic animals.[109]

Some have criticised Ulpian's reasoning for lacking a stringent line of thought.[110] This is especially apparent in the first sentence, which seemingly provides a general

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104 Op. cit. LITTEN, F. (1905) 427; op. cit. HAYMANN, F. (1921) 376; op. cit. WACKE, A. (2014) 1022 sq.; cf. also op. cit. CURSI, M.F. (2017) 501.

105 Cf. op. cit. ANKUM, H. (1982) 14 fn 1; PALMIRSKI, T. How the commentaries to de his qui deiecerint vel effuderint and ne quis in suggrunda edicts could be used on the ground of edictum de feris, in Revue Internationale des Droits de l'Antiquité 53 (2006) 324.

106 Op. cit. WACKE, A. (2014) 1023, might have overlooked this when he criticizes Ulpian's reasoning as "absurd, indeed downright absurd. Can the owner of a lion, i.e. a particularly dangerous animal, be released from liability with the excuse that lions are aggressive by nature?" When WACKE also draws the conclusion that one must be even more liable for wild animals if one must be liable for domestic animals in which the animal ferocity breaks through, then he is moving away from the liability-limiting function of the *contra naturam criterion*, as evidenced by the Roman sources.

107 Op. cit. CURSI, M.F. (2015) 368; op. cit. KLAUSBERGER, P. (2011) 22 seq.

108 Op. cit. HONORÉ, T. (1985) 248; op. cit. POLOJAC, M. (2012) 128.

109 Op. cit. POLOJAC, M. (2003) 32.

110 Cf. op. cit. WITTMANN, R. (1972) fn. 40, who therefore considers the passage to be interpolated.

exclusion of the *actio de pauperie* in cases involving wild animals. In contrast, the second part of the passage merely discusses the specific circumstances surrounding a wild animal's return to its natural habitat.[111] The reasoning that the *actio de pauperie* does not apply to wild animals due to their natural state goes considerably further than the reasoning in the second part, which merely refers to the fact that a wild animal that has escaped back to its natural habitat has no owner.[112] In my opinion, however, this does not indicate a substantial interpolation of the text. It is more likely that the text was shortened after the first sentence.[113] The first sentence contains the general guideline that the *actio de pauperie* does not apply to wild animals. While a more detailed discussion of this guideline has not survived, Ulpian probably provided an additional explanation based on the natural wildness of these animals. If the animal escapes, it becomes *res nullius* again, rendering the noxal action futile. This is too a consequence of the general principle that the *actio de pauperie* was not applicable to wild animals, since only wild animals became *res nullius* again if they escaped into their natural habitat. The first sentence therefore contains a general consideration that is confirmed in a specific instance.[114] In my view, the text of Ulpian should at least be seen as classical in substance.

6. SUMMARY AND OUTLOOK

Noxal liability is based on the principle that, in certain cases, an owner may be held liable for damage caused by their property.[115] This explanation can be traced back to the German philosopher Georg Wilhelm Hegel, who, in his Grundlinien der Philosophie des Rechts, described noxal liability as liability for 'things of which I am the owner' (Dinge, deren Eigentümer ich bin).[116]

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111 See op. cit. POLOJAC, M. (2012) 127.

112 Op. cit. LITTEN, F. (1905) 426 et seq.

113 In detail, op. cit. HONORÉ, T. (1985) 248 f.

114 JACKSON, B.S. Liability for Animals in Roman Law: An Historical Sketch, in The Cambridge Law Journal 37 (1978) 136 thinks that the case of the escaped wild animal was the most common. This would explain why the compilers left this particular part of the justification.

115 According to op. cit. CURSI, M.F. (2015) 376 ff, this follows a "logic of power".

116 HEGEL, G.W. Grundlinien der Philosophie des Rechts § 116, Werke vol. 7 (1979) 215: „Meine eigene Tat ist es zwar nicht, wenn Dinge, deren Eigentümer ich bin und die als äußerliche in mannigfaltigem Zusammenhange stehen und wirken (wie es auch mit mir selbst als mechanischem Körper oder als Lebendigem der Fall sein kann), anderen dadurch Schaden verursachen. Dieser fällt mir aber *mehr* oder *weniger* zur Last, weil jene Dinge überhaupt die meinigen, jedoch auch nach ihrer eigentümlichen Natur nur mehr oder weniger meiner Herrschaft, Aufmerksamkeit usf. unterworfen sind."
Translation: It is not my own act if the things of which I am the owner, and which stand and act in manifold connections as external things (as can also be the case with myself, as a mechanical body

Under the *actio de pauperie*, the owner of a four-footed animal was liable for any damage caused by the animal acting *contra naturam sui generis*. The owner of a slave was liable for all offences committed by the slave.[117] Fault is not a factor in either case; noxal liability is strict in this respect. Therefore, the owner was liable for the danger posed by their animal, regardless of fault. Similarly, the *dominus* must bear the risk of the slave causing tortious damage to a third party. In both cases, the legal status of the animal or slave made the owner liable. It was the owner who was responsible for compensating the injured party; neither the animal nor the slave could be taken to court and sued by the injured party.[118]

The owner's liability for their animals and slaves was justified by their ability to use them for their own purposes. The quadrupeds covered by the *actio de pauperie* were probably primarily farm animals used for agricultural purposes.[119] Thus, the owner's responsibility for damage caused by their property followed the idea of balancing benefit and disadvantage: anyone who had the possibility of using a thing for their own purposes was made within certain limits also to compensate for the loss that others may suffer.[120]

In the context of noxal liability, the defendant owner had two options: compensating for the damage caused by their slave or animal, or delivering the slave[121] or animal to the injured party in lieu of damage. Bearing the option of *noxae deditio* in mind, the owner was not liable for more than the current value of the slave or animal.[122] This interpretation of *noxae deditio* as a limitation of liability can primarily be found in classical law. Originally, however, the function of *noxae deditio* was probably different. In ancient Roman law, the *dominus* had to hand over the slave that had caused the injury to the injured party, who could then take revenge.[123] Only if the *dominus* refused to hand over the slave did he have to pay the penalty to the injured party. In the classical reinterpretation, the relationship between *noxae deditio* and compensating the damage

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or living being), cause damage to others. However, this is more or less a burden to me because, while those things are generally mine, they are also, according to their peculiar nature, only more or less subject to my control, attention, and so on.

117 The same applies in principle to the *pater familias* with regard to offences committed by his son in power.

118 Op. cit. CURSI, M.F. (2015) 376.

119 Op. cit. ONIDA, P.P. (2012) 164 sqq.

120 Op. cit. KLAUSBERGER, P. (2011) 26.

121 This explanation cannot easily be applied to the liability of the *pater familias* for the offences of his son in power, especially as they have no value as free persons. Roman jurists only developed this idea in this context of offences committed by slaves.

122 Op. cit. MÜLLER, L. (1965) 526; op. cit. KLAUSBERGER, P. (2011) 20 sq.

123 Op. cit. ONIDA, P.P. (2012) 325 sqq.; op. cit. SIRKS, B. (2013) 101; op. cit. GRÖSCHLER, P. (2010) 198 sqq.; op. cit. PENNITZ, M. (2023) Rz 105.7.

was reversed: here, the owner was primarily liable to compensate the damage but could free himself by surrendering the slave or animal in lieu of damages. Thus, the function of *noxae deditio* as limitation of the owner's liability was the result of evolving legal concepts during the classical period. However, even though classical law reinterpreted *noxae deditio*, the obligation of the *dominus* to assume liability for offences committed by his slaves was still a prerequisite.[124] Without such an obligation, *noxae deditio* would be deprived of its foundation.

From the injured party's perspective, this meant that in individual cases, they may not receive full compensation for their damages. For example, if a more or less worthless animal caused significant damage, an exemption from liability through *noxae deditio* was unlikely to be fair to the injured party. In this respect, Roman law put the interests of the owner who was held liable over those of the injured party.[125]

Under classical law, noxal liability continued an old concept of the *ius civile*. It was reinterpreted to a certain extent by classical jurists and developed further in the direction of 'strict liability'. Certain structures, such as the maxim *noxa caput sequitur*, remained in classical law and gave noxal liability its distinctive features.[126]

The regulatory technique of the *edictum de feris*,[127] which is discussed in depth in another paper in this volume, differs from this to a certain extent. The edict provided that the keeper of dangerous animals must accept liability, regardless of any fault on their part; as with the *actio de pauperie*, liability was strict in this respect.[128] However, there are a few differences. Firstly, under the edict, it was not possible to hand over the animal to the injured party instead of paying the penalty or compensation.[129] Furthermore, the edict did not focus on ownership of the animal, but on custody (the text reads *habuisse* as a form of *habere*). Therefore, it was not primarily the owner who was responsible, but rather the person who actually keept the animal. This may be the owner, but it may also be someone else who exercised control over the animal.[130] So the owner was no longer liable, as was originally the case with the *actio de pauperie*, for the animal's noxious behaviour. Instead, the person in whose sphere of influence the animal was at the time

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124 On the relationship between the two aspects of the establishment of liability and the limitation of liability, see also KNÜTEL, R. Die Haftung für Hilfspersonen im römischen Recht, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung 100 (1983) 396.

125 Op. cit. KLAUSBERGER, P. (2011) 20 sqq.

126 See also MANNI, A. *Noxae datio* del cadavere e responsabilità, in URBANIK, J. (ed.) *Culpa* : facets of liability in ancient legal theory and practice (Warsaw 2012) 126 sq.

127 Cf. D. 21.1.40.1 (Ulp. 2 *ad ed. aed. cur.*); D. 21.1.41 (Paul. 2 *ad ed. aed. cur.*); D. 21.1.42 (Ulp. 2 *ad ed. aed. cur.*).

128 Op. cit. KLAUSBERGER, P. (2011) 25.

129 Op. cit. KLAUSBERGER, P. (2011) 25.

130 Op. cit. KLAUSBERGER, P. (2011) 26.

of the incident was liable. Those best able to control the risks associated with keeping wild animals were liable, which meant that they were responsible for any accidents or injuries that may occur.[131] This was particularly true of wild animals used for public entertainment, such as in hunts or shows, where the keeper often benefitted greatly from them. Therefore, it was also in the interests of the general public to hold the owners accountable if the associated risk materialised.[132]

From the perspective of the owner being held responsible, noxal liability appears purely objective; the only relevant factor was whether a slave or animal owned by the defendant had committed an offence or caused damage. Noxal liability was not based on the owner's fault; in fact, if there was significant fault on the owner's side, such as with the *dominus sciens* or *dominus iubens*, they were liable for the offence as if they had committed it themselves.[133] In this case, noxal liability took a back seat to the owner's personal liability. However, noxal liability for slaves was not entirely a liability without fault, as it required subjective grounds of attribution on the slave's side as required by the delict for which noxal liability was sought. In contrast, noxal liability animals was completely independent of fault, since the animal itself cannot act wrongfully.[134] The same applied to liability arising from the *edictum de feris*, where the concept of strict liability is most clearly realised.

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131 Op. cit. KLAUSBERGER, P. (2011) 26.
132 Op. cit. KLAUSBERGER, P. (2011) 26.
133 Op. cit. HARKE, J.D. (2016) sq.
134 Cf. D. 9.1.1.3 (Ulp. 18 *ad ed.*) and *supra* fn 36 sqq.

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