Published in: *Grotiana* 42 (2021), pp. 23-52.

Qualitative liability in the Early Modern Low Countries (ca. 1425-1650)

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Abstract

In his 'Inleidinge tot de Hollantsche Rechtsgeleertheyt', Hugo Grotius introduced the concept of wrong-by-construction-of-law ('misdaed door wetsduidinge'), the idea that civil law could assign liability to someone who had not committed any fault, i.e. merely because of his or her 'capacity' or 'quality' as a parent, as an owner of an animal, as an inhabitant of a building, or as an employer or ship owner. This contribution situates Grotius's views on qualitative liability within the wider Netherlandish learned juridical context of his time, and especially studies the role of fault ('culpa') and presumptions of fault in the learned theories on qualitative liability. Apart from printed treatises and volumes of consilia, this contribution also takes into account hitherto unstudied handwritten lecture notes of the late medieval and early modern university of Leuven.

Keywords: *Culpa* – Corselius – Lecture notes – University of Leuven – Presumptions of fault – Quasi-delicts

I. Introduction

Around 1566, a simple non-injury traffic accident was considered sufficiently important to involve several professors of law from the university of Leuven. The horse-drawn carriage of Philippus van Rillaer had driven into Jacques Scharon's carriage. As a consequence of the collision, a bottle of costly oil in Scharon's carriage was broken. The bottle had belonged to Scharon's wife. Thereupon, Scharon had filed two claims against van Rillaer with the Leuven magistrate. First, he had brought an *actio de pauperie* for the damage caused by the defendant's horses' wild behaviour, the *pijlicheyt vanden Perden*. Secondly, he had also filed an *actio exercitoria* as applied to the *lex Aquilia*, based on the alleged fault (*culpa*) of the defendant's servants who had been in charge of the carriage, i.e. based on the *negligentie ende quaede toesien vanden Knechten*. Despite the efforts of the young Leuven law professor Philippus Zuerius (d. 1606) in favour of van Rillaer's position, the latter had been condemned to compensation.[1] Van Rillaer filed an appeal with the Council of Brabant and sought the support of a more experienced Leuven law professor, Jean de Waismes (Wamesius, 1524-1590). That consultation was posthumously published in 1628 by Wamesius's nephew Etienne Weyms (Weymsius, 1553-1633), also a professor of law at the Leuven university.[2]

This learned *consilium* dealt with a kind of liability that was mainly based on one's status or 'quality' as either an employer of servants or as an owner of an animal, and that could therefore be called 'qualitative liability'. The defendant's own personal fault was not the primary criterion for liability under those *actiones*, even if that proper fault still remained relevant in some way. In most early modern Netherlandish legal sources, one would indeed look in vain for theories of fault-

[1] Philippus Zuerius, or Filips Swerts, was appointed *regius* professor of the Institutes in 1566 and received his doctorate of law in 1570. He succeeded Michiel Herenbaut as *ordinarius de sero* in 1578 to obtain the position of *primarius* professor of Roman law (*ordinarius de mano*) in 1580 in succession of Elbertus Leoninus. In 1590, Zuerius was appointed as general administrator of the university. He died in 1606.

[2] Joannes Wamesius, *Consiliorum seu responsorum ad ius forumque civile pertinentium centuria secunda* (Leuven: Petrus Zangrius, 1628), *cons.* 54, fols. 179-88.

independent liability.[3] Hugo Grotius's views on 'wrong-by-construction-of-law' (*misdaed door wetduidinge*) – a concept that was limited to civil law – came closest to such an approach. In his *Inleidinge tot de Hollantsche Rechtsgeleertheyt*, Hugo Grotius introduced that concept as follows: '*There is a wrong-by-construction-of-law when the law imputes any event to a person as a wrong. This may happen even when there is no actual wrong, but not without some cause recognized by law, as when some one suffers damage from what belongs to us, or through what belongs to us.*'[4]

This contribution hopes to situate Grotius's take on this subject within the wider Netherlandish learned juridical context of his time. It will focus on the precise extent to which 'fault' (*culpa*) – and its proof – mattered in the context of cases of qualitative liability in the early modern Low Countries, the region where Grotius had his roots.[5] In that regard, the role of (refutable or irrefutable) presumptions of fault will be highly relevant. As early modern learned lawyers still founded most of their arguments on the *Corpus iuris civilis* and its canon law equivalent, a brief introduction into cases of fault-independent liability in the Roman law of Antiquity and into some major developments in medieval *ius commune* is required. The main emphasis will, however, be placed on Netherlandish sources from the sixteenth and seventeenth centuries, not only from the Dutch Republic, but also – and this is the most important novelty of this contribution – from the Southern Low Countries. Apart from printed works, this contribution also takes into account hitherto unstudied handwritten lecture notes of the late medieval and early modern university of Leuven. It concludes with a summary of the findings and with some brief remarks regarding the further evolution of the idea of qualitative liability till the twenty-first century.

II. Roman law of Antiquity

The most famous action for extracontractual liability in Roman law was the *actio legis Aquiliae*.[6] What started off as a claim with a very limited scope of application, was interpreted far more broadly in the classical period. The famous formula for liability under the *lex Aquilia* was that of *damnum corpore corpori iniuria datum*: material or corporeal (*corpori*) harm (*damnum*) that had been done (*datum*) in an unlawful manner (*iniuria*) through an act (*corpore*).[7] Gradually, the necessity of an act (*corpore*) became less important. In classical Roman law, *iniuria* did not necessarily imply the presence of a fault (*culpa*). Negligence (*negligentia*), lack of skills (*imperitia*) and weakness (*infirmitas*) were alternative criteria for *iniuria*. By the third century AD, authors like Ulpian subsumed these alternative criteria

[3] The Dutch version of this term, i.e. 'kwalitatieve aansprakelijkheid', is very common in contemporary legal scholarship. For the purposes of the current study, it is definitely to be preferred over 'strict liability' ('objectieve aansprakelijkheid') or 'fault-independent liability' ('foutloze aansprakelijkheid').

[4] *Inleidinge* III.38.1: 'Misdaed door wetduidinge is wanneer de wet eenige uitkomste iemand toe-rekent tot misdaed. 't Welck wel kan gheschieden, oock daer waerelick geen misdaed en is, maer nochtans niet zonder wettelicke oorzaecke, als wanneer iemand, uit het onze of door het onze, werd verkort.' The English translation is taken from: R. W. Lee (transl.), *The Jurisprudence of Holland by Hugo Grotius* (Oxford: Clarendon Press, 1926).

[5] Apart from the liability of an employer for harm caused by his employees, and that of an owner of an animal for harm done by that animal, for the purposes of this contribution the liability of an inhabitant or owner of an appartment, house or other building for certain damages in relation to that immovable good (e.g. as a consequence of a fire, or of goods that fell from a windowsill, …) will also be considered a form of 'qualitative liability'. For this reason, as title of this contribution, the term 'qualitative liability' was preferred over 'vicarious liability'.

[6] On the *actio legis Aquiliae*, see *e.g.*: R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), pp. 953-1049; L. Waelkens, *Amne adverso. Roman Legal Heritage in European Culture* (Leuven: Leuven University Press, 2015), pp. 361-73. See also, more recently, on its delictual origin: B. Sirks, 'The Delictual Origin, Penal Nature and Reipersecutory Object of the *actio damni iniuriae legis Aquiliae*', *Tijdschrift voor Rechtsgeschiedenis*, 77 (2009), pp. 303-53.

[7] On this formulation, see: Zimmermann, *The Law of Obligations*, pp. 996-7; Waelkens, *Amne adverso*, p. 362.

under the main heading of *culpa*.[8] Thus, in late Antiquity the successful invocation of the *actio legis Aquiliae* was in principle at least partly based on fault (*culpa*).[9] Roman law provided, however, for other claims of extracontractual liability that, at least in Antiquity, were not dependent on fault (*culpa*) of the liable party. As Cursi rightly set out, three major categories of such liability can usefully be distinguished, even though the theorization of these categories is one of legal historians, not of the ancient jurists themselves.[10]

A first category consisted of cases of fault-independent liability that were based on what she called the 'logic of power', e.g. the fact of being a *paterfamilias*, the head of a family. The aforementioned *actio de pauperie* belonged to this category.[11] With this claim, an owner of a tame animal could be held liable for harm done by the animal when it acted as a wild beast (*fera mota*) against its nature (*contra naturam*) as tame and essentially peaceful. The *actio de pauperie* was not applicable when a human fault was involved and was therefore undoubtedly governed by fault-independent liability. It was an *actio noxalis*; the owner of the animal had the choice to either deliver the animal or to pay a fine. If the animal had been transferred prior to the *litis contestatio*, the new owner was liable. If the animal had died, the action was rendered obsolete. In a similar way, the Roman law of Antiquity also recognized an *actio noxalis* in case of wrongful behaviour by slaves.[12]

A second category of qualitative liability in the Roman law of Antiquity consisted of a series of claims that meant to ensure that a person who had been harmed as a consequence of someone else's hazardous behaviour received a (private) fine. A first example was the *actio de deiectis et effusis*.[13] Any inhabitant of (part of) a building from which goods had been thrown or liquids poured out onto a road that was regularly used for traffic, was liable for damage incurred by those passing by the building. The damaged party did not have to prove that the defendant was the one who had also actually thrown or poured out the substances. A second example – albeit only in classical Roman law[14] – was the *actio damni vel furti adversus nautas, caupones et stabularios*, which implied the liability of a shipowner, innkeeper or stable owner in case of harm done to or theft of goods transported or kept on the ship or in the inn or stable, independent of their personal involvement or fault.[15] A third example concerned the liability for harm caused by wild animals on the basis of the *edictum de feris*.[16] This claim could be filed against the one who had held the wild animal and thus

[8] It needs to be noted, however, that the notion of *culpa* had already been introduced around 100 BC by Quintus Mucius Scaevola. *Cfr.* Dig. 9.2.31. He defined that concept as not having taken precautions where a diligent man could have done so (*culpam autem esse, quod cum a diligente provideri poterit, non esset provisum*), or as not having taken precautions in time (*aut tum denuntiatum esset, cum periculum evitari non possit*).

[9] This also implied that, according to Justinianic law, there was no liability under the *lex Aquilia* in the absence of fault. See, for instance: *Inst.* 4.3.3: 'Ac ne is quidem hac lege tenetur, qui casu occidit, si modo culpa eius nulla invenitur (…).'

[10] Maria Floriana Cursi, 'Modelle objektiver Haftung im Deliktsrecht. Das schwerwiegende Erbe des römischen Rechts', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung*, 132 (2015), pp. 362-407.

[11] In the *Corpus iuris civilis*, the main passages on the *actio de pauperie* can be found in *Inst.* 4.9 and *Dig.* 9.1. Cfr. also: M. V. Giangrieco Pessi, *Ricerche sull' actio de pauperie. Dalle XII tavole ad Ulpiano* (Naples: Jovene, 1995); R. Zimmermann, *The Law of Obligations*, pp. 1095-104.

[12] On the *actiones noxales*, see especially: *Inst.* 4.8; *Dig.* 9.4; *Cod.* 3.41. Cfr.: M. Kaser, *Das römische Privatrecht. I. Das altrömische, das vorklassische und klassische Recht* (Munich: Beck, 1971), pp. 630-4; Id., *Das römische Privatrecht. II. Die nachklassischen Entwicklungen* (Munich: Beck, 1975), pp. 430-3.

[13] On the *actio de deiectis et effusis*, see especially: *Inst.* 4.5.1; *Dig.* 9.3; *Dig.* 44.7.5.5. Cfr.: E. Kucuk, 'L'*actio de effusis vel deiectis* nel diritto romano classico', *Revista de Estudios Históricos-Jurídicos*, 30 (2008), pp. 99-110.

[14] According to Justinianic law, the liability of a shipowner, innkeeper or stable owner was based on a *culpa in eligendo*, namely on the fact that they had selected bad employees. See: *Inst.* 4.5.3.

[15] On the *actio damni vel furti adversus nautas, caupones et stabularios*, see especially: *Inst.* 4.5.3; *Dig.* 44.7.5.6; *Dig.* 47.5.

[16] On the *actio* based on the *edictum de feris*, see especially: *Inst.* 4.9.1. Cfr.: Zimmermann, *The Law of Obligations*, pp. 1104-7.

caused a dangerous situation, even when not in fault (for instance by bringing a wild animal into a town to perform at a circus).

A third category of qualitative liability involved preventive measures in case of hazardous situations or activities. Thus, anyone who feared that objects that were put on windowsills or hanging out of the window, were dangerous, could file a preventive (and penal) *actio popularis*, which was known as the *actio de positis vel suspensis*.[17] If someone had a credible reason to fear that his neighbour's house might fall into ruin and, thus, harm his own property, this person could also bring a claim for a *cautio damni infecti*.[18] Once the magistrate or judge had ordered the granting of such a *cautio*, the owner of the building was strictly liable in case his building indeed fell down and harmed his neighbour's land. In such a situation, no action or fault of the owner needed to be proven.

Interesting though this overview of cases of fault-independent liability in the Roman law of Antiquity might be, a true conceptualization of these doctrines did not exist in the thoroughly casuistic Roman legal approach, even if a certain categorisation effort was undertaken by Gaius and Justinian in their respective Institutes. Of special importance for the later debates on fault-independent liability was the category of the quasi-delicts. In *Institutes 4,5*, Justinian's principal lawyer, Tribonian, identified four kinds of liability that originated as it were from a delict (*de obligationibus quae quasi ex delicto nascuntur*). Next to the aforementioned *actio de deiectis et effusis*, the *actio de positis vel suspensis* and the *actio furti adversus nautas, caupones et stabularios*, also the *actio de iudice qui litem suam fecit* was included in this title on obligations *quasi ex delicto*. The latter claim was filed against a judge who had 'made the case his own' by disregarding the procedural technicalities of the law.[19] Nothing in the said title, however, suggests that the commonality between those four claims was strict, i.e. 'faultless', liability. To the contrary, both the *actio de iudice qui litem suam fecit* and the *actio furti adversus nautas, caupones et stabularios* were even explicitly linked to a (limited) personal fault of the defendant.[20] Neither was it a complete list of cases of fault-independent liability, as other passages in the *Institutes* mentioned other relevant situations, like an *actio noxalis*, with which the master of a slave could be summoned for a delict committed by his slave, even if the master himself was faultless. Liability was then limited, as the master could always opt to surrender his slave.[21] The *actio de pauperie* remained – also in Justinianic law – a form of fault-independent liability too, but again limited to the value of the animal, and only for those cases where a tame animal had acted *contra naturam*.[22]

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[17] On the *actio de positis vel suspensis*, see especially: *Dig.* 9.3.5.6-13; *Dig.* 44.7.5.5; *Inst.* 4.5.1.

[18] On the prevention of impending harm, see especially: *Dig.* 39.2; *Dig.* 39.3.11.3 *in fine*. See: J. M. Rainer, *Bau- und nachbarrechtliche Bestimmungen im klassischen römischen Recht* [Grazer Rechts- und Staatswissenschaftliche Studien, 44] (Graz: Leykam Verlag, 1987), pp. 97-151.

[19] On the meaning of *litem suam facere*, see: Eric Descheemaeker, 'Obligationes *quasi ex delicto* and Strict Liability in Roman Law', *The Journal of Legal History*, 31/1 (2010), 1-20 (pp. 11-8).

[20] Thus, *Inst.* 4.5.1 mentions that the *actio de iudice qui litem suam fecit* was filed against a judge who had 'sinned' (*et utique peccasse aliquid intellegitur*). For an identical passage, taken from Gaius's *Res cottidianae*, see: *Dig.* 44.7.5.4. In *Inst.* 4.5.3, it is argued that the quasi-delictual liability of a shipowner, an innkeeper or a stable owner for delicts committed by his servants is to a certain extent also based on his own fault, namely to have employed bad men (*aliquatenus culpae reus est, quod opera malorum hominum uteretur*). Some Romanists, however, do argue that *obligationes quasi ex delicto* in Roman law of Antiquity existed irrespective of fault and were thus based on strict liability. See: Reiner Höchstein, *Obligationes quasi ex delicto* (Stuttgart: Kohlhammer, 1971), p. 26; Descheemaeker, 'Obligationes *quasi ex delicto*', pp. 1-20. The latter developed several hypotheses to explain the aforementioned *culpa*-related passages: either those passages were to be ascribed to interpolations by the Byzantine compilers of the *Corpus iuris civilis*, or Gaius had tried to justify the existence of fault-independent liability by pointing at elements of 'quasi-fault' within it. Whether we accept those hypotheses or not, in Justinianic times the *obligationes quasi ex delicto* were clearly no longer fault-independent.

[21] In the classical period, these rules of noxal liability had also been applicable to *filiifamilias*, but at the time of Justinian, that was no longer the case. See: *Inst.* 4.8.7.

[22] *Inst.* 4.9*pr.*: '(…) pauperies autem est damnum sine iniuria facientis datum (…).'

III. The omnipresence of *culpa* in medieval *ius commune*

In the medieval Christian tradition, *culpa* became linked (though not identical) to ideas of sin (*peccatum*). Canonists and moral theologians developed complex theories of personal liability and fault.[23] Some of these ideas were also reflected in the debates among legists. Fault was constructed as one of the most essential criteria for liability, both in contractual and extracontractual relationships.[24] In the field of contract law, that might have been the reason for the creation of some presumptions of deceit, even in the absence of a demonstrable fault. A typical example seems to have been the idea of *dolus re ipsa* ('objective deceit'). That concept was linked to cases of *laesio enormis*. An ordinance, most probably enacted by emperor Diocletian (r. 284-305), came to the defense of small land owners who – presumably forced by financial difficulties – had sold their lands at very low prices.[25] If that price was lower than half of the *verum pretium* (true price) or *iustum pretium* (just price), the seller could file a claim against the buyer to enforce an alternative obligation, either to restitute the lands or to pay a surplus.[26] Such a prejudice for more than half of the just price was already interpreted in terms of deceit (*dolus*) by the earliest glossators. Medieval jurists such as Irnerius (1050-1125), Vacarius (1120-1200), Rogerius (fl. 1150-1170), Azo (1150-1225) and Accursius (1182-1263) coined the term *dolus re ipsa*.[27] The inspiration for this interpretation by the jurists – who always trusted the inner coherence of the *Corpus iuris civilis* – came from a passage of the Digest, namely *Dig.* 45.1.36. That passage by Ulpian stated the possibility that a *stipulans* had not committed any personal deceit, but that *ipsa res in se dolum habet*.[28] The humanist author Arias

[23] On these debates, see: Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX* (Vatican City: Biblioteca Apostolica Vaticana, 1935). See also: Laurent Waelkens, 'Et si la responsabilité pénale datait du douzième siècle?', in *Doctrines et pratiques pénales en Europe. Journées de la Société d'Histoire du Droit, 26-29 mai 2011*, ed. by J.-M. Carbasse and M. Ferret-Lersné (Montpellier: Presses de la Faculté de Montpellier, 2012), pp. 87-95; Harry Dondorp, 'Crime and Punishment. *Negligentia* for the Canonists and Moral Theologians', in *Negligence: the Comparative Legal History of the Law of Torts*, ed. by E. J. H. Schrage (Berlin: Duncker & Humblot, 2001), pp. 101-28.

[24] Of course, throughout the tradition of the *ius commune*, there also remained many instances of the attribution of risks that occurred on the occasion of the execution of a contract, even if none of the parties was in fault. Noteworthy are well-known rules like *casum sentit dominus* or *res perit domino*. Or, to give another example: in the field of mandates, when a diligent agent was robbed or suffered a shipwreck whilst performing a voyage on behalf of his principal, equity (*aequitas*) demanded that the (even equally) diligent principal compensated the agent. See: W.J. Zwalve, 'Law and Equity at Odds: Liability of a Principal for Accidental Losses Suffered by his Agent', in: *Law & Equity. Approaches in Roman Law and Common Law* [Legal History Library 10], ed. by E. Koops and W.J. Zwalve (Leiden: Brill, 2014), pp. 177-200. This contribution especially contains a discussion of the interpretation of *Dig.* 17.1.26.6 from Roman Antiquity till Robert Pothier in the eighteenth century.

[25] There has been a lot of discussion regarding the dating of the regulations on *laesio enormis*. See, *inter alia*: Johannes Platschek, 'Bemerkung zur Datierung der *laesio enormis*', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung*, 128 (2011), pp. 406-9; Martin Pennitz, 'Zur Anfechtung wegen *laesio enormis* im römischen Recht', in *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, ed. by M. J. Schermaier *et al.* (Cologne: Böhlau, 2002), pp. 575-90; Theo Mayer-Maly, 'Pactum, Tausch und *laesio enormis* in den sog. *Leges Barbarorum*', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung*, 108 (1991), pp. 226-31; Boudewijn Sirks, 'La *laesio enormis* en droit romain et byzantin', *Tijdschrift voor Rechtsgeschiedenis*, 53 (1985), pp. 291-307; Karl Hackl, 'Zu den Wurzeln der Anfechtung wegen *laesio enormis*', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung*, 98 (1981), pp. 147-161.

[26] C. 4,44,2 and C. 4,44,8. See also: Vera Langer, *Laesio enormis. Ein Korrektiv im Römischen Recht* (Marburg: Tectum, 2009), pp. 19-44.

[27] A. M. Grebieniow, 'Die *laesio enormis* und der *dolus re ipsa* heute: Die Verschuldensfrage', *Tijdschrift voor Rechtsgeschiedenis*, 85 (2017), p. 209. See, for instance: Azo, *Summa super Codicem* (Lyons, 1557), *ad Cod.* 4.44: 'Ubi autem decipitur quis re ipsa, non alterius proposito, tenet uenditio: sed deceptus ultra dimidiam iusti precii, quod erat tempore uenditionis, agit, ut non decipiatur, ut [*Cod.* 4.44.2] [*Cod.* 4.44.8].'

[28] *Dig.* 45.1.36 (Ulpianus 48 ad Sabinum): 'Si quis, cum aliter eum convenisset obligari, aliter per machinationem obligatus est, erit quidem suptilitate iuris obstrictus, sed doli exceptione uti potest: quia enim per dolum obligatus est, competit ei exceptio. Idem est et si nullus dolus intercessit stipulantis, sed ipsa res in se dolum habet: cum enim quis

Piñel argued that, from the perspective of classical Roman law, the said passage merely implied the possibility that instituting a judicial procedure (*res*) itself could – in certain circumstances – be deceitful, even if at the time of the original stipulation no deceit (*dolus*) had taken place.[29] In their wish to ground liability on deceit, the medieval glossators – both legists and canonists – used this passage to found a new theory. *Dolus re ipsa* (contrary to the *dolus ex proposito*) was no less than an irrefutable presumption of deceit if the purchase price had been lower than half of the just price, irrespective of the buyer's real intention, fault, or even knowledge of the just price. It was an 'objective' *dolus* that led to liability.[30]

Although we have to be cautious when transposing conclusions in the field of contract law – and definitely this concept of *dolus re ipsa* – to cases of extracontractual liability (delictual or quasi-delictual), late medieval sources nonetheless demonstrate that diverse presumptions of fault have been created in that field as well. In line with the Bartolian school of thought[31], these views also circulated in the Low Countries, for instance at the young Leuven university, established in 1425, as we can derive from the manuscript course notes on the Institutes of Justinian by one of the first Leuven law professors, Henricus de Piro (Heinrich von der Birnbaum, ca. 1400-1473).[32] In those lecture notes which date back to 1428[33], de Piro mentions – with reference to the Accursian Gloss – that the *actio de iudice qui litem suam fecit* was based on the judge's fault (*culpa*), as it was presumed that in case of bad judgement the judge had accepted a position for which he was not sufficiently qualified, even if the acceptance of such a position as a judge did not constitute a 'sin' (*peccatum*).[34] In a similar sense, de Piro also based the *actio de deiectis et effusis* on a fault, albeit a very slight one

petat ex ea stipulatione, hoc ipso dolo facit, quod petit.' See: Heinrich Kalb, 'Objektive Äquivalenzstörung und Arglist bei der *laesio enormis*', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Kanonistische Abteilung*, 74 (1988), 281-303 (pp. 286-8).

[29] Already in the sixteenth century, the humanist scholar Arias Piñel (1515-63) had criticized the theory that linked the Ulpian-passage in *Dig.* 45.1.36 to the regulations concerning *laesio enormis*. Ulpian had already died when Emperor Diocletian issued his decrees on the *laesio enormis*. See: Wim Decock, 'Elegant Scholastic Humanism? Arias Piñel's (1515-1563) Critical Revision of Laesio Enormis', in *Reassessing Legal Humanism and its Claims: Petere Fontes?*, ed. by P. J. du Plessis and J. W. Cairns (Edinburgh: Edinburgh University Press, 2016), 137-53 (pp. 137-8 and 146-7).

[30] According to Jan Hallebeek, the concept of *dolus re ipsa* did not – even not in its theoretical foundation – refer to an irrefutable presumption of fault, but was merely used as a synonym for 'any considerable deviation from the just price'. See: J. Hallebeek, 'Some Remarks on *laesio enormis* and Proportionality in Roman-Dutch Law and Calvinistic Commercial Ethics', *Fundamina*, 21 (2015), 14-32 (pp. 22-3).

[31] On the importance of Bartolus in the fifteenth-century Low Countries, see: Robert Feenstra, 'Bartole dans les Pays-Bas anciens et modernes avec additions bibliographiques à l'ouvrage de J.I.J. van de Kamp', in *Bartolo da Sassoferrato: Studi e documenti per il VI centenario* (Milano: Giuffrè, 1962), pp. 173-92.

[32] De Piro joined the Leuven law faculty in October 1428 as the second *ordinarius* (after Jan van Groesbeek), responsible for the teaching of the Institutes. He left Leuven in March 1431 already to become professor at the university of Cologne (*ordinarius de mane*). De Piro participated at the council of Basel, but afterwards retired from public life and became a Carthusian monk in 1435. On Henricus de Piro, see: R. Feenstra, 'Henricus Brunonis de Piro (+ 1473). Professeur de droit civil et Chartreux', *Tijdschrift voor Rechtsgeschiedenis*, 64 (1996), pp. 3-46; Guido van Dievoet, Dirk van den Auweele and Michel Oosterbosch, 'Henricus de Piro en de Leuvense Universiteit (1428-1431)', *Ex officina. Bulletin van de Vrienden van de Leuvense Universiteitsbibliotheek*, 6 (1989), pp. 139-68. See also: R. Feenstra, 'Teaching the Civil Law at Louvain as Reported by Scottish Students in the 1430s (mss. Aberdeen 195-197) with addenda on Henricus de Piro (and Johannes Andreae)', *Tijdschrift voor Rechtsgeschiedenis*, 65 (1997), pp. 245-79 (pp. 276-9).

[33] For an overview of the existing manuscripts and printed editions and an analysis of the lecture notes by de Piro, see: Feenstra, 'Henricus Brunonis de Piro', pp. 21-31; Roderich Stintzing, *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland* (Leipzig; Kirzel, 1867), pp. 53-6.

[34] Henricus de Piro, *Lectura in Institutionibus*, KU Leuven ms. 1346, *ad Inst.* 4.5, fol. 132v.: 'Nota primo quod iudex male iudicando ex impericia facit litem suam / nam imperitia iudicis ascribitur culpe sue / ipse enim est in culpa acceptando officium si est ignarus quia videtur se asserere sufficientem ex ipso quod acceptat ut notat glo[ssa] in l. ii ff. quod quisque iur. [*Dig.* 2.2.2]. Secundo nota quod iudex male iudicando obligatur ex quasi maleficio / ipse non peccavit (…).' It is remarkable how the terminology changed, as in this context of the *actio de iudice qui litem suam fecit* the Institutes of Justinian had used the term *peccasse*, but not the word *culpa*.

(*culpa sua etiam levissima*).[35] In the treatment of the *actiones noxales*, de Piro understandably did not refer to the defendant's *culpa*. However, in case of harm done by a tame animal in accordance with its nature (i.e. not *contra naturam*), deceit or fault (*dolus vel culpa*) of the animal's owner or attendant was the decisive criterion for the applicability of the *actio in factum* (based on the *lex Aquilia*) and was in some cases also presumed, for instance if a dog was led over a road where it should not have run (*propter iniquitatem loci*).[36]

IV. Continued importance of *culpa* in the Southern Low Countries (16th century)

If one reads some Southern Netherlandish lecture notes on the Institutes of Justinian from the sixteenth and early seventeenth centuries, one gets the impression that the concept of *culpa* had lost its importance in the field of quasi-delictual liability. Indeed it is worth noting that Leuven law professors like Nicolaus Heems around 1513,[37] Gerardus Corselius in 1597,[38] Henricus Zoesius around 1609,[39] and Diodorus Tuldenus in 1628[40] did not use the term *culpa* in their remarks on quasi-delictual liability. On the other hand, neither did these authors explicitly refer to the absence of *culpa*. They noted the absence of *dolus* (deceit) in case of the *actio de iudice qui litem suam fecit*, a liability that they based on the imprudence (*imprudentia*) or lack of knowledge (*imperitia*) of the judge. Although they did not explicitly state so, it is probable that they considered these notions as

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[35] Henricus de Piro, *Ibidem*, fol. 132v.: 'Item nota in versiculo 'ob hominem' quod si liber homo interficiatur per deiectionem vel effusionem punitur deiiciens in quinquaginta aureis pro culpa sua etiam levissima quia liberi hominis non est estimatio ut l. fi. ff. e. [*Dig.* 9.3.7].' With respect to the *actio de deiectis et effusis*, the Institutes of Justinian themselves do not mention the terms 'pro culpa sua etiam levissima'.

[36] Henricus de Piro, *Ibidem*, *ad* Inst. 4.9, fol. 172r.: 'Si autem istud animal non movetur ex se ad dampnum datum sed dolo vel culpa alterius tunc non habet locum hec actio [= actio de pauperie] sed agetur contra illum in factum verbi gratia si propter iniquitatem loci per quem ductum est animal vel propter nimium pondus animal pondus deiecit et aliquem lesit vel si canem quem retinere poteras relaxasti vel si animal duxisti per locum per quem ducere non debuisti et tunc si dampnum dederit tenetur talis actione in factum nec liberaretur dando animal pro noxa […].'

[37] The lecture notes on the Institutes of Justinian by the Leuven law professor Nicolaus Heems (also known as Nicolaus de Capella or Nicolaus de Bruxella), have been published as: Nicolaus de Bruxella, *Compendium in quatuor Institutionum imperialium libros* (Leuven: Servatius Sassenus, 1552), *ad Inst.* 4.5, f. 65r.-66r. Nicolaus Heems was *ordinarius* for the Institutes from 1506 till 1520, when he became *ordinarius de mane*. The first published edition of his *Compendium* dates from 1513. On this *Compendium*, see: Alphonse Rivier, 'Le Compendium Institutionum de Nicolas de Bruxelles', *Bulletin de l'Académie royale de Belgique. 2ième série*, 38 (1874), pp. 619-37. Joos de Damhouder, a specialist of criminal law, was one of his students. See: Egied Strubbe, 'Joos de Damhouder als criminalist', *Tijdschrift voor Rechtsgeschiedenis*, 38 (1970), p. 4.

[38] KBR, ms. 3351-52, f. 1r.-37v. The title page of this manuscript mentions: *Summationes in quatuor Institutionum seu Elementorum D. Iustiniani sacratissimi principis libros cum nonnullis tam ex ff. quam ex Cod. Titulis aliisque annotationibus*, Petri de la Torre Quintadvenas, Lovanii, 1597. The passages on quasi-delictual liability can be found on fol. 34r-v. Although the name of the professor is not mentioned, it is highly probable that it concerns lecture notes by Gerardus Corselius, *regius professor* of the Institutes from 1596 to 1606. Corselius is also known for his *Auctarium* at the Institutes (see *infra*, V). The same manuscript also contains a commentary on Inst. 4,6 by Gabriel Hennarts, *licentiatus iuris utriusque* (fol. 38r.-64v.), by Andreas Kemmer on *emphyteusis*, *societas* and *usurae* (fol. 65r.-83v.), and by Philippus Zuerius on the law of inheritance (fol. 84r.-142v.), as well as some alphabetically ordered notes in French (fol. 143r.-152r.).

[39] KBR, ms. 14152. For the parts on quasi-delicts, see fol. 62v.-63r. This manuscript was written from 26 April till 10 May 1609. Although the manuscript does not mention the name of the professor or author, it is probable that it contains notes of the lectures by Henricus Zoesius, who was *regius professor* for the Institutes as of 1606 at the university of Leuven, till his promotion as *ordinarius* for the Institutes in 1610. In 1619, he was appointed as *primarius legum*. He died in 1627.

[40] Diodorus Tuldenus, *Institutiones Iustinianeae paraphrasi, ad intellectum apta; methodo, ad memoriam; aetiologia, ad iudicium; consectariis et quaestionibus, ad usum fori, illustratae* (Leuven: Joannes Oliverius and Cornelius Coenesteyn, 1628), *ad Inst.* 4.5, f. 403-405. Tuldenus (1594-1645) had been appointed *regius professor* of *paratitla* at the university of Leuven in 1620. In 1631, he obtained a doctorate *utriusque iuris*. In 1633, he was appointed *primarius legum* as successor of Etienne Weyms.

indications of *culpa*.[41] They also explained the liability of a shipowner, innkeeper or stable owner for thefts by his servants by arguing that he 'should have used the works of good men' (*quia debuit uti opera bonorum hominum*), which could also be considered as an implicit reference to *culpa*.[42] Probably, the absence of the notion of *culpa* in those passages was, therefore, merely a consequence of the conciseness of these notes and of their relatively strict adherence to the exact wording of the original text of the Institutes. This conclusion is confirmed, for instance, by the fact that Zoesius did actually use the idea of *culpa* in relation to quasi-delictual liability elsewhere, namely in his commentary on the Digest.[43]

Plenty of other sources also demonstrate that in the sixteenth-century Low Countries, *culpa* remained a central legal concept. Interesting in this regard is the *Enchiridion seu Oikonomia et dispositio utriusque iuris in locos communes* by Jan Tack, or in Latin Joannes Ramus, from 1557.[44] In his *Oikonomia*, Jan Tack hoped to offer a general introductory overview of both civil and canon law. His work mainly provides a new structure for existing *regulae iuris*, predominantly taken from the final title of the Digest and from the *Liber Sextus* by Pope Boniface VIII. The work is structured in several *axiomata*. Axioma 14 deals with the idea that no one should be harmed by another's act, which is of course the essential idea of personal culpability. Both in matters of default (*in mora*) and in matters of delict (*in delictis*), one should not be harmed by another's fault. He refers, for instance, to *regulae iuris* such as *mora sua cuique est nociva*, or *delictum personae non debet in damnum ecclesiae redundare*, or still *neque in interdicto, neque in caeteris causis, pupillo nocere oportet dolum tutoris*. More in general, this principle was derived from the rules *factum cuique suum, non adversario suo nocere debet* and *non debet aliquis alterius odio praegravari*. Examples from the law of inheritance were added, like the idea that a mother must not exclude her son from her inheritance out of hatred for her husband.[45] The only exception Ramus seems to have made, can be found in *axioma* 15, where he argued that if one takes the gain, one should also take the burden. *Ex qua persona quis lucrum sentit, eius et factum praestare debet.* This rule is applied to the principal of a factor (*institor*): *sic dominus ex contractu et facto institoris perinde tenetur, ut ex suo*.[46] Thus, apart from this one exception, a person should only be liable in case of

[41] A Leuven law professor who did use the term *culpa* in relation to *imprudentia* and *imperitia* in his commentary to the Institutes was: Antonius Perezius (1583-1672), *Institutiones imperiales erotematibus distinctae* (Amsterdam: Ludovicus and Daniel Elzevirii, 1657), *ad* Inst. 4,5, fol. 459-60. He argued that a quasi-delict was not based on deceit (*dolus*), but on lack of knowledge (*imperitia*) or imprudence (*imprudentia*). He added: *imprudentia atque imperitia est species culpae*. There is also a manuscript version of Antonius Perezius's course notes on the Institutes of Justinian. See: KBR, ms. 14557, as of fol. 213r. (finished on 27 September 1628).

[42] Already in the early sixteenth century, Nicolaas Everaerts (Everardi, 1462-1532) had argued that someone who had appointed a notorius pirate to execute letters of reprisals, was liable for the compensation of damage caused by that pirate: Nicolaus Everardi, *Responsa siue Consilia* (Leuven: Servatius Sassenus, 1554), *cons.* 4, fol. 15, lines 35-53. At line 40, he states: 'Culpae enim reus est, qui opera malorum hominum utitur', with reference to *Dig.* 9.2.27.11.

[43] Henricus Zoesius, *Commentarius ad Digestorum seu Pandectarum iuris civilis libros L* (Leuven: Hieronymus Nempaeus, 1656), *ad Dig.* 9.3, nr. 4, fol. 245: 'Quod autem teneatur inhabitans, etsi non effuderit, dejecerit, est, quod sit in culpa, non prohibens effundi, deiici vel admittens tales, qui effundunt, deiiciunt.' See also: Diodorus Tuldenus, *Commentarius in Digesta sive Pandectas* (Leuven: Aegidius Denique, 1702), *ad Dig.* 9.1.1, *cap.* 1, nr. 1, fol. 286, where Tuldenus emphasizes the importance of *culpa* for liability, unless the claim has a noxal character (e.g. the *actio de pauperie*): 'Nam cum teneatur, etiamsi nulla ipsius culpa arguitur [*Dig.* 9.1.5], iniquum esset, si dedendo animal non posset liberari.'

[44] Joannes Ramus was born in Goes in 1535 in Zeeland and first studied classical philology. At the age of 20, he already taught rhetoric and Greek at the university of Vienna. By 1557, he returned to Leuven to obtain a doctorate in both civil and canon law (*utriusque iuris*), with the famous humanist scholar Gabriel Mudaeus (1500-60) as his supervisor. After a brief period as professor of law in Douai (1562-1565), he returned to Leuven as a professor from 1565 till 1578. He had planned to move to the university of Dôle, but died early in 1578, at the age of 43. On Joannes Ramus, see: Benjamin Verheye, 'Jan Tacks Oikonomia. Princeps legibus solutus est, sed in Dei potestate', *Jura Falconis*, 50 (2013), pp. 977-1002.

[45] Joannes Ramus, *Oikonomia seu dispositio regularum utriusque iuris in locos communes* (Cologne: Joannes Gymnicus, 1576), *axioma* 14, fol. 13-15.

[46] Ibidem, *axioma* 15, fol. 15-16.

deceit (*dolus*) or fault (*culpa*). In line with what we saw earlier, however, these terms were interpreted in a wide sense. Thus, for instance, in *axioma* 144 Ramus stated that if harm was done as a consequence of a lack of knowledge (*imperitia*), this involved *culpa* of the one who despite his lack of knowledge had chosen to intervene in the matter.[47]

The importance of reasonings in terms of 'fault' and guilt, even in cases of quasi-delictual liability, is also evidenced by the *consilium* by Joannes Wamesius on the case-van Rillaer, which has already been mentioned in the introduction.[48] That case involved a collision of two carriages which had led to the loss of some precious oil. The plaintiff had simultaneously invoked the *actio de pauperie* on the basis of the wild actions by the horses (*pijlicheyt vanden Perden*) and an *actio exercitoria* based on the negligence of the defendant's servants (*negligentie enden quaede toesien vanden Knechten*). After what has been explained earlier, it is not surprising that Wamesius first argued that both claims could not be filed simultaneously, as a *culpa* by the servants automatically excluded the possibility to invoke the *actio de pauperie*: indeed, the same harm could not follow simultaneously from an unexpected wild action of an otherwise tame animal (a prerequisite for the *actio de pauperie*) ánd from a human fault. Moreover, the *actio de pauperie*, which functioned like an *actio noxalis*, could not be cumulated with an *actio directa*, such as the *actio exercitoria*. Consequently, the *actio de pauperie* had to be considered unsuccessfully invoked. In a second step, our counsellor dealt with the *actio exercitoria*. The use of an *actio exercitoria* against a ship owner (or here, by analogy, a carriage owner) for delicts committed by a ship's master (or here, by analogy, by a driver of a carriage) was not mentioned in the Roman legal sources, but had been developed in the *ius commune* literature.[49] Wamesius stressed that this *actio exercitoria* was based on a principle of 'fault', i.e. on the idea that the defendant had to blame himself for not having chosen better and more diligent servants (*quasi sibi imputare debeat Reus, quod meliores aut diligentiores ministros non elegerit*). Nonetheless, according to the *ius commune*, this 'fault' by the principal was irrefutably presumed once the delictual behaviour by the agents had been proven. That is why Wamesius, to protect his client from liability, stressed the absence of *culpa*, and thus also of delict, by the servants.[50] Finally, and importantly, Wamesius argued that according to the learned law the liability under the *actio exercitoria* was in any case limited to harm done to goods that were carried in the defendant's own carriage. Arguably, its scope of application could not be extended to events that happened outside of the carriage.[51]

V. Gerardus Corselius on presumptions of fault

Thus, in sixteenth-century Netherlandish learned legal literature, proof of *culpa* remained essential for almost all types of extracontractual liability, especially as the *actiones noxales* (apart – maybe –

[47] Ibidem, *axioma* 144, fol. 143.

[48] Wamesius, *Consiliorum (…) centuria secunda*, *cons.* 54, fol. 179-188.

[49] Wamesius, *Consiliorum (…) centuria secunda*, *cons.* 54, fol. 186-187, nr. 18-19. It should indeed be noted here that the Institutes of Justinian, as well as the Digest and the Code, only applied the liability of a ship owner (*exercitor*) under the *actio exercitoria* to contractual obligations entered into by a ship's master (*magister navis*). No specific mention was made by the *Corpus iuris civilis* regarding a ship owner's liability in case of delictual behaviour by his ship's master. Nor did the Justinianic *Corpus* extend this liability to transport by land. See, respectively: *Inst.* 4.7.2-2a; *Dig.* 14.1; *Cod.* 4.25.

[50] For doing so, Wamesius could usefully invoke a sentence of first instance by the magistrate of Leuven, as that magistrate had acquitted the servant against whom also a personal *actio legis Aquiliae* had been filed. See: *Ibidem*, fol. 182-183, nr. 8-9.

[51] *Ibidem*, fol. 187, nr. 22-23: 'Etsi enim verissimum sit adversus exercitorem ideo dari exercitoriam vel aliam illi similem actionem, quia opera malorum hominum usus sit, de quibus antequam eos admitteret dispicere et statuere debebat quales essent, ideoque cum eligit seu adhibet explorare eum oportet cuius fidei, cuius innocentiae sint, ut non immerito eorum factum praestet, quos suo periculo adhibet: id tamen non latius patet, quam qua viget haec exercitoria vel de recepto actio; hoc est ad ea quae in navi, curru, vel caupona fiunt, non extra illam.'

from the *actio de pauperie*[52]) were no longer in use. It is hard to find discussions of fault-independent (contractual or extracontractual) liability in early modern Southern Netherlandish legal documents. An interesting source, though, is the so-called *Auctarium* by the Leuven law professor Gerardus Corselius (Gérard de Courcelles, 1568-1636).[53] Even if Corselius does not mention the idea of fault-independent liability as such, he deals with irrefutable presumptions of culpability. The *Auctarium* – which unfortunately has been preserved only in manuscript form – answers many *quaestiones* related (though sometimes only very loosely) to the Institutes of Justinian.[54] One of the questions sounded as follows: 'is a tenant or an inhabitant liable for the fact that his house had been lost in or damaged by fire, even if it is not proven that the fire was caused by his fault?'[55] Understandably, Corselius first explained that it was the common opinion of all jurists that if a *casus fortuitus* had been proven, the tenant or inhabitant was not liable. It was also commonly accepted that they were indeed liable if deceit (*dolus*) or at least a *culpa levis* had been proven on their part. In case of a *commodatarius*, proof of a *culpa levissima* sufficed. The academic controversy, however, centred around the question whether the tenant or inhabitant was liable if neither *casus fortuitus*, nor *dolus* or *culpa* had been proven. In other words, could the *culpa* of a tenant or inhabitant be presumed?

Corselius gave an overview of the *status quaestionis*, based on earlier works by the Italian jurist Giacomo Menochio (1532-1607), the German author Andreas Gaill (1526-87) and Andreas Fachinaeus (d. 1607), professor of law at the universities of Ingolstadt and Pisa.[56] Corselius stated that a minority of jurists had argued that such a (refutable) presumption of culpability should indeed be accepted. These authors referred to a passage from the Digest, where the third-century Roman jurist Julius Paulus had held that fires were often caused by the fault of the inhabitants (*Dig.* 1.15.3.1: *quia plerumque incendia culpa fiunt inhabitantium*). Their opponents argued that on the basis of that fragment – at most – a *culpa levissima* could be presumed, which was insufficient to declare a tenant liable (contrary to a *commodatarius*). As a second argument, the proponents of a presumption of

[52] Even as to the *actio de pauperie*, there already existed a debate among Roman-Dutch scholars on the reception of the noxal character of that claim in the Low Countries. Some authors, e.g. from Flanders and Frisia, argued that this noxal character had grown out of use in their regions. See for an overview of this discussion: C. G. van der Merwe, 'Erscheinungsformen verschuldensunabhängiger Haftung', in *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert*, ed. by R. Feenstra and R. Zimmermann (Berlin: Duncker & Humblot, 1992), pp. 455-84 (pp. 470-1).

[53] Corselius is known for having introduced at the Leuven law faculty a new teaching method, based on *disputationes*, which would later also be introduced at the Leiden law faculty by Jacobus Maestertius (1610-58). See: Feenstra, 'Jacobus Maestertius 1610-1658. Zijn juridisch onderwijs in Leiden en het Leuvense disputatiesysteem van Gerardus Corselius', *Tijdschrift voor Rechtsgeschiedenis*, 50 (1982), pp. 297-335.

[54] For this article, a manuscript version from the Royal Library of Belgium was used: KBR, ms. 4086. At fol. 467v./483v., the manuscript contains the following remark: 'Dictauit Clariss[imus] Dom[inus] Doct[or] Gerardus Corselius I[uris] U[triusque] Doctor postmodum primarius Antecessor MDC. Excepit Ioann[es] van Sestich postmodum I[uris] U[triusque] Doctor ac Praef[ectus] Coll[egii] Donatiani et deinde regius decretorum professor.' Thus, it concerns a copy made *post* 1621, the year when Joannes van 't Sestich was appointed *regius* professor of canon law, of course notes taken by van 't Sestich in the year 1600.

[55] Gerardus Corselius, *Ad Institutiones Iustiniani Auctarium*, KBR ms. 4086, *ad Inst. 4,3,13*, *quaestio* 2, fol. 345/355v.-348/358v.: 'An domo combusta eo nomine conductor seu inhabitator teneatur, etiamsi non appareat eius culpa incendium ortum?'

[56] Corselius seems to have especially based his argumentation on three sources. (i) Jacobus Menochius (1532-1607), *De arbitrariis iudicum quaestionibus et causis centuriae sex* (Cologne: Philippus Albertus, 1630), *lib.* 2, *cent.* 4, *casus* 390, fol. 709-712: 'Incendium cuius culpa, et facto commissum credatur, qua poena iure Caesareo ferendus sit incendiarius ob levem, et latam culpam, et qua cum dolo incendium immisit, quid iure Canonico et poenitentiali, plene et luculenter explanatum.' (ii) Andreas Gaill, *Practicarum observationum tam ad processum iudiciarium praesertim imperialis camerae, quam causarum decisiones pertinentium, libri duo* (Cologne: widow of Arnoldus Hieratus, 1645), *lib.* 2, *cap.* 21, *fol.* 315-317: 'Conductor domus an de incendio teneatur'. (iii) Andreas Fachinaeus, *Controversiarum iuris libri decem* (Cologne: Joannes Gymnicus and Antonius Hieratus, 1604), *lib.* 1, *cap.* 87, fol. 96-97: 'An si domus conducta comburatur, locatoris damnum sit, vel conductoris.'

culpability referred to the *lex Si vendita* (*Dig.* 18.6.12), taken from Alfenus, who argued that a fire could not exist without fault (*cum incendium sine culpa fieri non possit*). If a fire could not exist without a fault, and if fires were usually caused by the fault of the inhabitants, it resulted – so this minority argued – in a presumption of liability of the inhabitants until proof to the contrary. In their opinion, the answer to the *quaestio* had to be affirmative. Corselius did not explicitly mention which authors belonged to this minority opinion, but Fachinaeus was certainly one of them.[57]

Corselius then focused on a debate between the humanist scholars François Hotman (1524-1590) and Jacques Cujas (1522-1590). Hotman had argued that there must have been a failure in the textual transmission of the *lex Si vendita*, as the statement that a fire could not arise without a fault was at odds with other passages from the Justinianic *corpus* that did accept situations of *casus fortuitus*.[58] Cujas pleaded against such a textual adaptation for the simple reason that the statement that a fire could not arise without a fault was almost always true, even if in specific cases exceptions were possible.[59] Thus, Cujas accepted the minority opinion, but only to a very limited extent. A fire was generally caused by fault of the inhabitants, but the contrary could be proven and, in case the building was inhabited by several people, it would be impossible to argue whom of them was presumed culpable. Therefore, no presumption should be accepted in case several inhabitants had been living in the same building.

In his conclusion, Corselius supported the majority opinion. Culpability of the inhabitants should not be presumed. At most a *culpa levissima* could be presumed, and even that was only possible if there was merely one inhabitant. Therefore, the only case in which a presumption of (contractual) liability might have been accepted was that of a *commodatarius* who was the only inhabitant of the building. At the end of his *disputatio*, as far as the extracontractual liability was concerned, Corselius added – with a renewed reference to Menochio – that the *lex Aquilia* was not helpful here: most fires were caused by a *culpa levissima* which consisted of an omission rather than a commission, for which one could not be held liable on the basis of the *actio legis Aquiliae*.[60] Thus, although Corselius had asked the question and discussed the different arguments, in the end actual proof of a fault (*culpa*) remained decisive. For the jurists of the Southern Low Countries, fault-independent liability was out of the question.

VI. Donellus and Gudelinus: definition of *quasi maleficium*

In the Dutch Republic, the idea of fault (*culpa*) was of paramount importance as well, but presumptions of fault were more easily accepted than in the Southern Low Countries. At the newly-founded Leiden law school as of 1575, the French jurist Hugues Doneau (Donellus, 1527-1591) had made an important step to that end. In a key passage of his *Commentarii de iure civili*, Donellus

[57] Fachinaeus knew that he belonged to the minority opinion: Ibidem, fol. 96: 'Controversia autem inter Doctores est in eo. Quid si nesciatur, utrum culpa, vel casu ortum sit incendium? Aliqui enim, quorum sententia est communior, dicunt conductorem non teneri, et damnum ad locatorem pertinere. Alii vero contra, eum teneri, nisi de diligentia sua doceat. Et haec posterior sententia videtur mihi verior (…).'

[58] Franciscus Hottomannus, *Observationum et emendationum in ius civile libri XIII*, (Geneva: Eustathius Vignon and Jacobus Stoer, 1599), *lib.* 5, *cap.* 10, fol. 143: *Particula non duobus locis sublata.*

[59] Jacobus Cujacius, *Observationum libri XXVIII* (Paris: Societas typographica librorum officii ecclesiastici, 1657), *lib.* 17, *cap.* 29, col. 543: *Ad l. 6 § si tibi mandavero, D. Mand. et l. Si vendita D. de per. et com. rei vend.*

[60] Gerardus Corselius, *Ad Institutiones Iustiniani Auctarium*, KBR ms. 4086, *ad Inst. 4,3,13*, *quaestio* 2, fol. 348/358v.: 'Quod si actione legis Aquiliae de damno huiusmodi incendii agatur dubitari etiam possit an inhabitator omnino non teneatur cum etiam levissima culpa in legem Aquiliam veniat (…). Sed dici potest similiter de certae et determinatae personae culpa non apparere. Deinde in legem Aquiliam dicetur venire culpa etiam levissima quae in committendo admittitur, non etiam quae in omittendo, quali plerumque incendia excitantur. Vide Menochium (…).'

seemed to suggest that in case damage had been inflicted, *culpa* was presumed until proof to the contrary. That contradictory proof could consist either of a legal basis (*probabilis atque iusta ratio*; *si quis quod fecit, iure fecit*), or of *casus fortuitus*.[61] Thus, fault was presumed, unless behaviour in accordance with the law (*e.g.* legitimate self-defence), lack of intelligence, the impossibility to prevent the realisation of the harm, *casus fortuitus* or the contributory fault of the victim were proven.[62]

Donellus implemented the fault criterion and presumptions of fault in his analysis of the quasi-delictual liability too.[63] He defined a *quasi maleficium* as every fact, based on which the defendant could not be said to have committed a delict (*delictum* or *maleficium*), while nonetheless having done something that was very close to it (*fecit tamen, quod sit maleficio finitimum*). For Donellus, a *maleficium* was every fact, by which a wrong had been done, i.e. someone had been harmed or something had been detracted from someone (*maleficium est omne factum, quo male fit, id est, nocetur et detrahitur alteri*). The Leiden law professor distinguished two different kinds of *quasi maleficia*. In some cases, potentially dangerous actions implied liability, as those actions – for instance the hanging of objects from a windowsill – endangered the security which was important to a community (*hoc modo suam quodammodo securitatem aufert civitati*). In other cases, someone was held liable for harm caused by a third person. Donellus stated that, for both types of *quasi maleficia*, a defendant was presumed to have acted negligently, or to have acted in a way that came very close to negligence (*solum coercetur negligentia, aut quid negligentiae proximum*).[64] Whereas negligence – as Donellus argued – was in principle not sanctioned by aquilian liability, it did constitute a very slight fault (*culpa levissima*) that in the situations described as *quasi maleficia* was punished because of a reason of public utility (*publica utilitas*).

Donellus gave several examples. In case of the *actio de deiectis et effusis*, for instance, the inhabitant of the building from which objects had been thrown or liquids had been poured out, should have made sure that no one had been in the possibility to commit such a delict, or should have warned his visitors not to do such a thing, or – if he had wanted to be absolutely safe – should have lived alone and closed his apartment. Thus, if something had been thrown or poured out, the inhabitant was presumed to have been negligent. The reason that this kind of negligence was sanctioned, had to do with the concomitant reason of public utility. Donellus quoted Ulpian and stated that it was

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[61] Hugo Donellus, *Commentarii de iure civili* (Lucca: Joannes Riccomini, 1762), *lib.* 15, *cap.* 27, §3: 'Sic ergo facilis et expedita definitio est, ut statuamus omne damnum datum culpa datum videri, eoque pertinere ad coercitionem legis Aquiliae, nisi qui damnum dedit iust aliqua ratione defendatur, cur id fecerit. Iusta in hac re defensio omnino duplex. Una, si quis quod fecit, iure fecit. Altera, si fecit casu quem nulla facientis culpa praecesserit.'

[62] Ibidem, *Ad titulum D. ad legem Aquiliam*, cap. 1, nr. 5-6. See also: Guillaume Étier, *Du risque à la faute. Evolution de la responsabilité civile pour le risque du droit romain au droit commun* (Zürich: Schulthess, 2006), p. 247.

[63] Donellus, *Commentarii de iure civili*, *lib.* 15, *cap.* 43. Donellus is known for his influential thematical restructuring of the *Corpus iuris civilis*. See: C. A. Cannata, 'Systématique et dogmatique dans les *Commentarii iuris civilis* de Hugo Donellus', in *Jacques Godefroy (1587-1652) et l'Humanisme juridique à Genève. Actes du colloque Jacques Godefroy*, ed. by B. Schmidlin and A. Dufour (Basel: Helbing & Lichtenhahn, 1991), pp. 217-30; Feenstra, 'Hugues Doneau et les juristes néerlandais du XVIIe siècle: L'influence de son "système" sur l'évolution du droit privé avant le Pandectisme', in *Jacques Godefroy*, pp. 231-43.

[64] Interestingly, contrary to the Institutes of Justinian, Donellus did not count the *actio de iudice qui litem suam fecit* as a part of the *quasi maleficia*. A judge who had rendered an unjust sentence, had acted deceitfully or at least through a delict of commission, not one of omission or negligence. Only omissions truly fell within the category of the quasi-delicts. *Ibidem*: 'Non enim hic iudex delinquit negligentia, qualis vindicatur in superioribus quasi maleficiis; sed peccat dolo malo, aut ea culpa quae in faciendo est, ubi male iudicando damnum dat. Quod genus facti et damni dati id maleficium est, quod coercetur lege Aquilia.' According to Roman-Dutch literature of the seventeenth and eighteenth centuries, a judge was only liable in case of deceit or grave negligence. See: van der Merwe, 'Erscheinungsformen verschuldensunabhängiger Haftung', pp. 458-60.

useful for the public to be able to use roads without fear or danger.[65] Another example was related to maritime business: if a shipowner had appointed a ship's master and that ship's master or his seamen had committed a delict, the shipowner was considered to have been negligent, as he had apparently committed a *culpa in eligendo*.

Elsewhere in his *Commentarii*, Donellus also mentioned a liability that resulted 'from our goods' (*de obligatione ex rebus nostris nata*). In that chapter, he dealt with the aforementioned *actio de pauperie*, the *cautio damni infecti* and the *actio aquae pluviae arcendae*.[66] Thus, he had set a first step in the assimilation of the liability for a destruction of a building caused by a *casus fortuitus* and the liability for acts *contra naturam* by tame animals. That would become an essential passage which had a decisive influence on Grotius's thought, as will be argued in the following paragraph.

Before dealing with Grotius, however, the works by the Leuven scholar Pierre Goudelin (Petrus Gudelinus, 1550-1619) deserve a brief mention, as they demonstrate how – notwithstanding the political, religious and military difficulties – Netherlandish lawyers continued to read and (albeit to a more limited extent) receive each other's works and ideas. Gudelinus's dealings with the *quasi delictum* in his *Syntagma regularum iuris utriusque* and in his *Commentariorum de iure novissimo libri sex* were indeed clearly based on Donellus's thought, even though no explicit reference to Donellus is made. In a way that was very similar to Donellus, Gudelinus defined a *quasi delictum* or *quasi maleficium* as every fact based on which the defendant could not be said to have committed a *maleficium*, but nonetheless did something that was very close to it.[67] Just like Donellus, Gudelinus also invoked reasons of public utility (*ratio publicae utilitatis*) to support these claims for liability due to (presumed) negligence.[68]

VII. Grotius on wrong-by-construction-of-law

Although Donellus had already left Leiden by the time Hugo Grotius started studying there, the latter was clearly familiar with Donellus's works, as a study of his views on liability demonstrates.[69] In his *De jure belli ac pacis* (II.17.1), Grotius emphasized that according to the law of nature *culpa* was the decisive criterion for liability for harm done or inequalities caused.[70] In his *Inleidinge* (III.32.22),

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[65] *Ibidem*: 'In hac specie accedit utilitas publica, quae suasit hanc culpam coerceri: 'Publice enim utile est', inquit Ulpianus, 'sine metu et periculo per itinera commeari' [*Dig.* 9.3.1].'

[66] Donellus, *Commentarii de iure civili*, *lib.* 15, *cap.* 45; Étier, *Du risque à la faute*, pp. 254-7.

[67] Petrus Gudelinus, *Syntagma regularum iuris utriusque* (Antwerp: Hieronymus Verdussius, 1646), *cap.* 15, nr. 41: 'Quasi delictum, seu quasi maleficium appellatur omne factum, ex quo is, qui convenitur, dici nequit illud commisisse, quod omnino et evidenter in maleficium cadit, fecit tamen quod ei est affine.' For a manuscript version of Gudelinus' *Syntagma*, see: KBR, ms. 5794, fol. 153r.-319v. (for this passage, see fol. 300v.).

[68] Gudelinus, *Syntagma*, *cap.* 15, nr. 44: 'Profecto vix est, ut culpa in talibus notaretur, cum, ut ab initio huius Capitis dixi, non consueverit alias solus neglectus rerum alienarum puniri, nisi verteretur quoque hic ratio publicae utilitatis; quoniam publice interest absque metu et periculo per itinera posse commeari, nec non cum omni securitate in naves et diversoria recipi.' See also: Gudelinus, *Commentariorum de iure novissimo libri sex* (Antwerp: Hieronymus Verdussius, 1620), *lib.* 3, *cap.* 10, fol. 108-9. For a manuscript version of Gudelinus' *Dictata ad Novellas*, see: KBR, ms. 5802-03, here especially *lib.* 3, *cap.* 44, fol. 137v.-138r.

[69] For the general influence of Donellus's restructuring of Roman law on Grotius's thought, see: Feenstra, 'Hugues Doneau', pp. 237-43. Grotius might have heard of Donellus's teachings from his uncle Cornelius de Groot (1544/6-1610), who had been Donellus's colleague as law professor at the university of Leiden, or from his own professor Gerijt Tuning (1566-1610). Moreover, in a letter of 30 November 1614, Grotius mentions that he had read a manuscript copy of Donellus's *Compendium iuris civilis*. See: Margreet Ahsmann, *Collegia en colleges. Juridisch onderwijs aan de Leidse Universiteit 1575-1630, in het bijzonder het disputeren* (Groningen: Wolters-Noordhoff, 1990), pp. 63-4.

[70] Grotius, IBP, 2.17.1: '(…) Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantem cum eo quod aut homines communiter, aut pro ratione certae qualitatis facere debent. Ex tali culpa obligatio naturaliter oritur si damnum datum est, nempe ut id resarciatur.'

he added, however, that some wrongful acts were difficult to prove.[71] Therefore, in the civil law of the individual *civitates* situations of qualitative liability could be created, i.e. obligations that arose from (often fault-independent) 'wrong-by-construction-of-law', as Lee correctly translated *misdaed door wet-duidinge*.[72] This concept implied that certain results were ascribed to someone as a wrong (*misdaed*) by law itself. This could happen even if there had been no actual wrongdoing or fault, as long as there was, at least, a basis in the law (*cfr.* Donellus's *probabilis atque iusta ratio*), or if someone was harmed 'from what belongs to us or through what belongs to us' (*uit het onze of door het onze*).[73] After his definition of wrong-by-construction-of-law, he continued as follows (*Inleidinge*, III.38.2-18)[74]:

> (2) *'From what belongs to us': as, first, when fire coming from a man's house spreads to other houses. (3) Secondly, when from a man's dwelling something is thrown or poured on a public way, whereby some one suffers damage. (4) We say 'dwelling': that is a man's own house, or a house which he rents, or even lives in for nothing. But a father, occupying part of a house by himself, is not liable for anything that happens from another part of the house, where his son is living. (5) Thirdly, if any one has had anything projecting or hanging over a place where people are in the habit of riding by, which has fallen and harmed some one. (6) We say 'has a thing projecting or hanging out', although he did not put it there himself.*
>
> *(7) 'Through what belongs to us': whether living or without life: living, such as our servants or animals. (8) Masters and mistresses are not generally bound by their servants' wrongful acts, except to the amount of unpaid wages. (9) But masters of ships, innkeepers, and stablekeepers are bound to make good all damage which any one, having body or goods in their ship, house, or stable may have suffered through their ship's crew, servants, or stablemen. (10) A man is liable for mischief done by his animal which has become savage or wild contrary to nature and has caused harm to some one; or which has attacked another person's animal and has killed or hurt it. The owner of the animal that has done anything of the kind is bound to make good the loss or to give over the animal at his choice. (11) Further, animals found upon another person's land may be impounded, and may be kept in the pound at the animal's cost, until the injury is compensated or security given. (12) A wagoner or countryman whose horses run away, although without fault on his part, is bound to make good any injury. (13) The owner of a dog which has killed any one's swans or other birds is bound to make compensation, and it is not enough for him to give over the dog. (14) This liability ends with the animal's death, provided that no fault can be imputed to the owner. (15) 'Without life': as ships. (16) When in home or foreign waters two ships come into collision through being unable to sail clear or avoid one another, and one runs the other aground or causes her damage, the damage is borne half and half by the two ships, whether the accident happened by day or night, in fair weather or in foul: but if the collision was caused by intention or carelessness on either side, then that side alone must compensate the loss. (17) If in home or foreign waters a ship drifts without the master's fault and damages a ship lying at anchor, she bears her own damage entirely and half the damage of the ship at anchor. (18) If in home or foreign waters*

[71] *Inleidinge* III.32.22-23: 'Doch voor al staet te weten dat het aengeboren recht alleen ziet op de waerheid van de zaeck: maer de burgerwet ziende dat eenighe misdaden, oock als de selve zijn gheschied, niet wel en zijn te bewijsen, heeft in eenighe zaecken verbintenisse inghevoert, als off het waer door misdaed. Zulcks dat verbintenisse ter onminne ontstaet of uit dadelicke misdaed, of uit misdaed door wet-duidinge.'

[72] Hugo Grotius, *Inleiding tot de Hollandsche Rechtsgeleertheid* (The Hague: widow and heirs of Hillebrand Iacobsz van Wouw, 1631), 3.32.23; 3.38.1. For Feenstra's evaluation of the translation, see: Robert Feenstra, 'Grotius' Doctrine of Liability for Negligence: Its Origin and Its Influence in Civil Law Countries Until Modern Codifications', in *Negligence. The Comparative Legal History of the Law of Torts*, ed. by E. J. H. Schrage (Berlin: Duncker & Humblot, 2001), 129-71 (p. 136). See also: Joe Sampson, 'The Limits of Natural Law: Liability for Wrongdoing in the *Inleidinge*', *Grotiana*, 40 (2019), 7-27 (pp. 15-6 and 25-6).

[73] *Inleidinge*, III.38.1 (*cfr. supra*, fn. 4). Although, initially, Grotius had still linked the category of *quasi maleficium* to one of presumed fault (*Inleidinge*, III.32.22, *cfr. supra*, fn. 71), he argued here that an obligation out of *quasi maleficium* arose even where there was no delict, and so no fault.

[74] The translation is taken from: Lee, *The Jurisprudence of Holland*, pp. 484-7.

> *a ship is carrying sail or foresail and runs down a ship that is lying at anchor, causing damage, she is liable for half of the damage; and the master must clear himself by making oath with his crew that the damage was not caused by his fault; unless the master of the damaged ship will show that the first ship was in fault, and that he himself was free from all blame, in which case the first ship must pay for the whole damage.*

Grotius's mention of 'harm from what belongs to us or through what belongs to us' (*uit het onze of door het onze*) is clearly reminiscent of Donellus's category of *obligationes ex rebus nostris natae*, even if Grotius made a further subdistinction at this point. For Grotius, *uit het onze* apparently referred exclusively to liability linked to an object or a good (like a house that fell into ruin, objects on a windowsill that fell down or objects or liquids that were thrown or poured out of a building). *Door het onze*, to the contrary, referred to living creatures that belonged to us, like servants or animals. For some obscure reason, the situation of colliding ships was also brought under the latter category. In case of colliding ships, the *ius civile* in many nations provided that – due to the difficulties of proving fault – in the absence of proof the damage was to be split equally between the parties. Interestingly, just like Donellus and Gudelinus, Grotius left out the *actio de iudice qui litem suam fecit*.

In his *Inleidinge*, however, Grotius did not refer to the reason of public utility, the *publica utilitas* that had been so crucial for Donellus. *Prima facie*, this might cause doubts concerning Donellus's true impact on Grotius, but other sources constitute very strong evidence that those doubts are unnecessary and that Grotius's definition of the 'wrongs-by-construction-of-law' had very likely been influenced by Donellus. It was Feenstra's study of the background of a passage in *De jure belli ac pacis* that erased any doubt and found the 'missing link' between Donellus's commentary and Grotius's *Inleidinge*. In *De jure belli ac pacis*, Grotius discussed whether secular authorities were liable for piracy committed to ships of friendly countries by ship masters that had received a permit from the States General to perform actions of privateering against enemies. He argued that, according to natural law and the *ius gentium* (which had to be applied in such a situation), those authorities were required to punish and extradite the pirates, but could not be held personally liable for harm done by those pirates.[75] This excursus was in fact largely a summary of a brief that Grotius, by order of Henrick Storm, the then advocate-fiscal of the admiralty of Amsterdam, had written in a specific case involving merchants from Pomerania, and that had led to a decision by the High Council of Holland, Zeeland and West-Frisia on 13 May 1617. The text of that legal brief by Grotius has been preserved. Grotius assumed that the duke of Pomerania would invoke certain Roman law regulations of qualitative liability. He hoped to anticipate this reasoning in his brief. As Roman law had to be considered an element of 'civil law', not of the *ius gentium*, Grotius argued that Roman legal arguments were irrelevant in the case at hand. Nevertheless, for the purposes of this contribution, it is noteworthy that Grotius – in his argumentation – also briefly expanded on the concept of quasi-delict in civil law and argued that this was a *fictio quaedam iuris ob utilitatem publicam*, 'a certain fiction of the law due to public utility', a formulation which had clearly been inspired by Donellus. In his *Inleidinge*, this *fictio iuris* was afterwards translated as 'wet-duiding', and the reference to public utility had been left out.[76]

[75] Grotius, IBP, 2.17.20.

[76] Feenstra, 'Die Quasi-Delikte bei Hugo Grotius. Die Lehre in seinen juristischen Hauptwerken und eine Akte aus dem in DJB II,17,20 erwähnten Prozess von Stettiner Kaufleuten gegen die Generalstaaten (1609-1617)', in *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, ed. by M. J. Schermaier, J. M. Rainer and L. C. Winkel (Cologne: Böhlau, 2002), pp. 175-89.

VIII. A *caput selectum*: qualitative liability of a ship owner in Roman-Dutch law for delicts by a ship's master

Thus, for Grotius, *culpa* remained a key concept: according to natural law, it was even the only criterion that counted. Nonetheless, contrary regulations of civil law had given rise to certain (often fault-independent) 'wrongs-by-construction-of-law'. In this final subsection, the attention will turn to another situation in which Roman-Dutch lawyers tended to recognize a certain kind of strict, albeit limited, liability. It concerns the *actio exercitoria*, and especially its application in case of acts *ultra vires* and of delictual behaviour by a ship's master. Higher, it was already explained that in Roman law of Antiquity the *actio exercitoria* was only applied to contractual relationships related to maritime transport, but that *ius commune* sources had somewhat expanded the field of application, e.g. by an analogous application to land traffic and by an extension of its scope to a servant's delictual behaviour. This extensive interpretation was, however, not unlimited. As was mentioned before, Wamesius had limited the liability of a carriage owner for delicts by his servants to the damage sustained by the goods that were carried in that same carriage.[77]

Elsewhere, Wamesius applied the same rules to a maritime case. Four English ships had reportedly boarded two Netherlandish vessels and stolen some merchandise. Henricus Somers (from Zeeland), one of the shippers – whose goods had been taken away – accused the English ship's master William Tourson of piracy. Somers had filed an *actio exercitoria* against the shipowner Mordinck of the English ships to claim compensation for his loss.[78] Wamesius was of the opinion that a shipowner was not liable vis-à-vis third parties for delicts committed by his ship's master insofar as it concerned harm done to goods outside of the ship itself.[79] This limitation of the scope of application of the *actio exercitoria* to harm caused to the carried goods, was still defended by the Leuven law professor Antonius Perezius in the mid-seventeenth century.[80]

That restrictive interpretation, however, was no longer shared by their Northern colleagues in the early seventeenth century. Authors of *consilia* from the Dutch Republic substantially broadened the scope of application of the action for compensation by a shipowner for harm caused by delicts by his ship's master. That liability was no longer limited to harm done to the goods that were actually carried on the ship itself, but could also be invoked for harm done by ship's masters to goods or persons outside of the ship. The limited scope of application of the *actio exercitoria* rather seems to have changed into a limited liability. Thus, the Hollandic counsellor Reynier van Amstelredam argued that shipowners were liable in case of delicts by the ship's master, but that their liability was

[77] Wamesius, *Consiliorum … centuria secunda*, *cons.* 54, fol. 187, nr. 22-23. Still, this limitation did not go so far as the one mentioned by Grotius, who did not extend the application of the *actio exercitoria* to land traffic, and according to whom 'masters and mistresses are not generally bound by their servants' wrongful acts, except to the amount of unpaid wages' (*Inleidinge* III.38.8).

[78] Based on factual circumstances which do not concern us here, Wamesius mainly argued in defense of Mordinck that his ship's master Tourson had not committed any wrong. Wamesius argued *inter alia* that the Netherlandish vessels had started or at least given the impression to start hostilities, and that they had been transporting goods from France to Hamburg whereas they did not have a valid safeconduct (*salvus conductus*) to import goods from France, with whom Spain and the Netherlands were still at war. At the time of the consultation, the case had been pending with the Antwerp magistrate between Henricus Somers from Zeeland and Aemilius Mordinck from England. The shipowner Mordinck had appointed William Tourson as his ship's master or captain. See: Wamesius, *Consiliorum … centuria secunda*, *cons.* 86, fol. 312-315, nr. 3-11.

[79] Furthermore, the allegedly delinquent ship's master in this case enjoyed a very good reputation and the shipowner had explicitly warned the ship's master not to undertake actions which were harmful. *Ibidem*, fol. 315, nr. 15.

[80] Antonius Perezius, *Praelectiones in duodecim libros Codicis Iustiniani Imp.* (Naples: Josephus Raymundus, 1755), *ad Cod.* 4,25, fol. 168, nr. 15. The first edition of the first part of Perezius's commentary on the Code of Justinian was published in Leuven in 1626.

limited exclusively to the value of the goods carried on the ship.[81] Nevertheless, Jan Vermeeren, Dirck de Jonge and Nicolaas van Sorgen asserted in a Hollandic consultation from 6 July 1624 that shipowners apart from the carried goods also lost their ship if the ship's master had abusively overtaken other 'free' ships on the sea, even if the shipowner had not granted any mandate to do so. Consequently, if the shipowners had not secretly mandated their ship's master to commit those delicts, their liability remained limited, but nevertheless also included the loss of the ship itself.[82] That was also the opinion of the High Council of Holland, Zeeland and West-Frisia of 21 December 1629, reported by Jacob Coren.[83] This limited liability of shipowners is commonly referred to as the right of abandonment (*abandonrecht*).[84] It was still loosely based on the idea of *culpa in eligendo*, even though that 'fault in the selection process' was always presumed.

IX. Conclusion and outlook

This article studied the importance of personal fault (*culpa*) of the defendant in cases of qualitative liability. After having explained that in the Roman law of Antiquity – despite the growing importance of *culpa* for the *actio legis Aquiliae* – several categories of fault-independent liability existed, this contribution focused on the omnipresence of *culpa* in medieval and early modern *ius commune*. Previously fault-independent cases were then re-interpreted in terms of fault, not least under the influence of Christian theology and canon law. These ideas of the *ius commune* were also present in the Low Countries from the very beginning of the academic tradition in these regions, i.e. the early fifteenth century. Commentaries and treatises by Leuven law professors of the fifteenth till the seventeenth centuries are evidence of the continued importance of the fault criterion, even if some lecture notes on the *Institutes* only offered very brief explanations and largely paraphrased the wording of the commented passages. Presumptions of fault were accepted by Leuven scholars, as long as these presumptions were not used to subtly introduce a form of fault-independent liability. At the competing university of Leiden, established in 1575, Donellus showed more leniency towards presumptions of fault. He argued that presumed negligence could be sanctioned, if required by reasons of public utility. Some decades later, Grotius received many of Donellus's ideas. Just like Donellus, he introduced a category of liability that arises 'from what

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[81] *Consultatien, Advysen en Advertissementen gegeven ende geschreven bij verscheyden treffelijke Rechts-geleerden in Hollandt. Het tweede stuck van het derde deel* (= Hollandsche Consultatien IIIb) (Rotterdam: Joannes Naeranus, 1648), *cons.* 326, pp. 681-7. The printed version does not mention the date of this *consilium*.

[82] Hollandsche Consultatien IIIb, *cons.* 321, pp. 584-5: '(…) dat sy mede geen borgen zijn / noch gestelt hebben voor de mesusen of delicten van den voorsz[egden] Capiteyn / nochte oock / volgende de commissie by den Prince van Oraigne ofte d'Heeren Staten Generael gegeven / gehouden zijn te verantworden het mesuys van den Capiteyn. Dat in sulcken gevalle de voorsz[egde] Reeders / nopende 't voorsz[egde] mesuys van den Capiteyn / verder niet zijn gehouden / dan na advenant van hare parten scheeps / ende de goederen / daer inne geweest zijnde : Ende dien volgende mogen volstaen met hare presentatie van 't voorsz[egde] schip ende goederen te abandonneren / tot behoeve van de beschadigde.' Our counsellors referred to a judgement (of 31 July 1603) by the High Council between the Venetian Antonio Colari – whose ship had been overtaken – and the shipowners (*reeders*) of the ship's master Melchior van den Kerckhove. They concluded: 'Te weten / dat Exercitores, wesende in effecte de Reeders / a magistro navis – zijnde de Schipper of Capiteyn – niet verder konnen werden verobligeert / dan secundum modum quo praepositi sunt, quodque modus egressus non obligat Exercitorem, per text[um] in [*Dig.* 14.1.1.12, § Igitur] et ibi Bartol[us].' Regarding the aforementioned judgement of 1603, see: W.D.H. Asser, *In solidum of pro parte. Een onderzoek naar de ontwikkelingsgeschiedenis van de hoofdelijke en gedeelde aansprakelijkheid van vennoten tegenover derden* (Leiden: Brill, 1983), pp. 108-9.

[83] Jacob Coren, *Observationes rerum in Supremo Senatu Hollandiae, Zeelandiae, Frisiae judicatarum* (The Hague: Arnoldus Meuris, 1633), *obs.* 40, pp. 410-20. For an analysis of this *observatio*, see: Asser, *In solidum of pro parte*, pp. 110-3.

[84] The principle of this right of abandonment is set out in Grotius' *Inleidinge* III.1.32. See also: M. Punt, *Het vennootschapsrecht van Holland. Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland (diss. Leiden)* (Deventer: Kluwer, 2010), pp. 82-93.

belongs to us' ('*uit het onze*', '*ex rebus nostris*'). In the Republic, there was more room for presumptions of fault, whereas the Southern Netherlandish jurists strongly adhered to the limitations of Roman law and *ius commune*, e.g. with regard to the *actio exercitoria*. The *Auctarium* by Corselius and two *consilia* by Wamesius have been used to illustrate this Southern Netherlandish approach.

The late medieval and early modern ideas and theories on this topic have had a lasting impact on the contemporary law in the Low Countries. A full discussion of the later developments exceeds the limits of this paper.[85] It can be noted, however, that the Napoleonic *Code civil* of 1804 contained several articles on qualitative liability (Art. 1384-1386 CC), which – in Belgian law – have remained unchanged till this very day. In the Netherlands, the relevant articles of the *Burgerlijk Wetboek* of 1838 (Art. 1403-1405) have also long been almost identical to the Napoleonic Code. According to traditional Belgian and Dutch legal scholarship, all forms of qualitative liability found their theoretical foundation in a presumption of fault. Thus, on this point, modern (i.e. nineteenth- and early twentieth-century) scholarship was fully in line with the tradition of the *ius commune*, which has been presented in this article. This tradition had been summarized in the eighteenth century by the influential French jurist Robert Joseph Pothier (1699-1772), whose works have considerably inspired the compilers of the *Code civil*.[86] In the subsequent decades, these ideas have been developed further, but references to (presumptions of) fault have always remained predominant. In Belgian law, some of these presumptions were refutable (e.g. that of the parents in case of delicts by their children[87]), others weren't (e.g. that of owners of houses that fall into ruin[88]), but none of these cases – at least in their classical theoretical explanations – was completely independent from fault.[89] Given the disappearance of the noxal liability of the *actio de pauperie*, even the liability for damage caused by an animal was based on (an irrefutable presumption of) fault, as it already

[85] For a discussion of the position of post-Grotian Roman-Dutch authors from the seventeenth and eighteenth centuries on these themes, see already: van der Merwe, 'Erscheinungsformen verschuldensunabhängiger Haftung', pp. 455-84. He explains how most of these authors had received the Grotian ideas on wrong-by-construction-of-law.

[86] Pothier defined a quasi-delict as: 'le fait par lequel une personne, sans malignité, mais par une imprudence qui n'est pas excusable, cause quelque tort à une autre.' See: Robert Joseph Pothier, *Traité des obligations* (Paris: Debure, 1761), nr. 116. Thus, Pothier seems to have founded quasi-delicts on non-excusable imprudence, i.e. on (at least presumed) fault. Nonetheless, it has been argued that Pothier's work is somewhat ambiguous on this point: James Gordley, *Foundations of Private Law. Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006), p. 213.

[87] The refutable nature of the presumption is announced in Art. 1384 of the Belgian Civil Code itself.

[88] Henri de Page, *Traité élémentaire de droit civil belge*, vol. 2, *Les obligations (première partie). Sources des obligations* (Brussels: Bruylant, 1964), pp. 1035-6.

[89] On this discussion, see: de Page, *Ibidem*, pp. 860-1. See also: R. Dalcq, *Traité de la responsabilité civile. I. Les causes de responsabilité* [Les Novelles] (Brussels: Larcier, 1959), nr. 1541: 'La faute reste ainsi le fondement unique de la responsabilité aquilienne dans notre droit et le fait que certaines fautes sont présumées ne constitue pas une dérogation au droit commun de la responsabilité civile. Il n'y a qu'un fondement unique à la responsabilité: la faute. Mais il y a une pluralité de causes possibles de responsabilité que précise la loi: la faute personnelle qui doit être prouvée, la faute présumée qui est révélée par la faute personnelle dommageable qu'a commise un tiers; la faute présumée qui est révélée par le dommage qu'a causé une chose, un animal ou un bâtiment.' Nonetheless, in the chapter on liability of the owner of a building, he added (at nr. 2287): '(…) c'est essentiellement l'idée de garantie envers la victime qui domine l'article 1386 du Code civil.'

appeared from the legislatory discussions in the early 1800s[90] and as it was explicitly confirmed by the Belgian *Cour de cassation* in 1932.[91]

Grotius's concept of 'wrong-by-conception-of-law' has, thus, not survived into the nineteenth century. Nonetheless, some instances of fault-independent liability have since been created in the course of the twentieth century, e.g. in the context of labour accidents and product liability, often combined with compulsory insurance.[92] Despite some early attempts as of the late nineteenth century[93], it is only as of the second half of the twentieth century, however, that (a majority of) legal scholarship has again come to interpret several of the general quasi-delictual liabilities as instances of risk-based liability or as 'objective', fault-independent liability.[94] In the Netherlands, these ideas have been incorporated into the civil code of 1992.[95] In Belgium, at the occasion of an ongoing extensive reform project of the civil code, in 2018, a committee of experts has proposed the inclusion of paragraphs on faultless liability, i.e. a form of liability that is attributed by law itself on the basis of someone's 'capacity' or 'quality'.[96] Are we witnessing a revival of Grotian ideas?

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[90] For an interesting overview of the drafting process of the relevant articles of the *Code civil*, see: Olivier Descamps, 'La responsabilité dans le Code civil', *Histoire de la justice*, 19 (2009/1), 291-310 (pp. 302-10). On the foundation of the qualitative liability of the owner of an animal on a fault, see: P.-A. Fenet, *Recueil complet des travaux préparatoires du Code civil* (Paris: Videcoq, 1827), vol. 13, p. 488: 'Le dommage, pour qu'il soit sujet à réparation, doit être l'effet d'une faute ou d'une imprudence de la part de quelqu'un: s'il ne peut être attribué de cette cause, il n'est plus que l'ouvrage du sort, dont chacun doit supporter les chances; mais s'il y a eu faute ou imprudence, quelque légère que ce soit leur influence sur le dommage commis, il en est dû réparation. C'est à ce principe que se rattache la responsabilité du propriétaire relativement aux dommages causés par les animaux (…).'

[91] Cass. 23 June 1932, *Pasicrisie*, 1932, I, pp. 200-12, with a note by Paul Leclercq.

[92] See, e.g., the Belgian *Loi du 24 décembre 1903 sur la réparation des dommages résultant des accidents du travail* (Moniteur belge 28-29 December 1903); Belgian *Loi du 25 février 1991 relative à la responsabilité du fait des produits défectueux* (Moniteur belge 22 March 1991).

[93] Noteworthy is, for instance, the dissertation by the Dutch jurist Paul Scholten (1875-1946), *Schadevergoeding buiten overeenkomst en onrechtmatige daad* (Amsterdam: Scheltema & Holkema, 1899), pp. 12-3 and 20. Cfr. also: P. Scholten, 'Nieuwe rechtspraak over de aansprakelijkheid voor dieren en voor kinderen', *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1921, nrs. 2680-2.

[94] See *e.g.*: R. Dekkers, *Handboek burgerlijk recht, II. Verbintenissen – bewijsleer – contracten – zekerheden* (Brussel: Bruylant, 1971), nr. 259, who argued – against the then majority opinion – that the qualitative liability of an employer for a personal fault by the employed was based on risk, rather than on the employer's fault. He also applied a similar reasoning to the liability of an owner of a building or an animal: Ibidem, nr. 267 and 281. For an overview of the evolution towards risk-based liability in Belgian law, see: H. Bocken, 'Van fout naar risico. Een overzicht van de objectieve aansprakelijkheidsregelingen naar Belgisch recht', *Tijdschrift voor Privaatrecht*, 1984, pp. 329-415: B. Weyts, 'Objectieve aansprakelijkheid', in: *Aansprakelijkheid, aansprakelijkheidsverzekering en andere schadevergoedingssystemen* [XXXIIIe Postuniversitaire Cyclus Willy Delva] (Mechelen: Kluwer, 2007), pp. 373-415; S. Stijns and I. Samoy, *Leerboek verbintenissenrecht – Boek 1bis* (Brugge: die Keure, 2020), pp. 51 and 78-121.

[95] In the Dutch civil code of 1992, book 6, title 3, section 2 on liability for persons and goods ('Aansprakelijkheid voor personen en zaken') contains several articles on risk-based liability, independent of fault. On the evolution of risk-based liability in the Netherlands, see *e.g.* briefly: A. J. Verheij, *Onrechtmatige daad* [Monografieën Privaatrecht, 4] (Deventer: Wolters-Kluwer, 2019), § 7. For a more extensive overview, see: C.J.M. Klaassen, *Risico-aansprakelijkheid. De afdelingen 6.3.2 en 6.3.3 NBW, alsmede art. 31 Wegenverkeerswet* (Zwolle: Tjeenk Willink, 1991), pp. 7-121 and 141-54.

[96] In Belgium, the Civil Code is currently being revised. Some parts of the Code have already been altered, but, so far, the part on extracontractual liability has not yet been changed. A committee of experts, appointed on 30 September 2017, has proposed a new text, which resulted in an *avant-projet de loi* on 6 August 2018. Political crises have delayed the parliamentary discussions, which are still pending. If adopted, several situations which are currently governed by Articles 1384-1386 would be replaced by a subsection on faultless liability for the behaviour of someone else (*Responsabilité du fait d'autrui – Responsabilité sans faute*) or for harm caused by goods or animals (*Responsabilité sans faute du fait des choses et des animaux*). See: Art. 5.156-161 *Avant-projet de loi portant insertion des dispositions relatives à la responsabilité extracontractuelle dans le nouveau Code civil*, https://justice.belgium.be/fr/bwcc (last consultation: 11 August 2020).

Acknowledgements

This article has been made possible thanks to the support of KU Leuven – Internal Funds and of Fonds Wetenschappelijk Onderzoek – Vlaanderen (G0C4421N). A first version of this contribution was presented at the workshop 'Non-consequential theories of strict liability in historical perspective' at IE University in Madrid on 10 January 2020. I wish to thank Bart Wauters and Randall Lesaffer for their kind invitation, and the fellow participants James Gordley and Joe Sampson for the stimulating discussion. Furthermore, thanks are due to Hylkje de Jong and the participants of the Amsterdam *Forum Romanum*, where I presented my research on 16 February 2021, as well as to the members of the *Instituut voor Verbintenissenrecht* at KU Leuven. I also want to express my gratitude to Tammo Wallinga and Harry Dondorp for their remarks at an earlier draft of this paper and to Geert Sluijs for the linguistic correction. Of course, all remaining errors are exclusively mine.