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## "VIS MAIOR" AND "VIS CUI RESISTI NON POTEST"<sup>1</sup>

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I would like to take this opportunity to express my admiration for Eric Pool, an excellent Romanist. I also wish to show my deep respect for his great teaching skills. It has always been a great pleasure to listen to his presentations, especially at the Société Fernand de Visscher. Furthermore, I want to express my gratitude for his invitation to deliver a paper at his university in Amsterdam. The paper I wish to offer for the essays given in his honour may remind him of this occasion.

### 1 Introduction

The usual translation of "*vis maior*" is superior force. "*Vis cui resisti non potest*" could be translated as a force which one cannot resist. Dogmatically, both terms are considered equivalent. However, another expression which also corresponds must be added, namely "*casus*".<sup>2</sup> Nevertheless, "*vis maior*" expresses the force in an objective way, while on the other hand "*vis cui resisti non potest*" is subjective. Ernst states that the question regarding the objective or the subjective analysis of superior force has been a bone of contention during the epoch of the *ius commune* as well as during the period of the Pandectists.<sup>3</sup>

Subjective superior force is a force against which there is nothing to do, even if one is trying very hard. Objective superior force is the instance which corresponds to an event of extraordinary violence. In this respect some jurists, like Mayer-Maly, speak of a "list of catastrophes" ("Katastrophenliste").<sup>4</sup>

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1 This text is a revised version of the paper given at the Edinburgh Roman Law Group, on 25 April 2003.  
2 See e.g. Robinson "Casus in the Digest" in: (JF: editor please) *Essays in Honour of Ben Beinart II* (1979) 337-345.  
3 Ernst, "Wandlungen des 'vis maior'-Begriffes in der Entwicklung der römischen Rechtswissenschaft" 1994 *INDEX*, 293f.  
4 Mayer-Maly, "Höhere Gewalt: Falltypen und Begriffsbildung" in: (JF: editor please) *Festschrift Arthur Steinwenter* (1958) 63.

The paper does not aim at offering a new dogmatic and unified definition of superior force; the impossibility of success in this regard has been demonstrated by numerous failures of those who have tried to do so. The analysis and the explanation of these failures may be found in the articles by Mayer-Maly and Ernst.<sup>5</sup>

The recent analysis by Ernst deserves attention. He explains that the concept evolved over time. Until this stage of the argument there is no reason to disagree. Ernst explains that at first superior force was "Sachbezogen" (that is, related to the thing). This means that superior force could not discharge a person of his responsibility, but let the risk fall on the owner. In this respect, there is no question of "Zufall" (hazard). It is only the application of the idea: "Loss must lie where it falls." Later, superior force became "Leistungsbezogen" (related to performance). This means that it could become a justification for unlawful behaviour; some wrongdoers could be released. In this further development of superior force, the idea of hazard ("Zufall") made its appearance.

In my opinion, Ernst's distinction is not very different from the distinction between the objective and subjective analysis of superior force. Admitting that a thing has been destroyed by a violent event without wondering who would be responsible, but only considering that it is bad luck for the owner, is a way to avoid subjective analysis. My doubts increase when I read the examples used by Ernst regarding superior force which would be related to the thing ("Sachbezogen"). A random example will be used to explain this point:

*Digest 19.2.59 (Iav. 5 Lab. Post.). Marcius domum faciendam a Flacco conduxerat: deinde operis parte effecta terrae motu concussum erat aedificium. Massurius Sabinus, si vi naturali, veluti terrae motu hoc acciderit, Flacci esse periculum.*

It is correct that Sabinus does not say that Marcius is freed by superior force, but simply that Flaccus bears the risk. However, the question arises whether it

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5 Cf. *supra* n. 3 and n. 4.

is possible to dissociate the two aspects of the decision? I'm not persuaded that by attributing the risk to Flaccus, Sabinus didn't realise that it had as a necessary consequence that Marcius didn't bear the risk. It is difficult to comprehend that a jurist would dissociate these aspects.

## 2 Chronology: Development from an objective to a subjective analysis

In contrast, the development from an objective to a subjective analysis of superior force is without doubt correct. Such development must have been parallel to that of *iniuria* in the *lex Aquilia*. It is trite that the *actio legis Aquiliae* departs from the premise that the damage was caused unlawfully (objective analysis). It is only later that it was admitted – as may be seen in the *Institutes* of Gaius<sup>6</sup> – that there was *iniuria* in each instance of *dolus* or *culpa* (subjective analysis):

Gaius, *Institutes* 3.211:<sup>7</sup> *Is iniuria autem occidere intellegitur, cuius dolo aut culpa id acciderit, nec ulla alia lege damnum, quod sine iniuria datur, reprehenditur; itaque inpunitus est, qui sine culpa et dolo malo casu quodam damnum committit.*

This development can also be retraced from the following text:

*Digest* 47.9.3.7 (Ulp. 56 ad ed.).<sup>8</sup> *Quod ait praetor de damno dato, ita demum locum habet, si dolo damnum datum sit: nam si dolus malus absit, cessat edictum. Quemadmodum ergo procedit, quod Labeo scribit, si defendendi mei causa vicini aedificium orto incendio dissipaverim, et meo nomine et familiae iudicium in me dandum? Cum enim defendendarum mearum aedium causa fecerim, utique dolo careo. Puto igitur non esse verum, quod Labeo scribit. An tamen lege*

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6 Schipani *Responsabilità "ex lege Aquilia". Criteri di imputazione e problema della "culpa"* (1969) 249ff is of the opinion that Gaius' explanation is only the result of a simplification for teaching purposes and doesn't imply that *iniuria* may be confined to *culpa* and *dolus*.

7 On this text, see for example La Rosa "Il valore originario di 'iniuria' nella 'lex Aquilia'" 1998 *Labeo* 366ff.

8 On this text, see also my book "*Aeque Perituris*", *une approche de la causalité dépassante en droit romain classique* (1997) 98-114.

*aquilia agi cum hoc possit? Et non puto agendum: nec enim iniuria hoc fecit, qui se tueri voluit, cum alias non posset. Et ita Celsus scribit.*

The praetor gave the action *de incendio ruina naufragio rate nave expugnata* (hereafter: *actio de incendio*) against anyone who committed theft, received and concealed stolen goods or caused damage during a fire, the collapse of a house, or shipwreck.

With regard to the third element (causing damage) Ulpian specifies that the action for fourfold will be granted only in the event that the damage was caused intentionally (by *dolus*). In this respect, Ulpian does not agree with Labeo, according to whom the action must be granted even against the person who pulled the house down in order to preserve his own house against a fire. According to Ulpian, one who pulls down a house in such a situation is not guilty of *dolus*. On this occasion, Ulpian reminds us with approval of Celsus, who had stated that the *actio legis Aquiliae* will not be applicable either, because he who cannot act differently does not commit an *iniuria*.<sup>9</sup>

Thus, two actions are under discussion. If the question is approached from the point of view of Aquilian liability, Celsus' and Ulpian's solution proposes the adoption of a subjective analysis of liability. If the problem is approached only objectively, the conclusion must be reached that the damage was caused by the neighbour and not by the fire. To admit that the pulling down of the house was neither an *iniuria* nor committed with *dolus*, a subjective analysis of liability was unavoidable.

The other action (*actio de incendio*) – as has been pointed out – was granted when damage had been caused by fire. When this action was integrated in the praetor's edict, the notion of *iniuria* probably had not received a subjective interpretation. But, this was irrelevant in respect of the *actio de incendio* because *iniuria* was not a requirement as such. This raises the question what would happen if someone pulled down a house in order to protect his own house against fire (*damnum incendii arcendi causa datum*)? Labeo logically

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9 Celsus' opinion is also reported in *D.9.2.49.1* (see *infra*).

answers the question by stating that the action must be granted. However, Ulpian draws an analogy between the *actio de incendio* and the result which would have been reached with the action on the *lex Aquilia* in similar circumstances. He refers to Celsus' opinion stating that the action would not be granted in such an instance. This opinion of Celsus is found in *Digest* 9.2.49.1 (Ulp., 9 *Disp.*):<sup>10</sup>

*Quod dicitur damnum iniuria datum Aquilia persequi, sic erit accipiendum, ut videatur damnum iniuria datum, quod cum damno iniuriam attulerit; nisi magna vi cogente fuerit factum, ut Celsus scribit circa eum, qui incendii arcendi gratia vicinas aedes intercidit: nam hic scribit cessare legis Aquiliae actionem: iusto enim metu ductus, ne ad se ignis perveniret, vicinas aedes intercidit: et sive pervenit ignis sive ante extinctus est, existimat legis Aquiliae actionem cessare.*

According to Celsus, the action based on the *lex Aquilia* should be refused because there was no *iniuria* when a house was pulled down to protect oneself against fire. A comparison between the two actions appears to lead to an illogical difference: No finding for damages with the *actio legis Aquiliae*, but *condemnatio* to fourfold with the *actio de incendio*.

In the time of Labeo the above situation seems to have been accepted, but in Ulpian's time the matter had changed<sup>11</sup> because *dolus* had been integrated into the edict and the action *de incendio* now had three requirements, namely fire, damage and *dolus*. This meant that in Labeo's time, the liability for damage caused by fire was evaluated objectively, but at a later stage became evaluated subjectively.

Fire is traditionally considered a case of *vis maior*, but in Ulpian's text it is to be analysed subjectively: "*cum alias non posset*". This formulation makes one think of the *vis cui resisti non potest*. In the parallel text in the *Digest* (D.9.2.49.1), the evaluation is equally subjective, as it is said that the one who

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10 On this text, see Gerkens (n. 8) 85-98.

pulled the house down, acted *iusto metu ductus*, driven by a legitimate fear.

Thus, when the concepts of *culpa* and *iniuria* began to be evaluated in a subjective manner, the circumstances which could eliminate *culpa* and/or *iniuria* must have followed the same development. This is clearly the case in the texts dealing with damage caused to ward off fire. The fact that the subjective evaluation of *vis maior* had been introduced did not mean that the Roman jurists would not on occasion continue to evaluate superior force in the traditional and objective way. When a natural and extraordinary event causes damage, one cannot institute proceedings against nature. This does not surprise, as we know that Roman law developed casuistically. It is logical that the subjective evaluation was used only where the circumstances required it. If the same result could be reached by using the objective analysis of superior force there was no need to complicate things unnecessarily.

### **3 Superior force versus human action**

In the above examples, superior force eliminated unlawfulness from the human action. Thus, pulling down the neighbour's house in order to ward off fire was without *culpa*, because superior force instigated a legitimate fear in the perpetrator (*iusto metu ductus*). This is the normal role superior force plays in the questions of contractual liability; confer Javolenus in *Digest* 19.2.59, where he states that it is not Marcius' fault that the house was not completed, since the earthquake had demolished his work.

However, texts can also be found in the *Digest* according to which superior force is not considered in terms of the effect it had on human actions, but where superior force and human action are both considered in order to determine to whom the damage will be ascribed. One of such cases is the previously discussed case where a house was pulled down to ward off fire. This is not the contradiction it appears to be where cases in which human action is analysed separately from superior force and actually placed in competition with it, are in conflict with instances such as the example of the

house pulled down as the result of a legitimate fear. This would be the case if there were only the two texts which have been discussed *supra*. In these two texts, the *iniuria* of pulling down the house is covered by the fact that it was done in reaction to superior force.

There is, however, a third text, in which the problem is phrased in a different manner:

*Digest 43.24.7.4 (Ulp., 71 ad ed.).<sup>12</sup> Est et alia exceptio, de qua Celsus dubitat, an sit obicienda: ut puta si incendii arcendi causa vicini aedes intercidi et quod vi aut clam mecum agatur aut damni iniuria. Gallus enim dubitat, an excipi oporteret: "Quod incendii defendendi causa factum non sit"? Servius autem ait, si id magistratus fecisset, dandam esse, privato non esse idem concedendum: si tamen quid vi aut clam factum sit neque ignis usque eo pervenisset, simpli litem aestimandam: si pervenisset, absolvi eum oportere. Idem ait esse, si damni iniuria actum foret, quoniam nullam iniuriam aut damnum dare videtur aequae perituris aedibus. Quod si nullo incendio id feceris, deinde postea incendium ortum fuerit, non idem erit dicendum, quia non ex post facto, sed ex praesenti statu, damnum factum sit nec ne, aestimari oportere Labeo ait.*

The facts remain the same: Fire progresses towards a house; the owner thereof pulls down the house of a neighbour which is located between his house and the fire in order to protect his house. The difference between this text and the other two texts is that on this occasion the remedy used against the perpetrator is the *interdictum quod vi aut clam* (the interdict for what has been done by force or by stealth).<sup>13</sup> In short, it is a procedure in which an urgent measure is requested from the *praetor* in cases where someone has suffered a violent act, which he in vain tried to resist. The *praetor* grants such an interdict which orders the wrongdoer to stop the violence or repair the damage already caused by such violence. The peculiarity of this interdict is

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12 See Gerkens (n. 8) 33-84.

13 On this interdict, see for example Fagnoli *Studi sulla legittimazione attiva all'interdetto quod vi aut clam* (1998).

that it does not take the fire into account as a factor eliminating *iniuria*. In this aspect, the interdict differs from the action of the *lex Aquilia*, as it was not necessary to have acted unlawfully to have the interdict granted. All that was required was a violent action and damage. These two requirements preclude taking into account possible subjective circumstances deriving from superior force. This is probably the reason why the possibility of an *exceptio* was discussed by Gallus and Celsus, as the *exceptio* would allow the subjective circumstance deriving from superior force to be taken into account. However, the text refused the *exceptio* to a private person.

The fact that the *exceptio* was granted to magistrates was in all probability to empower them to fight fire efficiently without the risk of interruption by a praetorian procedure. This *exceptio* was only of use to magistrates without *imperium*, that is the only ones who could be summoned before the *praetor* in the course of their duty.<sup>14</sup>

The case of the private person to whom the *exceptio* is not granted, is of interest. This raises the question whether a private person could invoke the fire to escape liability for damages pursuant to the interdict. This is not exactly the case. The private person cannot rely on the fact that he was in legitimate fear of the fire; on the other hand there is an objective consequence of the superior force which may help the defendant. This objective circumstance is whether damage was suffered or not. As stated above, damage was one of the indispensable requirements to obtain sentence to make good the damage caused by violence.<sup>15</sup> This leads to the question whether it is relevant to discuss the existence of damage as it is difficult to doubt the existence thereof when the house has been destroyed.<sup>16</sup> In the text under discussion, Ulpian and Servius are of the opinion that if the fire reached the ruins of the house pulled down, there was neither *iniuria* nor damage. The absence of *iniuria* is relevant only as far as the *lex Aquilia* is concerned, while on the other hand the

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14 Robinson "Fire prevention in Rome" 1977 *RIDA* 380, who suggests that it could be an *aedile*. See also Gerkens (n. 8) 60ff.

15 See Berger "*Interdictum*", in *RE* 9/2 (1916) 1663; Schipani, (n. 6) 157; Capogrossi Colognesi, "L'interdetto '*quod vi aut clam*' e il suo ambito di applicazione" 1993 *INDEX*, 234f.

16 Cf Gerkens (n. 8) 82ff.



absence of damage concerns both remedies. The fact that there is no damage does not mean that the house has not been destroyed, but that it would have been destroyed in any event. Thus, the distinction whether the fire had progressed to the ruins of the pulled-down house is only of interest in respect of the absence of *damnum* and therefore for the interdict *quod vi aut clam*. This is the first case in which a single instance of damage may be ascribed either to a human action or to superior force.

Servius, Labeo and Ulpian choose to ascribe the destruction of the house to superior force where the fire had started at the moment the house was pulled down and also reached the ruins of the house. In such an instance the superior force is a hypothetical fact causing the damage, but is not purely hypothetical. At a certain moment, the superior force must have been really able to cause the damage, which would not have been the case if it had been purely hypothetical — as would be the case if a neighbour had pulled down the house prior to the fire starting.

This analysis also explains Labeo's position in the case of the *actio de incendio*. As stated, Labeo granted this action even when the house was pulled down *incendii arcendi causa*, since this action was granted whenever damage had been caused by fire. The fact that Labeo granted the action *de incendio* even if the damage had been caused *incendii arcendi causa* should not surprise, as we know that during his epoch *dolus* was not a requirement for granting the action. It appears that this requirement was added during the time of Ulpian. However, this does not mean that Labeo's solution should necessarily be considered iniquitous, for Labeo probably did not grant the *actio de incendio* where the fire did not reach the ruins of the pulled-down house for the same reason as he denied the interdict *quod vi aut clam*, namely, because there was no damage. It may also be considered a justification of the neighbour's intervention. Fire should not authorise pulling down houses without due consideration. The danger must be real, and this element may be evaluated objectively (no damage) as well as subjectively (legitimate fear).

There are other fragments in the *Digest* dealing with cases in which human action and superior force compete. For example, the case of the wild boar,

trapped in a snare dealt with in *Digest* 41.1.55 (Proc., 2 epist.):<sup>17</sup>

*In laqueum, quem venandi causa posueras, aper incidit: cum eo haereret, exemptum eum abstuli: num tibi videor tuum aprum abstulisse? et si tuum putas fuisse, si solutum eum in silvam dimissem, eo casu tuus esse desisset an maneret? et quam actionem mecum haberes, si desisset tuus esse, num in factum dari oportet, quaero. respondit: laqueum videamus ne intersit in publico an in privato posuerim et, si in privato posui, utrum in meo an in alieno, et, si in alieno, utrum permissu eius cuius fundus erat an non permissu eius posuerim: praeterea utrum in eo ita haeserit aper, ut expedire se non possit ipse, an diutius luctando expediturus se fuerit. summam tamen hanc puto esse, ut, si in meam potestatem pervenit, meus factus sit. sin autem aprum meum ferum in suam naturalem laxitatem dimisisses et eo facto meus esse desisset, actionem mihi in factum dari oportere, veluti responsum est, cum quidam poculum alterius ex nave eiecisset.*

What is interesting in this text is the eventuality that the hunter becomes owner of the boar owing to the fact that it fell in his snare. A passer-by freed the boar, although it could have extricated itself by a long struggle (*diutius luctando*). In this case the damage results from freeing the boar, as a consequence of which the hunter lost his property. Thus there is damage, but the question remains what was the cause of this damage? It could have been the fact that the passer-by freed the boar and if he had not done so, the animal would have escaped by itself. The animal's struggle is not usually referred to as superior force. This is due to the fact that the damage itself is unusual as it is *non corpori* (the boar is not damaged). Although there was no destruction, there was considerable natural force. If the boar had been able to free itself, the passer-by would not have been considered liable for the hunter's loss.

Another fragment is also found in the title of the *Digest* concerning the action *de incendio* namely *Digest* 47.9.4.pr. + 1 (Paul., 54 *ad ed.*):<sup>18</sup>

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17 On this text see Gerkens (n. 8) 121-152.

18 See Gerkens (n. 8) 152-158.

*Pedius posse etiam dici ex naufragio rapere, qui, dum naufragium fiat, in illa trepidatione rapiat. 1. Divus Antoninus de his, qui praedam ex naufragio diripuissent, ita rescripsit: Quod de naufragiis navis et ratis scripsisti mihi, eo pertinet, ut explores, qua poena adficiendos eos putem, qui diripuisse aliqua ex illo probantur. et facile, ut opinor, constitui potest: nam plurimum interest, peritura collegerint an quae servari possint flagitiose invaserint. (...)*

This text deals with goods that have been taken from a shipwreck. If the goods were perishable and were about to perish, it is not reprehensible to take them. The concurrence in this instance is between the shipwreck (as superior force) and the taking of the goods (as human action).

Another case is found in *Digest* 9.2.15.1 (Ulp., 18 *ad ed.*):<sup>19</sup>

*Si servus vulneratus mortifere postea ruina vel naufragio vel alio ictu maturius perierit, de occiso agi non posse, sed quasi de vulnerato, sed si manumissus vel alienatus ex vulnere periit, quasi de occiso agi posse Iulianus ait. haec ita tam varie, quia verum est eum a te occisum tunc cum vulnerabas, quod mortuo eo demum apparuit: at in superiore non est passa ruina apparere an sit occisus. sed si vulneratum mortifere liberum et heredem esse iusseris, deinde decesserit, heredem eius agere Aquilia non posse.*

This text deals with a mortally wounded slave. It is certain that he will die of his wounds; but fate hastens his death by some form of superior force. In this case, instead of considering the assailant liable for killing (first chapter of the *lex Aquilia*) it is decided that he is only liable for wounding (third chapter of the *lex Aquilia*). This is another instance of a concurrence of superior force and human action. The damage (the death of the slave) is ascribed only to the superior force. It is true that the assailant is nevertheless liable *ex vulnerato*, but on this point the decision is consistent with the opinions of Labeo and Ulpian in the case of the fire when the fire started after the house had been pulled down. In that case, the fire came too late to be of any help to the person

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19 See Gerkens (n. 8) 184-197.

who had pulled down the house. For the wounded slave the superior force also came too late as far as the wounding of the slave was concerned, but not with regard to the killing. It is interesting to note that this text has caused enormous interpretation problems.<sup>20</sup> It is all a question of context. In the context of this paper it probably seems logical. There are, however, two parallel texts, also dealing with cases of mortally wounded slaves, namely *Digest* 9.2.11.3 (Ulp., 18 *ad ed.*)<sup>21</sup> and *Digest* 9.2.51 (Iul., 86 *Dig.*).<sup>22</sup>

*Digest* 9.2.11.3: *Celsus scribit, si alius mortifero vulnere percusserit, alius postea exanimaverit, priorem quidem non teneri quasi occiderit, sed quasi vulneraverit, quia ex alio vulnere periit, posteriorem teneri, quia occidit. quod et Marcello videtur et est probabilius.*

*Digest* 9.2.51.pr: *Ita vulneratus est servus, ut eo ictu certum esset moriturum: medio deinde tempore heres institutus est et postea ab alio ictus decessit: quaero, an cum utroque de occiso lege Aquilia agi possit. respondit: occidisse dicitur vulgo quidem, qui mortis causam quolibet modo praebuit: sed lege Aquilia is demum teneri visus est, qui adhibita vi et quasi manu causam mortis praebuisset, tracta videlicet interpretatione vocis a caedendo et a caede. rursus Aquilia lege teneri existimati sunt non solum qui ita vulnerassent, ut confestim vita privarent, sed etiam hi, quorum ex vulnere certum esset aliquem vita excessurum. igitur si quis servo mortiferum vulnus infligerit eundemque alius ex intervallo ita percusserit, ut maturius interficeretur, quam ex priore vulnere moriturus fuerat, statuendum est utrumque eorum lege Aquilia teneri.*

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20 See Schindler "Ein Streit zwischen Julian und Celsus" 1957 ZSS 201ff.; Pugsley, "Causation and confessions in the *lex Aquilia*" 1970 TR, 163ff.; Ankum, "Das Problem der 'überholenden Kausalität' bei der Anwendung der *lex Aquilia* im klassischen römischen Recht", in: (JF: editor please) *Festgabe von Lübtow zum 80. Geburtstag* (1980), 352ff.; Willvonseder, *Die Verwendung der Denkfigur der "condicio sine qua non" bei den römischen Juristen* (1984), 144ff.

21 See Gerkens (n. 8) 159-163.

22 See Gerkens (n. 8) 163-184 and more recently Börsch, *Damit Übeltaten nicht ungestraft bleiben. Impunitas als Argument der klassischen römischen Juristen* (2003), 28-47.

1. *Idque est consequens auctoritati veterum, qui, cum a pluribus idem servus ita vulneratus esset, ut non appareret cuius ictu perisset, omnes lege Aquilia teneri iudicaverunt.*

2. *Aestimatio autem perempti non eadem in utriusque persona fiet: nam qui prior vulneravit, tantum praestabit, quanto in anno proximo homo plurimi fuerit repetitis ex die vulneris trecentum sexaginta quinque diebus, posterior in id tenebitur, quanti homo plurimi venire poterit in anno proximo, quo vita excessit, in quo pretium quoque hereditatis erit. eiusdem ergo servi occisi nomine alius maiorem, alius minorem aestimationem praestabit, nec mirum, cum uterque eorum ex diversa causa et diversis temporibus occidisse hominem intellegatur. quod si quis absurde a nobis haec constitui putaverit, cogitet longe absurdius constitui neutrum lege Aquilia teneri aut alterum potius, cum neque impunita maleficia esse oporteat nec facile constitui possit, uter potius lege teneatur. multa autem iure civili contra rationem disputandi pro utilitate communi recepta esse innumerabilibus rebus probari potest: unum interim proposuisse contentus ero. cum plures trabem alienam furandi causa sustulerint, quam singuli ferre non possent, furti actione omnes teneri existimantur, quamvis subtili ratione dici possit neminem eorum teneri, quia neminem verum sit eam sustulisse.*

These two fragments are very different from the first text discussed. In the latter texts there is no question of superior force. This distinction is obvious, because this paper deals with superior force. However, the authors who have analysed the cases of the mortally wounded slaves make no mention of the distinction.<sup>23</sup> Reference is usually only made to the controversy between Ulpian, Celsus and Marcellus on the one hand and Julian on the other hand. The situation is aggravated by the fact that Julian appears to contradict himself. In the last text, he explains in great detail why the first assailant should be considered liable for killing in spite of the fact that the slave eventually died of the second blow. In the first text, where the mortally wounded slave died as

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23 See Ankum (n. 20) 352ff. Ankum tries to change the meaning of Julian's text by changing the punctuation of *D.9.2.15.1* in order to avoid what many authors believe to be a contradiction in Julian's way of thinking because of what he writes in *D.9.2.51*.

a result of superior force, the assailant was only held liable for wounding.

It is submitted that Julian did not contradict himself. On the contrary, following his long reasoning in *Digest* 9.2.51, we can understand that the different conclusion is due to the fact that where a human action is weighed against superior force, the damage is ascribed to the superior force. In contrast, when two human actions are concurring, there is no reason to favour one above the other. This would authorise both assailants to defend themselves by accusing the other, and the crime would stay unpunished. It is clear that such impunity poses no problem where damage is ascribed to superior force. In the absence of superior force impunity becomes unacceptable. This change indicates a tendency to favour the imputation of damages to superior force or fate.

Traces of this way of thinking can also be found in other texts of the *Digest*, as in *Digest* 39.3.2.6 (Paul., *lib. 49 ad ed.*):<sup>24</sup>

*(...) Labeo (...) ait enim naturam agri ipsam a se mutari posse et ideo, cum per se natura agri fuerit mutata, aequo animo unumquemque ferre debere,<sup>25</sup> sive melior sive deterior eius condicio facta sit. Idcirco et si terrae motu aut tempestatis magnitudine soli causa mutata sit, neminem cogi posse, ut sinat in pristinam locum condicionem redigi. (...)*

#### 4 Conclusion

It appears that the Romans reasoned in a reverse way to today. Modern law does not favour fate. Modern times has many ways and means to escape fate, for example by using insurance. Life is organised to maximise the suppression of the consequences of bad luck. For the Romans, bad luck was part of life. It was not necessary to find a guilty or an accountable party at any price. On occasion fate was used as an acceptable reason to justify damages.

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24 On this text see Gerkens "Exégèse de Paul, *D.* 39, 3, 2, 6" 1995 *TR*, 11-26. See also Sitzia, *Aqua pluvia e natura agri* (1999); Bretone, *I fondamenti del diritto romano* (2001) 261ff.

25 On these words (*aequo animo ferre*) see Mayer-Maly, "Aequo animo ferre," in "MNHMH" Georges A. Petropoulos (1984) 105ff. (JF, is this a *Festschrift*? If so, please supply editor's name)