

VICIOUS DOGS A CASE STUDY FROM 2000 BC TO AD 2000

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ABSTRACT

Damage caused by animals is one of the aspects of law dealt with by legal codes dating as far back as the Old Babylonian period (1894-1595 BC). As part of a discussion of the legal aspects involved under such circumstances and of how losses were compensated for, the purpose of this article is to give the reader a broad overview of the ancient legal codes and law collections, to indicate the legal philosophies and similarities inherent to these codes, and to indicate to what extent the modern South African legal system derived its application of the concept of pauperies (“damage caused by animals”) directly from Roman law.

Introduction

In a pre-literate society the king or judge considering a dispute brought before him, would – in the absence of written laws – use his discretion in making his judgement. He would, of course, usually be guided by the customs of his people, including the ideas current in the community about right and wrong, and by previous decisions in similar cases and circumstances. He could also be guided by the opinions of other people present at the hearing (including the spectators) to help him assess the plaintiff's claims. But oral customary laws are generally unsatisfactory since it is too easy to disagree about what the law is, and public opinion can be discordant or vague (MacDowell 1978:41). One function of rules or laws is to reduce such doubts and uncertainties. All literate communities therefore put their laws in writing.

Dated 2350 BC, the *Code of Uru-inim-gina*, or *Uru-ka-gina* as the name was formerly read (Knapp 1988:72-73), is the earliest known legal code although the text itself has not been discovered as yet. Mentioned in other documents as a consolidation of existing “ordinances” or laws laid down by Mesopotamian kings, it must have been harsh by modern standards: an administrative reform document from the same period showed that thieves and adulteresses were to be stoned to death with stones inscribed with the name of their crime.

1. Sumerian Laws

The oldest written legal code discovered is that of *Ur-Nammu*, king of the Sumerian city of Ur from 2112-2095 BC, although historians tend to agree that the collection should rather be attributed to his son, Shulgi, who reigned until 2047 BC (Roth 1997:13). Only a prologue and 37 laws (some only fragmentary) could be deciphered.¹ The code was supported by an advanced legal system which included the

1 For the purpose of this article this collection will be identified by the abbreviation *LU*.

giving of testimony under oath, the proper form of judicial decisions and the ability of the judges to order that damages be paid to a victim by the guilty party. Typical of this code (as well as other extant Mesopotamian legal rules and provisions) is that punishment is proportionate to the crime:

If a man violates the right of another and deflowers the virgin wife of a young man, they shall kill that male (*LU 6*).²

A crime and punishment of less severity is dealt with in *LU 8*:

If a man acts in violation of the rights of another and deflowers the virgin slave woman of a man, he shall weigh and deliver 5 shekels of silver.

2. Babylonian Laws

Judging from the extant fragments a new aspect of liability and punishment is added in the laws of Dadusha, ruler of the kingdom of Eshnunna, ca. 1770 BC. Known as the *Laws of Eshnunna*, the composition includes provisions dealing with numerous situations, but for the first time explicit mention is made of damage caused by animals, introducing a principle that was to become common in ancient law by holding owners of domesticated animals responsible for the acts of their animals:³

- 53 If an ox gores another ox and thus causes its death, the two ox-owners shall divide the value of the living ox and the carcass of the dead ox.
- 54 If an ox is a gorer and the ward authorities so notify its owner, but he fails to keep his ox in check and it gores a man and thus causes his death, the owner of the ox shall weigh and deliver 40 shekels of silver.
- 55 If it gores a slave and thus causes his death, he shall weigh and deliver 15 shekels of silver.
- 56 If a dog is vicious and the ward authorities so notify its owner, but he fails to control his dog and it bites a man and thus causes his death, the owner of the dog shall weigh and deliver 40 shekels of silver.
- 57 If it bites a slave and thus causes his death, he shall weigh and deliver 15 shekels of silver.

During the reign of the Old Babylonian king Hammurabi (1792-1750 BC) the longest and best organised collection of laws from Mesopotamia was compiled. The *Code* or *Laws of Hammurabi* – in actual fact rather a selection of the principal decisions taken by virtue of the law and just verdicts imposed by Hammurabi (Bottéro 1992:164-165)

² For references to and translations of Ancient Near Eastern texts I have used Roth 1997.

³ For the purpose of this article this collection will be identified by the abbreviation *LE*.

– drew on the traditions of earlier law collections and undoubtedly influenced those that came later (Roth 1997:71). Originally carved on a stele of basalt (discovered at Susa in south-western Iran in 1902 and now in the Louvre Museum) it consists of a lengthy prologue, between 275 and 300 law provisions, and an epilogue.⁴

The formulation of these laws reveal important information about the legal system which was much more complex than that of Ur-Nammu (Roth 1997:72). Compare

If a man commits a homicide, they shall kill that man (*LU* 1)

with

If a man accuses another man and charges him with homicide but then cannot bring proof against him, his accuser shall be killed (*LH* 1).

We note the following:

- A private individual (and not necessarily only an official body or officer) may bring charges against another person;
- such charges must be substantiated in some way;
- and a false accuser suffers the penalty he sought for his intended victim.

This law of Hammurabi infers that which Ur-Nammu makes explicit in its simpler formulation: homicide demands the death penalty.

The legal philosophy on which the Laws of Hammurabi are based is the principle of “an eye for an eye” or the so-called *ius talionis* (from the Latin word *talio*, meaning *retaliation in kind*). The phrase “an eye for an eye” came to symbolise the laws in modern expression. The cases dealt with in these laws cover a vast array of obligations, professions and rights including commerce, slavery, marriage, sexual offences, assault and bodily injuries, theft and debts, and also goring oxen:

250 If an ox gores to death a man while it is passing through the streets, that case has no basis for a claim.

251 If a man’s ox is a known gorer, and the authorities of his city quarter notify him that it is a known gorer, but he does not blunt[?] his horns or control his ox, and that ox gores to death a member of the awilu-class [that is, a free-born man], he [the owner] shall give 30 shekels of silver.

252 If it is a man’s slave [who is fatally gored], he shall give 20 shekels of silver.

⁴ For the purpose of this article this collection will be identified by the abbreviation *LH*.

3. Hebrew Law

The most ancient collection of Hebrew law is the *Covenant Code* (Ex 20:22-23:33). According to tradition Moses received the *Ten Commandments* directly from God. These were transcribed as part of the Book of Moses (in Ex 20:1-21) and are followed by a complete set of legal rules (the *Covenant Code*) which are based on the “eye for an eye, tooth for a tooth” legal philosophy of Hammurabi. Stipulations also occur on the so-called goring ox,⁵ showing a remarkable resemblance to the laws of both Eshnunna and Hammurabi:

- 21:28 If an ox gores a man or a woman to death, the ox shall be stoned to death, its flesh may not be eaten, but the owner of the ox is innocent.
- 21:29 But if the ox was previously reputed to have had the propensity to gore, its owner having been so warned, yet he did not keep it under control, so that it killed a man or a woman, the ox shall be stoned to death, and its owner shall be put to death as well. Should a ransom be imposed upon him, however, he shall pay as the redemption for his life as much as is assessed upon him...
- 21:32 If the ox gores a slave or slavewoman, he [the owner of the ox] must pay thirty shekels of silver to his [the slave's] owner, but the ox shall be stoned to death.
- 21:35 If an ox belonging to one man gores to death the ox of his fellow, they shall sell the live ox and divide the proceeds, and they shall divide the dead one as well.
- 21:36 But if the ox was previously reputed to have had the propensity to gore, and its owner had not kept it under control, he shall make good ox for ox, but will keep the dead one for himself.

Analysis of Ancient Near Eastern Laws

The “eye for an eye” or *lex talionis* principle is obviously a common aspect of the legal philosophies of all the Ancient Near Eastern legal sources. The formulation of the provisions in all of these collections follow the basic style of case law typical of the time (Bottéro 1992:158; Roth 1997:71). The provisions are mostly structured according to the grammatical order of a conditional proposition, beginning with a *protasis* introduced by the conjunction *if*, describing a concrete situation or a state of circumstantial elements in the past or present tense, followed by the *apodosis* in the future tense, indicating what the judicial result of such a situation should be.

Furthermore, an analysis of the above selections pertaining more specifically to damage caused by animals show certain contextual similarities between the

⁵ Translations by Finkelstein 1981:20.

Mesopotamian collections of Eshnunna and Hammurabi and the biblical legal enactments. (The extant fragments of the laws of Ur-Nammu do not mention damage of this kind.)

Although literally tens of thousands of cuneiform documents relating to legal matters have been discovered, there is hardly a single allusion to a real instance in which an ox killed or injured a person or another animal (Finkelstein 1981:21). This does not mean that such occurrences never happened or that they could not happen, but the suggestion is that such occurrences would have been very rare at best. The goring ox-rules should therefore be interpreted as a typical case law illustration of the legal principles involved when damage is caused by animals: *if* a certain situation arises, *this* is how it should be resolved. The same interpretation probably applies to the instances of damage caused by vicious dogs as stated in the Laws of Eshnunna, the only source that specifically refers to this kind of injury or damage.

Apart from the fact that these rules deal with two different situations, namely where the victim is either another ox or a human being (man/woman/slave), they can be summarised in the following two categories.⁶

Category 1:

- *LE 53*; Ex 21:35
If an ox gores another ox and causes its death,
the owners shall divide the value of the live ox;
the carcass of the dead ox shall also be divided.
- *LH 250*; Ex 21:28
If an ox, passing through the streets, gores a man to death,
there shall be no claim against the owner;
the biblical ox shall be stoned to death.

Category 2:

- Ex 21:36
If a known gorer gores another ox and causes its death,
the owner shall replace the dead ox;
he shall keep the dead ox.
- *LE 54-57*; *LH 251-252*; Ex 21:29, 32
If a known gorer or vicious dog causes the death of a human being,
the owner shall be fined;
the biblical ox shall be stoned to death and its owner killed or fined.

Firstly, the goring ox rules as described in Category 2 serve to introduce the principle of culpable negligence and its consequences: the owner of the ox known to be a gorer

⁶ On the inner *interdependence* of the three cuneiform sources, as well as on interdependence and differences between the Mesopotamian laws and the Covenant Code, see i.a. Finkelstein 1981:17-20 and Fensham 1988:87.

is punished for *his failure in exercising due care* while leading or driving it through an area of public access or thoroughfare. In this context *due care* does not denote the idea of keeping the animal fenced in or guarded, since injury under such circumstances would raise the issue of trespassing and contributory negligence (Finkelstein 1981:20 nn. 1 and 2).

Secondly, in situations where the ox was not a known gorer (Category 1) the ratio of the rule seems to be that since the animal had not previously given any indication of vicious tendencies so that its owner could have been forewarned, there can be no presumption of fault or negligence on the side of the owner. However, since an unforeseen accident (when an ox causes the death of another ox) ought not to be an occasion on which one party is expected to bear the entire loss, it must be borne by both parties equally (Finkelstein 1981:23).

When a person is killed by the ox, the unavoidable implication is that the death could have been the result of the victim's own carelessness (by perhaps wandering into the animal's path), thereby constituting contributory negligence (Finkelstein 1981:24).

In the biblical tradition as elsewhere in the Ancient Near East, death by stoning is reserved for crimes of a special character. The fact that the biblical ox is to be *stoned* to death even in cases where the death of the victim could presumably be attributed to his own carelessness (whereas the negligent owner in Ex 21:29 "shall be put to death", traditionally understood to be death by the sword), is probably on account of its blood-guilt as a result of killing a human being (Fensham 1988:86), making the animal untouchable and cursed: the executioners must keep their distance from the animal not to be contaminated themselves.

I have argued before that it was an accepted principle in ancient law that the owners of domesticated animals were responsible for the acts of their animals, but to hold the *animal* responsible for its deeds was clearly not so generally accepted (Fensham 1988: 85): it is only in Ex 21:28 that the non-habitual goring ox is punished by being stoned to death.

4. Greek Law

Traces of ascribing liability to animals also occur in Greek legal thought. The first written laws of Greece were compiled by Draco (621 BC) who introduced the state's exclusive role in punishing persons accused of crime, instead of relying on the system of private justice. Although no reliable account of Draco's laws exists, they were known for the severe penalties laid down in them (the death penalty was specified for nearly all offenders), giving rise to the word "draconian" referring to unreasonably harsh laws.

With the exception of his laws on homicide (the only surviving portion), all Draco's laws were repealed and replaced by Solon (c. 594 BC). Henceforth the laws of Draco on homicide and of Solon on other matters were regarded as the *Laws of Athens* (MacDowell 1978:42-43). Two centuries later orators often referred to a law existing in their day as "the law of Solon", even when there was actually no doubt

that it did not go back to Solon's time. Consequently, authorship of the remaining fragments and laws attributed to Solon can in many instances not be certified.

The laws of Solon were largely concerned with family law and public law. What is important for our purpose, however, is that the laws set specific penalties for various offences, for instance for theft (where the penalty depended in part on the value of the stolen goods), for libel, and – perhaps – even for a dog bite.⁷

He also made a law to deal with injuries suffered from beasts, which included an ingenious safety-device whereby a dog which had bitten anybody must have a collar and a pole three feet long fastened to it and be delivered up to the injured party (Plutarch, *Solon* 24).⁸

By the 5th century BC a special court, the Prytaneion, heard cases of homicide alleged to have been committed by an unknown person, or by an animal or inanimate object (Jones 1956:256-257). An animal found guilty of homicide was presumably put to death or driven out of Attika. From a modern viewpoint this may seem to have been a pointless ritual, but for Greek legal thought it was desirable that the state should take note of the manner of death if someone was killed by an unknown person, an animal or inanimate object, and take any practicable steps to avoid anyone else from dying in the same way in future (MacDowell 1978:117-118). It is obvious that animals cannot act with premeditation and knowledge, but in Aristotle's view (*EN* 3.2.2) an animal's liability is based on voluntary action, often simultaneous with physical movement (Jones 1956:273).

5. Roman Law

This introduces the topic of Roman law. In general usage the term "Roman law" refers to the legal system developed by the Romans from the time of their first codification of law in 450 BC, known as the *Leges Duodecim Tabularum* (or "Law of the Twelve Tables"), until the death in AD 565 of Justinian, ruler of the Byzantine Empire. More specifically, the term designates the codification of law ordered by Justinian and known as the *Corpus Iuris Civilis*, also called the *Justinian Code*, that became incorporated in the legal systems of many continental European countries, including that of the Netherlands. With the Dutch occupation of the Cape of Good Hope in 1652 Roman-Dutch law also arrived in South Africa.

The Law of the Twelve Tables set forth simple rules suitable for an agricultural community, established equal law for nobles and common people, and was prized as the source of all public and private law. The legal system established under this code and the body of rules that developed around it became known as the *ius civile*. This later became the law of the Roman Empire.

⁷ Gagarin (1986:65) refers to Fragment 35 in the collection by E Ruschenbusch (*Solonis Nomoi*, *Historia Einzelschriften* 9, Wiesbaden 1966) which I have not been able to get hold of locally.

⁸ Translated by Scott-Kilvert 1960. "Delivering an animal to the injured party" will be commented on with reference to Roman law.

Although it is written in archaic and concise Latin, the Law of the Twelve Tables (Warmington 1967:424-511) shows signs of early legal development such as assigning *tutela* or trustees for minor children, the insane (*Tabula* 5.7) and women (*Tabula* 5.1). There are however several more primitive elements, strongly resembling Hammurabi's *lex talionis* legal philosophy and also the case law formulation typical of Ancient Near Eastern enactments as expressed in *Tabula* 8.2:

If a person has maimed another's limb, let there be retaliation in kind [Latin = *talio*] unless he makes an agreement for compensation with him.

The text that is important for our purposes is *Tabula* 8.6 as it was preserved in a text by the lawyer Ulpian (3rd century AD) recorded in Justinian's *Digest* 9.1.1.pr.

In cases where a four-footed animal is alleged to have committed *pauperies* [i.e. loss or damage], a right of action is derived from the Twelve Tables, which statute provides that that which has caused the offense (that is, the animal which causes harm) should be handed over or that pecuniary damages should be offered for the amount of the harm done.⁹

It should be noted that "four-footed animal" refers to domesticated animals only and that wild animals causing damage are considered as a separate category not only in Roman law (*D* 9.1.1.10, "The action does not lie in the case of beasts which are wild by nature") but also in the Ancient Near Eastern laws (for example *LH* 244, "If a man rents an ox or a donkey and a lion kills it in the open country, it is the owner's loss.")

Although the term "four-footed animals" was originally (with reference to the *Lex Aquilia* on wrongful damage to property) interpreted as domesticated grazing animals (Justinian *Inst.* 4.3.pr.-1) such as cattle, horses, donkeys, mules, pigs and goats typically used in an agricultural community (similar to the "goring oxen" examples in the Ancient Near Eastern laws), the term was extended to include specifically dogs (*D* 9.1.1.5) and eventually any animal "of some other kind" (*D* 9.1.4).

Pauperies is damage done without any legal wrong on the part of the doer since an animal (being devoid of reasoning) is incapable of committing a legal wrong (*D* 9.1.3). In this instance the owner is held responsible for damage caused by his animal merely because he is the owner: but he could avoid pauperien liability by handing the animal over to the victim in noxal surrender (*noxae deditio*) if he chose not to "offer pecuniary damages".

If we accept Plutarch's information about Solon's laws as correct – and much of his evidence on other laws is confirmed by other sources (Gagarin 1986:65 n. 58) – it could be that the basic idea of avoiding pecuniary liability by *handing over* the offending animal and thereby holding the animal responsible for its voluntary action (as expressed by Aristotle) was indeed also part of Greek law.

⁹ References to the Digest will henceforth be abbreviated as *D*. For translations of Digest texts I have used Watson's edition.

But Roman law goes even further and stipulates: “Since the rule that liability for damage attaches to the physical corpus which caused the damage even in the case of animals, this action lies not against the owner of the beast *at the time the damage was caused*, but against *whoever owns it when action is brought*” (D 9.1.12). This principle is known as *nox a caput sequitur*, “the damage follows the animal.”

Even a superficial reading of the complete text of D 9.1 makes it clear that the Roman equivalent of the goring ox or biting dog is much more complex than the enactments of the Ancient Near Eastern and Greek sources. Since Roman law to a certain extent still features in South African courts, the complexity but also practicality of Roman law could best be illustrated to a modern reader with reference to a decision by the Court of Appeal, namely *Lever vs Purdy* 1991 (3) SA 17-26, from which I quote freely.

6. South African Law

Mr. Lever was the owner of a vicious dog. While he was overseas for a period of time, a certain Mr. Cohen was in occupation and control of his residence and was also taking care of the dog. During this time Mr. Cohen requested a certain Mr. Purdy to meet him at the Lever residence in order to adjust the video recorder and television set, mentioning that there was a vicious dog on the premises. It was arranged that the dog would be locked away on the day that Purdy would be calling on him. No instructions were given as to how Purdy should proceed onto the premises.

When Purdy arrived as agreed, he parked his car outside the front gate which was partly open and hooted to announce his arrival. He then proceeded to walk through the gate along a fenced-in passage towards a closed wire mesh gate, consisting of two sections, where he stopped on its outside. Placing his right hand on one of the sections, he leant over and shouted for Cohen. Suddenly a dog appeared on the opposite side and seized Purdy’s right hand in its teeth. A tug of war ensued between them and the dog succeeded in pulling Purdy through the two sections of the gate which had opened. Purdy managed to hit the dog on its nose with his left hand whereupon it let go of his hand but bit him on his left thigh. The dog only let go of Purdy when he closed one section of the gate on the dog’s nose. At that stage Cohen arrived at the scene and escorted Purdy into the house.

Purdy later instituted an action against Lever as first defendant and Cohen as second defendant. The claim against Lever was based on the *actio de pauperie* in that he was the owner of the dog which injured Purdy. In D 9.1.1.7 Ulpian describes this as a guiltless liability based solely on *ownership* of an animal which causes harm *contra naturam sui generis* (contrary to the nature of its kind) and *sponte feritate* (from inward vice).

The claim against Cohen was based on the *actio legis Aquiliae* for his *negligence* “in failing to lock up the dog in the backyard of the residence...and in permitting the dog to be in the vicinity of the gates at the entrance to the residence...at the time of Purdy’s pre-arranged arrival at the residence.” In terms of a settlement with Cohen, Purdy, however, decided not to proceed with his claim against Cohen.

Lever's defence that he could not be held liable since Purdy was bitten by the dog as a result of Cohen's negligence, was not allowed by the Provincial Division and in this appeal Lever challenges the correctness of the finding by the Court *a quo* that "Lever could only escape pauperien liability if the negligence of Cohen could be said *to have excited or provoked the animal, or to have caused it to bite Purdy*".

Reliance on the negligence of a third party as a defence to the *actio de pauperie* was at that stage a *res nova* as far as South African case law was concerned. The law of pauperien liability is treated in some detail by Ulpian in *D 9.1*, dealing firstly with those instances in which the culpable conduct of a third party causes a domesticated animal to act *contra naturam sui generis* in injuring the victim. In such instances the owner of the animal was exonerated from pauperien liability to the victim who could, however, claim damages under the *lex Aquilia* (*D 9.1.1.7*):

Therefore, if a horse kicks out because it is upset by pain, this action [i.e. the *actio de pauperie*] will not lie, but he who hit or wounded the horse will be liable ... under the *lex Aquilia*.

Other texts dealing with Aquilian liability of a third party are for example where the third party scared a horse which a slave was riding, with the result that the slave was thrown into the river and died (*D 9.2.9.3*) and where someone annoyed a dog and accordingly caused it to bite the victim (*D 9.2.11.5*). The distinguishing feature of this category is that the culpable conduct of the third party consisted of *some positive act* such as provoking, striking, scaring or annoying the animal. It was on this principle that the court originally found in favour of Purdy's claim and rejected Lever's defence.

A second category of texts (reminding one of the habitual gorger) relates to those instances in which a third party *in charge or control of an animal* by his negligent conduct *failed to prevent* the animal from injuring the victim (*D 9.1.1.4*):

If an animal should upset its load onto someone because of the roughness of the ground or a mule driver's negligence or because it was overloaded, this action will not lie and proceedings should be brought for wrongful damage [i.e. under the *lex Aquilia*].

The principle seems to be that the *actio legis Aquiliae* lies against the muleteer or person whose negligence caused the damage, *since he who provided the opportunity for the damage to be done is deemed to have caused it*. It is also explained in the following example (*D 9.1.1.5*):

Take the case of a dog which, while being taken out on a lead by someone, breaks loose on account of its wildness and does harm to someone else: if it could have been better restrained by someone else or if it should never have been taken to that particular place, this action will not lie and the person who had the dog on the lead will be liable.

A final example (*Inst.* 4.3.8):

If your slave is run over by a team of mules, which the driver has not enough skill to hold, the latter is suable for carelessness; and the case is the same as if he was simply not strong enough to hold them, provided they could have been held by a stronger man.

These texts clearly establish the principle of Roman law that the owner of a domesticated animal, which *contra naturam sui generis* harmed a victim, may successfully avoid pauperien liability by proving as a defence that the harm was caused by the controller's negligence in his control of the animal. *The mule driver's failure in exercising proper, that is reasonable, control over the mules, provided them with the opportunity to continue their flight and run over the victim.* He is guilty of negligent conduct which resulted in the injury of the victim.

The Dutch jurists adopted these principles of Roman law into Roman-Dutch law without any significant discussion or original contribution of their own. In his *Commentarius ad Pandectas* 9.1.6 the jurist Johannes Voet bases his argument on liability in terms of the *actio de pauperie* on Roman law and quotes *D* 9.1.1.5 almost *verbatim*:

If a dog, when he was being led by someone, escaped through his own rough temper and did damage to somebody, or killed another's sheep, hens or geese, and if he could be more firmly held in by another or ought not to have been led over such a spot, this action on pauperies falls away but there is room for a beneficial Aquilian action against the leader.

This passage endorses the views expressed by the Roman law texts that negligent conduct also amounts to a failure on the part of the controller to exercise proper control over an animal in his care. *That negligent conduct provided the dog with the opportunity to injure the victim. The controller did not by any act cause the dog to bite or harm the victim.*

In casu Cohen was at all relevant times in charge of and had control over the dog. He was aware of its nature and even mentioned it to Purdy whom he lead to believe that he would lock the dog away when Purdy called at the premises as arranged. Cohen's failure to adopt any reasonable precautionary measures provided the dog with the opportunity to injure Purdy and he failed to prevent it from doing so. Cohen as *controller* of the dog was in the circumstances guilty of *negligent conduct* which resulted in the injury of Purdy *despite the fact that he did not by any positive act cause the dog to bite Purdy.* Cohen's liability in terms of the *lex Aquilia* afforded Lever, as owner of the dog, a defence which exonerated him from pauperien liability to Purdy, and the appeal succeeds.

Conclusion

The relevance of Roman law is still being debated in South African legal circles (see i.a. Domanski 1996 & 1997; Stoop 1991; Thomas 1997). It is argued that Roman law

was for another time, for another people, antiquated, and that its application is anachronistic – particularly in our gentler, compassionate age. The debate ranges from discussions about the validity of the study of Roman law and the practical value thereof to requests for the study of Roman law for the sake of its educative value; it argues that “as far as our courts are concerned, Roman law is dead and no longer has any practical value in South Africa and...will finally be buried at the turn of the century” (Stoop 1991:180) or pleads that the teaching of Roman law should be justified in an Afrocentric context (Domanski 1996:542) and that the emphasis in teaching should be shifted from the technical to the ethical content of Roman law: what should be studied is Roman *iurisprudentia* with its immutable values of *honestas*, *iustitia* and *ratio*: honesty, justice and reason (Domanski 1997:38).

Ancient Near Eastern legal enactments held owners responsible for the acts of their animals – the owner of a known gorer or vicious dog was expected to exercise proper care when leading or driving his animal in a public area. Failing to do so constituted culpable negligence. When animals or humans were killed by animals who were not known to be vicious, the owner was not held responsible and the possibility of contributory negligence on the part of the victim presumably came into play: only the Covenant Code ordered an animal that caused the death of a human under these circumstances to be stoned to death.

This concept of “animal liability” reappears in the Greek thought of Aristotle, if not in Greek law. There is a (doubtful) tradition in Roman law that three of the ten magistrates responsible for compiling the Law of the Twelve Tables undertook a visit to Athens to study Greek law. Not enough evidence exists of what 5th century BC Greek law actually entailed, however, and the actual similarities between Greek and Roman law should be regarded as a coincidence.

What is important, however, is that the basic philosophy and precepts of law - be it Mesopotamian, Greek, Roman or South African – do share a certain degree of logic and practicality related to the situation and circumstances of the specific civilisation: for this case study it implies that negligence on the part of an owner – in 2000 BC, with “an eye for an eye” philosophy characteristic of legal thought, or in AD 2000, where an owner no longer has recourse to *noxae deditio* – places liability for harm caused by his animals on the owner, but that contributory negligence by a third party (as a result of an omission or his own carelessness) exempts an owner from liability. Ulpian’s text in *D* 9.1 is an excellent example of precisely the values of *honestas*, *iustitia* and *ratio* and demonstrates its practical application even in a post-modern society.

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