

Wrongs and Responsibility in Pre-Roman Law

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The Ancient World knew two different approaches to legal responsibility, one dependent on the extent to which the actor was acting voluntarily, and the other dependent on comparing the actor's conduct with some external standard. This duality is found in the legal systems of the Ancient Near East (Sumeria, Babylon, and the Hittite Empire), in Greek law, and in Roman law, where it crystallised approximately into a contrast between criminal law (voluntariness) and civil law (external standard). The legal development of these distinct sets of idea provides the background against which Aristotle's analysis of voluntariness can be understood.

The relationship between early Roman law and other legal systems of the Mediterranean and the Near East is a matter of controversy. The tradition, retailed by Livy and Pomponius among others, that the Twelve Tables were in some way derived from a Greek model is treated with suspicion; the fact that some specific provisions can be paralleled in Greek law is rightly seen as having little probative value.¹ Borrowing the graphic image of the Accursian gloss, in so far as Greek law might have provided a direct model for them to borrow, the Romans waved two fingers at it.² While similarities between Jewish law and early Roman law can be observed, the suggestion that there was some direct influence remains no more than a tentative hypothesis.³ More conservatively, a case can be made to locate early Roman law within the broad legal culture of the region: that there was some Greek influence is widely accepted.⁴ In the wider context, the Twelve Tables can be seen as a 'code'⁵ not dissimilar in form and function from the Babylonian laws of Eshnunna and Hammurabi, the Hittite Laws, or the Hebrew codes preserved in the Old Testament Books of Exodus and Deuteronomy; and legal-social values discernible in those codes can be found also in the law of the Roman republic.⁶ The present paper adopts this hypothesis, examining ideas of responsibility for wrongful conduct as they appear from the late Sumerian texts of the end of the third millennium BC, through the Babylonian and Hittite materials of the second millennium to Greece and Rome in the first millennium and beyond.

The paper has a second function. For the past 1500 years or more, lawyers have attempted to link the idea of *culpa*, blameworthiness, in Roman law with

a Greek equivalent. At first, probably by the early third century AD, the connexion was made with the Greek *adikema*, a connexion which passed into the Western legal tradition through its incorporation into the Institutes of Justinian.⁷ More recently, since Grotius, it has been supposed that the proper equivalent is in fact *hamartema*, as analyzed in Aristotle's Nicomachean Ethics.⁸ This supposition was attacked by Daube in the 1960s, on the grounds that the Aristotelian treatment was concerned with excusable mistake as a basis for the partial exculpation of a person who had brought about harm through voluntary conduct, whereas *culpa* in Roman law was based on a comparison between the defendant's behaviour and some external standard such as that of the *diligens paterfamilias*, akin to the 'reasonable man' of the nineteenth-century Common Law.⁹ Daube's argument is a very powerful one, but it is not conclusive. First of all, when applied to sets of facts the Aristotelian approach will almost always produce the same result as the Roman. The idea of mistake elucidated in the Ethics encompasses not simply mistakes as to circumstances (not knowing that the drink I am giving is a poison rather than a love-potion), but also mistakes as to consequences (throwing my javelin at a target not knowing it will hit you). Moreover, the production of an unintended result will only count as *hamartema* if that result was reasonably foreseeable; if it was not, it will be a case of *atuchia*, mishap.¹⁰ Secondly, at least in the Eudemian Ethics (through which his moral theory was primarily known in the Roman world), Aristotle is clear that there is room in his conception of *hamartema* for some assessment of the actor's behaviour by reference to an external standard of carefulness: a person who had knowledge but failed to use it owing to carelessness, or who failed to obtain knowledge that was easily obtainable, was not on a par with the person who was excusably ignorant.¹¹ Thirdly, there remains a nagging suspicion – though no more than that – that there must surely be some connexion between the Greek trichotomy *adikia*–*hamartema*–*atuchia* (deliberate wrong, error, mishap) and the trichotomy *dolus*–*culpa*–*casus* (deliberate wrong, fault, mishap) found in Roman private law.

I shall here argue that if we look at the broader context provided by the ancient Near Eastern legal systems it is possible to identify two clearly distinct approaches to responsibility, and that the Aristotelian approach fits into one of them while the Romans' *dolus*–*culpa*–*casus* trichotomy fits into the other.¹² The temptation to think of these in terms of modern categories of crime and tort has to be rejected: such a division has no part to play in the laws of the ancient Near East or Greece,¹³ and to read it into the material is unjustifiably to impose a wholly alien systematization. Roman law was different. If it was influenced by the Aristotelian analysis, this was primarily in the field of *iudicia publica*, criminal law, rather than contract or delict; and if there was any Greek influence on the approach to liability found in contract and delict it was more from Greek models of forensic oratory than from Aristotle's ethical theory.

DEFECTIVE COGNITION AND GRADATIONS OF RESPONSIBILITY

The first approach to responsibility found in the legal collections of the ancient Near East is typified by the law relating to causing injury and killing. We might start at the beginning with the Sumerian laws of Ur-Namma, dating probably from around 2100 BC:¹⁴

- 18 If a man cuts off the foot of another man . . . he shall weigh and deliver 10 shekels of silver.
- 19 If a man shatters the bone of another man [with a club] he shall weigh and deliver 60 shekels of silver.
- 20 If a man cuts off the nose of another man with [. . .] he shall weigh and deliver 40 shekels of silver.
- 21 If a man cuts off [the . . . of another man] with [. . . he shall] weigh and deliver [10 shekels of silver].
- 22 If [a man knocks out another man's] tooth with [. . .], he shall weigh and deliver 2 shekels of silver.

The shape of each of these provisions points firmly to the conclusion that liability is determined by result. If I cut off your foot I am liable; there is no obvious suggestion that it matters whether I do so deliberately, recklessly, carelessly, or accidentally. Exactly the same is true for the core provisions of the later Babylonian texts, the laws of Eshnunna and Hammurabi,¹⁵ for the Hittite Laws,¹⁶ and for the Old Testament Covenant Code: 'Whenever hurt is done, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, bruise for bruise, wound for wound.'¹⁷ In all of these, on a straightforward reading, the root idea is the same: it is the bringing about of the result that generates liability.¹⁸

It does not follow from this that we are necessarily dealing with absolute liability, though,¹⁹ merely that the wrong is seen from the victim's point of view, taking the harm suffered as the starting point, rather than from the point of view of the wrongfulness of the aggressor's conduct. Looking more closely at the Laws of Eshnunna, we see that the focus on results is the same as in the Laws of Ur-Namma but there is a gravitational pull towards seeing liability in terms of intentionally inflicted injuries:²⁰

- 42 If a man bites the nose of another man and thus cuts it off, he shall weigh and deliver 60 shekels of silver; an eye – 60 shekels; a tooth – 30 shekels; an ear – 30 shekels; a slap to the cheek – he shall weigh and deliver 10 shekels of silver.
- 43 If a man should cut off the finger of another man, he shall weigh and deliver 20 shekels of silver.
- 44 If a man knocks down another man in the street (?) and thereby breaks his hand, he shall weigh and deliver 30 shekels of silver.

- 45 If he should break his foot, he shall weigh and deliver 30 shekels of silver.
- 46 If a man strikes another man and thus breaks his collarbone, he shall weigh and deliver 20 shekels of silver.
- 47 If a man should inflict (?) any other injuries (?) on another man in the course of a fray, he shall weigh and deliver 10 shekels of silver.
- 47A If a man, in the course of a brawl, should cause the death of another member of the *awilu*-class,²¹ he shall weigh and deliver 40 shekels of silver.

This pull is felt most strongly in § 42. The slap across the cheek at the end of the list must surely be intentional if it is to be penalized;²² the biting of the nose at the beginning must in all probability have been referring to an intentional act, since it is not the sort of thing that could happen in any other way; perhaps too the ear-ripping. Should we say the same about the less obviously deliberate blinding or breaking of a tooth, or the injuries referred to in §§ 43–47? However strong the pull, though, the fact remains that it is not something that is made explicit in the texts.

The same pull can be felt in the Laws of Hammurabi, where the principal provisions relating to personal injury are sandwiched between the punishment of the son who strikes his father and the various examples of cheek-slapping:²³

- 195 If a child should strike his father, they shall cut off his hand.
- 196 If an *awilu* should blind the eye of another *awilu*, they shall blind his eye.
- 197 If he should break the bone of another *awilu*, they shall break his bone.
- 198 If he should blind the eye of a commoner, or break the bone of a commoner, he shall weigh and deliver 60 shekels of silver.
- 199 If he should blind the eye of an *awilu*'s slave or break the bone of an *awilu*'s slave, he shall weigh and deliver one-half of his value (in silver).
- 200 If an *awilu* should knock out the tooth of another *awilu* of his own rank, they shall knock out his tooth.
- 201 If he should knock out the tooth of a commoner, he shall weigh and deliver 20 shekels of silver.
- 202 If an *awilu* should strike the cheek of an *awilu* who is of status higher than his own, he shall be flogged in the public assembly with 60 stripes of an ox whip.
- 203 If a member of the *awilu*-class should strike the cheek of another member of the *awilu*-class who is his equal, he shall weigh and deliver 60 shekels of silver.

- 204 If a commoner should strike the cheek of another commoner, he shall weigh and deliver 10 shekels of silver.
- 205 If an *awilu's* slave should strike the cheek of a member of the *awilu*-class, they shall cut off his ear.

Again, though, as with the Laws of Eshnunna, except in the cases of face-slapping there is nothing concrete necessitating the interpretation that the texts are concerned with intentional injuries. None the less, the perception that there is some such focus is reinforced by §§ 206–208 of the Laws:²⁴

- 206 If an *awilu* should strike another *awilu* during a brawl and inflict upon him a wound, that *awilu* shall swear, ‘I did not strike him *idû*,’ and he shall satisfy the physician (i.e. pay his fees).
- 207 If he should die from his beating, he shall also swear (‘I did not strike him *idû*’); if he (the victim) is a member of the *awilu*-class, he shall weigh and deliver 30 shekels of silver.
- 208 If he (the victim) is a member of the commoner class, he shall weigh and deliver 20 shekels of silver.

Whereas the Laws normally provide for talion where a higher-class person injured another, § 206 provides simply for the payment of medical expenses. Twenty shekels are payable under § 208 for killing a commoner in a brawl, the same sum normally payable for knocking out his tooth.²⁵ Clearly, the fact that the injury or death resulted from a fight is something that reduced the wrongdoer’s culpability. This is borne out by the oath referred to in § 206: ‘I did not strike him *idû*.’ It is not easy to capture the precise sense of *idû*, but some further light is cast by the use of a similarly-worded oath in § 227 of the Laws: ‘If a man misinforms a barber so that he then shaves off the slave-hairlock of a slave not belonging to him, they shall kill that man and hang him in his own doorway; the barber shall swear, “I did not shave it off *idû*,” and he shall be released.’ The sense of the word comes through clearly here: the barber was acting intentionally in the sense that he had deliberately done what he had done, but he did so under a misapprehension about the circumstances surrounding his doing it. While it is not possible sensibly to transfer exactly this meaning into the earlier context – we would not naturally think of the man in the brawl as acting under a misapprehension about the circumstances – we should not discard all of its connotations. The brawler, acting in hot blood, might well be said not to have struck the victim ‘knowingly’,²⁶ ‘intentionally’,²⁷ or ‘wittingly’,²⁸ in the sense that his inflamed passion prevented him from being fully conscious of what he was doing. Non-legal texts lend some support to this approach. There is a primary focus on

doing physical acts quite deliberately, but with a lack of some crucial knowledge: a man may 'unwittingly' step on a salamander or commit sacrilege towards a god, for example. Not far away from this, but not involving a deliberate act committed under a misapprehension, it could be said that a man was surrounded by evil machinations 'without his knowing it'. Further away from this core meaning, the same word could be used to describe a man walking about 'in a daze', without knowing what he was doing.²⁹ It is this latter usage that is perhaps closest to that found in the first of the Hammurabi provisions: the man who wounded another in hot blood did not know what he was doing.³⁰

A further situation of killing dealt with in the Code of Hammurabi, seemingly governed by a similar principle, involves a man striking a pregnant woman and causing her to die, probably as a result of suffering a miscarriage.³¹ Where the aggressor was of high status and the victim of low status, the penalty prescribed in the Laws was thirty shekels of silver; this compares with the twenty shekels laid down as the penalty for killing a lower-status man in a fray, or the sixty shekels payable for blinding him.³² No text in the Laws tells us what the ordinary penalty would be for killing a lower-status woman, but it must be a reasonable supposition that it was greater than the thirty shekels laid down here, and that we are here dealing with a killing involving a reduced level of culpability. If we were to ask exactly why the aggressor was less blameworthy here than in an ordinary case of killing, the answer must surely be that it is because the death was an accidental, or at least unintended, consequence of the original wrong, the blow to the woman.

Only one of the early Mesopotamian Codes deals with the presumably straightforward case of the deliberate killing, § 1 of the early Laws of Ur-Namma:³³ 'If a man commits a homicide, they shall kill that man.' Beyond this, the only provision to say anything about that is § 153 of the Laws of Hammurabi, prescribing that a woman who has her husband killed because of her relationship with another man should be impaled. We know, though, from records of actual cases and from non-legal texts that such a killing would (or in any event might) be punished by the death of the wrongdoers.³⁴ The evidence is sufficient for us to recognize what we would otherwise have to have guessed, that there must have been a distinction between the ordinary case of killing³⁵ and the case where the defendant had undoubtedly killed but with a reduced level of culpability.

Hittite law followed very similar contours. The Laws, whose earliest texts date from around 1650 BC, begin with a set of provisions relating to homicide, but make no reference at all to the case of the deliberate killing. This we only find out about collaterally, primarily through an Edict of the

sixteenth-century King Telipinu providing that the choice between death and ransom is for the heirs of the victim and not for the King.³⁶ A letter from King Hattusili III to the Babylonian King Kadashman-Enlil II (late thirteenth century) apparently alludes to the same practice:

[T]hey do not kill (as punishment) in Hatti. [But. . .] they kill. If the King hears about it, [they pursue] that matter. They apprehend the murderer [and deliver him] to the relatives of the dead man, [but they allow] the murderer [to live. The place] in which the murder occurred is purified. If his relatives will not accept [the compensatory silver], they may make the murderer [their slave].³⁷

Not only is deliberate killing almost completely ignored by the Laws, but the two cases of reduced culpability which are dealt with are essentially identical to those found in Mesopotamia:³⁸

1. If anyone kills [a man] or a woman in a [quarr]el, he shall [bring him] (for burial) and shall give four persons, male or female respectively, and he shall look [to his house for it.]
2. [If] anyone kills [a male] or female slave in a quarrel, he shall bring him (for burial) [and] shall give [two] persons, male or female respectively, and he shall look to his house for it.
3. [If] anyone strikes a free [man] or woman so that he dies, but his hand sins, he shall bring him (for burial) and shall give two persons, and he shall look to his house for it.
4. If anyone strikes a male or female slave so that he dies, but his hand sins, he shall bring him (for burial) and shall give one person, and he shall look to his house for it.

The first pair of provisions, relating to killing in a quarrel, is relatively straightforward and is clearly the Hittite equivalent of § 47 of the Laws of Eshnunna and §§ 206–8 of the Laws of Hammurabi.³⁹ The second pair is more difficult. The wrongdoer strikes the victim, but in doing so he kills him or her.⁴⁰ His hand sins; less literally, it is an accident.⁴¹ Whatever translation we choose, it is generally accepted that we are here dealing with the case of a blow with an unexpected and unintended consequence, structurally speaking the same situation as the killing of the pregnant woman in §§ 210, 212 and 214 of the Laws of Hammurabi. It is possible that there was a contrasting term, ‘sin of the head’, to designate a deliberate killing, though this remains controversial and modern scholarly opinion tends towards rejecting it.⁴²

These provisions are followed by a text dealing with the killing of a merchant which in its original form is not in itself relevant to the present

discussion, but a version of it dating from around 1200 BC, the so-called Late Parallel Version, is highly suggestive:

- III If anyone kills a Hittite [merchant] in the midst of his goods he shall pay [. . .] minas of silver, and he shall replace his goods threefold. But [if] (the merchant) is not in possession of goods, and someone kills him in a quarrel, he shall pay 240 shekels of silver. But if his hand sins he shall pay 80 shekels of silver.⁴³

This provision is formulated very clearly in terms of a trichotomy: Since the same verb, *kuen-*, is used for killing in the first two instances, we are justified in translating this as killing, killing in a quarrel, and causing death by hand-sin-ning. This might be translated into modern terms as a trichotomy between premeditated killing, killing that is intentional but not premeditated, and accidental killing;⁴⁴ and while this is a reasonable approximation, it is none the less inexact. It is quite impossible to read into the word for killing in § III any requirement of premeditation which would govern the first of the three situations in contrast to the second and third. In so far as we might want to give the first element any limited range, this can only be done by reading back from the second and third elements: killing that is neither in hot blood nor the result of hand-sin-ning.⁴⁵ Premeditation, too, may be too narrow a term to use. Section 43 of the Laws looks to be exploring the boundary between unqualified killing and the reduced culpability of hand-sin-ning: ‘If a man is crossing a river with his ox, and another man pushes him off (the ox’s tail), grasps the tail of the ox, and crosses the river, but the river carries off the owner of the ox, (the dead man’s heirs) shall take that very man (who pushes him off).’⁴⁶ The penalty here, the handing over of the wrongdoer to the family of the victim, is that described in the Edict of Telipinu and the letter of Hattusili as appropriate to killing, not one of those laid down in §§ 2–3 for hand-sin-ning. Yet it is difficult to describe the wrongdoer’s conduct as ‘premeditated’. It is not obvious even that the killing was intentional, in the sense that the wrongdoer’s purpose was to cause death, and certainly there is no hint in the text of § 43 that this was thought to matter. While it is tempting to say that it is obvious that pushing a man into a river in spate is highly likely to kill him and that the defendant must surely have recognized this, and that it is this factor that differentiates the case of the ox’s tail from the normal case of the (unexpected) death by hand-sin-ning,⁴⁷ the temptation has to be resisted. The text will not go quite so far. All we can say with any confidence is that where a deliberate act led to death, without death being its purpose, there was room for a distinction to be drawn between cases which were treated as unqualified killing and cases of hand-sin-ning.⁴⁸ We do not know where the line was drawn, or indeed whether it was drawn at any specific place.⁴⁹

We may draw three provisional conclusions from this survey. First is that in the situations at which we have been looking liability was formulated primarily in result-oriented terms. Secondly, we may be confident that by the time of the Laws of Eshnunna, Hammurabi and the Hittites the paradigm case of liability in these situations involved intentional behaviour on the part of the defendant, though it is a striking fact that this is never explicitly stated. Thirdly, the case of the quarrel and the case of the unexpected consequence, the Hittite hand-sin, represented two standard cases of reduced culpability. While we cannot tell for certain whether they were seen as two stock examples of the same thing, we may note that they both involve situations which could be seen in terms of failures of cognition on the part of the wrongdoer.

The Hellenistic legal evidence, such as it is, fits into this pattern, though there has been a clear development within it. No substantial codes comparable to those of Hammurabi have been discovered, though a fragment from the Cretan city of Eltynia deals with personal injuries in the same way as the Ancient Near Eastern codes, laying down penalties for specific types of injury without any reference to the measure of the wrongdoer's culpability.⁵⁰ It is clear, too, that at least some kinds of assault would have been classified in terms of *hubris* in Athenian law; these, like the face-slapping provisions of the Ancient Near East, can hardly have involved anything less than deliberate wrongdoing.⁵¹ The wrong about which we are best informed, homicide, had come to include a distinction framed explicitly in terms of the wrongdoer's intentionality, reflecting or giving rise to a procedural distinction between the two types of cases.⁵² The late fifth-century re-publication of Dracon's homicide law, purportedly reproducing a seventh-century original,⁵³ provided that even if ('*kai*') the killing was not *pronoia* the wrongdoer should go into exile; the statement that killings should have the same effect whether or not they were *pronoia* clearly points to this as a fundamental distinction within the law. While the precise meaning of *pronoia* is uncertain, it clearly refers to the defendant's mental state, perhaps specifically to premeditatedness, perhaps more generally to a harmful intent.⁵⁴ It is probable, too, that this requirement was satisfied if the blow causing death was intentional, even if the death itself was not.⁵⁵

So too in the Greek rhetorical and ethical tradition. The pseudo-Aristotelian *Rhetoric to Alexander* introduces a trichotomy: *adikia*, wicked deeds done deliberately; *hamartema*, harmful acts done as the result of some ignorance; and *atuchia*, misfortunes, where a person is aiming to do something good but instead, without any fault on his or her part, causes some harm.⁵⁶ Aristotle is far more sophisticated, but his analytical framework is very much the same as this, with a principal division between acts which are *hekon* and those which are *akon*, conventionally translated as 'voluntary'

and 'involuntary',⁵⁷ and a mid-position between these two extremes where a person causes harm through ignorance.⁵⁸ An early work attributed to him speaks more generally of acting 'without thought', with a sense sufficiently broad to include both acting in anger and acting under a misapprehension,⁵⁹ thereby mirroring the approach of the Laws of Hammurabi and encompassing the two cases of reduced culpability found in the Hittite laws. In the Ethics, though, he draws a distinction between these: the person who acts in anger may act in ignorance, but not *because of* ignorance, and it is only the latter case that properly falls into the middle category.⁶⁰ For all the differences, though, the central fact remains that Aristotle is not departing one whit from what appears to be the traditional framework within which responsibility was analyzed, an examination of the actor's state of cognition. His work, too, reflects the third feature of the Babylonian and Hittite laws, in the recognition that the paradigm case of 'voluntary' action is best defined negatively, as 'not involuntary'.⁶¹

NEGLIGENCE AND RESPONSIBILITY: THE FAILURE TO TAKE APPROPRIATE CARE

Thus far we have been looking at cases where one person has acted in such a way as to bring about some undesirable result; in so far as there are gradations of responsibility these are expressed by reference to his or her mental state at the time of committing the act. We now turn to a very different set of situations, where the person's liability does not necessarily depend on their having done an act, and where responsibility is not linked to their mental state. These can be divided loosely into two categories: where one person has control over something belonging to another which is then destroyed, lost or damaged; and where injury is caused by someone's property.

The first of these categories is concerned with the liability of different types of bailee. Typical are the provisions dealing with the killing or disappearance of hired oxen. The Sumerian texts contrast on the one hand the situation of the ox being killed by a lion, where the hirer is free from liability, and on the other the situation of the ox simply being lost, where the hirer must replace it.⁶² The Laws of Hammurabi have the same contrast, though with a move to a more abstract formulation. Thus §§ 244 and 249 cover situations in which the loss is to be borne by the owner:

- 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.
- 249 If a man rents an ox, and a god strikes it down dead, the man who rented the ox shall swear an oath by the god and he shall be released.

Contrast with these § 245: 'If a man rents an ox and causes its death either by negligence or by physical abuse, he shall replace the ox with an ox of comparable value for the owner of the ox.'⁶³ A near-identical division is found relating to the liability of shepherds: if the animals are killed by a lion or die as a result of an epidemic, the loss is borne by the owner; but if they die from a mange attributable to the shepherd's negligence, then it is he who must bear the loss.⁶⁴

So too, *mutatis mutandis*, with boatmen. While the Sumerian laws speak of the liability of the boatman to replace the boat should it be lost through his deviating from an agreed route,⁶⁵ the Babylonian laws two or three hundred years later formulate the principle in more general terms. Hence, in § 5 of the Laws of Eshnunna: 'If the boatman is negligent and causes the boat to sink, he shall restore as much as he caused to sink.' The same in the Laws of Hammurabi:

- 236 If a man gives his boat to a boatman for hire, and the boatman is negligent and causes the boat to sink or become lost, the boatman shall replace the boat for the owner of the boat.
- 237 If a man hires a boatman and a boat and loads it with grain, wool, oil, dates or any other lading, and that boatman is negligent and thereby causes the boat to sink or its cargo to become lost, the boatman shall replace the boat which he sank and any of its cargo which he lost.⁶⁶

All of these texts use the same word for 'negligence', *egû*, whose core sense is the failure to do what one ought to do, something close to the modern English 'neglect';⁶⁷ outside the legal corpus, for example, it is used to describe an individual's failure to perform his duty towards a god. The same word is used to describe the behaviour of an agent who failed to take a receipt for payments,⁶⁸ of a householder who had failed to prevent the disappearance of another person's goods which were in his possession,⁶⁹ and perhaps of a guard who failed to prevent thieves getting into a house.⁷⁰ So too in the Epilogue to his Laws, Hammurabi boasts of his care for his people: 'I Hammurabi, the gracious king, have not been careless nor been slack on behalf of the dark-haired folk whom Illil has granted to me (and) whose shepherding Marduk has granted to me'.⁷¹ The sense of 'negligence' here is objective, therefore, in the sense that it involves measuring the defendant's conduct in the instant case against some external standard; though in one section of the Laws of Eshnunna it appears that that standard might have been the level of care which the defendant showed in the custody of his own property.⁷²

Essentially the same set of ideas can be traced in the Hittite sources. The text of the Laws draws the distinction between what we take to be liability for negligence and liability for accident, though it is only the latter that is

generalized in abstract terms: ‘If anyone hitches up an ox, a horse, a mule or an ass, and it dies, [or] a wolf devours [it], or it gets lost, he shall replace it at fair value. But if he says, “It died by the hand of a god,” he shall take an oath (to that effect).’ The links between this and the Sumerian and Babylonian laws are evident. The only real difference is that the Hittite text lacks the general principle of liability for neglect or negligence found in Hammurabi’s Laws. It is, therefore, especially interesting to find an articulation in abstract terms in the case-law, in the only substantial record of a Hittite lawsuit so far discovered.

The case, dating from the late thirteenth century BC, was brought by Queen Puduhepa against one of her officials, Ukkura, together with his son Ura-Tarhunta (‘Great is the Stormgod Tarhunta’) and others.⁷³ Ukkura was in charge of a caravan transporting goods from Hattusa to Babylon. His son, it appears, was assisting him, and took delivery from the Queen of a substantial cargo, consisting of chariots, bronze and copper goods, cloth, bows and arrows, shields, weapons, tools, men, oxen, sheep and mules. Proper documentation was lacking, goods went missing, and on their return the Queen hauled them to the temple of the goddess of the Underworld, Lelwani, to swear oaths as to what had happened. The oath sworn by Ukkura is of particular interest: ‘It was for me a matter of *šallakartatar* but not of *kupiyatis*.’ The primary purpose of the oath is to deny that he is in any way a participant in a deliberate plan to despoil the Queen’s property; the core meaning of *kupiyatis* is ‘plot’ or ‘scheme’, with obvious overtones of deliberate action.⁷⁴ At the same time he admits to being guilty of *šallakartatar*, literally ‘big-heartedness’, with negative connotations of presumptuousness or hubris.⁷⁵ This core meaning, like the Babylonian *egû*, shades into the failure to take proper care. When an oracle is asked whether a predicted road accident—or misdeed of horses – will happen to the King by human *šallakartatar*, the temptation to translate it as ‘negligence’ is irresistible.⁷⁶ In the context of Ukkura’s lawsuit, it can really only mean that he has neglected his duty towards the Queen, that while he has done nothing wrong himself he has failed to keep proper control over what was happening within the scope of his responsibilities.

The second category of cases is typified by the case of a man being gored by an ox. The Laws of Hammurabi distinguish two situations:⁷⁷

- 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 (?) its horns or control his ox, and that ox gores to death a member of the awilu-class, 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.

In the simple case there is no liability; if however the owner has been warned and has failed to take appropriate action then liability will arise if the ox gores someone to death. The identical rule is applied in the Laws of Eshnunna, and is extended to the case where a dog bites someone after its owner has been warned of its vicious propensities.⁷⁸ So too where a person is warned that his wall is dangerous and he does nothing about it, reflecting a provision in the earlier Sumerian Laws of Lipit-Ishtar that a man warned that his land is falling into neglect must compensate his neighbour for any property that is lost should thieves get into his house through the derelict land.⁷⁹ In none of these cases has the defendant *acted* in such a way as to cause the loss or injury; liability arises from the failure to do something that ought to have been done once the warning had been given: the failure to control an ox or dog, the failure to reinforce a wall, the failure to fortify a field.

The same principle, though, formulated more revealingly, lies behind a group of provisions in the Laws of Hammurabi about the escape of water from an irrigation canal:

- 53 If a man has been slack in reinforcing the embankment of (the irrigation canal of) his field and does not reinforce its embankment, and then a breach opens in its embankment and allows the water to carry away the common irrigated area, the man in whose embankment the breach opened shall replace the grain whose loss he caused.
- 55 If a man opens his branch of the canal for irrigation and has been slack and allowed the water to carry away his neighbour's field, he shall measure and deliver grain in accordance with his neighbour's yield.⁸⁰

Regulation of water was a deadly serious matter in ancient Mesopotamia,⁸¹ and it is unsurprising that there is no suggestion here that a warning was needed before liability could arise. The person who was slack, literally 'who let his hand drop',⁸² who was neglectful of his responsibility to keep his bank in repair or who allowed his water to sweep across his neighbour's field, was required to pay compensation. This principle was not limited to Babylon. A fragmentary inscription from early fifth-century Crete imposes a penalty on a landowner when water flooded from his land as a result of his *ameleia* – that is to say his failure to take due care;⁸³ and in one of his Orations Demosthenes refers to flooding caused by the *ameleia* of a predecessor in title of the defendant's father.⁸⁴ It may be, too, that similar ideas lay behind the clause of the Twelve Tables which formed the foundation of the developed

Roman liability for *aquae pluviae arcendae*, which looks to be referring to the situation where damage has been caused by escaping rain-water.⁸⁵

The failure to take proper care does have some part to play in Aristotle's treatment of responsibility, but it is only a secondary part. As we have seen, responsibility is primarily determined by reference to whether the defendant was acting voluntarily, not under a mistake, *hamartema*. In the Eudemean Ethics this is qualified. Although in the normal case the person would have been treated as acting involuntarily when acting under a mistake, this is not so where he or she has through *ameleia*, failing to take proper care, either failed to make use of knowledge or failed to obtain the knowledge in the first place.⁸⁶ But the important feature to note is that *ameleia* is not in itself a reason for holding someone responsible. It is a reason for treating ignorance as if it were knowledge.

We might loosely treat the second type of responsibility as appropriate to different situations from the first: to cases where the defendant had a special status or was in some relationship (typically contractual) with the victim, rather than to cases where there was no such status or relationship. We need have no doubt that the two forms were logically distinct and that they had different focal ranges of application, but it is as well not to treat this distinction too rigidly. The more serious end of the responsibility spectrum seems to have been characterized indifferently in terms of deliberate wrongdoing (if subject to a degree of ambiguity about what constituted deliberateness), and in general it would be a mistake to suppose that in practice there could have been no cross-over between them.

The principal function of both approaches to the analysis of responsibility was, no doubt, to determine whether and to what extent a person was or was not liable for some result. By the time of the Greek orators, though, this was not its sole function; it was also being used to cut through issues of causal ambiguity, where liability might be ascribed to one or more of a number of interacting causes, and it is here that we see most clearly the way that the two forms might have operated side by side. The classical form in which the problem was framed was the case of the javelin thrower. The defendant throws a javelin, the victim walks across the field in front of it and is killed. Pericles, we are told, 'squandered an entire day discussing with Protagoras whether it was the javelin, or rather the one who hurled it, or the judges of the contests, that "in the strictest sense" ought to be held responsible for the disaster'.⁸⁷ A more detailed picture is painted in the version of the problem discussed by Antiphon in his *Second Tetralogy*.⁸⁸ Boys were practising with their javelins under the eye of their trainer. One of them threw just at the moment that another one ran out into the field to pick up those that had been thrown before. The javelin hit him and he died. The question was whether the killing had been done by the person throwing the javelin, or by the victim

himself, or just possibly by the trainer. Central to the defendant's argument, and essentially admitted by the prosecutor, is the presupposition that the identity of the killer is to be discerned by seeing which of the two boys was to blame for the death.⁸⁹ This is the central point: the defendant is not saying that he killed but he should be excused because of his lack of blameworthiness; he is saying that his lack of blameworthiness means that *he* did not kill at all. The arguments about which of the boys was to blame touch both on their mental state, particularly whether one of them was guilty of *hamartema*, error, and also on whether either or both of them was acting in the proper way. Essentially they are arguments of the two types which we have been examining: both could be called into play alongside each other.



RESPONSIBILITY IN ROMAN LAW

There is not a lot of evidence about the approach to responsibility found in early Roman law, but such as there is points towards it not having been substantially different from the approach found in other early legal systems. So far as personal injury is concerned, liability in the Twelve Tables is expressed in straightforward result-oriented terms:

- I.13 If he has maimed a part (of a body), unless he settles with him, there is to be talion.
- I.14 If he has broken a bone of a free man, 300, if of a slave, 150 (asses) are to be the penalty.
- I.15 If he do (any other) injury ?to another?, 25 (asses) are to be the penalty.⁹⁰

It is easy to suppose that the primary concern of these provisions was with the deliberate infliction of the relevant harm, but the centrally important feature is that there was no such limitation expressed in the texts themselves.⁹¹ In this respect they parallel exactly the 'codes' of the Ancient Near East and (so far as we can tell) the equivalent Greek provisions. For property damage, the *lex Aquilia*, probably of the third century BC, similarly focused on the causation of the relevant harm:

- 1 If anyone shall have unlawfully killed a male or female slave belonging to another or a four-footed animal, whatever may be the highest value of that in that year, so much money is he to be condemned to give to the owner.
- 3 If anyone may cause loss to another, insofar as he shall have burnt, smashed or maimed unlawfully, whatever may be the value of that matter in the thirty days next ?preceding?/?following?, so much money is he to be condemned to give to the owner.⁹²

NOTES

1. A.D.E. Lewis and M. Crawford, in M. Crawford, ed., *Roman Statutes*, London, 1996, II.560–61. See too the discussions, with literature, in M. Ducos, *L'Influence Grecque sur la Loi des Douze Tables*, Paris, 1978; F. Wieacker, *Römische Rechtsgeschichte*, Munich, 1988, 299–304; A. Watson, *Legal Transplants*, 2nd edn., Athens, Ga, 1993, 25–7.
2. *Gl constitui* ad D.1.2.2.4; W. Wolodkiewicz, 'Les Remarques d'Accurse sur les Origines Grecques de la Loi des XII Tables', in R. Feenstra *et al.*, eds., *Collatio Iuris Romani*, Amsterdam, 1995, 643.
3. R. Yaron, 'Semitic Influences in Early Rome', in A. Watson, ed., *Daube Noster*, Edinburgh, 1974, 343. See too E. Volterra, *Diritto Romano e Diritti Orientali*, Bologna, 1937, 1–9, for earlier arguments.
4. See in particular Ducos, *L'Influence Grecque*; F. Wieacker, 'Solon und die XII Tafeln', in *Studi Volterra*, Milan, 1971, III.757. The modern consensus appears clearly from

- M. Bretone, *Storia del Diritto Romano*, 7th edn., Rome, 1999, 79: 'L'ispirazione greca delle XII Tavole e sicura'.
5. Or, more properly perhaps, not-code. There is much disagreement among scholars as to the nature of the early texts (collections of judgments or precedents, legal codes designed for practical application, literary constructs within a scholarly tradition) and as to the mechanisms of their transmission from one culture to another over many centuries (cf. R. Westbrook, *History of Ancient Near Eastern Law*, Leiden, 2003, I.15–19). These controversies do not impinge significantly on the present paper, whose concern is with legal values rather than legal rules; all that is important is that we may suppose that the values found in the texts reflect a particular legal tradition.
 6. R. Westbrook, 'The Nature and Origin of the Twelve Tables', 105 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* (1988), 74. For the cultural continuity from Mesopotamia, see generally S. Dalley, ed., *The Legacy of Mesopotamia*, Oxford, 1998.
 7. The link was probably made by the early third-century jurist Paul, in a text preserved in the *Mosaicarum et Romanarum Legum Collatio*: Coll. 2.5.1; but the manuscripts of the Collatio are defective at this point, so we cannot be certain of this (see T. Mommsen, in P. Krueger, T. Mommsen and W. Studemund, eds., *Collectio Librorum Iuris Anteiustiniani*, Berlin, 1890, III.144; M. Hyamson, *Mosaicarum et Romanarum Legum Collatio*, Oxford, 1913, 8–9). The text is incorporated into Justinian's Institutes 4.4.pr., and it is generally supposed that the lacuna in the Collatio can be filled by reference to this. It is worthy of note that the Hebrew *peša* (=sin, unfaithfulness) in Genesis 31.36 is translated as *adikema* in the Septuagint and as *culpa* in the Vulgate (I owe this reference to Professor William Horbury). Another text possibly showing the same link between the two ideas is Exodus 22.9, where *peša* is translated by *adikema* in the Septuagint, and by *kusya*' (or *bhysya*' (= negligence)) in the Aramaic targum Ps. Jonathan: cf. D. Daube, 'Negligence in the Early Talmudic Law of Contract', in *Festschrift Fritz Schulz*, Weimar, 1951, I.124, 132–4.
 8. H. Grotius, *Florum Sparsio ad Ius Iustinianum*, Paris, 1642, 67; *Nicomachean Ethics*, III.1, V.8. The strongest proponent of this view in more modern times was Bernhard Kübler: 'Der Einfluß der Griechischen Philosophie auf die Entwicklung der Lehre von den Verschuldensgraden im Römischen Recht', in K. Larenz, ed., *Rechtsidee und Staatsgedanke*, Berlin, 1930, 63.
 9. D. Daube, *Aspects of Roman Law*, Edinburgh, 1969, 131–56.
 10. J. Crook, review of Daube, 20 *Classical Review* (NS) (1970), 363; M. Schofield, 'Aristotelian Mistakes', 19 *Proc. Camb. Philological Soc.* (NS) (1973), 66; R. Sorabji, *Necessity, Cause and Blame*, London, 1980, 278–81.
 11. *Eudemian Ethics*, II.9 1225b10–16. For the primacy of the *Eudemian Ethics* in the Roman world, see A. Kenny, *Aristotelian Ethics*, Oxford, 1978.
 12. The connexion between the Ancient Near East (at least, the Code of Hammurabi) and Aristotle is made by B. Kübler, 'Les Degrés de Faute dans les Systèmes Juridiques de l'Antiquité', in *Introduction à l'Étude du Droit Comparé (Études Lambert)*, Paris, 1938, I.174, but he fails to distinguish between the different criteria for assessing responsibility (the same, it should be said, is true of some scholars of the Ancient Near East: e.g. J. Klíma, 'Fahrlässigkeit', in *Reallexikon der Assyriologie*, Berlin, 1928–).
 13. J. Renger, 'Wrongdoing and its Sanctions: On "Criminal" and "Civil" Law in the Old Babylonian Period', 20 *Journal of the Economic and Social History of the Orient* (1977), 65; D.M. MacDowell, *The Law in Classical Athens*, Ithaca, 1978, 54.
 14. Translation from M. Roth, *Law Collections from Mesopotamia and Asia Minor*, 2nd edn., Atlanta, 1997, from which all translations of Ancient Near Eastern texts are taken unless otherwise stated. The readings and interpretation of the text are in places uncertain (cf. C. Saporetti, *Antiche Leggi*, Milan, 1998, 115–21). There is now a very full introduction to the laws of the ancient Near East: Westbrook, *A History of Ancient Near Eastern Law*.
 15. Laws of Eshnunna, §§ 42–47A; Laws of Hammurabi, §§ 195–214.

16. Hittite Laws, §§ 7–16.
17. Exodus 21.23–5 (NEB translation).
18. R. Haase, *Einführung in das Studium keilschriftlicher Rechtsquellen*, Wiesbaden, 1965, 114; D. Nörr, 'Zum Schuldgedanken im Altbabylonischen Strafrecht', 75 *ZSS, Rom. Abt.* (1958), 1; G. Cardascia, 'Le Caractère Volontaire ou Involontaire des Atteintes Corporelles dans les Droits Cunéiformes', in *Studi in Onore di Cesare Sanfilippo*, Milan, 1985, VI.163 (with references to literature at 165 n.4).
19. Cf. the sensible warning of Westbrook, *History of Ancient Near Eastern Law*, I.73.
20. For discussion, see R. Yaron, *The Laws of Eshnunna*, 2nd edn., Jerusalem, 1988, 285–91; E. Otto, 'Aspects of Legal Reforms and Reformulations in Ancient Cuneiform and Israelite Law', in B.M. Levinson, ed., *Theory and Method in Biblical and Cuneiform Law* (Journal for the Study of the Old Testament, Supplementary Series vol. 181 (1994)), 160, 168–71.
21. I.e., a person of high social status.
22. M. Roth, 'Ancient Rights and Wrongs: Mesopotamian Legal Traditions and the Laws of Hammurabi', 71 *Chicago-Kent Law Review* (1995), 13, 24–36. In addition, Roth points to the strong element of dishonour involved in the slap across the face: in the Near Eastern corpus it always involves the inversion of proper relations of power or respect, and there is no example where the person receiving the slap is a social inferior to the person administering it. See too Westbrook, 'The Nature and Origin of the Twelve Tables', 103–8 (though I am not convinced by the author's linking of the XII Tables provision on *iniuria* (Table I.15 (below note 90)) with the face-slapping provisions of the Near Eastern Codes).
23. Laws of Hammurabi, §§ 195–205. The structure of the text is examined in E. Otto, *Körperverletzungen in den Keilschriftrechten und im Alten Testament: Studien zum Rechtstransfer im Alten Testament*, 56–70.
24. Cf. Laws of Eshnunna, §§ 47 and 47A, Exodus 21.18–19, Middle Assyrian Laws, § A 8; J.R. Ziskind, 'When Two Men Fight: Legal Implications of Brawling in the Ancient Near East', 44 *Revue Internationale des Droits de l'Antiquité*, 3rd series (1997), 13.
25. Laws of Hammurabi, § 201.
26. As Roth translates, § 227.
27. As Roth translates, § 206.
28. As § 206 and § 227 are translated in G. Driver and J.C. Miles, *The Babylonian Laws*, Oxford, 1955.
29. *Chicago Assyrian Dictionary*, sub-verb *idû* (3).
30. Compare the approach of Aristotle, below p.108.
31. Laws of Hammurabi, §§ 209–14. §§ 209, 211 and 213 deal with the blow causing a miscarriage, §§ 210, 212 and 214 with the death of the woman. Though the Hammurabi text is not explicit, there is an obvious implication that the woman's death followed from the miscarriage. Compare the Laws of Lipit-Ishtar, §e, to the effect that causing death in such circumstances should be punished by the death of the aggressor; so too in the Middle Assyrian Laws, § A 50 and the Hebrew Exodus 21.22–3 (where the link between the miscarriage and the death is made clear). For the linkage between §§ 206–8 and §§ 209–14 of the Laws of Hammurabi, see Otto, *Körperverletzungen*, 56–70.
32. Laws of Hammurabi, §§ 212, 208, 198.
33. Reflected too in trial reports of the time: Westbrook, *History of Ancient Near Eastern Law*, I.219. There is another example from a later period: Middle Assyrian laws, § B 2.
34. T. Jacobsen, 'An Ancient Mesopotamian Trial for Homicide', in *Toward the Image of Tammuz*, Cambridge, MA, 1970, 193; D.J. Wiseman, 'Murder in Mesopotamia', 36 *Iraq* (1974), 249, 258 ff; Westbrook, *History of Ancient Near Eastern Law*, I.414, 515–16 (K. Slanski). Cf. R. Westbrook, *Studies in Biblical and Cuneiform Law*, Paris, 1988, 49–55, arguing that the relatives of the victim might choose between carrying out the execution or accepting a ransom.
35. We would suspect that this would have involved a deliberate killing, but there is no evidence from which we can securely draw this conclusion.

36. Edict of Telipunu, § 49 (in Roth, *Law Collections*, 237); I. Hoffmann, *Der Erlass Telipinus*, Heidelberg, 1964, 53. For the interpretation of the provision, see H.A. Hoffner, 'On Homicide in Hittite Law', in G.D. Young *et al.*, eds., *Crossing Boundaries and Linking Horizons: Studies in Honor of Michael C. Astour on his 80th Birthday*, Bethesda, MD, 1997, 293, 311.
37. G. Beckman, *Hittite Diplomatic Texts*, 2nd edn., Atlanta, 1999, 138 no. 23, at 142 § 10 (also in W.W. Hallo, ed., *The Context of Scripture*, Leiden, 2002, III.52).
38. Translation from H.A. Hoffner, *The Laws of the Hittites*, Leiden, 1997, reproduced in Roth, *Law Collections*, but adopting the more literal translation of §§ 3 and 4, given by Hoffner in his footnote. See too Hoffner, 'On Homicide in Hittite Law', 297.
39. 'In a quarrel' here has a causal sense (F. Imparati, *Le Leggi Ittite*, Rome, 1964, 184–94; Hoffner, *The Laws of the Hittites*, 166); cf. the translation 'in anger' in E. Neufeld, *The Hittite Laws*, London, 1951. Cf. also § 174: 'If (when) men are hitting each other, one of them dies, (the other) shall give one slave.' But this would appear to be dealing with a death resulting from a boxing bout rather than a killing in anger.
40. There is a change of verb between §§ 1 and 2 and §§ 3 and 4; in the former pair the defendant 'kills', in the latter pair 'death follows': Hoffner, *The Laws of the Hittites*, 170.
41. See further U. Sick, 'Die Tötung eines Menschen und ihre Ahndung in den Keilschriftlichen Rechtssammlungen unter Berücksichtigung rechtsvergleichender Aspekte', dissertation, Tübingen, 1984, 194–7; J. Catsanicos, *Recherches sur le Vocabulaire de Faute*, Paris, 1991; P. Dardano, "'La Main est Coupable'", *"Le Sang Devient Abondant"*, 71 *Orientalia* (NS) (2002), 333, 374–6, with references.
§ 174 (above note 39) would seem to envisage a case of this sort too. Cf. Exodus 21.13, contrasting premeditated killings with killings on a chance meeting: 'But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee' (RSV translation); the parallel between this and the Hittite sin of the hand is drawn by D. Daube, 'Direct and Indirect Causation in Biblical Law', 11 *Vetus Testamentum* (1961), 246, 255.
42. J. Friedrich, *Die Hethitischen Gesetze*, Leiden, 1959, 90–91; R. Westbrook and R.D. Woodward, 'The Edict of Tudhaliya IV', 110 *Journal of the American Oriental Society* (1990), 641, 644–5; Catsanicos, *Recherches sur le Vocabulaire de Faute*, 13–14; Dardano, "'La Main est Coupable'", *"Le Sang Devient Abondant"*, 360–62. The interpretation of the clause of the Edict of Tudhaliya ('SAG.DU-ZU wa-as-ta') which is the principal evidence for such a conception is highly problematic. Early commentators, criticized by Westbrook and Woodward, generated the phrase by emending the verb 'wa-as-ta' in the text, but Catsanicos suggests that the Hittite could be rendered as 'the head sins' without the need for any emendation. That said, though the Sumerogram SAG.DU translates literally as 'head', it commonly means simply 'person' (as in §§ 1–4 of the Laws).
43. See too § VI, introducing the quarrel-hand-sinning pair into the case of blinding.
44. R. Haase, 'Zum Tatbestand der Vorsätzlichen Tötung eines Menschen in der Hethitischen Rechtssammlung', 18 *Bibliotheca Orientalis* (1961), 14. Cp. Cardascia, 'Le Caractère Volontaire ou Involontaire des Atteintes Corporelles dans les Droits Cunéiformes', in *Studi Sanfilippo*, VI.163, 200–207, which seems to draw too unsubtle a contrast between voluntary and involuntary actions.
45. Cf. Exodus 21.13, Deut 19.4–5, allowing for places of sanctuary for those who killed unpremeditatedly.
46. This may be a precedent case (Hoffner, *Laws of the Hittites*, 188), though we should not rule out the possibility of its being a schoolroom hypothetical. Note also § 44a, which seems to be a variant on the same theme: 'If anyone makes a man fall into a fire, so that he dies, (the guilty party) shall give a son in return.' The penalty here is difficult to explain.
47. Contrast, perhaps, § 44a (above note 46).
48. Greek law seems to have had the same problem: below p.107.

49. See too the Sumerian Laws Exercise Tablet, §§ 1 and 2, where the bringing about of a miscarriage by jostling the mother is treated less severely than bringing it about by striking her. While in the latter case the blow may have been intentional and in the former not (Driver and Miles, *Babylonian Laws*, 413–14), we should still want to say that the miscarriage was an unintended consequence in both cases.
50. H. van Effenterre and F. Rudé, *Nomima*, Rome, 1994, 1995, II.290 no. 80; I. Arnaoutoglou, *Ancient Greek Laws*, London, 1998, 34, no. 32 (early fifth century).
51. S.C. Todd, *The Shape of Athenian Law*, Oxford, 1993, 270–71; M. Gagarin, ‘The Athenian Law against Hubris’, in G.W. Bowersock *et al.*, eds., *Arktouros: Hellenic Studies presented to Bernard M.W. Knox on the Occasion of his 65th Birthday*, Berlin, 1979, 229; D.M. MacDowell, ‘Hybris in Athens’, 23 *Greece and Rome*, 2nd series (1976), 14.
52. Aristotle, *Constitution of Athens*, 57.3; D.M. MacDowell, *Athenian Homicide Law in the Age of the Orators*, Manchester, 1963.
53. Van Effenterre and Rudé, *Nomima*, I.16 no. 2, with notes to literature. The beginning of the text is missing.
54. M. Gagarin, *Drakon and Early Athenian Homicide Law*, New Haven, 1981, 30 ff, with discussion of different views.
55. MacDowell, *Athenian Homicide Law*, 59.
56. [Anaximenes], *Rhetoric to Alexander*, 1427a30–37. Note too Plato, *Laws*, 866d–67a, introducing a mid-point of killing in anger between the two poles of voluntary and involuntary killing.
57. *Magna Moralia*, I.9 1187a19–22, I.11 1187b32–5; *Eudemian Ethics*, II.7 1223a21–3; *Nicomachean Ethics*, III.1 1109b30–33, V.8 1135a19–23. For the problems of translating the Greek terms *hekon* and *akon* into English, see D. Bostock, *Aristotle’s Ethics*, Oxford, 2000, 103–4.
58. *Rhetoric*, 1374b6; *Eudemian Ethics*, II.9 1225a37–1225b11; *Nicomachean Ethics*, III.1 1110b19–1111a21, V.8 1135b12–26.
59. *Magna Moralia*, I.16 1188b25–32.
60. *Nicomachean Ethics*, III.1 1110b25–30, V.8 1135b12–26; cf *Eudemian Ethics*, II.9 1225b6–7. The distinction also has to be drawn between the situation where the harm brought about is reasonably foreseeable and where it is not; where it is not, then it is a misfortune, *atuchia*. It is *hamartema* only when the test of reasonable foreseeability is satisfied.
61. This is clearest in *Nicomachean Ethics*, III.1, where the argument moves directly from stating that we need to define the voluntary and the involuntary (1109b30–35) to an analysis of those factors bringing about involuntariness (1110a1–2).
62. Sumerian Laws Exercise Tablet, §§ 9, 10; Laws about Rented Oxen, §§ 7, 8.
63. Laws of Hammurabi, § 245.
64. Laws of Hammurabi, §§ 266–7.
65. Laws of Lipit-Ishtar, § 5; Sumerian Laws Exercise Tablet, § 3.
66. Note also § 238 (no explicit reference to fault) and § 240 (concrete situation deriving from general principle). The Middle Assyrian Laws, M1 and M2a, also deal with boatmen, though by reference to specific situations; but the tablet is not complete so we cannot tell if a similar generalization would have been found there.
67. *Chicago Assyrian Dictionary*, sub-verb *egû*. The nature of negligence in the Laws of Hammurabi is discussed by Driver and Miles, *Babylonian Laws*, I.461–6, though with too great an emphasis on the supposed nature of the tort of negligence in English law. See too E. Szelechter, *Les Lois d’Ešnunna*, Paris, 1954, 101 (squeezing the Babylonian into the Roman idea of *culpa* found in D.18.6.12 (11) and D.13.6.18.pr: ‘diligentia quam debent homines frugi praestare, culpa in abstracto’), and A. Goetze, *The Laws of Eshnunna*, New Haven, 1956, 39. To the same effect, translating simply as *fahrlässigkeit*, is Klíma, ‘Fahrlässigkeit’.
68. Laws of Hammurabi, § 105.
69. Laws of Hammurabi, § 125; see further below note 72.

70. Laws of Eshnunna, § 60; though note the strong reservations of Yaron as to the reconstruction of this text: Yaron, *The Laws of Eshnunna*, 79–80.
71. Driver and Miles, *Babylonian Laws*, 95 (not in Roth).
72. Laws of Eshnunna, § 37: property deposited with a *nap̄tarum* is stolen; the depositee can exonerate himself by swearing that his own goods were lost too, and that he was not guilty of any fraud (for a discussion of the meaning of *nap̄tarum*, see R. Westbrook, 'The Old Babylonian Term *naptarum*', 46 *Journal of Cuneiform Studies* (1994), 41–6). See Yaron, *The Laws of Eshnunna*, 248–51. Contrast Laws of Hammurabi, § 125 (above note 69), where the depositee is liable if his own goods have been lost too. The Eshnunna provision goes a long way towards confirming the conjecture of Paul Koschaker (*Rechtsvergleichende Studien zur Gesetzgebung Hammurapis, Königs von Babylon*, Leipzig, 1917, 7–45) that Hammurabi's law marks a change from an earlier rule that the depositee would not be liable if his own goods had been lost too. Cf. too Exodus 22.8, 10–12, discussed by D. Daube, 'Negligence in the Early Talmudic Law of Contract (*Pešī'ah*)', in *Festschrift Fritz Schulz*, Weimar, 1951, I.124). For a recent comparative study see E. Otto, 'Die Rechtshistorische Entwicklung des Depositenrechts in Altorientalischen und Altisraelitischen Rechtskorpora', 105 *ZSS, Rom. Abt.* (1988), 1; older but more wide-ranging is the classic study of Fritz Schulz: 'Rechtsvergleichende Forschungen über die Zufallshaftung in Vertragshältnissen', 25 *Zeitschrift für Vergleichende Rechtswissenschaft* (1911), 495; 27 *Zeitschrift für Vergleichende Rechtswissenschaft* (1912), 145.
73. Edited, with commentary, by R. Werner, *Hethitische Gerichtsprotokolle*, Wiesbaden, 1967, 3; translated by H.A. Hoffner in Hallo, *The Context of Scripture*, III.57. See too the brief discussion in O. Gurney, *The Hittites*, 2nd edn., London, 1975, 94, and the lengthier analysis (with an English translation of the text) in C.F. Justus, 'The Case of the Missing Dusdumi and Lalami', 29–30 *Minos* (1994–95), 213.
74. J. Puhvel, *Hittite Etymological Dictionary*, Berlin, 1984–, sub-verb *kup-*; the translation of Hoffner is 'deliberate deceit'.
75. *Chicago Hittite Dictionary*, fascicle Š, 84, sub-verb *šallakartatar*.
76. R. Beal, 'Assuring the Safety of the King during the Winter', in Hallo, *The Context of Scripture*, I.207, 210. In the Ukkura text Hoffner translates the word as 'careless incompetence'.
77. Similar is the Hebrew Covenant Code: Exodus 21.28–9. See, among much else, J. Finkelstein, 'The Ox that Gored', 71 (2) *Transactions of the American Philosophical Society* (1981), 1, 14–39; M. Malul, *The Comparative Method in Ancient Near Eastern and Biblical Studies*, Kevelaer, 1990, 113–52; J. van Seters, *A Law Book for the Diaspora*, Oxford, 2003, 119–22.
78. Laws of Eshnunna, §§ 54–7.
79. Laws of Eshnunna, §58; Laws of Lipit-Ishtar, §11. Probably also in the Laws of Hammurabi, where our text is defective: § e, between §§ 65 and 66 (Roth, *Law Collections*, 95).
80. Translation from Roth, though replacing her references to neglect and negligence with the more non-committal 'has been slack' used by Driver and Miles. Note also the Neo-Babylonian Laws (c.700 BC), §§ 2 and 3; these may have dealt with similar cases, but the text is too fragmentary to be reconstructed properly.
81. For the context, see J.N. Postgate, *Early Mesopotamia*, London, 1992, 173–83. The need for organization and co-operative activity in ensuring a water supply is graphically brought out in S.D. Walters, *Water for Larsa*, New Haven, 1970, especially at 143–66.
82. The phrase is the same as is used in the Epilogue to the Laws, above note 71.
83. Van Effenterre and Rudé, *Nomima*, II.322. The reference to *ameleia* involves a conjectural reconstruction of the text, but it is generally accepted.
84. Demosthenes, *Against Callicles*, 55.11. See too Plato, *Laws*, 844c.
85. Tab VII.8, in Crawford, *Roman Statutes*, II.673–5: 'si aqua pluuiua nocet. . .'. The comparative context provides some support for the hesitant view of Professors Crawford and Lewis that the focus of the provision of the Twelve Tables was on loss which had already occurred, against the argument of Professor Watson that it must have been concerned

- with the fear of prospective damage (*The Law of Property in the Later Roman Republic*, Oxford, 1968, 155); cf. F. Sitzia, *Ricerche in Tema di 'Actio Aquae Pluviae Arcendae': dalle XII Tavole all'Epoca Classica*, Milan, 1977, 1–39.
86. *Eudemian Ethics*, II.9 1225b10–16. Compare *Nicomachean Ethics*, III.5 1113b25–1114a3, using the language of causal responsibility (cf. T. Irwin, *The Nicomachean Ethics*, Indianapolis, 1999, 208–9, 318–19), on which see below.
 87. Plutarch, *Pericles*, 36.3 (trans. B. Perrin, Loeb Classical Library, London, 1916).
 88. See the commentary in M. Gagarin, ed., *Antiphon: The Speeches*, Cambridge, 1997, 144–60.
 89. *Second Tetralogy*, 2.6, 4.5–7. For the prosecutor's more muted acceptance of this, 3.6.
 90. Translation from Crawford and Lewis, in Crawford, *Roman Statutes*, II.607. The meaning of Tab I.15 is unclear, though note the parallel with Laws of Eshnunna, § 47.
 91. Crawford and Lewis, in Crawford, *Roman Statutes*, 607; R. Wittmann, *Die Körperverletzung an Freien im Klassischen Römischen Recht*, Munich, 1972, 19–23.
 92. J.A. Crook, in Crawford, *Roman Statutes*, II.723–6.
 93. MacDowell, *Athenian Homicide Law*, 73–9.
 94. U. von Lubtow, *Untersuchungen zur Lex Aquilia de Damno Dato*, Berlin, 1971, 84–5.
 95. J.-L. Ferrary, in Crawford, *Roman Statutes*, II.749–53.
 96. F.I.R.A. I.13; T. Mommsen, *Römisches Strafrecht*, Leipzig, 1899, 612–14; J.D. Cloud, 'Parricidium: from the lex Numae to the lex Pompeia de Parricidiis', 88 *ZSS, Rom. Abt.* (1971), 1, 2–18.
 97. Cf. also Livy XXII.10.5 (quoted in Crawford, *Roman Statutes*, II.607), implicitly distinguishing between the knowing and unknowing (*insciens*) killing or injuring of a sacrificial victim.
 98. Table VIII.13 (Crawford and Lewis, in Crawford, *Roman Statutes*, II.692–4); see A. Völkl, *Die Verfolgung der Körperverletzung im Frühen Römischen Recht*, Vienna, 1984, 83–143, especially 118–30. The parallel is sometimes drawn with the Hittite formulation of accidental injury as a 'sin of the hand' (above p.105): e.g. E. Cuq, *Études sur le Droit Babylonien*, Paris, 1929, 488; Imparati, *Leggi Ittiti*, 187 n.6.
 99. *Rhetoric ad Herennium*, 2.16.24: Si autem imprudentia reus se peccasse dicit, primum quaeretur, utrum potuerit nescire an non potuerit; deinde, utrum data sit opera, ut sciretur, an non; deinde, utrum casu nescierit an culpa. Nam qui se propter vinum aut amorem aut iracundiam figisse rationem dicit, is animi vitio videbitur nescissem non imprudentia; quare non imprudentia se defendet, sed culpa contaminabit. Similar is Quintilian, *Institutiones Oratoriae*, 5.10.34, 7.2.40. S. Schipani, *Responsabilità 'ex lege Aquilia', Criteri di Impunzione e Problema della 'Culpa'*, Turin, 1969, 91–131.
 100. Cf. *Eudemian Ethics*, II.9 1225b10–16 (above p.112)
 101. G.3.211 (below note 108). See the many examples given by G.D. MacCormack, 'Culpa', 38 *Studia et Documenta Historiae et Iuris* (1972), 123.
 102. The earliest text referring to this is D.16.3.32 (Celsus, 11 *Digestorum*), citing the early classical jurist Nerva. See H. Hausmaninger, 'Diligentia quam in Suis', in D. Medicus and H.H. Seiler, eds., *Festschrift für Max Kaser zum 70 Geburtstag*, Munich, 1976, 265. It is hard to account for the parallel with § 37 of the Laws of Eshnunna (above note 72); there are parallels too in the Indian *Ngrada-smṛti* 2.9, *Bṛhaspati-smṛti* 12.10 and *Kātyāyana-smṛti* 1.421 (quoted by Schulz, 'Rechtsvergleichende Forschungen', 25 *ZVgR* (1911), 459, 466), but all these texts are late.
 103. P. Voci, '“Diligentia”, “Custodia”, “Culpa”. I Dati Fondamentali', 56 *Studia et Documenta Historiae Iuris* (1990), 29, especially at 33–6. As a public virtue, *diligentia* was said by Cicero (*De Oratore*, 2.35.150) to encompass carefulness, mental attention, reflectiveness, vigilance, persistence and labour; as a private virtue, as a characteristic of the good paterfamilias, it was linked with sobriety, vigilance and industriousness (*Pro Caelio*, 31.74).
 104. D.13.6.5.3 (Ulpian, 28 *ad Edictum*).
 105. D.18.6.12 (Ulpian, 28 *ad Sabinum*).
 106. D.7.1.65.pr (Pomponius, 5 *ex Plautio*). It is not clear how old this rule is.

107. Cicero, *In Verrem Oratio*, 2.1.51§ 135. The rule is not established unequivocally in legal texts before Papinian: D.26.7.39.3, 12, 13 (Papinian, 5 *Responsorum*); D.26.7.41 (Papinian, 7 *Responsorum*); D.46.6.12 (Papinian, 12 *Quaestionum*). See G.D. MacCormack, 'Liability of the Tutor in Classical Roman Law', 5 *Irish Jurist*, (NS) (1970), 369.
108. Gaius, *Institutes*, 3.211 (translations are based on the edition of Francis de Zulueta). See too D.9.2.5.1 (Ulpian, 18 *ad Edictum*) and D.47.10.1.pr (Ulpian, 56 *ad Edictum*) referring to the lex Aquilia as providing a remedy for *damnum 'culpa' datum*, loss caused blameworthy.
109. D.9.2.31 (Paul, 10 *ad Sabinum*, citing Quintus Mucius); D.9.2.52.1, 4 (Alfenus, 2 *Digestorum*).
110. E.g. D.9.2.5.2 (Ulpian, 18 *ad Edictum*, citing Pegasus); D.9.2.29.2 (Ulpian, 18 *ad Edictum*, citing Proculus); D.9.2.57 (Javolenus, 6 *ex Posterioribus Labeonis*, citing Labeo), D.9.2.11.pr (Ulpian 18 *ad Edictum*, citing Mela and Proculus); D.47.10.15.46 (Ulpian 77 *ad Edictum*, citing Labeo).
111. Above p.112.
112. D.9.2.11.pr (Ulpian, 18 *ad Edictum*). See too D.9.2.52.3 (Alfenus, 2 *Digestorum*); D.9.2.57 (Javolenus, 6 *ex Posterioribus Labeonis*). Translations from the Digest are based on the translation edited by A. Watson, Philadelphia, 1985, together with F.H. Lawson, *Negligence in the Civil Law*, Oxford, 1950.
113. D.50.17.203 (Pomponius, 8 *ad Quintum Mucium*); cf. D.9.2.7.3 (Ulpian, 18 *ad Edictum*). Compare Antiphon, *Second Tetralogy* (above p.112): if the boy throwing the javelin was not to blame, then he was regarded as not having killed.
114. D.9.2.9.4 (Ulpian, 18 *ad Edictum*); cf. Inst. 4.3.4. Ulpian's text continues by saying that the person throwing the javelin would none the less be liable if he had deliberately aimed at the victim.
115. G.D. MacCormack, 'Aquilian Culpa', in A. Watson, ed., *Daube Noster*, Edinburgh, 1974, 201.
116. D.9.2.6 (Paul, 22 *ad Edictum*).
117. D.9.2.10 (Paul, 22 *ad Edictum*).
118. D.9.2.31 (Paul, 10 *ad Sabinum*) attributing the definition to Quintus Mucius. See further below p.117.
119. D.9.2.8.1 (Gaius, 7 *ad Edictum Provinciale*).
120. D.9.2.8.1, D.50.17.132 (Gaius, 7 *ad Edictum Provinciale*).
121. D.9.2.44.pr (Ulpian, 42 *ad Sabinum*).
122. D.9.2.5.2 (Ulpian, 18 *ad Edictum*). To the same effect, D.47.2.23 (Ulpian, 41 *ad Sabinum*), citing Julian.
123. B. Perrin, 'Le Caractère Subjectif de l'Iniuria Aquilienne à l'Époque Classique', in *Studi de Francisci*, Milan, 1956, IV.265, 271–84.
124. Cf D.9.1.1.3 (Ulpian, 18 *ad Edictum*), to the effect that an animal cannot act *iniuria, quod sensu caret*.
125. D.9.2.31 (Paul, 10 *ad Sabinum*). The text has been much discussed; see the references in R. Zimmermann, *The Law of Obligations*, Cape Town, 1990, 1008 n.69, and B. Winiger, *La Responsabilité Aquilienne Romaine: Damnum Iniuria Datum*, Geneva, 1997, 31 n.44, 117–19.
126. On Quintus Mucius, see R.A. Bauman, *Lawyers in Roman Republican Politics*, Munich, 1983, 340–421. For his Stoicism: E. Rawson, *Intellectual Life in the Late Roman Republic*, London, 1985, 206
127. D.50.16.213.2 (Ulpian, 1 *Regularum*); D.50.16.223.pr (Paul, 2 *Sententiarum*).
128. O.F. Robinson, *The Criminal Law of Ancient Rome*, Oxford, 1995, 40–46.
129. D.48.8.1.3 (Marcianus, 14 *Institutionum*); Coll. 1.6.2 (Ulpian, 7 *de Officio Proconsulis*).
130. D.48.8.1.3 (Marcianus, 14 *Institutionum*), in fin; D.48.8.7 (Paul, 1 *de Publicis Iudiciis*); D.48.8.14 (Callistratus, 6 *de Cognitionibus*); Coll. 1.6.1, 4 (Ulpian, 7 *de Officio Proconsulis*); Coll. 1.11.3 (Ulpian, 7 *de Officio Proconsulis*) (*consulto*); P.S. 5.23.3 (= Coll. 1.7.1, 2); C.Th. 9.12.1 (= C.J. 9.14.1) (AD 319), C.Th. 9.12.2 (AD 326–9).
131. D.48.8.1.3 (Marcianus, 14 *Institutionum*); Coll. 1.6.2 (Ulpian, 7 *de Officio Proconsulis*); the version of the rescript in the Collatio says that it is customary (*solet*) to absolve

the non-intentional killer, in contrast to the version in the Digest which says that it is possible (*posse*). To the same effect D.48.8.14 (Callistratus, 6 *de Cognitionibus*): one looks at the will, not the result.

132. D.48.8.7 (Paul, 1 *de Publicis Iudiciis*).
133. For Labeo, approved by Ulpian, *rixa* might be contrasted with *turba*. While the latter involved a multitude, the former involved only two people: D.47.8.4.3 (Ulpian, 56 *ad Edictum*).
134. M. Balzarini, 'Appunti sul "Rixa" nel Diritto Criminale Romano', 28 *Labeo* (1982), 17. Cf above pp.103, 105.
135. Coll. 1.7.2; abbreviated in D.48.8.1 (Paul, 5 *Sententiarum*).
136. Coll. 1.6.1–3 (Ulpian, 7 *de Officio Proconsulis*).
137. D.48.8.1.3 (Marcianus, 14 *Institutionum*).
138. So Balzarini, 'Appunti', 35 n.60.
139. D.48.5.39 (38).8 (Papinian, 36 *Quaestiones*). Cf C.9.9.4. For the context of the killing of adulterous spouses, see E. Cantarella, *Studi sull'Omicidio in Diritto Greco e Romano*, Milan, 1976, 163–204.
140. Above p.100.
141. Coll. 1.11.1–4 (Ulpian, 7 *de Officio Proconsulis*); the five-year exile is referred to in earlier rhetorical works, and may possibly represent a borrowing of a Greek penalty: E. Höbenreich, 'Überlegungen zur Verfolgung unbeabsichtigter Tötungen von Sulla bis Hadrian', 107 *ZSS, Rom. Abt.* (1990), 249, 309.
142. D.48.8.7 (Paul, 1 *de Publicis Iudiciis*); PS 5.23.12. Note also the cases of causing death by poisoning, which mirror the Aristotelian approach to liability, though since they were the subject of special rules in the *lex Cornelia* it would be wrong to try to draw any general conclusions out of them: Höbenreich, 'Überlegungen', 283–94.
143. D.48.19.11.2 (Marcianus, 2 *de Publicis Iudiciis*): *Delinquitur autem aut proposito aut impetu aut casu*. See G. Polara, 'Marciano e l'Elemento Soggettivo del Reato', 77 *Bulletino dell'Istituto di Diritto Romano* (1974), 89, and more generally W.W. Buckland, 'Marcian', in *Studi in Onore di Salvatore Riccobono*, Palermo, 1936, 273.
144. I owe particular debts of gratitude to Dr Barrie Fleet, Professor David Hawkins, Mr Andrew Hobson, Professor William Horbury and Mr Geoffrey Styler for guidance through linguistic minefields. All errors remaining are, of course, my own; but without their help these would have been far more numerous. Some elements of the present paper have appeared in my 'How the Romans did for Us: Ancient Roots of the Tort of Negligence', 26 *University of New South Wales Law Journal* (2003), 475.

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