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CULPA IN THE SCOTS LAW OF REPARATION

THE following propositions have been asserted by writers on the law of Scotland: (i) that the Scots law of reparation is founded upon a principle of *culpa*, (ii) that the principle is derived from Roman law, in particular from the *lex Aquilia*, and (iii) that the word *culpa* in this context has a wide sense and expresses a liability for *dolus* and *culpa* in a narrow sense. *Culpa* in the wide sense is expressed to be fault and in the narrow sense negligence.[1] To some extent these propositions are derived from, or at least have the same content as, observations made by judges when considering the conditions of liability in the law of reparation.

Two types of judicial observation may be noted. The word *culpa* may be used and explained with the addition of a synonym, negligence,[2] fault,[3] tort,[4] or quasi-delict.[5] Or one may have explicit statements that the basis of the law of reparation is *culpa* or that a necessary condition for the attachment of liability is proof of *culpa*. Sometimes a reference to Roman law is made.[6]

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[1] *Cf.* Guthrie Smith, *A Treatise on the Law of Reparation* (1864), 8, 58 *et seq.*; Glegg, *A Practical Treatise on the Law of Reparation*, 2nd ed. (1905), 8 *et seq.*, 19 *et seq.*; Smith, *A Short Commentary on the Law of Scotland* (1962), 283, 657 *et seq.*, 663 *et seq.*; Walker, *The Law of Delict in Scotland*—I (1966), 32, 47 *et seq.*; Elliott (1952) 64 J.R. 1, 4, 8; (1954) 66 J.R. 10, 16, 19, 29; Gow 65 (1953), 17 *et seq.*, 20, 35 *et seq.* Smith and Gow consider that *culpa* is more comprehensive than negligence or intention and negligence, but do not contest that the law of reparation is founded upon *culpa*.

[2] Examples are too numerous for a complete list to be given, but *cf. Finlay* v. *Thomson* (1842) 4 D. 776, 782 *per* the Lord Ordinary; *Fleeming* v. *Orr* (1853) 15 D. 486, 488 *per* Lord Wood; *Cleghorn* v. *Taylor* (1856) 18 D. 664, 671 *per* Lord Cowan; *Clark* v. *Armstrong* (1862) 24 D. 1315, interlocutor of the court; *Mackintosh* v. *Mackintosh* (1864) 2 M. 1357, 1364 *per* Lord Inglis; *Campbell* v. *Kennedy* (1864) 3 M. 121, 124 *per* Lord Benholme and 126 *per* Lord Inglis; *Owners of the "Islay"* v. *Patience* (1892) 20 R. 224, 227 *per* Lord Kinnear; *Miller* v. *Robert Addie and Sons' Collieries*, 1934 S.C. 150, 160 *per* Lord Murray, 1934 S.L.T. 160.

[3] *Cf.* Lord Gifford in *Chalmers* v. *Dixon* (1876) 3 R. 461, 467, *Woodhead* v. *Gartness Mineral Co.* (1877) 4 R. 469, 504; *Moffatt and Co.* v. *Park* (1877) 5 R. 13, 17. See also *Bourhill* v. *Young's Executor*, 1941 S.C. 395, 415 *per* Lord Mackay, 1941 S.L.T. 364, 374.

[4] *Horn* v. *North British Ry.* (1877) 5 R. 1055, 1067 *per* Lord Ormidale.

[5] *Cf. Harpers* v. *Great North of Scotland Ry.* (1886) 13 R. 1139, 1148 *per* Lord Young.

[6] *Machargs* v. *Campbell* (1767) Mor. 12541, argument of the pursuer; *Laurent* v. *Lord Advocate* (1869) 7 M. 607, 614 *per* Lord Kinloch; *Moffatt & Co.* v. *Park* (1877) 5 R. 13, 17 *per* Lord Gifford; *Owners of the "Islay"* v. *Patience* (1892) 20 R. 224, 227 *per* Lord Kinnear; *Bourhill* v. *Young's Executor*, 1941 S.C. 395, 1941 S.L.T. 415 *per* Lord Mackay; *McLaughlan* v. *Craig*, 1948 S.C. 599, 610 *et seq.*, 1948 S.L.T. 483 *per* Lord Cooper; *Hamilton & Co.* v. *Anderson & Co.* 1953 S.C. 129, 137 *per* Lord Cooper; *Hester* v. *MacDonald*, 1961 S.C. 370, 390 *per* Lord

On the whole statements which assert that the law of reparation is founded upon a principle of *culpa* derived from Roman law are of a fairly late date. The general remarks on the conditions for delictual liability to be found in the works of the institutional writers are phrased with greater caution. Stair, in his discussion of obligations by delinquence,[7] does not specify a requirement of fault; he distinguishes the general types of damage which are reparable and proceeds with a consideration of various special delinquencies. By contrast Bankton,[8] in his treatment of "damage which arises from diminishing, spoiling or destroying one's goods," emphasises the element of fault. Liability in these cases, he suggests, is determined by the rule

> "that where damage occurs, through any fault of the person who occasions it, the same must be repaired to the person aggrieved, either by him or his employer; but if it was accidental, and could not be prevented by the utmost care of the other, he who suffers the damage has no remedy."[9]

In evaluating this statement one should remember that Bankton is not describing the basis of the law of reparation but formulating a rule applicable to a special type of damage. He does not use the word *culpa*; nor does he specify what is to be understood by fault. Whether the courts applied so general a rule as that stated by Bankton even in the area of damage which he designates is at least to be taken as uncertain.

Erskine[10] has the following argument. The precept *alterum non laedere* established by Justinian entails that "every one who has the exercise of reason, and so can distinguish between right and wrong, is naturally obliged to make up the damage befalling his neighbour from a wrong committed by himself." A person is liable not only for "every fraudulent contrivance or unwarrantable act by which another suffers damage" but also for "blameable omission or neglect of duty." In general he will not be liable unless there has been some "culpable act or omission." He does not refer to the *lex Aquilia* except in connection with the rule that the

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Guthrie, 1961 S.L.T. 414; *Henderson* v. *John Stuart (Farms) Ltd.*, 1963 S.C. 245, 250 *et seq. per* Lord Hunter, 1963 S.L.T. 22. Many other cases contain dicta referring to actions in respect of *culpa*.

[7] Stair, *The Institutions of the Law of Scotland*, I.IX.

[8] Bankton, *An Institute of the Laws of Scotland*, I.X.IV.

[9] *Ibid.*, para. 41.

[10] Erskine, *An Institute of the Law of Scotland*, III.I.XIII.

assessment of damages does not take into account *pretium affectionis*. It is difficult to extract from Erskine's discussion the conclusion that he based the law of reparation upon a principle of *culpa* derived from the Roman law.[11] Bell's brief account of the "general principles of the obligation to repair damage" contains no analysis of fault and makes no reference to *culpa* or to Roman law.[12]

The institutional writers do not support the assertion that the Scots law of reparation is based upon a principle of *culpa* derived from Roman law. Is support to be derived from cases decided by the courts in the seventeenth, eighteenth and nineteenth centuries? The approach I have adopted is to investigate the occurrence of the word *culpa* in the reasoning employed by judges and advocates. My basic assumption has been that if their reasoning expressed in terms of *culpa* does not disclose acceptance of the proposition that the law of reparation is based upon a principle of *culpa,* assertions of this proposition to be found in the later cases and in academic writings should not be taken as correct. That is, they should not be taken as an accurate statement of the historical development of the law of reparation. They may be correct in a different sense. Once a line of judgments has affirmed that the law of reparation is based upon a principle of *culpa,* this affirmation becomes authoritative and takes its place among the principles employed for the development of the law.

I have divided the cases into two groups, those dealing with liability for damage to property and those dealing with liability for the infliction of death or physical injury. Within the first group the cases, apart from a few miscellaneous ones, concern either liability for damage caused by the conduct of a dangerous activity or the existence of premises in a dangerous condition, or liability for damage caused by animals. In both these situations there is a particular reason for the emphasis upon *culpa* to be found in the language of advocates and judges. There was some uncertainty whether a person was strictly liable for the state of his premises, the conduct of inherently dangerous activity or the behaviour of his animals. Hence maintenance of the view (which eventually triumphed) that there was no liability without fault required em-

[11] He cites Paul 74 ad ed. D.50.17.151: *nemo damnum facit, nisi qui id fecit, quod facere ius non habet.* But the Scots law of reparation cannot be said to be derived from this maxim.

[12] Bell, *Principles of the Law of Scotland*, paras. 543, 544, 553.

phatic expression. This not unnaturally was found in frequent use of the language of *culpa*.

The miscellaneous cases need little comment. On occasion when compensation is sought for damage to property an argument is made or a judgment given that the facts disclose *culpa* on the part of the defender. Thus the reckless and indifferent running down of one boat by another is alleged by the pursuers to be *culpa latissima*,[13] knowledge by the defender's servant that a horse stabled with the pursuer was diseased is alleged by the pursuer to be *culpa*,[14] the circumstances responsible for the collapse of a store [15] and for damage sustained by a ship in harbour [16] are characterised as *culpa*, and, in one case, breach of a statute is held to be *culpa*.[17]

Of the cases on dangerous activities and dangerous premises one may consider first those on liability for fire. The earlier cases, from the seventeenth and eighteenth centuries, exhibit arguments drawn from the Roman law framed in terms of *culpa*. In *Sibbald* v. *Rosyth* [18] an action was brought by a landlord against the tenants of property which had been destroyed by fire. One of the arguments advanced by the pursuer was that under the *lex Aquilia* the defenders were liable for *culpa levissima* and that in any case by Roman law fires were presumed to arise *ex culpa inhabitantium* (citing D.1.15.3.4). A few years later in *Farquarharson* v. *Gillanders* [19] an action was brought in respect of the burning down of a church. The defenders alleged that the presumption that fires arose *ex culpa inhabitantium* applied only to dwelling houses. In reply the pursuer put an argument amounting to the assertion that the defender was liable on the ground of *culpa* since he had not displayed the *diligentia* which a prudent *paterfamilias* would have exercised in the conduct of his own affairs. In a muirburning case from the middle of the eighteenth century, *Gordon* v. *Grant*,[20] the defenders argued on the basis of D.9.2.30.3 that they were not liable for the escape of the fire and the consequent damage to the

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13 *Forfar and Moyes* v. *Stark* (1712) 4 B.S. 888.

14 *Baird* v. *Graham* (1852) 14 D. 615 and *cf.* the judgment of the Lord Ordinary.

15 *Caledonian Ry.* v. *Greenock Sacking Co.* (1875) 2 R. 671, judgment of the Sheriff, affirmed on appeal.

16 *Niven* v. *Ayr Harbour Trustees* (1897) 24 R. 883, judgment of the Lord Ordinary, reversed on appeal.

17 *Macfarlane* v. *Colam*, 1908 S.C. 56, (1908) 15 S.L.T. 451, judgment of the Sheriff-substitute, reversed on appeal.

18 (1685) Mor. 13978.

19 (1698) 4 B.S. 400.

20 (1765) Mor. 7356. The defenders were not owners of the land on which they started the fire; but they appear to have had some right or privilege to burn the muir.

pursuer's wood. According to the law laid down in that text they were not liable *ob dolum aut culpam* unless they had kindled muirburn on a windy day or by carelessness allowed the fire to reach the pursuer's wood.

One may infer from these cases that in actions arising out of damage caused by fire arguments drawn from Roman law, expressed in terms of *culpa*, were addressed to the court. These arguments form part only of the case presented by the pursuer or defender and it is not clear from the judgments what weight the court attached to them. There is certainly no evidence for concluding that questions of liability for fire were settled through the application of rules derived from the Roman jurists on the presence or absence of *culpa*.

In later cases the reasoning is somewhat different. *Mackintosh* v. *Mackintosh* [21] is another case arising out of damage caused by muirburn. The issue debated by the judges was the degree of care required of a person who conducts a dangerous activity on his own land. Whereas the Lord Ordinary considered that the highest possible degree of care was to be exercised and expressed his view in the words *tenet culpa levissima*,[22] the members of the Inner House, rejecting the distinction between *culpa levis* and *culpa levissima*, held that the defender was liable if he had failed to exercise the care to be expected of a prudent man in the circumstances. Failure to exercise such care constituted *culpa* or negligence.[23]

The contrast between strict liability and liability based upon *culpa* is brought out in *Chalmers* v. *Dixon* [24] where the pursuers had sustained damage through noxious vapours given off by a heap of inflammable material on the defender's property, which had caught fire. The pursuers argued that the defenders were liable even in the absence of *culpa*, though they also affirmed that *culpa* could be shown. The defenders denied that they were liable without proof of negligence or *culpa*. Although the judges of the Inner House found for the pursuer the ground of their decision is uncertain. Lords Moncreiff and Neaves held that the mere accumulation of the inflammable materials constituted *culpa*.[25] Lord Ormidale held that the defenders were liable for the escape of a harmful object stored on their land. But he also held that they

[21] (1864) 2 M. 1357. [22] *Ibid.* 1361.
[23] *Cf. ibid.* at 1362 *per* Lord Neaves, at 1363–1364 *per* Lord Cowan, and at 1364 *per* Lord Inglis.
[24] (1876) 3 R. 461. [25] *Ibid.* 464.

were liable on the separate ground of *culpa*, in that they had not taken proper precautions in the disposition of the inflammable material or exercised the utmost diligence in the control of the fire.[26] Lord Gifford, whose reasoning is the least clear, distinguishes between an "absolute obligation" and an obligation derived from "actual *culpa*," but he also seems to imply that what is called an absolute liability involves a slight degree of fault and therefore may be expressed in terms of *culpa*.[27]

In both *Mackintosh* v. *Mackintosh* and *Chalmers* v. *Dixon* the Inner House considered whether there had been *culpa* on the part of the defender. The judges understood by *culpa* fault or negligence; sometimes, more specifically, the failure to exercise the degree of care to be expected of a prudent man is taken to be *culpa*. Or the matter may be considered in a less general fashion and the actual circumstances which have occurred held to disclose *culpa*. But there is also evident a willingness to qualify as *culpa* conduct which of itself betrays little in the way of fault or negligence. Although one is able to deduce that the term *culpa* plays a more significant role in the reasoning of the later cases than in that of the earlier, one cannot deduce that the rules expressed in terms of *culpa* in *Mackintosh* and *Chalmers* are derived from the *lex Aquilia* or other Roman material. The judges have simply taken the word *culpa* and used it in the construction of arguments which consider the incidence of fault or negligence.

Another line of cases considers liability for damage incurred by property through the state of neighbouring premises. The earliest of these, *Cleghorn* v. *Taylor*,[28] evidences a strict approach to the question of liability. Where a badly constructed chimney fell and damaged china kept in an adjoining shop, the court held that the owner of the premises, not the person who had constructed the chimney can, was liable. Lord Murray, the only judge to speak of *culpa*, held that a proprietor was liable for his failure to keep his premises in a safe state even though there was "no bad intention or special *culpa* on his part."[29] Yet in *Laurent* v. *Lord Advocate*,[30] where a landlord of a public house sought damages for loss of custom brought about by work being done on neighbouring premises, the court rejected his argument that any invasion

[26] *Ibid.* 466–467.
[27] *Ibid.* 467–468.
[28] (1856) 18 D. 664.
[29] *Ibid.* 668.
[30] (1869) 7 M. 607.

of another's property, irrespective of "*culpa* arising through negligence or unskilfulness," is wrongful. Again only one judge, Lord Kinloch, spoke of *culpa*. He stated that, except in a few special circumstances, a person can be made liable in respect of operations conducted on his premises only where there has been *culpa* on his part. Hence the pursuer could not succeed unless he could show that the defender's works were improper, illegal or negligently conducted.[31]

Liability for damage resulting from the escape of water has been discussed in terms of *culpa*. The most interesting case is *Moffatt and Co.* v. *Park* [32] in which the pursuers brought an action in respect of damage suffered by goods stored on their premises through the bursting of a waterpipe on the defender's premises. The court on the whole was concerned to show that liability arose from *culpa*, not from the mere fact of ownership, but that *culpa* might be inferred from the circumstances in which the escape took place.[33] Certain observations of Lord Gifford, and especially of Lord Moncreiff,[34] suggest that the mere existence of defective waterpipes is sufficient to constitute *culpa*.[35]

With the advent of gas the issue again was raised whether a proprietor was strictly liable for the escape of a dangerous substance from his premises. The Court of Session in two cases affirmed that for liability there must be *culpa*. In *Miller* v. *Robert Addie and Sons' Collieries Ltd.*[36] Lords Aitchison and Murray understood *culpa* in the sense of negligence; in *M'Laughlan* v. *Craig* [37] Lord Russell understood *culpa* in the sense of breach of the duty to exercise reasonable care.[38]

In the cases on damage resulting from the state in which premises are kept or from the escape of water or gas, one has exhibited a characteristic use of the word *culpa*. Where liability in these situations is held to depend upon *culpa* the point being made

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[31] *Ibid.* 614.
[32] (1877) 5 R. 13.
[33] *Cf. ibid.* at 15–16 *per* Lord Ormidale, and at 17 *per* Lord Gifford.
[34] Lord Moncreiff stated, *ibid.* 18: "The true only *culpa* is the failure of the proprietor to fulfil the absolute obligation to protect his neighbour against ordinary contingencies, which is nothing but a breach of implied obligation."
[35] *Cf.* also *Campbell* v. *Kennedy* (1864) 3 M. 121 where Lords Benholme and Inglis emphasised that liability did not arise purely *ex dominio* but that *culpa* or negligence must be shown; *Hampton* v. *Galloway and Sykes* (1899) 1 F. 501, judgment of the Sheriff.
[36] 1934 S.C. 150, 1934 S.L.T. 160.
[37] 1948 S.C. 599, 1948 S.L.T. 483.
[38] *Ibid.* 607. *Cf.* also the remarks of Lord Wheatley in *Gilmour* v. *Simpson*, 1958 S.C. 477 at 479, 1958 S.L.T. 281.

is that the mere conduct of a certain operation or the mere escape of water or gas is not of itself enough to impose liability upon the proprietor. There must be present some element of fault. It is perhaps not too fanciful to suggest that "*culpa*" is often used in preference to "fault" because it is the more forceful word; it carries a stronger implication of wrongdoing and hence is suitable in a context intended to stress this element.

Culpa, as is stated in some of the judgments, may express faults of varying degrees of gravity. It may express some demonstrable fault on the part of the person made liable, some clear piece of wrongful conduct, or it may express a fault which is implied from the circumstances. The court may infer that there has been wrongful behaviour, even though no specific misconduct can be proved. The type of fault expressed is frequently negligence, by which is meant a failure to exercise care, or, in the later cases, a breach of a duty to take care. Sometimes the particular state of affairs under consideration is held to disclose *culpa* (for example, accumulation of dangerous materials, failure to keep waterpipes in repair), and in one instance *culpa* is used in the sense of breach of an implied obligation.

The reasoning in the cases on liability for animals is obscure. There is discernible on the one hand a view which contrasts liability based upon *culpa* with liability based upon *scientia*, and on the other hand a view which attempts to subsume liability based upon *scientia* under the head of liability based upon *culpa*. Both views may be found in the same judgment. Thus Lord Cranworth who delivered the leading judgment of the House of Lords in *Fleming* v. *Orr* [39] commenced his analysis by drawing a distinction between knowledge of the animal's vicious propensities and *culpa* or negligence.[40] But he concludes with the observation that in English law liability is based upon *culpa* and that an essential ingredient of *culpa* is knowledge of the animal's vicious propensities.[41]

Where the person sought to be made liable is not the owner of the animal, knowledge of vicious propensities has assumed a less prominent part in the reasoning of the judges. In *Harpers* v. *Great*

[39] (1855) 2 Macq. 14.
[40] *Ibid.* 21.
[41] *Ibid.* 24. *Cf.* also *Clark* v. *Armstrong* (1862) 24 D. 1315 in which the court founded its interlocutor that there was no liability on the ground of *culpa* or negligence upon absence of proof that the owner of the offending animal knew of its vicious character; and *McIntyre* v. *Carmichael* (1870) 8 M. 570 in which the court held that knowledge by the owner of a sheepdog's addiction to worrying sheep coupled with his allowing the dog to go at large constituted *culpa*.

North of Scotland Railway Co.[42] a bull while being led down the street by servants of the defenders broke loose and injured the pursuer. Lord Young (with whom Lords Craighill and Rutherfurd Clark concurred) stated that the action was founded not upon breach of contract but upon *culpa* and that since the normal precautions had been taken in the conduct of the bull along the street, *culpa* had not been established.[43]

In the most recent case on the subject, *Henderson* v. *John Stuart (Farms) Ltd.*,[44] Lord Hunter attempted to state in terms of *culpa* a coherent set of rules determining the liability of a person for damage done by an animal.[45] His Lordship distinguished between the duty to confine effectually incumbent upon a person aware of an animal's vicious propensities and the duty to take reasonable care that an animal should not cause harm. In Scots law breach of either duty constitutes *culpa* and imposes liability. When considering the implications of the duty to confine effectually, Lord Hunter suggested that *culpa* would normally be presumed where an animal known to be vicious escaped. However, the presumption should not be treated as irrebuttable. Escape through act of God, of the Queen's enemies, or through the rash intermeddling of the person injured precluded *culpa*.[46]

Although judges when dealing with cases arising from damage done by animals show a preference for the language of *culpa*, they are not applying rules derived from the Roman law. They were required to decide whether knowledge of an animal's vicious propensities itself entailed liability in cases of damage or whether some separate element of fault needed to be shown. One again has a contrast between a strict liability and a liability based upon fault, a contrast which, as in other contexts, finds a natural expression in the language of *culpa*. Once judges have begun to express the liability in terms of *culpa* they relate it to liability in other areas of the law of reparation also expressed in terms of *culpa*. They are then induced to treat liability for damage done by animals as an application of a general principle of liability for *culpa*.[47]

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[42] (1886) 13 R. 1139.
[43] *Ibid.* 1148–1149. *Cf.* also *Gray* v. *North British Ry.* (1890) 18 R. 76, judgment of Lord Inglis.
[44] 1963 S.C. 245, 1963 S.L.T. 22.
[45] Lord Hunter's observations appear to apply to a person (whether or not the owner) who has custody of an animal.
[46] 1963 S.C. 245, 247 *et seq.* *Cf.* also the dissenting judgment of Lord Johnston in *Milligan* v. *Henderson*, 1915 S.C. 1030, 1043; 1915, 2 S.L.T. 156.
[47] *Cf.* especially the approach of Lord Hunter in *Henderson* v. *John Stuart (Farms) Ltd.*, 1963 S.C. 245, 1963 S.L.T. 22.

In the second group of cases, those dealing with death and personal injuries, *culpa* appears frequently in the language of advocates and judges. Sometimes arguments are expressed simply in terms of *culpa*, sometimes resort is had to the maxim *culpa tenet suos auctores*. I have studied the use of the maxim in an earlier paper [48] and the conclusions reached may briefly be restated. The maxim is often cited by judges as the first and most basic principle of the Scots law of reparation. Yet it does not appear to have been extensively used until the latter part of the nineteenth century and its use is confined to cases raising an issue of the type, which of two or more persons is the appropriate defender? Characteristically the maxim supplies a reason for the conclusion that a person who has not caused loss should not be made liable. In some cases it is advanced successfully, in others unsuccessfully. A particular sphere of its application is to be found in cases which turn upon the doctrine of common employment. Judges are fond of citing the maxim as a justification for the doctrine.

Where the word *culpa* alone or the phrases *culpa lata, levis, levissima* occur in the reasoning of advocates or judges a particular reason for their occurrence is often discernible. There was a point in the development of the law at which it was uncertain whether a master without fault on his own part could be made liable for loss caused by a servant. The issue focuses attention upon the element of fault and may lead to the adoption of the forceful language of *culpa*. In *Baird* v. *Hamilton*,[49] for example, a servant through his carelessness in managing a horse and cart entrusted to him by his master knocked over and injured a child. The master argued that he could be made liable *ex culpa* of his servant only if there had been some blame or negligence on his part and cited in support the maxim *culpa tenet suos auctores*. He suggested that *culpa* might be attributed to him if he had assigned to the servant more horses than he could possibly manage, or if he had employed a servant who had shown himself to be careless in the past. The court, without making use of the notion of *culpa*, rejected these arguments on the ground that a master was liable for the carelessness of his servant occurring in the course of employment.[50]

[48] "*Culpa tenet suos auctores*: the Application of a Principle in Scots Law," 1973 J.R. 159.

[49] (1826) 4 S. 790.

[50] *Cf.* also *McLean* v. *Russell, Macnee & Co.* (1850) 12 D. 887, 892 where Lord Mackenzie remarks on the constructive *culpa* in the employment of careless persons; *McEwan* v. *Cuthill* (1897) 25 R. 57, 63 *per* Lord Young and 64 *per* Lord Trayner.

Later cases accept the proposition that masters are liable for the delicts of their servants committed in the course of employment, irrespective of personal *culpa* on the part of the master. Some of them are concerned with the question whether the seriousness of the fault committed by the servant is relevant to the amount of the damages. Again the language of *culpa* is to be found. In *Cooley* v. *Edinburgh and Glasgow Railway Co.*[51] Lord Jeffray held that the measure of damages depended upon whether the *culpa* of the defenders' servants had been gross or venial.[52] The view represented by Lord Jeffray was rejected in two cases at the beginning of the twentieth century. Lord Johnston in *Hillcoat* v. *Glasgow and South Western Railway Co.*[53] held that the degree of negligence was not relevant to the question of damages and that the distinction between *culpa levis* and *culpa lata* formed no part of this branch of the law. In *Black* v. *North British Railway Co.*, decided in the same year,[54] the Inner House affirmed the opinion of Lord Johnston and rejected the defender's contention that the damages should be increased if *culpa lata* was shown.

Another aspect of the relationship between master and servant that finds expression in the language of *culpa* is the liability of the master for injuries suffered by the servant in the course of employment. In numerous cases throughout the nineteenth century persons employed in factories, mines or the railways (or their dependants) seek to recover damages from their employers for injuries sustained from allegedly defective machinery or equipment. There is an attempt on the part of the employee to argue that the master is absolutely liable for the state of his machinery or equipment. This attempt is resisted by the courts who stress that the master cannot be made liable without fault on his part, even though fault may sometimes be inferred from the state in which the machinery or equipment is kept. The requirement of fault is often expressed with the word *culpa.*

Some examples follow. Lord Mackenzie in *Sneddon* v. *Addie* [55] held that the employer must not be taken as warranting absolutely the safety of his machinery; he is not liable if he has taken all the precautions that a careful man would have taken. His Lordship,

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51 (1845) 8 D. 288.
52 *Cf.* also *Black* v. *Croall* (1854) 16 D. 431.
53 1908 S.C. 454, reported in a note to *Black* v. *North British Ry.*
54 1908 S.C. 444, (1908) 15 S.L.T. 840.
55 (1849) 11 D. 1159.

whose remarks have been abbreviated by the reporter, appears to have stated that for liability there must be *culpa* and that *culpa levis* (the failure to exercise strict diligence) is sufficient.[56] In *Ovington* v. *McVicar*,[57] a case arising out of the death of an employee caused by defective machinery, Lords Inglis, Cowan and Benholme held that the master was not liable unless there had been *culpa* on his part.[58]

There is no point in setting out the details of all the cases on deaths or physical injury which contain allegations of *culpa* or decisions framed in terms of *culpa*.[59] In most of the cases no particular significance can be attached to the choice of the word *culpa*. A few, however, are more instructive and it is possible to see why a judge should have framed his reasoning or decision in terms of *culpa*. In *Innes* v. *Magistrates of Edinburgh*[60] the pursuer was injured when he fell into a pit dug in a lane during some building operations. The evidence showed that gaps in the fence surrounding the pit were caused sometimes through the carelessness of the workmen, sometimes through the removal of bars by third persons. In holding the defenders liable the court observed that they were liable for the smallest neglect of the duty to keep the streets safe and that the accident could not have happened without some degree of *culpa* on their part. The court wanted to make clear that the defenders were not absolutely liable; there must be some fault. But the circumstances of the accident were such that they were prepared to infer fault on the part of the defenders.[61]

In some cases a contrast is drawn between liability arising from breach of a contractual obligation and liability arising from delict.

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[56] Lord Mackenzie's opinion was followed by Lord Ivory in *Gray* v. *Brassey* (1852) 15 D. 135, 141.

[57] (1864) 2 M. 1066.

[58] *Cf.* also *Cook* v. *Duncan* (1857) 20 D. 180, argument of defender; *Cray* v. *North British Ry.* (1863) 1 M. 670, 671, argument of pursuer; *Bowie* v. *Rankin* (1886) 13 R. 981, 982 *per* the Sheriff; *Ramsey* v. *Robin, McMillan & Co.* (1889) 16 R. 690, 693 *per* Lord Young; *Morris* v. *Boase Spinning Co. Ltd.* (1895) 22 R. 336, 340 *per* Lord Young; *Wilson* v. *Love* (1897) 25 R. 280, 281 *per* the Sheriff-substitute and Sheriff.

[59] *Cf.* for example *Lumsden* v. *Russell* (1856) 18 D. 468 *per* the Lord Ordinary; *Balfour* v. *Baird and Brown* (1857) 20 D. 238, 244 *per* Lord Cowan, and 245, 246 *per* Lord Ardmillan; *Sneddon* v. *Langloan Iron Co.* (1862) 24 D. 569, argument of pursuer; *King* v. *Pollock* (1874) 2 R. 42, 43 *per* the Sheriff-substitute; *McFeat* v. *Rankin's Trustees* (1879) 6 R. 1043, argument of defenders; *McQuade* v. *Wm. Dixon Ltd.* (1887) 14 R. 1039, 1041 *per* Lord Young; *Morrison* v. *McAra* (1896) 23 R. 564, 566 *per* the Sheriff-substitute; *McKenzie* v. *Magistrates of Musselburgh* (1901) 3 F. 1023, 1026 *per* Lord Young.

[60] (1798) Mor. 13189.

[61] Possibly one has a similar use of *culpa* in *Reilly* v. *Greenfield Coal and Brick Co. Ltd.* 1909 S.C. 1328, 1333 *per* Lord Johnston, 1909 2 S.L.T. 171.

Culpa may be used broadly to express delictual in contrast to contractual obligation. In *Birrell* v. *Anstruther* [62] the widow and children of a schoolmaster brought an action for damages on the ground that the death of the schoolmaster had occurred through the defender's failure to keep the schoolhouse in proper repair. Lord Inglis, dismissing the action, held that it was founded upon *culpa* and that failure to keep the schoolhouse in repair may have been a breach of obligation but did not constitute *culpa* causing the death.[63]

In *Cramb* v. *Caledonian Railway Co.*[64] representatives of persons who had died from eating sugar contaminated through contact with leaking tins of weedkiller sued the defenders who had custody of the sugar and weedkiller at the time of contamination, and in *Gordon* v. *McHardy* [65] the father of a child killed through eating a tin of poisoned salmon sued the grocer who had supplied it. The Lord Ordinary in the former case pointed out that the ground of liability was *culpa* not breach of contract. He held that the defenders were liable in that they had broken the duty to take reasonable precautions for the life and safety of their neighbours.[66] The defender in the latter case argued that the ground of action was *culpa* not breach of contract and that a retail dealer was not liable *ex delicto* for latent defects in specific articles sold to a customer. This argument appears to have been accepted by the court who dismissed the action.[67]

Finally one may consider the use of *culpa* in *Eisten* v. *North British Railway Co.*[68] Two sisters brought an action of assythment in respect of the death of their brother in a railway accident. The court held that the action of assythment was incompetent and that no other ground of action was to be found. The approach of the judges was to assume that any possible action other than assythment must be founded upon *culpa* (understood in the sense of fault).[69] It was the search for a relevant ground of action that led them to speak of *culpa*.

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62 (1866) 5 M. 20.
63 *Ibid.* 23
64 (1892) 19 R. 1054.
65 (1903) 6 F. 210.
66 His judgment was reversed on appeal but the judges of the Inner House appear to have accepted his analysis of the law.
67 *Cf.* also the observations of Lord Young in *Harpers* v. *Great North of Scotland Ry.* (1886) 13 R. 1139, 1148.
68 (1870) 8 M. 980.
69 *Cf. ibid.* 982 *per* the Lord Ordinary, 984 *per* Lord Inglis and 986 *per* Lord Ardmillan.

Only in one case is there a specific reference to the Roman law. In *Linwood* v. *Vans Hathorn* [70] the pursuer sought damages for the death of her husband killed by a tree felled on the defender's estate. The judges by a majority found that no fault could be attributed to the defender. Lord Craigie, dissenting, applied a passage in the Institutes of Justinian [71]:

> Item si putator ex arbore deiecto ramo servum tuum transeuntem occiderit, si prope viam publicam aut vicinalem id factum est neque praeclamavit, ut casus evitari possit, culpae reus est: si praeclamavit neque ille curavit cavere, extra culpam est putator.[72]

The Lord Justice-Clerk also referred to the passage cited by Lord Craigie but held that on the facts the conditions established by it for the attachment of liability were not present.[73]

The material collected and analysed above does not support the proposition that the Scots law of reparation derived a principle or doctrine of *culpa* from Roman law in general or from the *lex Aquilia* in particular. Some early cases contain citations from the *corpus iuris civilis* in the arguments of counsel or the reasoning of judges. But the sporadic reliance on texts from the Digest or Institutes which use the term *culpa* does not prove that Scots law extracted from the Roman sources and applied a principle of *culpa*. Possibly not all the cases in which advocates or judges cited texts from the *corpus iuris* have been reported; in some of the cases which have been reported citation of texts may have been omitted. Nevertheless it is apparent that there was no requirement of, or consistent practice in, their citation.

The more frequent occurrence in the cases of the word *culpa* itself without a specific reference to the Roman law shows merely that some advocates and judges preferred to reason with the help of a word derived from Roman law. It does not show that the rules or principles which they expressed in terms of *culpa* were derived from Roman law.

One should not leave the point without considering a further argument that might be raised. The law of contract appears to have been developed rather earlier than the law of reparation. Is

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[70] 14 May 1817, F.C. 327.
[71] *Ibid.* 334.
[72] Just. Inst. 4.3.5.
[73] 14 May 1817, F.C. 327 at 334–335.

it possible that the courts applied a principle of *culpa* derived from Roman law to the solution of contractual problems and later utilised the principle in the construction of the law of reparation? Cases from the seventeenth and eighteenth centuries which discuss questions of liability in terms of *culpa lata, levis* or *levissima* or of *dolus* and *culpa* are prominent in three areas of the law: liability under the edict on *nautae, stabularii* and *caupones,*[74] mandate[75] and *locatio conductio.*[76] Very few of these cases contain direct citations of texts on *culpa* drawn from the *corpus iuris civilis.*[77] In some there are garbled, unacknowledged quotations from texts.[78] Probably in a number of cases texts were cited and have not been included in the report. Yet the impression one obtains is that advocates and judges constructed their reasoning in terms of *culpa lata, levis* and *levissima* and the degrees of *diligentia* to be expected from an individual, without examining or adopting the specific decisions given by the Roman jurists. To say that Scots lawyers in the seventeenth and eighteenth centuries took from Roman sources a principle of *culpa* and applied it to contractual situations would, I think, be a misrepresentation. They make a considerable use of words and phrases taken from Roman law; that is all. Hence the development of the law of contract does not help those who wish to derive the law of reparation from a principle of *culpa.*

Judicial statements that a principle or doctrine of *culpa* is basic to the law of reparation are not found until the latter part of the nineteenth century and the twentieth century. They imply acceptance of a particular view of the way in which the law developed. To say that a principle is basic or fundamental to the law, appears to be an assertion about the origin of the law. The principle is postulated as a datum from which the law developed or grew. If the legal system or a particular branch of the law is traced from

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74 *Sibbald* v. *Rosyth* (1658) Mor. 13976; *Master of Forbes* v. *Steil* (1687) Mor. 9233; *Chisholm* v. *Fenton* (1714) Mor. 9241; *Hay* v. *Wordsworth,* 13 Feb. 1801, F.C. 496.

75 *Anderson* (1583) Mor. 10082; *McNeil, Rawling* v. *Dauling* (1696) Mor. 10085; *Wood* v. *Fullarton* (1710) Mor. 13960; *Gillon* v. *Drummond* (1724) Mor. 3522; *Arnot* v. *Stewart,* 25 Nov. 1813, F.C. 462, 465 *per* Lord Meadowbank.

76 *Mowat* (1626) Mor. 10074; *Binny* v. *Veaux* (1679) Mor. 10079; *Trotter* v. *Buchanan* (1688) Mor. 10081; *Lawrie* v. *Angus* (1677) Mor. 10107; *Deans* v. *Abercromby* (1681) Mor. 10122; *Sutherland* v. *Robertson* (1736) Mor. 13979; *Sinclair* v. *Hutchison* (1751) Mor. 10130; *Swinton* v. *McDougals,* 16 Jan. 1810, F.C. 487; *Kincaid* v. *Oswald* (1709) B.S. 759; *Davidson* (1749) Mor. 10081; *Gordon* v. *Straiton* (1677) B.S. 211; *Maxwell* v. *Todrige* (1684) Mor. 10079.

77 *Anderson* (1583) Mor. 10082; *Kincaid* v. *Oswald* (1709) B.S. 759.

78 *Master of Forbes* v. *Steil* (1687) Mor. 9233; *Binny* v. *Veaux* (1679) Mor. 10079; *Swinton* v. *McDougals,* 16 Jan. 1810, F.C. 487. *Cf.* also a case on commodatum, *Duncan* v. *Town of Abroath* (1668) Mor. 10075.

a given point in time it is assumed that from that point the principle has been consistently employed as a guide for the framing of rules.

Such a view of the development of the law is incorrect. One may say that in the course of the eighteenth and nineteenth centuries judges sometimes used the language of *culpa* in certain areas of the law. Once a series of decisions within the field of reparation framed in terms of *culpa* had been built up, it was possible for judges and others to infer the existence of a principle. Decisions reached subsequently might invoke or be justified by an appeal to the principle. If some such development is understood one may speak of a principle of *culpa* operating within the law of reparation. But a qualification of the principle as basic or fundamental is misleading.

The statement that a principle of *culpa* (which might be formulated as liability in the Scots law of reparation is based upon *culpa*) emerged in the latter part of the nineteenth century requires some modification. There is no unanimity of expression on the part of judges either in the cases decided before the emergence of the principle or in those which contain appeals to it. Frequently it is only one judge of the court who expresses his reasoning in terms of *culpa* or invokes the principle, and indeed *culpa* appears to have been a word preferred by certain judges. More common is the expression of issues on the part of advocates and judges in terms of the words " fault " and " negligence." [79]

The circumstances in which an appeal might be made to the principle are of great variety. Yet one should note that it appears to have been invoked with particular frequency in cases where there has been a doubt as to the basis of liability. At one point it was uncertain whether a master was liable for loss caused by his servant in the absence of personal fault, whether a proprietor was absolutely liable for the consequences of dangerous activities conducted on his land or for the state of his premises, or an employer for injuries sustained by his workmen in the course of their employment, or what precisely were the conditions entailing liability for damage done by animals. Not only do the courts in the process of settling the rule to be applied in these situations

[79] The word *culpa* is never used in the formulation of issues to be put before a jury. Where an issue on a question of fault is put before a jury the standard phrase used is " fault or negligence." *Cf. McLachlan* v. *Gordon* (1855) 17 D. 773.

bring into relief the element of fault, expressed in terms of *culpa*, but these situations appear to have provided the medium for the creation of the principle. It was in areas where the basis of liability was doubtful that the pressure for the emergence and utilisation of a principle was strongest.[80]

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