The History of Foreseeability

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Abstract: The factual component of the duty of care inquiry—that harm to the claimant as a result of the defendant's conduct was reasonably foreseeable by the defendant—has been entrenched in English law since *Donoghue v Stevenson*. Both indigenous and comparative (specifically South African) evidence suggests that Lord Atkin's formulation of the duty of care test was influenced by a particular fragment contained in Title 9.2 of Justinian's Digest, 'On the *lex Aquilia*'. Interrogation of the foreseeability principle in its original setting shows, however, that its role there was rather circumscribed. Derived perhaps from the account of wrongdoing offered by Aristotle, for whom the fact that harm had occurred contrary to expectation (*paralogos*) served to demonstrate that it had been unintentionally inflicted, in the context of Roman *culpa* foreseeability functioned as a technique for determining the avoidability of the harm—essentially a causal inquiry. This historical insight serves to illuminate the limits of foreseeability in the context of the modern test for duty of care. As a principle which generates liability, it may be that reasonable foreseeability cannot bear the normative weight assigned to it. Thus the history of foreseeability furnishes the material for a further critique of the duty concept, adding an historical dimension to contemporary calls to abandon the factual component of the duty of care entirely.

Setting the scene

On a Tuesday afternoon in July 2008 Elizabeth Robinson, aged 76, was walking along a shopping street in the centre of Huddersfield when she was knocked over by a group of men who were struggling with one another. Two of the men were sturdily built police officers; the third was a suspected drug dealer whom they were attempting to arrest. As they struggled, the men knocked into Mrs Robinson and they all fell to the ground, with Mrs Robinson underneath. She suffered injuries as a result.[1] The principal question which had to be decided by the Supreme Court was whether the officers owed a duty of care to Mrs Robinson.[2] Lord Reed SCJ, with whom Baroness Hale P and Lord Hodge SCJ agreed, said,

> It was not only reasonably foreseeable, but actually foreseen by the officers, that Williams was likely to resist arrest by attempting to escape... The place where the officers decided to arrest Williams was a moderately busy shopping street in a town centre. Pedestrians were passing in close vicinity to Williams. In those circumstances, it was reasonably foreseeable that if the arrest was attempted at a

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[1] This account of the facts is taken more-or-less verbatim from the first paragraph of Lord Reed's judgment in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736.

[2] *Robinson v Chief Constable of West Yorkshire Police* [2]

> time when pedestrians—especially physically vulnerable pedestrians, such as a frail and elderly woman—were close to Williams, they might be knocked into and injured in the course of his attempting to escape. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards the pedestrians in the immediate vicinity when the arrest was attempted, including Mrs Robinson.[3]

There is almost nothing more fundamental in English private law than the test for duty of care applied here. If asked to supply some authority for Lord Reed's proposition, every first-year law student would reach for *Caparo Industries Plc v Dickman*,[4] in which foreseeability was said to constitute the first (trouble-free) stage of a three-step analysis of the duty of care.[5] Behind that decision lies a series of cases stretching back into the mid-twentieth century: *Anns v Merton London Borough Council*,[6] *Dorset Yacht Company Ltd v The Home Office*[7] and *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[8] But behind them all is *Donoghue v Stevenson*,[9] and in particular Lord Atkin's neighbour principle. As every lawyer knows, Lord Atkin formulated his famous generalisation of the duty of care as follows:

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[10]

Before *Donoghue*

Novel as it was, this formulation was of course not free of context. As Lord Atkin himself observed in the lines immediately preceding and following the ones I have quoted, a generalisation of the duty of care in terms of reasonable foresight had already been attempted by Sir William Brett, Master of the Rolls, in *Heaven v Pender* at least as far back as 1883.[11] Following his judgment in *MacPherson v*

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[3] *Robinson v Chief Constable of West Yorkshire Police* [74]
[4] [1990] 2 AC 605
[5] See the judgment of Lord Bridge at p 617–18. Cf the criticisms of the so-called '*Caparo* test' offered by Lord Reed in the *Robinson* case at [21]–[30]
[6] [1978] AC 728
[7] [1970] AC 1004
[8] [1964] AC 465
[9] [1932] AC 562
[10] *Donoghue v Stevenson* at p 580
[11] (1883) 11 QBD 503, 509: '…whenever one person is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once recognise that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' For the wider context of this decision, and in particular the decisions of Brett MR/Lord Esher which preceded and followed it, see J Plunkett, *The Duty of Care in Negligence* (Hart 2018) 22–25.

Buick Motor Company[12] in 1915, in which *Heaven v Pender* was quoted with approval[13] and a duty to inspect held to be owed by a manufacturer to the ultimate purchaser of a defective motor car,[14] Cardozo CJ famously held in *Palsgraf v Long Island Railroad Company* in 1928 that there had been no breach of any duty owed to the plaintiff, to whom injury as a result of the defendant's employee's negligent conduct was unforeseeable.[15] Referencing *Heaven v Pender*, Frederick Pollock had since the first edition of his *Textbook* in 1887 been advocating a general duty of care in acts.[16] But the duty concept itself was in truth relatively peripheral to Pollock's account.[17] His general duty of care was formulated in the following terms:

> One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against that risk… Thus we arrive at the general rule that everyone is bound to exercise due care towards his neighbours in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default.[18]

The emphasis thus fell not so much on the determination of duty as on negligence itself, famously defined by Baron Alderson in 1856 in *Blyth v Birmingham Waterworks Company.*[19] Pollock was of course careful to circumscribe the operation of his general duty—several pages later, he specified that liability in negligence would arise only 'provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care'[20]—but it is clear that it was fault rather than duty that constituted the focus of his analysis. In an article published in the Law Quarterly Review in 1926, Sir Percy Winfield placed negligent conduct at the heart of the tort;[21]

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[12] 217 NY 382 (1916)

[13] Cardozo J referred not to the general principle on p 509 quoted in n 11 above, but to a passage on p 510 of the judgment in which Brett MR discussed defective products in particular: see *MacPherson* at 388.

[14] See especially the well-known passage on p 390: 'We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.'

[15] 248 NY 339; 162 NE 99 (1928) at p 99: 'The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.' See also p 100: 'The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation.'

[16] F Pollock, *Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens and Sons 1887) 353.

[17] On the nature of Pollock's 'quest for a general principle to explain negligence' see the recent account of M Lobban, "The Law of Obligations: The Anglo-American Perspective" in H Pihlajamäki, M Dubber, and M Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press 2018) 1037–40.

[18] See note 16 above. In support of this general principle Pollock referred to p 507 *of Heaven v Pender,* rather than to the general principle on p 509. Presumably he had in mind the following passage from the judgment: 'If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances, they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them.'

[19] *Blyth v Birmingham Waterworks Company* (1856) 11 Ex 781, 784, quoted by Pollock *Torts* (1st edn) at 355.

[20] Pollock *Torts* (1st edn) at 355.

[21] 'The History of Negligence in the Law of Torts' (1926) 42 LQR 184, 196.

indeed, writing shortly after *Donoghue* was decided, in 1934, he stressed that the duty concept had emerged only during the course of the nineteenth century and argued that it was analytically redundant.[22] William Buckland's Roman-law-inspired denunciation of the duty of care as 'an unnecessary fifth wheel on the coach' in 1935 is notorious.[23]

The reasons for the rise of the duty of care in the context of the nineteenth-century tort of negligence are difficult to pin down. On the one hand, it appears to have played a critical role in the emergence of an autonomous law of tort.[24] The duty concept, derived from eighteenth-century natural-law sources,[25] served as the organising device for nineteenth-century negligence.[26] On the other hand, the existence of jury trials in negligence cases tended to promote the duty concept, which was 'more-or-less firmly within the judicial domain',[27] as judges sought to limit the power of the jury: in particular, 'the more precisely delineated [duty situations] became, the more firmly did the incidence of liability fall under the control of the judges.'[28] But the progressive disappearance of the jury from negligence trials in England during the latter part of the nineteenth century and early decades of the twentieth removed this incentive to particularise.[29] Thus while *Heaven v Pender* and the later decision of Brett MR as Lord Esher in *Le Lievre v Gould*[30] are significant for cementing the duty of care in the tort of negligence, equally they can be seen to represent the beginning of a decline in its importance: the generalisation of the concept implied its obsolescence.

In sum, the picture briefly sketched out here is a puzzling one. The possibility of a general, foreseeability-based test for duty was already prominent in the Anglo-American case law of the late nineteenth and early twentieth centuries. English tort scholars had been pushing hard for the generalisation of the tort of negligence for several decades by the time that *Donoghue v Stevenson* was handed down in 1932.[31] But those scholars tended to be hostile to the duty of care, preferring

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[22] P Winfield, 'Duty in Tortious Negligence' (1934) Columbia L Rev 41. See in particular (for our purposes) the following passage on p 58, in which he appears to have been referring directly to *Donoghue v Stevenson*: 'I hope that the student of comparative law may find some interest in the investigation of why tortious negligence should be permeated by a conception which was wholly alien to Roman Law and of which there is no trace in the modern Continental systems.'

[23] WW Buckland, 'The Duty to Take Care' (1935) 51 LQR 637, 639. For a survey of early twentieth-century criticism of the duty of care concept see Plunkett *Duty of Care* 79–82.

[24] See D Ibbetson, '"The Law of Business Rome": Foundations of the Anglo-American Tort of Negligence' (1999) 52 CLP 74, 87–89. Also *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) ch 9, especially 170–74 and 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' in E Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker & Humblot 2001) 228, 247–48.

[25] See in particular Samuel Pufendorf, *De Iure Naturae et Gentium* (1672) III.1.6.

[26] Ibbetson 'The Law of Business Rome' 85–87.

[27] Ibbetson *Historical Introduction* 176.

[28] Ibbetson *Historical Introduction* 173. See also the more detailed account of this phenomenon in 'The Law of Business Rome' 89–91.

[29] Ibbetson *Historical Introduction* 188–89; 'Negligence in the Common Law' 259–60.

[30] [1893] 1 QB 491.

[31] In addition to the authorities set out above see also those cited by Ibbetson *Historical Introduction* 189 n 11, Plunkett *Duty of Care* 19 ff.

[32] It appears that Pollock himself did not see *Donoghue* as setting up a general principle that a duty to take care would arise wherever the defendant ought to foresee harm to the plaintiff arising from his conduct. Rather, '[a] notable step has been made in enlarging and clarifying our conception of a citizen's duty before the law (to put it in the shortest and plainest words) not to turn dangerous or noxious things loose on the world.' F Pollock, 'The snail in the bottle, and thereafter' (1933) 49 LQR 22.

to emphasise negligent conduct itself. There were of course powerful arguments to be made against the injustices produced by the restrictive nineteenth-century approach to the duty of care in particular instances—for example, where harm had been done to a remote party by a defective product—but the forces favouring the generalisation of the duty concept itself were largely negative ones.[32] Given that, the emergence of a general duty of care grounded in reasonable foreseeability in *Donoghue v Stevenson* does not appear to have been inevitable.[33] Is it possible that there were other intellectual forces at work beneath the surface of Lord Atkin's speech?

Mrs Donoghue and Quintus Mucius Scaevola[34]

David Ibbetson has offered an account of the genesis of the foreseeability principle in *Donoghue v Stevenson* which presents it as a phenomenon wholly internal to English law. Received into the remoteness inquiry from the writings of eighteenth-century Natural lawyers[35] such as Burlamaqui[36] via Francis Buller's *Introduction to Trials at Nisi Prius*,[37] it was applied by Chief Baron Pollock in *Rigby v Hewitt*[38] and *Greenland v Chaplin*[39] in 1850. From there it migrated to breach[40] (as in the *Blythe* case[41]) and thence to duty of care, as in *Heaven v Pender* and ultimately *Donoghue* itself.[42]

However, I want to suggest an alternative—or at least additional—explanation.[43] Title 9.2 of Justinian's *Digest* contains the following famous text:

> If a pruner threw down a branch from a tree and killed a slave passing underneath (the same applies to a man working on a scaffold), he is liable only if it falls down on to a public place and he failed to shout a warning so that the fall of the branch could be avoided. But Mucius says that even if the accident occurred in a private place, an action can be brought on account of his fault [*culpa*]; for he thinks there is fault [*culpa*] when what could have been foreseen by a diligent man [*a diligente provideri poterit*] was not foreseen or when a warning was shouted too late for the danger to be avoided. Following the same reasoning, it does not matter much whether the deceased was making his way through a public or a private place, as the general public often make their way across private places. But if there is no path, the defendant should be liable only for intentional wrongdoing [*dolus*], so he should not throw anything at someone he sees passing by; for he is not to be held to account

[32] It appears that Pollock himself did not see *Donoghue* as setting up a general principle that a duty to take care would arise wherever the defendant ought to foresee harm to the plaintiff arising from his conduct. Rather, '[a] notable step has been made in enlarging and clarifying our conception of a citizen's duty before the law (to put it in the shortest and plainest words) not to turn dangerous or noxious things loose on the world.' F Pollock, 'The snail in the bottle, and thereafter' (1933) 49 LQR 22.

[33] See Ibbetson 'Negligence in the Common Law' 261–63 on the various ways in which *Donoghue* might have been decided given the context. See also Plunkett *Duty of Care* 32.

[34] With apologies to Alan Rodger: cf A Rodger, 'Mrs Donoghue and Alfenus Varus' (1988) 41 CLP 1

[35] Ibbetson *Historical Introduction* 167; 'Negligence in the Common Law' 246.

[36] *Principes des Droit Naturel*. See the 1817 English translation of the 1748 edition by Thomas Nugent (*The Principles of Natural and Politic Law*) at p 241–42.

[37] I have used the 5th edition of 1788: see p 25–26.

[38] (1850) 5 Ex 240 at 243.

[39] (1850) 5 Ex 243 at 248.

[40] Ibbetson *Historical Introduction* 174–76, especially 175 n 41: 'The test of foreseeability was already found as a rule of remoteness of damage, and its translation from there marks the first step of its recategorization.' (at p 175 n 41) See also 'Negligence in the Common Law' at 246–47.

[41] *Blyth v Birmingham Waterworks Company* (1856) 11 Ex 781.

[42] Ibbetson *Historical Introduction* 176–77; also 'Negligence in the Common Law' at 247–48, 263.

[43] The argument which follows appears in embryonic form in R Evans-Jones and H Scott, 'Lord Atkin, *Donoghue v Stevenson* and the *Lex Aquilia*: Civilian Roots of the "Neighbour" Principle' in PJ du Plessis (ed), *Wrongful Damage to Property in Roman in Law: British Perspectives* (Edinburgh University Press 2018) 255, 270–72.

> for *culpa* [*culpa ab eo exigenda non est*] when he could not divine whether someone was about to pass through that place.[44]

This text is attributed by Justinian's compilers to Paul, a classical Roman jurist of the early third century CE, and is said to have been excerpted from the tenth book of his commentary on the works of the first-century jurist Sabinus. For centuries it has been read as a general definition of fault, *culpa*, in the context of the *lex Aquilia*: we see this reading, for example, in the work of the sixteenth-century Humanist Hugo Donellus.[45] A close reading of this passage side-by-side with Lord Atkin's neighbour principle suggests some relationship between them: some direct influence of the Roman text on the English law. In particular, the formulation of a general duty inquiry in terms of reasonable foreseeability is strongly suggested by the final sentence of the text, where it is said that 'he is not to be held to account for *culpa* when he could not divine whether someone was about to pass through that place.'[46] Paul could reasonably be understood by an English lawyer to mean that a duty of care would arise wherever the presence of the victim was foreseeable.[47] This suggestion of influence is, of course, strongly underlined by Lord Atkin's explicit reference to *culpa*.

How likely is it that Lord Atkin had Digest 9.2.31 in mind when he wrote his speech in *Donoghue v Stevenson*? Roman law is prominent in the Anglo-American tort textbooks of the late nineteenth- and early twentieth centuries: examples are Pollock's textbook, Francis Wharton's *Treatise on the Law of Negligence*[48] and Thomas Beven's *Principles of the Law of Negligence.*[49] Chapter 3 of Beven's work contains a detailed discussion of numerous individual texts drawn from Digest 9.2, while Wharton opens his Book 3, 'Negligence in Discharge of Duties not Based on Contract', with a paragraph in praise of the general *culpa* principle 'recognised by the Aquilian law'. As for Pollock, from its first edition in 1887 and throughout, several pages of the first chapter of his *Textbook* were devoted to a discussion of *dolus* and *culpa* in Roman law. In particular, he makes the following observation:

> *Culpa* is exactly what we mean by "negligence"<:> the falling short of that care and circumspection which is due from one man to another… The Roman conception of such rules, as worked out by the lawyers of the classical period, is excellently illustrated by the title of the Digest "ad legem Aquiliam," a storehouse of good sense and good law (for the principles are substantially the same as ours) deserving much more attention at the hands of English lawyers than it has ever received.[50]

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[44] The full citation is D 9.2.31 Paul Book 10 *On Sabinus.* The translation given here is taken from Watson's *Digest*, with some adjustments: Alan Watson (ed), *The Digest of Justinian* Vol 1 (University of Pennsylvania Press 1998)

[45] Donellus *Commentary on the Civil Law* at XV.27.2: *'Culpa* must be understood as follows: when what could have been foreseen by a diligent person, that some loss might come about from a particular event, was not foreseen. This definition is found in D 9.2.31…' This translation is that given Evans-Jones & Scott, 'Lord Atkin, *Donoghue v Stevenson* and the *Lex Aquilia*' 271.

[46] Also noteworthy is the fact that as in the context of Lord Atkin's speech, the issues of 'duty' and 'breach' are transposed, i.e. the question of whether the defendant acted carefully is considered in advance of the question of whether he was obliged to be careful.

[47] BW Frier, *A Casebook on the Roman Law of Delict* (Scholars Press, Atlanta, 1989) 29–32; Cf D Ibbetson, 'How the Romans Did for Us: Ancient Roots of the Tort of Negligence' (2003) 26 UNSWLJ 475, 509. Of course this argument is pure heresy from the point of view of Professor Buckland: see 'The Duty to Take Care' 639–40.

[48] F Wharton, A Treatise on the Law of Negligence (Kay & Bro, Philadelphia, 1874)

[49] T Beven, *Principles of the Law of Negligence* (Steven & Haynes, London, 1889)

[50] Pollock *Torts* (1st edn) 17

A recently-published letter written to Pollock by James Muirhead, Professor of Civil Law at Edinburgh, in 1886 includes a discussion of our text;[51] it is clear that Muirhead is responding to a specific question from Pollock.[52] Furthermore, Erwin Grueber's *The Roman Law of Damage To Property*,[53] published in 1886 for the use of undergraduate students of Roman law at Oxford,[54] was warmly praised by Pollock in one of the very early volumes of the Law Quarterly Review[55] and favourably reviewed by Muirhead in the same volume, a review of course commissioned by Pollock himself.[56] It is significant that Grueber's account of Digest 9.2.31 appears to encourage the interpretation I have proposed here, a reading of the text in terms of which it anticipates a general foreseeability-based test for duty of care:

> On the other hand, the circumstances of a case may be of such kind as to require only a very low degree of care and effort; it even may be that culpa levis cannot come into existence, because no diligence, the omission of which would imply culpa levis, can be required according to the facts of the case… a diligens pater familias, although he would look round in order to avoid injury to people passing by, if he were lopping trees in places where people are accustomed to walk, certainly would not take such care in a place where there is absolutely no way, and therefore a passer-by cannot be expected.[57]

As Pollock makes explicit in his review, Grueber's work acted as a conduit for introducing contemporary German scholarship to Anglo-American scholars:[58] in his discussion of D 9.2.31 Grueber refers to works by Pernice,[59] Mommsen,[60] and Hasse,[61] all of whom discuss the text themselves.[62] Under their influence, Grueber appears to have understood Aquilian *culpa* as *culpa levis*: absence of the care which would have been exercised in the circumstances by a *diligens paterfamilias*, a general standard which features across the Roman law of contract.[63] The possibility

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[51] J Cairns, 'English Torts and Roman Delicts: The Correspondence of James Muirhead and Frederick Pollock' (2013) 87 Tulane L Rev 867. Digest 9.2.31 is discussed in a letter reproduced by Cairns at p 880.

[52] Cairns 'English Torts and Roman Delicts' 880–81.

[53] *The Roman Law of Damage to Property Being a Commentary on the Title of the Digest Ad Legem Aquiliam (IX.2) with an Introduction to the Study of the Corpus Iuris Civilis* (Clarendon Press 1886)

[54] Cairns 'English Torts and Roman Delicts' 874.

[55] 'Oxford Law Studies' (1886) 2 LQR 452, 456.

[56] (1886) 2 LQR 379. According to Pollock, '…our colleague Dr. Grueber has for the first time, in his exhaustive monograph on the Lex Aquilia, exhibited to us in our own language the very form and method of the leading modern school of Roman law: and this, be it remembered, with direct and definite relation to our University course' (p 456).

[57] Grueber *Damage to Property* 225. His 'systematic exposition' of the 'requirement of *culpa*' extends from p 222–33.

[58] German private-law scholarship of the mid- and late nineteenth century was characterised, in contrast to much of the civilian tradition of the seventeenth and eighteenth centuries, by the emphasis which it placed on the original Roman texts: W Ernst, 'Negligence in 19th Century Germany' in E Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (Duncker & Humblot 2001) 341. See also A Fagan, 'The German origins of a South Africa dogma about delict' in *Undoing Delict: The South African Law of Delict Under the Constitution* (Juta 2018) 134, 135-39. Of the Anglo-American textbook writers mentioned above, Wharton too makes frequent reference to Hasse. Cf D Ibbetson, 'The Law of Business Rome: Foundations of the Anglo-American Tort of Negligence' (1999) 52 CLP 74 and in particular his discussion of the impact of Hasse's *Die culpa des römischen Rechts* on Wharton at 107.

[59] A Pernice, *Zur Lehre von den Sachbeschädigungen nach römischen Rechte* (H Böhlau Weimar 1867)

[60] T Mommsen, *Beiträge zum Obligationenrecht* (CA Schwetschke und Sohn Braunschweig 1853–55)

[61] JC Hasse, *Die culpa des römischen Rechts : eine civilistische Abhandlung*. I have used the 2nd edition prepared by D August Bethmann-Hollweg (A Marcus, Bonn, 1838); the first edition appeared in 1815.

[62] Pernice *Lehre* at p 66; Mommsen *Beiträge* at p 361 ; Hasse *Culpa* at 68–70.

[63] See further p 12 below.

of some direct influence by our text on Lord Atkin is strengthened by its prominence in contemporary German treatments of the requirement of *culpa*.

It is important to stress, finally, that I am not here concerned with the question of the influence on Lords Atkin and Macmillan of Scottish civilians such as Stair, Erskine, and Bell. A first draft of Lord Macmillan's speech showing heavy reliance on those authorities was famously discovered and published by Alan Rodger in the early 1990s.[64] It seems that these authorities were later stripped out by Lord Macmillan, perhaps in response to persuasion by Lord Atkin, perhaps in order to avoid the danger that his speech would be understood to be confined to Scottish law only:[65] in Lord Rodger's words, '[o]ne may therefore surmise that Lord Atkin…managed to persuade Lord Macmillan to recast his opinion in such a way that their Lordships' decision would decide the matter once for all for the entire Common Law world.'[66] In fact, Lord Rodger was of the view that these Scottish authorities played little part in the decision of the case.[67] Firmly oriented towards the Natural law tradition, there is certainly no sign in the passages referred to by Lord Macmillan of Digest 9.2.31 itself or of the generalised foreseeability principle found in the writings of Humanists such as Donellus. Nevertheless, we cannot rule out the possibility that it was precisely for reasons such as these that Lord Atkin did not expand upon the reference to 'culpa' in his formulation of the neighbour principle. An explicit reference to Digest 9.2.31 might have had the same limiting effect as reliance on the Scottish civilians would have done.

South African parallels: duty of care in a mixed jurisdiction

Thus far I have made out a circumstantial case for the direct influence of Digest 9.2.31 on Lord Atkin's formulation of the neighbour principle, relying both on the text of Lord Atkin's' speech itself and on the wider context of his decision in *Donoghue v Stevenson*. The next stage of my argument involves triangulating the neighbour principle, on the one hand, and Digest 9.2.31, on the other, with a series of South African decisions dating from the early decades of the twentieth century. All emanate from a single judge, James Rose Innes: essentially an autodidact, yet deeply learned in Roman, Roman-Dutch and German law as well as the English common law; second Chief Justice of the Union of South African; one of the 'Cape Liberals' who battled unsuccessfully to achieve universal suffrage in South Africa during the early decades of the twentieth century; and probably among the greatest judges the country has ever produced.[68] These decisions seem to me to strengthen significantly the case for influence made out above. I propose to discuss three in particular.

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[64] 'Lord Macmillan's speech in *Donoghue v Stevenson*' (1992) 108 LQR 236, 249.

[65] Rodger 'Lord Macmillan's speech in *Donoghue v Stevenson*' 246–47.

[66] Rodger 'Lord Macmillan's speech in *Donoghue v Stevenson*' 246 (footnote omitted). See also R Evans-Jones, 'Roman law in Scotland and England and the development of one law for Britain' (1999) 115 LQR 605, 618-28.

[67] 'If either side could have shifted the balance of the argument in their favour by citing some passage from a Scottish institutional writer or from a Scottish case, then they would certainly have done so. The truth is that there was nothing in the Scottish material which really advanced the argument one way or the other.' Rodger 'Lord Macmillan's speech in *Donoghue v Stevenson*' 241. Cf Evans-Jones 'One law for Britain' 624.

[68] See e.g. J Gauntlett, 'James Rose Innes: the making of a constitutionalist' *Consultus* 1 (1988) 11; S Girvin, 'The Architects of the Mixed Legal System' in R Zimmermann and D Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Juta, Cape Town, 1996) 95, 121.

The first of these is *Fleming v Rietfontein Deep Gold Mining Company*, handed down in 1905 when Innes was Chief Justice of the Supreme Court of the Transvaal.[69] The plaintiff, a miner, making his way home from a local hotel one night, fell into a disused mining shaft excavated upon one of its claims by the defendant company at a distance of about 80 feet from the road and left unfenced. It seemed that the plaintiff had wandered off the road in the dark without realising it. It was argued by counsel for the defendant on the basis of certain English cases that because the plaintiff was a trespasser on the defendant's claim, the latter owed him no duty in negligence.[70] On the other hand, there was English and American authority for the proposition that liability could arise from the dangerous condition in which the excavation had been left, even if situated some distance from a public road.[71] Chief Justice Innes held that the matter could be settled by direct reference to the Roman law, and in particular to the accounts of *culpa* given in Digest 9.2.28 and Digest 9.2.31, both of which deal with hazards on or near public thoroughfares.[72] In the circumstances of the case it seemed that the defendant ought indeed to have foreseen that the excavation might pose a real danger to persons such as the plaintiff who might stray off the road for a short distance.[73] Thus he founded his decision directly on the general definition of *culpa* apparently enshrined in 9.2.31.

The second case is *Farmer v Robinson Gold Mining Company*, decided twelve years later in 1917 when Innes was Chief Justice of the Union of South Africa.[74] The defendant mining company carried on operations on a piece of ground adjoining a public park. The property was intersected by a cutting, which was fenced off. In the cutting there was a carriage which ran upon rails and supported a large pulley. A rope connected the carriage with the engine room from where it was controlled. The rope passed from the carriage round a large wheel which sat close to the ground. Peter Farmer, who was six and a half, having come from the park and got through the fence, was playing on the wheel when it was started; his legs became caught between the pulley and the rope and he was seriously injured.[75] The Chief Justice conducted a detailed review of the contemporary English authorities on liability in negligence to trespassers, licencees, and invitees, including the position regarding 'traps' likely to entice children to trespass.[76] Then he turned to 'the principles of the *lex Aquilia* embodied in Tit., 9, 2 of the *Digest,*' setting out once again the general definition of *culpa* derived from Digest 9.2.31.[77] It was plain that in Roman law, as in English law, an owner would not as a general rule be obliged to be careful in the case of a trespasser. This was not

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[69] 1905 TS 111 Cf also his decision in *Skinner v Johannesburg Turf Club* 1907 TS 852. The approach taken in the *Fleming* case was confirmed in *Transvaal and Rhodesian Estates Ltd v Golding* 1917 AD 18.

[70] At p 114. The cases cited to the court were *Hardcastle v South Yorkshire Railway Co* 28 LJ Ex 139 (decided in 1859) and *Binks v South Yorkshire Railway Co* 32 LJ QB 26 (decided in 1862).

[71] *Hirst v Taylor* 54 LJ QB 310 (decided in 1885; also reported as *Hurst v Taylor* e.g. at 14 QBD 918); *Crogan v Schiele* (cited by Innes CJ at 'Schiele') 55 Amer Reps 88 (also decided in 1885; the original citation is 53 Conn. 186).

[72] At p 116. He cited also Justinian's *Institutes* 4.3.5 (for a full discussion of these Roman texts see p 12–14 below). 'The practical effect of [these principles of the Roman law] is this: The liability of those who make an excavation or do dangerous work in the neighbourhood of roads, and cause injury to persons using those roads, depends on whether or not a reasonable, careful man ought to have foreseen that an accident was likely to happen, and ought to have recognised that there would be danger to persons using the road. Then it would have been his duty either to guard against the danger, or not to do the work.' (at p 117).

[73] At p 118.

[74] 1917 AD 501. See also *Union Government v National Bank of South Africa* 1921 AD 121.

[75] This account of the facts is drawn from the judgment of Innes CJ at p 516.

[76] At p 519–521.

[77] At p 521.

because the act of trespass deprived the wrongdoer of all right to protection, but rather because the owner could not reasonably be expected to anticipate his presence.[78] In such circumstances, the ordinary reasonable man would take no precautions, and the failure to take any could not constitute *culpa*. This reading of Digest 9.2.31 was, he continued, supported by the passage from Grueber's *Roman Law of Damage to Property* quoted above.[79] In the Chief Justice's words, 'The suggested reason for exemption from liability is therefore based upon the same considerations on which liability itself would rest, —namely, the conduct of the owner tested by the standard of the reasonable man.'[80]

What we notice in both cases, first, is the generalisation of Digest 9.2.31 beyond its original context of the dangers posed to road-users by activities over, on or near roads. This clearly shows that Innes construed the definition of *culpa* in D 9.2.31 as a general rule which applied to the law of negligence in its entirety. At the same time, the splitting off of the duty of care inquiry from Roman *culpa* is striking. Again, in this the Chief Justice seems to have been directly influenced by Grueber's paraphrase of the last sentence of our text. We may reasonably suspect that this separation of the duty and breach questions was impelled by the need to accommodate Roman and Roman-Dutch law to the English common law, a need pressing now that he was presiding over a united South Africa; the parallels with the pressure on the Law Lords in *Donoghue v Stevenson* to create 'one law for Britain' are clear.[81] Finally, although he seemed to deduce from D 9.2.31 an exclusionary rule only, that there could be no liability to a trespasser whose presence on the owner's land was not foreseeable, towards the end of his judgment there are hints of a positive formulation: 'In most cases the presence of trespassers cannot reasonably be foreseen; but if in any instance a reasonable man would anticipate such presence, then it seems to me that the owner should observe towards the trespasser due and reasonable care.'[82]

These tendencies culminated in the last case, *Cape Town Municipality v Paine*, decided in 1923.[83] Here, the defendant municipal council had erected a grandstand on athletic grounds belonging to it for the use of spectators. In 1920 the council leased the grounds to the YMCA for a period of three years: the lease provided that the council should repair the exterior of the stand.[84] In October 1921 a meeting was held at the grounds under the auspices of the South African Athletic and Cycling Association, a body to whom the lessees were bound to grant the use of the ground under the terms of the lease.[85] The plaintiff, who had paid for admission, while stepping from one seat to another on the grandstand put his foot through the woodwork of the flooring, sustaining serious injury. According to Innes CJ, in a case such as this one the English decisions on the point[86] 'attach decisive importance to two factors, – absence of contractual privity between the landlord

[78] At p 522.
[79] See text to n 57; Grueber *Roman Law of Damage to Property* 225, quoted by Innes at p 522 of the judgment.
[80] At p 522. Innes CJ included here (at p 522–23) also extensive discussion of the account of liability to trespassers given by Thomas Atkins Street in *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law* Vol 1 (Edward Thompson Co, Northport NY, 1906) 155–56.
[81] Cf R Evans-Jones, 'Roman law in Scotland and England and the development of one law for Britain' (1999) 115 LQR 605. See the discussion of *Donoghue* at p 8 above.
[82] At p 523.
[83] 1923 AD 207.
[84] At p 218.
[85] See e.g. Innes CJ's account of the facts at p 218.
[86] The contemporary English authorities concerning the liability of a landlord to third persons injured by defects in the premises are discussed by Innes CJ at pp 212–15.

and the person injured and absence of control on the part of the landlord. Further, they refuse to recognise the application in cases of this class of the general doctrine enunciated…in *Heaven v Pender.*'[87] However, he said, 'our law applies a wider test of liability than is recognised by English Courts', based upon *culpa*:

> Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established, and it only remains to ascertain whether it has been discharged.[88]

Applying this principle to the facts,

> …the council ought to have realised the danger to occupants of the stand, which would result from failure to carry out its undertaking to repair and should have taken due steps to guard against it. That is what a reasonable man would have done, and a duty to do so, therefore, arises as between the council and the occupants.[89]

Furthermore, according to the Innes CJ,

> English Courts would probably hesitate to infer that duty from circumstances involving no element of proximity and no contractual relationship between the parties… [But] upon a careful consideration of all the facts I am satisfied that such a duty did arise.[90]

Thus we observe in the *Paine* case the almost total abstraction of the rule set out in *Digest* 9.2.31 and its application in a context quite remote from its original Roman one: indeed, in imposing liability in favour of a plaintiff who had contracted with the Cycling Association rather than the municipality itself, Innes CJ effectively anticipated the decision in *Donoghue v Stevenson*. On the other hand, the separation out of an anterior duty of care inquiry from Roman *culpa* and the formulation of such a duty in positive terms are unmistakable.[91]

To sum up, in this series of early twentieth-century decisions we see a South African judge wrestling with English authority (both primary and secondary) alongside the definition of *culpa* given in Digest 9.2.31 and producing a general formulation of the duty of care very similar to that ultimately adopted by Lord Atkin.[92] Admittedly the remarks of Brett MR in *Heaven v Pender* are prominent in the *Paine* judgment; but it is Digest 9.2.31 which appears to be the main source of

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[87] At p 215. Here Innes CJ quoted the famous passage on p 509 of the judgment in *Heaven v Pender* set out in n 11 above. He cited also the remark in Street *Foundations of Legal Liability* (above n 80) at p 93 to the effect the statement of Brett MR / Lord Esher in that case amounted to, 'the most powerful, judicial effort which has ever been put forth to generalise the theory of negligence.' See also his reference to the third edition of Beven's work on negligence, *Negligence in Law* Vol 1 (Stephen & Haynes, London, 1908) at p 63.

[88] At p 217.

[89] At p 219.

[90] At p 219.

[91] See in particular pp 219–220 of the judgment, where the issues of duty and breach are considered separately.

[92] Cf the remark to that effect by D Hutchison in 'Aquilian Liability II (Twentieth Century)' in R Zimmermann and D Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Juta, Cape Town, 1996) 595, 635–36 as well as the very full discussion of the foreshadowing of the *Donoghue v Stevenson* neighbour principle in *Cape Town Municipality v Paine* by RG McKerron in the final seventh edition of his *The Law of Delict: A Treatise on the Principles of Liability for Civil wrongs in the Law of South Africa* (Juta, Cape Town, 1971) at 28–30. The foundation of the South African law in D 9.2.31 is also extensively discussed. The first edition of this work, which appeared early in 1933, similarly emphasises the central role played by D 9.2.31 in the development of the South African law. *Donoghue v Stevenson* makes its appearance in a footnote, presumably added at a late stage in the preparation of the manuscript: see RG McKerron *Law of Delict* (Juta, Cape Town, 1933) 28–30 and in particular n 109 on p 29.

Innes's formulation of a general duty of care in terms of reasonable foreseeability. I am not suggesting any direct influence of the South African decisions on Lord Atkin, although we cannot discount the possibility that he may have read them. What I do suggest is that these cases clearly show that the admixture of Digest 9.2.31 with the Anglo-American authorities of the time was likely to produce a general principle of precisely the kind articulated by Lord Atkin. As such, these decisions are a kind of juridical Rosetta stone, revealing the otherwise hidden relationship between Lord Atkin's neighbour principle and our text.

The history of foreseeability

That completes the case for the direct influence of Digest 9.2.31 on Lord Atkin's neighbour principle. The next step in my argument require considering more carefully the role of the foreseeability principle in its original Roman context. Was its nature and function there similar to that assigned to it by Lord Atkin? If not, what was its role?

As we have seen,[93] at least since Donellus there has been a tendency to treat the foreseeability principle in D 9.2.31 as a general definition of *culpa*, a definition assumed to have determined the outcome in other key texts in Digest 9.2 even while it remained unacknowledged. As the cases discussed in the previous section show, this was James Rose Innes's understanding of the principle. This view of 9.2.31 is tied to an understanding of Roman *culpa* as the failure to exercise the care of a bonus paterfamilias, a conception which implies a degree of moral blameworthiness, rather like negligence in the common law.[94] Such an account of Aquilian *culpa* is, however, open to doubt, at least insofar as it purports to describe classical Roman law. It seems, rather, that the classical jurists did not apply any unitary test, either explicitly or implicitly: instead, *culpa* was determined differently in different contexts, according to a range of different tests.[95] Moreover, although *culpa* could be determined according to subjective considerations,[96] it was in the main objective: liability in the context of the *lex Aquilia* was determined primarily by comparing the defendant's conduct with

[93] Cf p 6 above.

[94] See in particular JC Hasse, *Die culpa des römischen Rechts : eine civilistische Abhandlung,* revised 2nd ed by A Bethmann-Hollweg (A Marcus, Bonn, 1838) 64ff; B Beinart, 'The relationship of iniuria and culpa in the lex Aquilia' in *Studi Arangio-Ruiz* Vol I (Jovene 1953) 279, esp. his discussion of D 9.2.31 at 293–94, as well as the other sources cited by G MacCormack, 'Aquilian *Culpa*' in WAJ Watson (ed) *Daube Noster: Essays in Legal History for David Daube* (Scottish Academic Press 1974) 201, 202 n 6. Others have taken the view that this version of *culpa* was inserted into the classical texts by Justinian's compilers, or perhaps by post-classical jurists working before Justinian. This view supposes substantial interpolation of the classical texts excerpted in *Digest* 9.2; certainly, general explanations for *culpa* such as that offered in D 9.2.31 are assumed to be post-classical. See eg W Kunkel, 'Diligentia' (1925) 45 ZSS 266, 298–99; 'Exegetische Studien zur aquilischen Haftung' (1929) 49 ZSS 158, 163, 180–81, as well as the other sources cited by MacCormack 'Aquilian Culpa' 202 n 7 and 203 n 10.

[95] eg MacCormack 'Aquilian Culpa'; 'Aquilian Studies' (1975) 41 Studia et Documenta Historiae et Iuris 46 as well as R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta, Cape Town, 1990) 1007–1009. D 9.2.8 (Gaius Book 7 *On the Provincial Edict*) appears to recognise a test of *imperitia*; Also D 9.2.6 and 10 (both Paul Book 22 *On the Edict*) suggest that *culpa* will be established wherever there is *nimia saevitia* (excessive brutality) or a *lusus noxius* (dangerous game). The version of *culpa* deployed in 29.3–4 (Ulpian Book 18 *On the Edict*) seems to catch any case in which the damage caused is not attributable to *casus* or *vis maior*. D 9.2.30 pr (Paul Book 22 *On the Edict*) and 45.4 (Paul Book 10 *On Sabinus*) seem to concern justified killing.

[96] See in particular D 9.2.30.3 (Paul Book 22 *On the Edict*) and Ulpian Book 18 *On the Edict* at D 9.2.5.2 and 9.2.27.9 (= Coll 12.7.7).

some external standard.[97] This shift in our understanding of *culpa* necessitates in turn the re-evaluation of the meaning of 9.2.31 itself.[98] If not the centrepiece of a general, relatively subjective test for *culpa*, at least in cases involving accidents in the narrow sense,[99] what was the nature of the foreseeability principle expressed there?

Here it is useful to consider the only other text in Digest 9.2 in which the idea of foreseeability figures, namely Digest 9.2.28, also excerpted from Book 10 of Paul's commentary on the works of Sabinus:

> People who dig pits to catch bears and deer are liable under the *lex Aquilia* if they dig such pits where people pass[100] and something falls in and is damaged, but there is no such liability for pits made elsewhere, where they are habitually made. 1. But this action is given only for good reason, that is, if no warning was given and the victim was unaware of and could not foresee the danger [*providere potuerit*]; and many cases of this sort can be seen in which the claimant fails, if he could have avoided the danger.[101]

What is immediately striking about this text is that foreseeability is deployed here with respect to the victim rather than the wrongdoer. This in itself militates against the view that foreseeability formed the centrepiece of a general test for *culpa* as negligence. Of course it is possible to argue that this is a case of contributory negligence; that we are applying the general test to determine *culpa* on the part of the claimant.[102] But in fact the word '*culpa*' is not used. What we do find is the word 'avoid'—in Latin, *evitare*—which occurs also in our primary text. There, the pruner's *culpa* is said to lie in the fact that he failed to shout a warning so that the victim could avoid the falling branch, or shouted the warning too late. Here, in the text about the pits, it is said that the claimant will fail if he could have avoided the danger: that is, if a warning was given, or if he could have foreseen the danger or knew of it. The language of avoidability and the way in which it is used suggests that we are dealing here not with a technique for determining blame, specifically blame for a deficient mental state, the failure to foresee, but rather, simply, with causation: could the risk have been anticipated by either party and the injury thus avoided?

If we broaden our focus and consider the subset of cases discussed in Digest 9.2 which involve accidents in the narrow sense, here too it seems that *culpa* is essentially causal. This question is which of the parties has behaved in accordance with an established social practice such as walking

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[97] Ibbetson 'Wrong and Responsibility' 113–17. This is to be contrasted with the 'clear subjectivism, with a strongly Aristotelian slant…found elsewhere in Roman law': see the examples from Roman criminal law given by Ibbetson, 'Wrongs and Responsibility' at 117–19. In particular he contrasts the treatment of the pruner case in the context of the *lex Aquilia* in D 9.2.31 with that in D 48.8.7 (Paul *Criminal Proceedings*), where the context is the *lex Cornelia*: here, it is said, the statute will apply only if *dolus* is present.

[98] As discussed by H Scott, 'Pits and Pruners: Culpa and Social Practice in Digest 9.2' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earslferry* (Oxford University Press 2013) 251.

[99] That is, the collision between moving bodies (or one stationary and one moving body) where the parties are strangers to one another.

[100] Lawson: 'where people pass'; Munro: 'where people habitually pass.' See CH Monro, *Digest IX.2. Lex Aquilia* (1898); FH Lawson, *Negligence in the Civil Law* (Clarendon Press 1955)

[101] Again, I have used Watson's translation with some adjustments.

[102] This is the explanation offered by e.g. Grueber: see his *Damage To Property* 229–30. The effect of such contributory negligence on the part of the claimant was to extinguish liability entirely: cf Pomponius Book 8 *Ad Quintum Mucium*, D 50.17.203.

on a road or path,[103] or throwing a javelin on a military parade ground or javelin range,[104] or playing a ballgame in an appropriate place,[105] or digging a bear pit where it was customary to do so.[106] Where one of the parties was behaving in accordance with such a social practice, it was the other who could have avoided it and on whom the *culpa* rested. What Paul appears to have trying to do in Digest 9.2.28 and 31 was to shift this highly localised, concrete criterion towards a more abstract, subjective test of foreseeability.[107] In most cases the concrete and abstract tests produced the same results: the risks created by abnormal behaviour are unforeseeable and therefore unavoidable; the risks created by normal or typical behaviour can be foreseen and avoided. But as Paul shows in these two texts, they will not invariably coincide. The foreseeability principle also had the virtue of being capable of operating even in the absence of some well-defined social practice.

Was the foreseeability principle Paul's own invention? Although the point has been strenuously argued,[108] there is no good reason to reject as interpolated Paul's attribution of it to Quintus Mucius Scaevola, a jurist active around 100BCE.[109] On the other hand, it may be that it was Paul who imported it from contract to delict and applied it to the problem of *culpa* in the context of the *lex Aquilia*.[110] Indeed, it may be that the foreseeability principle was derived by Quintus Mucius—either immediately or via some Stoic intermediary—from the writings of Aristotle, specifically from the account of wrongdoing given in his Rhetoric[111] and Nicomachean Ethics,[112] in which the concept of foreseeability—or more precisely, the occurring of an event 'contrary to expectation', *paralogos*—features prominently.[113] Yet it seems that the foreseeability principle played a very different role in the context of Aristotle's analysis than it did in Paul's. This difference reflects—at the level of specific detail—a fundamental difference in their approaches to responsibility.[114]

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[103] As in D 9.2.28 and 31 as well as Justinian's *Institutes* 4.3.5. Note that in the latter version of the text the outcome is made to turn on whether the victim had had a right to walk where he did. This may also be an alternative explanation for the non-liability of the soldier practising in a designated area in *Institutes* 4.3.4; cf also D 9.2.29 pr (Ulpian Book 18 On the Edict) See further Scott 'Pits and Pruners' 257–59, 261.

[104] As in D 9.2.9.4 (Ulpian Book 18 *On the Edict*) as well as *Institutes* 4.3.4.

[105] As in D 9.2.11 pr (Ulpian Book 18 *On the Edict*)

[106] As in D 9.2.28. All these cases are discussed by Scott in 'Pits and Pruners'.

[107] Cf Scott 'Pits and Pruners' 263–64. Another instance where Paul appears to have adopted a subjective understanding of *culpa* is D 9.2.30.3 (Paul Book 22 *On the Edict*).

[108] Cf n 92 above.

[109] 'We know he wrote a book of definitions, and there is nothing suspicious in a lawyer of known Stoic inclinations adopting an analysis in terms of the actor's foresight.' Ibbetson 'Wrongs and Responsibility' 117. On the other hand, such abstract definitional statements are characteristic of Paul's writing on the *lex Aquilia*: see 'Wrongs and Responsibility' at 116.

[110] Ibbetson, 'How the Romans Did for Us' 505. D 13.6.5.2, 3 (Ulpian Book 28 *On the Edict*) seems to show Quintus Mucius Scaevola working with the concept of *diligentia* in the context of the contract of *commodatum*. On this view Paul's formulation of *culpa* in terms of reasonable foreseeability represents 'the continuation of a late Republican subjectivism into classical law.' See Ibbetson 'Wrongs and Responsibility' 117.

[111] I.13 (1374b)

[112] V.8.7.

[113] e.g. F Wieacker, *Römische Rechtsgeschichte: Quellenkunde, Rechtsbildung, Jurisprudenz und Rechtsliteratur* Vol 1 (CH Beck 1988) 645–46. The *Rhetorica Ad Herennium* certainly attests to Aristotelian influence on Roman philosophers at around this time: see 2.16.24.

[114] It is on this basis that David Daube sought to refute the view—articulated by e.g. B Kübler, 'Griechische Einflüsse aus die Entwicklung der römischen Rechtswissenschafte gegen Ende der republikanischen Zeit'

Central to Aristotle's analysis is the distinction between voluntarily and involuntarily inflicted harm. Accordingly, in the passages cited above he recognises a distinction between *adikema* (deliberate wrongdoing), on the one hand, and *hamartema* (harm inflicted by mistake) and *atychema* (harm inflicted through misfortune, bad luck) on the other. While neither the second nor the third constitutes wrongdoing according to this scheme, both falling within a wider concept of harm inflicted in error and thus involuntarily,[115] for David Daube at least they differ in the following way. In the case of *hamartema*, the harm does not occur contrary to expectation, *paralogos*—an example would be Oedipus's killing of his father.[116] Thus the harm is in a sense intentionally inflicted. But because the actor labours under the influence of a mistake as to his victim's identity, it is not characterised by vice (*poneria*) or wickedness (*kakia*).[117] In the case of *atychema*, on the other hand, the consequence does indeed occur *paralogos*, contrary to expectation, as in the case where you confuse a sharp spear with one with a button on it.[118] The function of foreseeability—or rather unforeseeability—is then to show that the harm in question was unintentionally inflicted.[119] As Daube puts it, '[o]n the basis of the authentic Aristotle, if, while practising, you unwittingly hit a passer-by, it is *paralogos*, unexpected, *atychema*, accident, no matter whether you are in the gymnasium or on a highway.'[120]

We might be able to close the gap between Aristotle and Paul somewhat if we accept that—contrary to what was said in the previous paragraph—there is in fact a negligence standard at work in Aristotle's account.[121] It is true that *paralogos* is probably more accurately translated as 'contrary to *reasonable* expectation',[122] and in other contexts—his Eudemian Ethics,[123] and even elsewhere in the Nicomachean Ethics[124]—Aristotle did discuss ignorance (*agnoia*) through carelessness (*ameleia*): for example, where the wrongdoer had acted under the influence of an inexcusable mistake of law.[125] If this is right, then the distinction between *hamartema* and *atychema* turned on whether or not the consequence in question—the death of Oedipus's father, your friend's fatal stabbing by your

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in *Atti del Congresso Internazionale di Diritto Romano* Vol 1 (Pavia 1934) 79, 88–89—that the Roman *dolus/culpa/casus* typology was Aristotelian in origin: see *Roman Law: Linguistic, Social, and Philosophical Aspects* (Edinburgh Edinburgh University Press 1969) 131–56.

[115] Nichomachean Ethics V.8.6. cf also NE III.1.13 ff, where Aristotle appears to treat both kinds of cases as instances of *agnoia*, ignorance.

[116] Cf NE V.8.3. See Daube *Aspects* 140–42.

[117] Daube *Aspects* 141.

[118] This example is drawn from NE III.1.17. While it seems plausible to assign these fact complexes to the categories *hamartema* and *atychema* (in the first case the actor intends the consequence of his action, the death of the old man; in the second he does not), I cannot find explicit support for this view in Aristotle's account.

[119] This point is most clearly articulated by Daube at p 134.

[120] Daube *Aspects* 143–44. Cf D 9.2.9.4, discussed above.

[121] Rackham's translation in the Loeb Classical Library edition of the Nicomachean Ethics is misleading in this respect: there is no Greek equivalent to the 'culpable' in his 'culpable error' for *hamartema*. But see R Sorabji, *Necessity, Cause and Blame* (London, 1980) ch 17, especially 278–81 (discussed further in the next note).

[122] As in both Ross's translation (first published by Oxford University Press in 1925) and Rackham's (Loeb Classical Library 73, Harvard University Press, revised edition 1934) of NE V.8.7. For a defence of the reading of *paralogos* as reasonably unforeseeable, see M Schofield, 'Aristotelian Mistakes' (1973) 19 Proceedings of the Cambridge Philological Society (NS) 66, followed by Sorabji: *Necessity, Cause and Blame* (London, 1980) 280. See also J Crook, 'A Roman Candle' (1970) 20 Classical Review (NS) 361, 363. Cf Daube *Aspects* 144–45.

[123] Eudemian Ethics II.9.4.

[124] NE III.5.8.

[125] Cf Ibbetson 'Wrongs and Responsibility' 99.

unguarded spear during a practice session, the passer-by transfixed by your javelin—could reasonably have been anticipated.[126] But on the view I have taken here, there remains an unbridgeable gulf between Aristotle and Paul. First, the use of the positive (Paul) and negative (Aristotle) formulations is telling. In Digest 9.2.31 Paul appears to have been using reasonable foreseeability—*a diligente provideri poterit*, what could have been foreseen by a diligent man—as a principle capable of generating liability in cases in which the victim's presence, although not underwritten by some clearly delineated social practice, was nevertheless predictable and therefore avoidable.[127] In the context of Aristotle's analysis, on the other hand, the fact that the harm is question occurred in accordance with reasonable expectation is nowhere adduced as a reason for the actor's responsibility. What mattered was that the harm was unforeseeable (*atychema*) or not unforeseeable (*hamartema*). In other words, the function of the *paralogos* concept was exclusionary rather than generative. Moreover, as I have argued above, for Paul the subjective foreseeability of the accident does not appear to have been normatively significant in itself. Instead, it constituted only a technique for demonstrating the avoidability of the accident, at the instance of either party, by virtue of its predictability. Again, this is an objective, essentially causal question.

There is, however, a more fundamental similarity between the Greek and Roman accounts. The cases discussed in the Nicomachean Ethics are almost all cases of killing, typically intentional conduct.[128] Indeed, this is the best argument for Daube's reading of the *adikema / hamartema / atychema* typology: the peripheral—indeed invisible—status accorded to cases of indirectly produced harm made an analysis in terms of negligence unnecessary.[129] In fact, this appears to be true of Roman law too. The original *lex Aquilia* treated unlawful killing—under Chapter 1—or burning, breaking, and rupturing—under Chapter 3—as actionable per se; it was only much later—probably in the time of Quintus Mucius Scaevola—that *culpa* (and *dolus*) began to be recognised as independent elements of liability.[130] But even after this reconceptualisation occurred, discussion of *culpa* in the context of Digest 9.2 appears to have remained largely confined to cases of killing and—to a lesser extent—wounding and burning.[131] Cases of providing a cause of death or causing to be

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[126] Critical to this view is the claim (in NE V.8.7) that *hamartema* occurs when 'the cause of one's ignorance' (Rackham, relying on an amendment to the original Greek text) or 'origin of the train of events' (Daube) or 'origin of the cause' (Sorabji) lies in oneself, whereas it is *atychema* when the cause lies outside. Cf Daube *Aspects* 142; Sorabji *Necessity, Cause and Blame* 279. For Sorabji, this shows that Aristotle has in mind here outcomes which are (reasonably) unforeseeable rather than unforeseen (see pp 279–80).

[127] It had the opposite effect in D 9.2.28: here, to the extent that the presence of the traps was foreseeable by the victim, liability was extinguished, even where they had been dug in a road or path.

[128] See e.g. the long list of cases in NE III.1.17.

[129] Similarly, for Daube the fact that accidentally inflicted harm is subsumed under a wider concept of error within Aristotle's scheme shows its relative unimportance: Daube, *Aspects* 150. 'Accident…though it falls under the same heading as special pleas of ignorance…is found far less deserving of deep study. The deed in error is felt to be the real problem of man as man, as a thinking being; error—where things proceeds not unexpectedly, not *paralogos*, not *praetor rationem*, but on the contrary as intended, everything goes according to plan, in the language of Aristotle you are the author of the train of events—and yet it is all flawed by ignorance, misapprehension, misjudgement, when the desired result is finally achieved, when you have killed the solider you aimed at, it turns out to be a calamity. The accidental deed does not show up the defective nature of man at his highest level, the level of thought.' (at p 149)

[130] In addition to D 9.2.31 itself see also D 9.2.52.1, 4 (Alfenus Book 2 *Digest*) and D 9.2.29.4 (Ulpian Book 18 *On the Edict*, referring to Alfenus).

[131] Discussions of *culpa* in the context of killing: D 9.2.5.1, 9.4, 11 pr (all Ulpian Book 18 *On the Edict*), D 9.2.10 and D 9.2.30 pr (both Paul Book 22 *On the Edict*), and D 9.2.52.2 (Alfenus Book 2 *Digest*) as well as D 9.2.31 itself. Discussions of *culpa* in the context of wounding: D 9.2.5.3, D 9.2.30.4 (*negligentia*) and D 9.2.52.1 and 4

wounded, burnt, broken etc were actionable by means of *actiones utiles* or *in factum*, but these were equitable Praetorian actions which fell outside the scope of the *ius civile* and therefore largely outside the scope of juristic analysis. While there is detailed discussion of the borderline between the statutory actions and the Praetorian ones,[132] there is very little in Digest 9.2 about the scope of the latter; that is, about the outer boundaries of liability in cases where harm was indirectly inflicted. Thus—at least on the face of Digest 9.2—the Roman account of *culpa* was overwhelmingly focused on typically intentional acts: indeed, D 9.2.31 is itself exactly such a case. That emphasis severely circumscribed the role of the foreseeability principle in Roman jurisprudence. Apparently preoccupied with cases in which the relationship between conduct and consequence was immediate, we hear very little from the Roman jurists about issues of what we would call remoteness.[133] And it is for this reason that the Roman law of accidents appears to have been able to get by with the rather unsophisticated concept of *culpa* which I have described: because it was largely confined to instances of killing, wounding, burning, breaking etc, the law faced only rather few questions under the rubric of fault.[134]

What is foreseeability for?

What has all this to do with Lord Atkin's speech in *Donoghue v Stevenson*? Let me remind you, once again, of his formulation of the duty of care:

> Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

I have suggested that in formulating a general duty of care in this way Lord Atkin may have been influenced by the account of *culpa* given by the classical jurist Paul in Digest 9.2.31, which may itself have been influenced by Aristotle's account of wrongdoing. But it will now be obvious, I think, not only that Aristotle and Paul used the concept of foreseeability very differently, but also that the purpose to which Lord Atkin put it was very different to that which it served in its original Greek and Roman contexts.

Foreseeability is a recurring feature of the modern tort of negligence.[135] It has since at least *Vaughan v Menlove*[136] in 1837 been central to determining the breach of a duty of care, and since

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(citations above). Discussions of *culpa* in the context of burning: D 9.2.27.11 (Ulpian Book 18 *On the Edict*) and D 9.2.30.3 (citation above). D 9.2.5.2 (citation above), D 9.2.29.2–4 (Ulpian Book 18 *On the Edict*), and D 9.2.45.4 (Paul Book 10 *On Sabinus*) discuss *culpa* in the context of the rather abstract 'damnum dare' (or 'facere'); D 9.2.28 speaks of 'aliquid deterius factum' and appears to involve the *actio directa* ('lege Aquilia obligati sunt'). D 9.2.8 (Gaius Book 2 *On the Provincial Edict*), which is clearly about *culpa*, may be a case of causing to be killed; 27.9 (citation above), which may be about *culpa*, is clearly a case of causing to be burnt (and cf Coll. 2.12.7).

[132] As at D 9.2.7.1–11.5 (Ulpian's commentary on the word 'occiderit') and 27.6–24 (on 'usserit fregerit ruperit'). See also D 9.2.51 (Julian Book 86 *Digest*).

[133] With the possible exception of D 9.2.30.3 (Paul Book 22 *On the Edict*). D 9.3.29.3 appears to deal with remoteness of loss rather than remoteness of harm.

[134] The broadness of *corrumpere* means that it does not necessarily connote intentional conduct. But the four cases discussed in D 9.2 which are explicitly identified as instances of *corrumpere*—D 9.2.27.14, 15 and 20 (Ulpian Book 18 *On the Edict*) as well as D 9.2.42 (Julian Book 48 *Digest*)—are all directly—and, it seems, intentionally —inflicted.

[135] See e.g. the well-known statement to that effect by Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27.

1961 it has been firmly established as part of the test for remoteness.[137] It is beyond the scope of this lecture to offer a comprehensive account of the historical processes by which foreseeability came to infuse these common-law concepts; as argued above,[138] it seems likely that a test for remoteness based on reasonable foreseeability was derived from the writings of eighteenth-century Natural lawyers[139] concerned with the imputability of harm, and that it passed from there into the test for breach.[140] We should now note, if only in passing, that Natural lawyers such as Samuel Pufendorf were themselves looking to Aristotle,[141] or at least to the Aristotelian tradition, in thinking about imputability in this way.[142]

The prominence of foreseeability in the modern law of negligence is a function of the conceptual orientation of the tort, which is itself a product of its historical origins in the action on the case.[143] As we have seen, because they dealt almost exclusively with cases of killing, wounding, burning, and breaking rather than providing a cause of death or causing to be wounded, burnt, or broken, the Roman jurists could do without any concept of remoteness in their account of liability under the *lex Aquilia*; dealing with a limited range of proscribed acts, typically intentional, meant that their concept of *culpa* could remain relatively unsophisticated too. But in the case of a tort confined to unintentionally inflicted harm, and typically concerned with indirectly inflicted harm, the position is of course very different: here, foreseeability becomes an important tool not only for moderating the scope of liability for consequences but also for evaluating the blameworthiness of conduct.[144] Thus in *Blyth v Birmingham Waterworks*, in which an exceptionally hard frost froze pipes laid by the defendant, causing water to escape from the pipes and damage the plaintiff's house, it was held that:

> The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against; and they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against which no reasonable man can provide.[145]

The unforeseeability of the frost which caused the water's escape served to demonstrate the absence of negligence on the defendant's part. This analysis was necessitated by the long causal chain between the defendant's conduct—the laying of the pipes—and the consequence suffered by the plaintiff.

More recently—since the early twentieth century, and under American influence[146]—the emphasis in the breach inquiry has shifted from foreseeability to probability or risk. As the mid-

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[136] V*aughan v Menlove* (1837) 132 ER 490 (CP)
[137] *The Wagon Mound No 1* [1961] AC 388.
[138] See p 5 above.
[139] Ibbetson *Historical Introduction* 167–68.
[140] Ibbetson, *Historical Introduction* 175–77; 'Negligence in the Common Law 246–47, 265.
[141] Aristotle's Nicomachean Ethics is frequently cited by Samuel Pufendorf in his discussion of imputability at I.5 of *De Iure Naturae et Gentium* (1672)
[142] See e.g. R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta 1990) 1033–34.
[143] See e.g. JH Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) ch 23. Unlike in the Roman *lex Aquilia*, cases of deliberate wrongdoing are of course excluded.
[144] Cf Frier *A Casebook on the Roman Law of Delict* 29.
[145] (1856) 11 Ex 781, 784–85.
[146] See e.g. Lobban 'The Law of Obligations: The Anglo-American Perspective' 1040–45.

twentieth century decision of the House of Lords in *Bolton v Stone*[147] illustrates, conduct is considered culpable by virtue of the generation of unreasonable risks; it involves, centrally, the weighing up of the gravity of the threatened harm against the likelihood of that harm's occurring. As Lord Reid emphasised, probability, unlike foreseeability, is a matter of degree: the greater the risk, the less likely it is to be outweighed by other factors. But if the danger thus posed is found to have been unforeseeable from the perspective of the defendant, even if objectively probable, he will be exculpated.[148] In other words, in the context of the modern breach inquiry, foreseeability serves to qualify probability. As in the context of remoteness, it functions as a limiting principle, ruling out liability in respect of risks which the defendant could not reasonably have been expected to anticipate.

It is unclear, however, whether foreseeability is itself capable of generating liability. Admittedly foreseeability seems to operate in this way in the context of Digest 9.2.31. Indeed, in that context reasonable foreseeability seems to function as the sole determinant of both the duty and breach questions: that is, whether the defendant owed the claimant a duty to take care and whether he was careful. But as I have tried to show, Paul's analysis was in fact a causal one, in the context of which foreseeability served merely as the subjective counterpart of avoidability. As deployed by Lord Atkin, however, in the context of his test for the duty of care, the fact that the defendant could have foreseen that his conduct might occasion harm to the claimant is of primary normative significance. Yet in truth it tells us very little about the moral case for liability.

As we now know, following four decades of research by Amos Tversky and Daniel Kahneman (recently popularised in Kahneman's book, *Thinking, Fast and Slow*), human beings are subject to a wide range of biases, for example the 'availability heuristic': roughly, the rule of thumb that the ease with which instances of an event come to mind accurately predicts the likelihood of its occurring.[149] An attack by a shark on a swimmer in False Bay in Cape Town is in fact extremely unlikely; yet because of the operation of the availability heuristic—shark attacks feature prominently in popular culture and are widely reported in the media when they occur—it is eminently foreseeable. Biases such as this one notoriously impair our human ability to assess probability. We have to think effortfully and often counter-intuitively—using what Kahneman calls our 'system 2', the 'thinking slow' of the title—in order to overcome them. But to the extent that 'human foresight' has a meaning independent of probability, it must surely be tethered at least in part to the instinctive conclusions of 'system 1', Kahneman's 'thinking fast'. In other words, because these biases are endemic—they are part of what it means to be human—they must surely be factored into any credible concept of foreseeability. In short, what is 'foreseeable' is 'the kind of thing that happens'; something which we determine on the basis of a mishmash of personal experience, popular culture, and anecdote. It is justifiable to limit liability according such considerations, either in evaluating harm-causing conduct or in attributing responsibility for consequences. But as a principle which generates liability, it does not seem that human foresight, even the foresight of a reasonable person, can bear the normative weight assigned to it by Lord Atkin.

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[147] [1951] AC 850

[148] *Roe v Minister of Health* [1954] 2 QB 66.

[149] *Thinking, Fast and Slow* (Penguin Books London 2012) ch 12. The original paper on which the popular account is based is A Tversky and D Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability' (1973) 5 Cognitive Psychology 207.

Whatever the historical origins of the factual duty of care in English law, examining the foreseeability principle in its ancient context affords insight into the variety of purposes which it is capable of serving. For the Roman jurist Paul, foreseeability functioned as a criterion for *culpa*, fault: specifically, it served to capture in general, abstract terms the multiplicity of concrete social practices which render human behaviour predictable. As such, it redefined the boundaries of liability for inadvertently inflicted harm. But it does not seem that subjective foreseeability was relevant in itself; rather, it served to demonstrate the avoidability of the harm, an objective, essentially causal inquiry. In the context of Aristotle's Nicomachean Ethics, on the other hand, the subjective foreseeability of harm was certainly normatively significant: that harm had occurred contrary to expectation served to demonstrate that harm had been unintentionally inflicted. But the function of the concept here was exclusionary only: harm qualified as mishap, *atychema*, to the extent that it was unforeseeable; if not unforeseeable, it was error, *hamartema*. In neither of those traditions—the Roman and the Aristotelian—did the foreseeability of harm serve as a generative principle; as a reason in itself for imposing liability. Indeed, it appears that it may be incapable of functioning in that way. Thus the history of foreseeability yields the material for a further critique of the duty concept, adding an historical dimension to contemporary calls to abandon the factual component of the duty of care entirely.[150]

[150] See e.g Nolan, 'Deconstructing Duty' 573; Plunkett, *Duty of Care* ch 4.