ACTIO DE PAUPERIE:
ANTHROPOMORPHISM AND RATIONALISM

Milena Polojac *

1 Introductory remarks

Roman law, like other ancient legal systems but unlike most contemporary legal systems, contained complicated legal provisions concerning animals and the damage caused by them. However, as far as can be determined, Roman law had no criminal-law provisions about animals and in that way was more rational than Greek law which did.

Roman society and other ancient societies that were predominantly agricultural used to prohibit illegal pasturing, and the person who suffered damage had the actio de pastu pecoris at his disposal. This was an old action dating back to the decemviral legislation that could be brought if somebody let his cattle be on another person’s land and the cattle grazed on the other person’s grass or fruits. The perpetrator of the delict in this case was not the animal, although it was the direct cause of the damage, but the person whose fault caused the damage.¹

If damage was caused by wild or dangerous animals on a public road, the aediles issued an edict prescribing the actio de feris. The action based on the aediles’ edictum de feris could be brought against a person who kept wild or dangerous animals next to a public road contrary to the law, as a result of which damage was caused. The edict distinguished three cases, namely the death of a free man, injury inflicted on a free man, and any other kind of damage. In each case a different fine had to be paid by the responsible person.²

1 Cases relating to the actio de pastu pecoris, directly or indirectly, are given in the following sources:
D 19 5 14 3, Ulp 41 ad Sab; Paul Sent 1 15 1; D 9 2 39, Pomp 17 ad Q Mucium; D 10 4 9 1, Ulp 24 ad ed; D 50 16 31, Ulp 18 ad ed; C 3 35 6 (Diocl et Maxim, De lege Aquilia). A complete analysis of the legal scope of this action was given by A Fliniaux “Une vieille action du droit romain l’Actio de pastu” in P Collinet & F de Visscher (eds) Mélanges de droit romain dédiés a Georges Cornil vol 1 (Paris, 1926) at 245-294.

2 D 21 1 40-42. Cf/T Palmirski “How the commentaries to de his qui deiecerint vel effuderint and ne quis in suggrunda edicts could be used on the ground of edictum de feris” (2006) 53 Rèvue Internationale des Droits de l’Antiquité at 323-333.

* Associate Professor, University of Belgrade, Faculty of Law.
The Aquilian action was brought when a delict (damnum iniuria datum) was committed through the act of one person’s animal that caused damage to another person’s property.

A special provision, probably borrowed from Greek law, was applied when damage was caused by dogs. Sources mention a lex Pesolania de cane whose existence is, however, uncertain. The large number of remedies available when animals inflicted harm and the various legal provisions that were applicable must have been introduced for a variety of purposes. In all the delicts listed, although the animal was the direct cause of the damage, it was the owner or the keeper of the animal who was considered to be at fault and who bore sole responsibility for the delict. However, this was not the case in the pauperian action. Debates about the actio de pauperie, its character and its place in the law have a long history.3


Confusing and contradictory sources on this topic allow for different interpretations.

2 The actio de pauperie in the Twelve Tables

D 9 1 1 pr, Ulp 18 ad ed: “Si quadrupes pauperiem fecisse dicetur, actio ex lege duodecim tabularum descendit: quae lex voluit aut dari id quod nocuit, id est id animal quod noxiam commisit, aut aestimationem noxiae offerre.”

Ulpian’s introductory paragraph in the main title of the Digest is considered to be a paraphrase of the original legal rule.

The action can be brought provided two conditions are met:

2 1 Quadrupes and classification of animals

The sources mention different classes of animals. They are divided into different categories according to two main criteria, namely the nature of the animal and its usefulness to mankind.

Animals are divided into wild animals (ferae, bestiae, ferae bestiae), for example bears, lions and panthers, on the one hand, and into various categories of domestic animals useful to man on the other. Between these two classes are grouped the animals that are wild by nature, such as camels and elephants, which can be domesticated to serve man by, for example, carrying burdens. The characteristics of an individual animal were not relevant in deciding whether it was wild or tame.6

On the basis of the purpose they serve, animals are classified into iumenta7 or animalia (sometimes quadrupedes or pecora) quae collo dorsove domantur.8 These are mainly domestic animals such as bulls,9 horses, mules, asses, as well as animals that are wild by nature but useful as beasts of burden, like elephants and camels.


5 D 9 2 2 2, Gai 7 ad ed prov; D 9 1 1 10, Ulp 18 ad ed; Gai Inst 2 16 and 3 217.
6 As an exception, the “wildness” of an actual animal rather than the species is considered relevant in D 3 1 1 6, Ulp 6 ad ed. G McLeod “Wild and tame animals and birds in Roman law” in P Birks (ed) New Perspectives in the Roman Law of Property, Essays for Barry Nicholas (Oxford, 1989) at 171.
7 D 21 1 38 4-7, Ulp 2 ad ed aed cur.
8 Gai Inst 2 16, Ulp Reg 19 1: “quadrupedes quae dorso collove domantur velut boves, muli, equi, asini”; Fragmenta Vaticana 259 (Pap 12 resp): “pecora, quae collo vel dorso domarentur.”
9 Ulpian’s fragment from his commentary on the curulean aediles’ edict (D 21 2 38 6) raises the question whether bulls belong to the category of iumenta or not (“Unde dubitari desiit, an hoc edicto boves quoque contineantur: etenim iumentorum appellazione non contineri eos versus est, sed pecoris appellazione contineantur”). As is evident from the text, Ulpian excludes bulls from this class, which
Apart from *iumenta*, another category of useful domestic animals is the so-called “pecora”. According to Saint Augustine, this term refers to those animals that serve man by means of the products they provide. However, according to Gaius the term has a wider sense:

\[ \text{D 9 2 2 2, Gaius 7 ad edictum provinciale: “quadrupedes, quae pecudum numero sunt et gregatim habentur, veluti oves caprae boves equi muli asini. sed an sues pecudum appellacione continentur, quaeritur: et recte Labeoni placet contineri. Sed canis inter pecudes non est. Longe magis bestiae in numero non sunt, veluti ursi leones pantherae. Elefanti autem et cameli quasi mixti sunt (nam et iumentorum operam praestant et natura eorum fera est) et ideo primo capite contineri eas oportet.”} \]

As the text shows, *pecudes* are not only useful because of their products – such as sheep and goats – but also beasts of burden, *iumenta*. The status of pigs was doubtful, but thanks to the prestigious Labeo’s statement, they were also included. Dogs were not included in the category of *pecudes*, nor were wild animals. A special status was granted to elephants and camels, which are “mixed”.

From some legal and literary sources it may be concluded that Roman law did not commit itself to the view that a whole species could always be classified as either wild or tame by nature. Species referred to in those sources include fowls, geese, pigeons, bees, boars and dolphins.

The classification of animals according to their nature and their economic purpose has important consequences in the law. For example, it is the basis of the classification of animals as mancipi or nec mancipi.

The classification of animals is also important where some are the object of protection, for example in the case of *damnum injuria datum*. The first chapter of the *lex Aquilia* covers the case of killing *quadrupedes pecudes* and the third chapter extends protection

is surprising because it contradicts another source that refers to bulls as examples of *iumenta* (*Ulp Reg 19 1*). Moreover, it is difficult to find a good argument for such an exclusion.

10 *De Genesi ad litteram imperfectus liber* 15 (CSEL XVIII III 1, 496): “Cum autem in latina lingua nomine bestiarum omne irrationabile animal generaliter significetur, hic tamen distinguendae sunt species, ut quadrupedes accipiamus omnia iumenta, serpentes omnia serpentia, bestias vel feras omnia quadrupedia indomita, pecora vero quadrupedia, quae non operando adiuvant, sed dant aliquem fructus pascentibus.”

11 “(F)ourfooted cattle which are kept in herds, such as sheep, goats, horses, mules, and asses. But it has been questioned whether pigs should be included among cattle, and Labeo rightly holds that they are. A dog, however, does not fall within this class, and it is much more apparent that wild beasts such as bears, lions, and panthers are not cattle either. But elephants and camels are, as it were, ‘mixed’ (for they serve as draft animals, but they are nature wild) and accordingly should be within the scope of the first chapter.” (Translation ed by A Watson (Philadelphia, 1998). The following translations of fragments from the Digest are based on the same edition.)

12 D 41 1 5 2-6; Varro 3 7 1-2; Pliny 8 82 2 20. See McLeod (n 6) at 172-173. Further D Daube “Doves and bees” in *Mélanges Lévy-Bruhl* (Paris, 1959) at 63-75 = *Collected Studies in Roman Law* (Frankfurt am Main, 1991) at 899-913.

13 *Ulp Reg 19 1*; *Gai Inst 2 15-16*.

14 D 9 2 2 pr, *Gai 7 ad ed prov*; *Gai Inst 3 210*. 
to include cases of wounding quadrupedes pecudes and killing or wounding other classes of animals that are non pecudes:

Gai Inst 3 217: "Itaque si quis servum vel eam quadrupedem quae pecudum numero est vulneraverit, sive eam quadrupedem quae pecudum numero non est, velutu canem, aut feram bestiam, veluti ursum leonem, vulneraverit vel occiderit, hoc capite actio constituitur."

This text also presents a clear division of animals into three classes: quadrupedes pecudes, quadrupedes quae pecudum numero non sunt veluti canes, and ferae bestiae.

The classification of animals has important legal consequences in the acquisition of ownership by *occupatio.*

It is also important in relation to the cause of damage, as in the actio de pauperie and other actions involving damage caused by animals.

2.2 Quadrupes in the Twelve Tables

The term “quadrupes” has both an extended and a restricted meaning in Latin. In its wider, literal, sense it means any quadruped animal, either wild or domestic. It also has a narrower meaning that refers only to domestic quadruped animals.

The Twelve Tables and other legal sources in general, apparently use the term in its narrower meaning. In addition to its more general meaning – animal – the term “quadrupes” is used as a genus proximum for different types of domestic animals such as *pecora,* that is *pecudes* or *iumenta.* The most famous example can be found in the lex Aquilia. Wild animals are denoted by the words “fera”, “fera bestia” or “bestia”. When the term “quadrupes” is used without further explanation, it refers to domestic animals.

However, it seems likely that the term *quadrupes* as used in the actio de pauperie in the Twelve Tables has an even narrower meaning and does not refer to all quadruped domestic animals. Kerr Wylie states that the term “quadrupes” originally probably referred only to quadruped *mancipi* animals. According to him the term was later extended to include quadruped grazing animals (*pecora*) and finally also others that were non-grazing. Kaser maintains that the term refers only to useful quadruped animals, citing cattle and horses as examples. Jackson is of the opinion that the *quadrupes* referred to in the Twelve Tables are grazing domestic animals, that is *quadrupedes pecudes,* as in the Aquilian statute; and that the decemviral legislation implicitly assumed what the later statute stated explicitly. Zimmerman also holds this view.

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15 Gai Inst 2 66-68; CI 2 1 12-16; D 41 1 1 1, 41 1 2 and 41 1 3-5.
17 D 9 2 2 2, Gai 7 ad ed prov: “quadrupedes quae pecudum numero sunt et gregatim habentur.” See, also, *Ulp Reg* 19 1: “quadrupedes quae dorso collove domantur, mancipi sunt.”
18 Giangrieco Pessi (n 4) at 144 holds an opposite opinion.
19 Kerr Wylie (n 4) at 465.
20 Kaser (n 4) (*Das römische Privatrecht,* 1971) at 165.
21 Jackson (n 4) at 123ff.
22 Zimmermann (n 4) at 1101.
It does not seem likely, however, that the *actio de pauperie* in the Twelve Tables covered cases of damage caused by dogs.\textsuperscript{23}

Dogs were neither *res mancipi* nor *pecora*. Macqueron asserts that the action was extended to apply to dogs by a special statute called *lex Pesolania de cane*.\textsuperscript{24} It seems more probable that this was done by interpretation:\textsuperscript{25} See, for example, D 9 1 1 2, *Ulp 18 ad ed*: “Quae actio ad omnes quadrupedes pertinet.”

The expression “omnes quadrupedes” is not used accidentally. It should be emphasised that the action was applied not only to *quadrupedes in the sense of quadrupedes pecudes*, but also to *omnes quadrupedes*, including the quadruped animals *quae pecudum numero non sunt veluti canes*. It might even have applied to domesticated animals, namely useful animals whose nature was originally wild. The formulation *omnes quadrupedes* cannot include wild animals because this class is expressly excluded from the application of the action.\textsuperscript{26}

### 2.3 Pauperies in the Twelve Tables

It seems highly probable that the word “pauperies” was to be found in the Twelve Tables.\textsuperscript{27} It remains a puzzle, though, exactly why this term rather than another one was chosen to denote an injury caused by animals.\textsuperscript{28}

Most Romanists are of the opinion that there is no solution to this problem. Some, however, have tried to find an answer in the etymology of the word.\textsuperscript{29}

In his attempt to solve this enigma, Alan Watson started with Ernout-Meillet’s explanation of the word. Watson’s conclusion is that the term “pauperies” may be translated as “the state of producing little or of being unproductive”.\textsuperscript{30} According to him the word “pauperies” is used in the Twelve Tables in its original meaning and the expression “si quadrupes pauperiem fecisse” should be translated as follows: “(I)f the quadruped animal produces the state of being unproductive.” Consequently, the object

\textsuperscript{23} Giangrieco Pessi, (n 4) at 157 on the other hand, says the following: “E plausibile allora ritenere che non ci troviamo di fronte ad un’ estensione dell’ *actio de pauperie* ai cani (estensione non necessaria, stante la dimostrata applicabilità dell’ *actio* a tratto generale ai danneggiamenti procurati da qualsivoglia quadrupede), ma all’ affiancamento, nel tempo, di altri rimedi specifici - quali, appunto, la *lex Pesolania de cane* .”

\textsuperscript{24} Paul Sent 1 15 1: “quod etiam lege Pesolania de cane cavetur.” See Macqueron (n 3) at 136.

\textsuperscript{25} See Jackson (n 4) at 129ff.

\textsuperscript{26} D 9 1 1 10, *Ulp 18 ad ed*. See, eg, Ashton-Cross “Damage” (n 4) at 397; Zimmermann (n 4) at 1102.

\textsuperscript{27} Alan Watson (n 4) at 134 is almost certain of this. Some authors doubt whether the word “pauperies” appeared in the Twelve Tables and suggest the possible usage of the more general word “noxa” or “noxia”. Müller (n 4) at 521; Z Lisowski “*Noxalis actio* ” *RE Suppl* 7 at 657; T Mommsen *Römisches Strafrecht* (Leipzig, 1899) at 834 n 4; M Kaser *Das altrömische Ius* (Göttingen, 1949) at 224.

\textsuperscript{28} The substantive “pauperies” means “poverty” and is related to the adjective “pauper” which means “poor”: see CT Lewis & C Short *A Latin Dictionary* (Oxford, 1975) at 1318.

\textsuperscript{29} Mommsen (n 27) at 834. See, further, Walde-Hofmann *Lateinisches Etymologisches Wörterbuch* vol 2, 3 ed (Heidelberg, 1954) at 268; Ernout-Meillet *Dictionnaire étymologique de la langue latine* vol 2, 4 ed (Paris, 1960) at 490.

\textsuperscript{30} Watson (n 4) at 133.
of protection originally comprised only the means of production, mainly slaves and cattle whose destruction rendered their owner unproductive.

3 The actio de pauperie in classical Roman law

It is difficult to trace the development of the action without clear indications in the sources of the time when the changes were introduced or who introduced them, nor what was later added to the concise formulation of the decemviral codification. It seems probable that the actio de pauperie started to acquire its classical form after the introduction of some innovations by the praetor. Republican jurists, particularly Servius Sulpicius Rufus, later added a few explanations and restrictions. Eventually, following the ideas of the republican jurists, and expressing them in accordance with the time he lived in, Ulpian gave final form to the pauperian action.

3.1 Actio de pauperie and the praetor

3.1.1 Actio de pauperie utilis

From Paul’s fragment it appears that the actio de pauperie is applied as an actio utilis\(^\text{31}\) where damage is caused by animals other than quadrupedes: “Haec actio utilis competit et si non quadrupes, sed aliud animal pauperiem fecit” (D 9 1 4, Paul 22 ad ed).

The basic question here is whether this extension involving other animals refers to all animals, whether wild or domestic, quadrupeds, bipeds and others, or whether the extension was limited to other domestic animals, mainly bipeds and perhaps useful domesticated animals.

The prevailing opinion in literature seems to be that in classical Roman law the actio de pauperie could also be instituted where damage was caused by wild animals.\(^\text{32}\) Some authors do not necessarily associate this extension with the introduction of the actio de pauperie utilis, but they believe that the extension may date back to an earlier time and may be associated with the formulation “quae actio ad omnes quadrupedes pertinent”.\(^\text{33}\) There is, however, no doubt that aliud animal also includes wild animals.\(^\text{34}\)

\(^{31}\) The introduction of actions on the basis of analogy with civil actions for the sake of convenience is related to the activities of the praetor: see D 19 5 11, Pomp 39 ad Q Mucium: “sed et eas actiones, quae leges prodivae sunt, si lex iusta ac necessaria sit, supplet praetor in eo quod legi deest: quod facit in lege Aquilia reddendo actiones in factum accommodatas legi Aquiliae, idque utilitas eius legis exiguit.” This fragment speaks about actions in factum, but by analogy can be applied to the actiones utiles. Regarding these questions, see A Steinwenter Prologomena zu einer Geschichte der Analogie, Studi in memoria di Emilio Albertario (Milano, 1953) at 103-127.

\(^{32}\) Haymann (n 4) at 374; Kerr Wylie (n 4) at 465, 471; Müller (n 4) at 524; Nicholas (n 4) at 188; Honoré (n 4) at 249.

\(^{33}\) D 9 1 1 2, Ulp 18 ad ed.

\(^{34}\) Haymann (n 4) at 374; Kerr Wylie (n 4) at 465, 471; Müller (n 4) at 524; Nicholas (n 4) at 188.
Some of the Romanists who claim that the actio de pauperie also applied to wild animals, are silent about the way in which it was extended.\textsuperscript{35} Jackson, in surveying the historical development of liability for damage caused by animals in Roman law, asserts that the action could initially only be instituted where damage had been caused by \textit{quadrupedes pecudes}, and was extended to include dogs by the end of the Republic. From Ulpian’s time, or probably even earlier (from the time of Paul), it also included \textit{ferae}. Justinian reverted to traditional ideas, excluding wild animals from the application of the actio de pauperie.\textsuperscript{36}

According to Giangrieco Pessi the actio de pauperie could from the outset be instituted for damage caused by all \textit{quadrupedes}, both domestic and wild, if the animal had an owner when the damage was caused. Thus there was no legal exclusion pertaining to wild animals. However, it is conceivable that the pauperian action did not extend to damage caused by wild animals in the earliest period, although they were not \textit{in abstracto} excluded from the reach of the action simply because they were not in someone’s ownership at the time.\textsuperscript{37} With the introduction of the actio utilis, the pauperian action was extended to include animals other than quadrupeds, such as fish, birds, insects and reptiles. According to Giangrieco Pessi, the reasons for the inclusion of these types of animals are of a socio-economic and legal nature, it being hardly conceivable that they could be possessed in a stable way in the early period and used for economic purposes or pleasure.\textsuperscript{38}

In the second edition of his \textit{Das Römische Privatrecht}, Kaser maintains that the action could originally only be instituted for damage caused by useful quadruped animals; but was later extended to other useful animals. He says nothing, however, about the wild or domestic nature of the animals.\textsuperscript{39} Thus his later view differs from his earlier explicit support for the view that wild animals were also subject to the application of the classical actio de pauperie.

It seems that a minority of Romanists maintain that the pauperian action applied only to domestic animals and that the extension introduced by the actio utilis accordingly relates only to two-legged and other domestic animals.\textsuperscript{40} In spite of certain difficulties encountered in the sources, this opinion seems to be correct. It is supported by the following arguments:

First, Ulpian’s fragment (D 9 1 1 10) refers to a general rule that clearly excludes the application of the actio de pauperie in cases where a wild animal inflicts harm.

Case law conforms to the general rule. All examples in the main title relate to domestic animals, such as a kicking horse, a goring bull, a mule that has inflicted damage

\textsuperscript{35} Kaser (n 4) (\textit{Das römische Privatrecht}, 1955) at 530; Honoré (n 4) at 249.
\textsuperscript{36} Jackson (n 4) at 126, 127 and 136.
\textsuperscript{37} Giangrieco Pessi (n 4) at 123.
\textsuperscript{38} Idem at 160ff.
\textsuperscript{39} Kaser (n 4) (\textit{Das römische Privatrecht}, 1971) at 633.
\textsuperscript{40} See Robbe (n 4) at 353; Ashton-Cross”Damage” (n 4) at 399. See also Méleze-Modrzejewski ”Nature des animaux” (n 4) at 183; Zimmermann (n 4) at 1101.
because of an unusual vice, a dog that has attacked and bitten somebody, and rams and bulls fighting each other. There is only one example involving a wild animal, a bear, but the sentence in this particular case contradicts the general rule given in the previous paragraph:

\[D\ 9\ 1\ 1\ 10,\ Ulp\ 18\ ad\ ed:\ "In\ bestiis\ autem\ propter\ naturalem\ feritatem\ haec\ actio\ locum\ non\ habet:\ et\ ideo\ si\ ursus\ fugit\ et\ sic\ nocuit,\ non\ potest\ quondam\ dominus\ conveniri,\ quia\ desinit\ dominus\ esse,\ ubi\ fera\ evasit:\ et\ ideo\ et\ si\ eum\ occidi,\ meum\ corpus\ est."\]

The first sentence clearly expresses the general principle: the action can never be applied in the case of damage inflicted by wild animals because of the natural wildness of such creatures. The example given in the second sentence – which is logically connected to the preceding one by \textit{et ideo}, and serves to explain the general rule – contradicts the general rule. The example concerned relates to a wild animal, a bear that escaped and inflicted damage. Here the owner cannot be sued through the actio de pauperie because he lost ownership of the wild animal when it escaped and it became a \textit{res nullius}. \textit{A contrario} it is not difficult to conclude that the actio de pauperie could be instituted where damage was caused by a bear or any other wild animal if it was owned by somebody. This conclusion contradicts the general rule that the action can never be instituted where damage is caused by wild animals because of their wild nature.

It is difficult to resolve this contradiction in a satisfactory way. Honoré proposes an interpretation that appears to be acceptable: a part of the text between the first sentence (containing the general rule) and the second one (regarding the example of the escaping bear) seems to be missing and it is this that might provide the logical connection between two existing sentences. It is logical to assume that Ulpian furnished an additional reason why the actio de pauperie could not be applied in respect of the missing part, namely the loss of ownership. The actio de pauperie cannot be instituted in the case where the bear escaped. Two reasons for this are, first the general rule in terms of which the action

\begin{itemize}
  \item \textit{D 9 1 1 4.}
  \item \textit{D 9 1 1 5.}
  \item \textit{D 9 1 1 11.}
  \item Translated as: “But this action does not lie in the case of beasts which are wild by nature: therefore, if a bear breaks loose and so causes harm, its former owner cannot be sued because he ceased to be owner as soon as the wild animal escaped.”
  \item Giangrieco Pessi (n 4) at 120-121 does not pay attention to this contradiction, understanding it as if Ulpian essentially did not show any interest in the domestic or wild nature of animals. She argues: “Infatti, il brano di Ulpiano sembra esplicitare una sostanziale indifferenza circa il carattere domestico o selvaggio dell’animale. Ciò è dimostrato: – anzitutto dai vocaboli utilizzati: animal, fera, bestia; - in secondo luogo, dall’uso di analoghe espressioni sia per animali c.d. domestici, che per animali c.d. selvaggi (esemplificativamente: \textit{cum commota feritate} riferita al bue, al cavallo, alla mula; \textit{propter naturalem feritatem} riferita all’orso); – in terzo luogo (e direi in modo decisivo), dall’implicita previsione dell’applicabilità dell’actio de pauperie all’orso, con la contestuale eccezione determinata dalla perdita di proprietà dell’animale, a seguito della fuga.”
\end{itemize}
cannot be instituted where the damage was caused by wild animals, and secondly that because the wild animal has escaped it is no longer owned by a person.\textsuperscript{46}

The third and perhaps strongest argument is based on the famous \textit{contra naturam} principle. An animal must have caused damage while acting \textit{contra naturam}. Whatever the expression \textit{contra naturam} means,\textsuperscript{47} it cannot refer to wild animals because their ferocious behaviour while inflicting harm is in conformity with their wild nature.\textsuperscript{48}

In spite of the arguments strongly supporting the thesis that the action lies only in cases of damage caused by domestic animals, this problem has not yet been resolved, because there is another problem that endangers that hypothesis. Instead of the usual terms “quadrupes” or “animal”, two texts contain the term “fera” which can hardly mean anything else than a wild animal:

\begin{quote}
D 9 1 1 6, \textit{Ulp 18 ad ed}: “Sed et si instigatu alterius fera damnun dederit, cessabit haec actio.”
\end{quote}

\begin{quote}
D 9 1 1 7: “Et generaliter haec actio locum habet, quotiens contra naturam fera mota pauperiem dedit.”
\end{quote}

Although the word “fera” means “wild animal” in standard Latin, such an application would be senseless in the context of the second text. It is obvious, as stated above, that the \textit{contra naturam} principle can hardly apply to wild animals. In the translations of the Digest “fera” is simply an animal\textsuperscript{49} or an excited animal, so\textsuperscript{50} it seems that the word “fera” was used here to refer to an excited animal rather than a wild one. However, this does not solve the problem, because both domestic and wild animals can be excited. However, in formulating the above general rule as well as the \textit{contra naturam} principle, Ulpian had only domestic animals in mind.

Another explanation offered by Honoré also looks convincing. According to him the original text contained the word “feritate” instead of “fera”;\textsuperscript{51} in which case the sentence resembles what was said by Servius and cited by Ulpian in D 9 1 1 4: “Itaque, ut Servius scribit, tunc haec actio locum habet, cum commota feritate nocuit quadrupes.”

It seems probable that Ulpian, when formulating the general rule for the application of the actio de pauperie, wanted to refer to his predecessor Servius. This seems even more likely because the casuistry in both cases is the same. The question is why this sentence appeared strange to a copyist, and what prompted him to intervene. According to Honoré it was because the compiler, probably Anatolius, misunderstood the structure

\textsuperscript{46} Honoré (n 4) at 248.

\textsuperscript{47} This question will be discussed later.

\textsuperscript{48} Giangrieco Pessi (n 4) at 118-120 holds a different view: “E infatti evidente che sia gli animali domestici che quelli considerati feroci possono porre in essere comportamenti innaturali; e che la non naturalità vada riferita alla differenza rispetto ai comportamenti normali propri di ciascuna specie.”

\textsuperscript{49} In the English translation by Alan Watson the text of D 9 1 1 7 is worded as follows: “The general rule is that this action lies whenever an animal commits \textit{pauperies} when moved by some wildness contrary to the nature of its kind.”

\textsuperscript{50} Corpus iuris civilis (Dutch translation by R Feenstra & J Spruit & KEM Bongenaar \textit{Tekst en Vertaling} vol 2 \textit{Digesten} 1-10 (Zutphen- 스 Gravenhege, 1994)) bk 9 at 707.

\textsuperscript{51} Honoré (n 4) at 246.
of the sentence, which had a hidden subject (the hidden subject being quadrupes). He thought the sentence had no subject. That is why feritate is changed into fera, thus becoming the subject of the sentence. However, its meaning was misunderstood. The same method referred to by Honoré as retrospective interpolation was also applied to the preceding paragraph (D 9 1 1 6).

312 The technical meaning of the word “pauperies”

D 9 1 1 3, Ulp 18 ad ed: “Ait praetor ‘pauperiem fecisse’. pauperies est damnum sine iniuria facientis datum: nec enim potest animal iniuria fecisse, quod sensu caret.”

It is clear from the beginning of the text that the praetor gave “pauperies” its technical meaning, namely damnum sine iniuria facientis datum.52

The syntagm “pauperiem facere” is reserved exclusively for the damaging act by the animal and contrasts with the usual expressions denoting an offensive act committed by a human being, namely “damnum facere”, “damnum dedere” or “delictum committere”. At the same time, the definition “pauperies est damnum sine iniuria facientis datum”, not only contrasts the harmful act by the animal with the offensive act of a human being, damnum iniuria datum, but also draws an analogy between a harmful act committed by a human being and that committed by an animal. This analogy is often used in casuistry.53

3 2 Actio de pauperie and early jurisprudence

We have only indirect knowledge of the opinions of republican jurists on the legal regime of the actio de pauperie. Chronologically, the first jurist to give his opinion was probably the famous Quintus Mucius Scaevola, pontifex maximus, regarding rams or bulls fighting:

D 9 1 1 11, Ulp 18 ad ed: “Cum arietes vel boves commisissent et alter alterum occidit, Quintus Mucius distinxit, ut si quidem is adgressus erat, cessaret actio, si is, qui non provocaverat, competeret actio.”54

The distinction that Quintus Mucius draws in the case of two fighting rams or bulls when one kills the other, is that no action can be brought if the aggressor is killed, but if the animal that did not start the fight is killed, then the actio (de pauperie) lies.

In Quintus Mucius’ opinion, it is important to know whether the animal that was killed started the fight or was provoked by another animal. In the first case the actio de pauperie does not lie, whereas in the second case the owner of the dead animal can bring the actio de pauperie against the owner of the ram or the bull that provoked the fight. A certain anthropomorphism should be noticed here.

52 Lenel Das Edictum Perpetuum (Leipzig, 1927) at 195 n 9 considers the words “ait praetor” as interpolations.
53 D 9 1 1 4; D 9 1 1 5; D 9 1 1 7.
54 Translated as follows: “When two rams or two bulls fight and one kills the other, Quintus Mucius draws the distinction that if it was the aggressor that was killed, no action lies, but if it was the one that did not start the fight, the action is available.”
Following this casuistic approach by Quintus Mucius, another republican jurist, Servius Sulpicius Rufus, tried to solve the problem in a more general way:

D 9 1 1 4: “Itaque, ut Servius scribit, tunc haec actio locum habet, cum commota feritate nocuit quadrupes, puta si equus calctiurosus calce percussit, aut bos cornu petere solitus petierit, aut mulae propter nimiam ferociam: quod si propter loci iniquitatem aut propter culpam mulionis, aut si plus iusto onerata quadrupes in aliquem onus everterit, haec actio cessabit damnique iniuriae agetur.”

The actio de pauperie could be brought if the animal had caused damage *commota feritate*. In other words, in inflicting harm the animal had to have been acting according to its instincts, not have been provoked or irritated by someone or something external. In giving the examples of the kicking horse, the goring ox, and the mule that inflicted damage, Servius apparently was thinking of the application of the action only where damage had been caused by domestic animals.

Human fault always excludes the pauperian action. In any case involving human fault, the Aquilian action or the actio in factum based on Aquilian principles can be brought. Servius contrasts the above-mentioned examples of damage caused by domestic quadruped animals provoked by unusual vice with cases of loss inflicted by the same types of animals for reasons not relating to the animals’ instinctive behaviour, but to human fault, as in the case of the overloaded mule that overturned its load onto someone. The actio de pauperie cannot even be brought in the case of a ferocious animal. Ulpian made this clear:

D 9 1 1 5: “Sed et si canis, cum duceretur ab aliquo, asperitate sua evaserit et alicui damnum dederit: si contineri firmius ab alio poterit vel si per eum locum induci non debuit, haec actio cessabit et tenebitur qui canem tenebat.”

55 Translated as follows: “Therefore, as Servius writes, this action lies when a quadruped animal causes harm because its ferocity has been provoked, for example, when a horse that is prone to kicking does kick someone, or when a goring ox tosses someone, or when mules cause damage because of some unusual vice. On the other hand, if an animal overturns its load on someone because of uneven ground or negligence on the part of the person driving the mule or because it was overloaded, this action does not lie and proceedings should be instituted on account of wrongful damage.”

56 Although it was not said so explicitly, the “someone” referred to is probably a slave, who was protected under the lex Aquilia. Injury to a free man constituted the delict of *iniuria*. In the classical period, however, actiones utiles on the Aquilian principles could also be brought where a homo *liber bona fide serviens* and a *filius familias* were injured. If the Roman citizen *sui iuris* was injured or killed, it is doubtful whether the actio legis Aquiliae lay in classical Roman law. On the basis of the text (D 9 2 7 4, *Ulp 18 ad ed*) an affirmative answer is provided by R Wittmann *Die Körperverletzung an Freien im klassischen römischen Recht*, Münchener Beiträge zur Papyrologie, antiken Rechtsgeschichte Heft 63 (München, 1972) at 102-104. The same view, supported by other arguments, is presented by R Feenstra “L’application de la loi Aquilia en cas d’homicide d’un homme libre, de l’époque classique à celle de Justiniens” in JA Ankum (ed) *Mélanges Felix Wabbe* (Fribourg, 1993) at 141-160. H Hausmaninger *Das Schadenersatzrecht der lex Aquilia* (Wien, 1990) at 33 considers the extension as uncertain. F Pringsheim “Die Verletzung Freier und die lex Aquilia” (1962) *Studia et Documenta Historia et Iuris* at 1-13 considers the extension to be a Justinianic intervention.

57 Translated as follows: “However, if a dog that has been taken out on a lead by someone attacks because of its wildness and does any kind of harm to someone else: If it could have been better
Although the dog attacked because of its own instinctive asperitas, and not, for instance, because it was provoked, the actio de pauperie does not lie if the person who took the dog out on the lead can be blamed for the damage. Therefore the actio de pauperie and the Aquilian action cannot be instituted at the same time and if the Aquilian action is instituted the action de pauperie cannot be. In other words, the pauperian action has a subsidiary character when either action could lie. The reason for this is perhaps to be found in the noxal character of the actio de pauperie and its lack of guarantees that the damage will be fully compensated.

Alfenus Varus, a student of Servius Sulpicius, also considered the question of the distinction between the actio de pauperie and the actio legis Aquiliae in the following well-known case:

D 9 2 52 2, Alfenus 2 digestorum: “In clivo Capitolino duo plostra onusta mulae ducebant: prioris plostri muliones conversum plostrum sublevabant, quo facile mulae ducrent: inter superius plostrum cessim ire coepit et cum muliones, qui inter duo plostra fuerunt, e medio existissent, posterior plostrum a priore percutit et puerum cuiusdam obtinerat: dominus pueri consulebat, cum quo se agere oporteret. respondi in causa ius esse positum: nam si muliones, qui superius plostrum sustinuissent, sua sponte se subduxissent et ideo factum esset, ut mulae plostrum retinere non possint atque onere ipso retraherentur, cum domino mularum nullam esse actionem, cum hominibus, qui conversum plostrum sustinuissent, lege Aquilia agi posse: nam nihil minus eum damnum dare, qui quod sustineret mitteret sua voluntate, ut id aliquem feriret: veluti si quis asellum cum agitasset non retinuissent, acque si quis ex manu telum aut aliiud quid immisisset, damnum iniuria daret. sed si neque mulae neque homines in causa essent, sed mulae retinere onus nequissent aut cum coniterentur lapsae concidissent et ideo plostrum cessim redisset atque hy quo conversum fuisset onus sustinere nequissent, neque cum domino mularum neque cum hominibus esse actionem. illud quidem certe, quoquo modo res se haberet, cum domino posteriorum mularum agi non posse, quoniam non sua sponte, se percessae retro redisset.”

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Translated as follows: “The mules were pulling two loaded carts up the Capitoline. The front cart had tipped up, so the drivers were trying to lift the back to make it easier for the mules to pull it up the hill, when suddenly it started to roll backward. The drivers, seeing that they would be caught between the two carts, leapt out of its path, and it rolled back and struck the rear cart, which careened down the hill and ran over someone’s slave boy. The owner of the boy asked me whom he should sue. I replied that it all depended on the facts of the case. If the drivers who were holding up the front cart leaped out of its way of their own accord and that was the reason why the mules could not take the weight of the cart and were pulled back by it, in my opinion no action could be brought against the owner of the mules, but the actio legis Aquiliae could be brought against the muleteers: for damage is wrongful even when someone voluntarily lets go of something in such circumstances and it hits someone else. For example, if a man failed to restrain an ass that he was driving, he would be liable for any damage that he caused, as he would if he threw a missile or anything else from his hand. But if the accident that we are considering occurred because the mules shied at something and the drivers left the cart for fear of being crushed, no action would lie against them; but in such a case, action should be brought against the owner of the mules. On the other hand, if neither the mules nor the drivers were at fault, as, for
The facts of this long and instructive case are rather complicated. The persons who could be liable for the damage suffered by the owner of the slave who had been run over are the owner of the mules of the first cart or the cattle drivers of the first cart. It is difficult to imagine that the mule drivers of the second cart could be liable, whilst the owners of the mules of the second cart are not liable. What are the criteria for determining who will be liable? Alfenus is clear: if the mule drivers of the first cart deliberately went away, so that the mules could not pull the cart and the burden, it is the mule drivers’ culpa. If, however, the mules were “at fault” because they suddenly drew back and frightened the mule drivers, the owner of the mules is liable for the damage. In the case of the mule drivers’ liability, Alfenus is explicit: the actio legis Aquiliae can be brought. However, he does not mention what the action against the owner of the mules is, but there can be no doubt that it is the actio de pauperie.

Another case discussed by the same republican jurist:

D 9 1 5, Alfenus 2 dig: “Agaso cum in tabernam equum deduceret, mulam equus olficit, mula calcem reiecit et crus agasoni fregit: consulebatur, possetne cum domino mulae agi, quod ea pauperiem fecisset. respondi posse.”

The fact that the horse sniffed the mule is not considered to be provocation and the reason for the mule’s wild behaviour. That is why the owner of the mule is noxally liable under the actio de pauperie.

From all the above examples it is clear that the owner is noxally liable if damage is caused by the instinctive behaviour of a domestic animal (feritas commota) that has not been provoked by anything or anybody. In judging the animal’s conduct, it is necessary to compare it to human behaviour.

3.3 Actio de pauperie and classical jurisprudence

3.3.1 Pauperies and the extension of the object of protection

D 9 1 3, Gai 7 ad ed prov: “Ex hac lege iam non dubitatur etiam liberarum personarum nomine agi posse, forte si patrem familias aut filium familias vulneraverit quadrupes: scilicet ut non deformitatis ratio habeatur, cum liberum corpus aestimationem non recipiat, example, if the mules just could not take the weight or if in trying to do so they slipped and fell and the cart then rolled down the hill because the men could not hold it when it tipped up, neither the owner nor the drivers would be liable. It is quite clear, furthermore, that however the accident happened, no action could be brought against the owner of the mules pulling the rear cart; for they fell back down the hill not through any fault of theirs, but because they were struck by the cart in front.”

The text refers to the mule drivers of the second cart and says nothing about the drivers of the first cart. The only logical conclusion is that the mule drivers of the first cart were also frightened for the same reason.

Translated as follows: “When a groom was leading a horse into the yard of an inn, it sniffed at a mule. The mule kicked out and broke the groom’s leg. An opinion was requested as to whether the owner of the mule could be sued on the grounds that his mule had committed pauperies. I answered: ‘Yes’.”
sed impensarum in curationem factarum et operarum amissarum quasque amissurus quis esset inutilis factus.”

As can thus be seen, protection was extended to the case where a free man was wounded. However, in this case the plaintiff could not claim damages for any disfigurement because of the famous rule liberum corpus aestionamem non recipiat (the body of a free man is not susceptible for valuation). That is why only material damage could be claimed, such as the cost of the medical treatment or damage flowing from loss of employment.

Injuries caused to a free Roman citizen were already covered by the delict of iniuria and its corresponding actio iniuriarum. However, this action could be brought only in cases of intentional injury. The actio de pauperie provided complementary protection in the case of the wounding of a free Roman, together with the actio legis Aquiliae, the actio de effusis vel deiectis and the actio de feris in the case of unintentional wounding.

The formulation “iam non dubitatur” (“there is no longer any doubt”), seems to indicate that it was doubtful whether this was the case prior to Gaius. The extension was probably made by interpretation. A certain analogy can be drawn with the lex Aquilia and its extension to the cases of unintentional injury to free Romans. It may be assumed that the main problem was that it was difficult to accept that the victim was the owner of his own body.

The sources make no reference to the possibility that the actio de pauperie might also be applied in the case of the death of a free Roman, while modern literature unanimously rules this out.

3.3.2 The contra naturam principle

In the sources this famous rule is mentioned twice: in the text by Ulpian from the sedes materiae of the Digest and also in Justinian’s Institutes:

D 9 1 1 7, Ulp 18 ad ed: “Et generaliter haec actio locum habet, quotiens contra naturam fera mota pauperiem dedit: ideoque si equus dolore concitatus calce petierit, cessare istam actionem, sed eum, qui equum percusserit aut vulneraverit, in factum magis quam lege Aquilia teneri, utique ideo, quia non ipse suo corpore damnun dedit. at si, cum equum permulsisset quis vel palpatus esset, calce eum percusserit, erit actioni locus”

61 Translated as follows: “There is no longer any doubt that under this law an action can be brought even in the name of free persons, if, for example, an animal wounds a head of a family or a son in power, but that is not to say that disfigurement can be taken into account, because the body of a free person is not susceptible of valuation. Nevertheless, account can be taken of the expenses of medical treatment and the loss of employment and of the opportunity of taking a job which were caused by the party being disabled.”

62 The same rule is mentioned in D 9 3 7, Gai 6 ad ed prov and in D 9 3 1 5, Ulp 23 ad ed.

63 See Feenstra (n 56) at 144.

64 Translated as follows: “The general rule is that this action applies whenever an animal commits pauperies when instigated by some wildness that is contrary to its nature. Therefore, if a horse kicks out because it is upset by pain, this action will not apply, but he who hit or wounded the horse will be liable based on the actio in factum under the lex Aquilia because he did not cause the damage with his own body. But if the horse kicked someone who was stroking it or someone who was patting it, this action was available.”
Just Inst 4 9pr: “haec actio autem in his, quae contra naturam moventur, locum habet: ceterum si genitalis sit feritas, cessat.”

Ulpian’s formulation, compared to that of Servius (in D 9 1 1 4), is more generalised but conveys basically the same idea. It is not only necessary that an animal shows its instinctive feritas, but also that its ferocity be considered as contra naturam. The conclusion that may be drawn from Justinian’s Institutes is that there are two types of ferocity, namely the natural one (genitalis feritas, feritas secundum naturam) of wild animals, and the non-natural (feritas contra naturam) one of domestic animals. The actio de pauperie lies in cases of non-natural, ferocious behaviour by domestic animals. Such behaviour can neither be expected from these peaceful creatures nor tolerated.

This principle, because of the obvious anthropomorphism in its approach to domestic animals, has given rise to fierce disputes in literature and has inevitably become a target of criticism. The basic and still unresolved problems are the following: the issue of the origin of the expression, its date, and the expression’s real meaning.

3 3 2 1 The history of the problem

Even the earliest Romanists deliberated about the concept contra naturam. However, early literature did not criticise it. It was only interpreted by glossators with the additional gloss sui generis. The famous gloss can be found in several places in the works of the glossators.

Accursius gives the following explanation of the concept feritate in D 9 1 1 4:

“Id est crudelitate contra naturam sui generis, ut subicit in exemplis. Ceterum si secundum naturam est crudele animal, cessat haec actio, et habet locum utilis”.

The concept contra naturam is explained by the following text of the gloss in the Institutes of Justinian (4 9pr):

“id est contra consuetudinem generis illius animalis, licet sit sua consuetudo ut calcitret. nam maior pars equorum non pessundat et maior pars bovum cornu non petit: quia equi et boves dicuntur mansueti.”

The origin of the concept contra naturam and its meaning did not stir up any controversy until the end of the nineteenth century. However, in the late nineteenth century there was some critical writing on the syntagm. Radical criticism started with Haymann. He came to the conclusion that the expression “contra naturam” is not of classical origin, but a Byzantine interpolation that changed the nature of the classical actio de pauperie and introduced strange, irrational ideas.

65 Translated as follows: “This action lies only in respect of animals which turn fierce contrary to their nature. It does not cover those born wild.” This English translation is based on Justinian’s Institutes by P Birks & G McLeod (New York, 1987).
66 Gloss contra naturam in the text D 9 1 1 7: scilicet sui generis: Summa Azonis on Justinian’s Institutiones 4 9pr. See Litten (n 4) at 494-497.
67 Eisele (n 4) at 480ff; Litten (n 4) at 494.
68 Haymann (n 4) at 357-393.
of an animal’s *culpa*. Finding support primarily in philosophical and literary sources, as well as legal ones, the author shows that Romans had different ethno-psychological characteristics from the other peoples of antiquity, including the neighbouring Greeks. Consequently, according to Haymann, the anthropomorphic ideas that were well known to the Greeks were not familiar to the Romans.

Haymann has many followers, some of whom are even more radical than himself, like Biondi and Kerr Wylie. In the first half of the twentieth century few opposed the prevalent theory. One who did was Rudolf Düll. He asserted that traces of anthropomorphic ideas were still present in classical Roman law, and cited the actio de pauperie as an example. Düll found support in Mommsen for his ideas and also his daring statement that under the actio de pauperie an animal was considered as subject to the same rules of human society as man, and could therefore be punished for a delict it committed.

Düll was followed by Fliniaux and De Visscher, who criticised Haymann’s opinions. However, in their studies the actio de pauperie is not the main topic, and these questions are treated as being of secondary significance.

Modern literature has abandoned the method of searching for interpolations. This has resulted in a change of approach to the sources on the actio de pauperie and more particularly on the concept of *contra naturam*. Many modern Romanists accept the classical origin of the expression.

There are two opinions about the date when the expression was first used. According to the first, the concept can be ascribed to late republican jurisprudence, probably to

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69 *Idem* at 365.

70 The most important source proving that difference between the Greeks and the Romans is Plutarch *Cato Maior* 5. Plutarch, a Greek, could not understand the pragmatic and unfeeling Romans who would sell an old and weak animal that had served them all its life because it was not profitable to feed it.

71 For example, Porphyrius *De abstinentia* 3 12. See Haymann (n 4) at 369.

72 Haymann (n 4) at 373.

73 E Levy *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht* (Berlin, 1922) at 226ff; WW Buckland *A Manual of Roman Private Law* (Cambridge, 1925) at 333; S Perozzi *Institutioni di diritto romano* vol 2 (Roma, 1928) at 397; Robbe (n 4) at 345ff; Kerr Wylie (n 4) at 459; CA Maschi *La concezione naturalistica* (Milano, 1937) at 17; Kaser (n 4) (*Das römische Privatrecht*, 1955) (n 4) at 530, n 29. In the second edition (1971) Kaser, however, changed his opinion. See Nicholas (n 4) at 187ff; A Lebigre *Quelques aspects de la responsabilité pénale en droit romain classique* (Paris, 1969) at 24; Jackson (n 4) at 136.

74 Düll “Archaisches” (n 4) at 1ff and “Zum Anthropomorphismus” (n 4) at 346.

75 Mommsen (n 27) at 834.

76 Fliniaux (n 1) at 256 n 3; De Visscher (n 4) at 373 n 5.

77 Ashton-Cross "Animals" (n 4) at 399; A Watson *The Law of Obligations in the Later Roman Republic* (Oxford, 1965) at 281; Kaser (n 4) (*Das römische Privatrecht*, 1971) at 634 n 34; J Triantaphyllopoulos "Contra naturam" in V Giuffre (ed) *Sodaiitas. Scritti in onore A. Guarino* vol 3 (Napoli, 1984) at 1415, 1417; Honoré (n 4) at 243ff; Zimmermann (n 4) at 1103; Méleze-Modrzejewski "Nature des animaux" (n 4) at 177 and 183. See, also, Méleze-Modrzejewski "Hommes libre" (n 4) at 97; Giangrieco Pessi (n 4) at 15ff and esp at 18-19, 41.
jurists like Servius Sulpicius or Quintus Mucius Scaevola. According to the second opinion, the expression should be attributed to Ulpian because of the influence of Greek philosophy and the concept of natural law in the time of this famous late classical jurist.

There are more arguments that seem to favour the second hypothesis. First, in his text mentioning the concept “contra naturam” Ulpian does not quote any other jurist, as he normally does when necessary. Thus it seems quite likely that contra naturam is an expression that he himself invented. Secondly, the word “natura” is a familiar concept in Ulpian’s vocabulary, as it is in his famous division of the law (ius civile, ius gentium, ius naturale).

The concept should probably be attributed to Ulpian rather than Servius, but in any event both jurists basically had the same ideas about the actio de pauperie, and that is not difficult to see from the casuistry of both.

3.3.2.2 Possible explanations of the meaning of contra naturam

Almost all explanations treat the concept as related to the animal’s behaviour. An exception to this is Schömann who understands the expression to refer to the type of damage. His view is that there is a damnum secundum naturam, such as grazing for which, for example, the actio de pastu lies, and on the other hand that there is damnum contra naturam, covered by the actio de pauperie. The sources provide no support for this view.

Contra naturam might be taken to mean the behaviour of a particular animal but this explanation is unacceptable, since the sources give examples of the horse that has a habit of kicking or the bull that usually gores: D 9 1 1 4: “si equus calcitrosus calce percusserit, aut bos cornu petere solitus petierit (my emphasis).”

This behaviour is in conformity with the nature of individual animals. However, the sources are explicit in stating that the actio de pauperie applies in these cases too. That means that the behaviour of the kicking horse is contra naturam even though the horse has a habit of kicking; and the same goes for the ox that has a habit of goring.

The glossators’ abovementioned classical explanation speaks of damage caused by an animal that has been acting contrary to the nature of its kind (species). Although this explanation is largely acceptable, it has some weak points. Is it really unnatural if a horse kicks or a ram and a bull start to fight?

Another possible explanation is that any behaviour contrary to the provisions of natural law can be considered contra naturam, in which case the animal is treated as a

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78 PF Girard Les actions noxales, Mélanges de droit romain vol 2 (Paris, 1923) at 312-313 n 1; Fliniaux (n 1) at 256 n 3; Watson (n 4) at 281.
79 Méleze-Modrzejewski “Nature des animaux” (n 4) at 184ff; Giangrieco Pessi (n 4) at 21.
80 In D 9 1 1 4 Ulpian quotes Servius and in another text (D 9 1 1 11) he speaks of the opinion of Quintus Mucius.
81 D 1 1 3.
82 Schömann Handbuch des Civilrechts vol 1 at 192, as cited by Giangrieco Pessi (n 4) at 37.
83 D 9 1 1 7: “quotiens contra naturam fera mota pauperiem dedit.” “Contra naturam” refers to “pauperiem dedit”, thus to the behaviour of the animal. See Giangrieco Pessi (n 4) at 38.
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delinquent. This explanation is not satisfactory. It is obvious that Ulpian, when speaking of the provisions of natural law that apply to both humans and animals, considered different types of conduct (for instance, failure to care for one’s descendants). Ulpian also believes that the provisions of natural law apply to all kinds of animals, both wild and domestic. The actio de pauperie, however, applies only to domestic animals.

The term contra naturam can also be applied to domestic animals acting contrary to their tame and peaceful nature. These animals have acquired a second nature, have become civilised, and belong more to human society than to nature. Mommsen even says that animals are subject to the social order and are capable of violating it. This may be going too far, but with regard to the rule contra naturam, the behaviour of domestic animals was judged by standards similar to human ones. It appears that this interpretation, combined with the classical one held by the glossators, comes closest to the basic idea of the famous concept.

4 Noxal character of the action

Most Romanists today hold that the actio de pauperie undoubtedly has a noxal character. Lenel, in his reconstruction of the Edictum perpetuum, takes this action’s formula as a model for all noxal actions. Girard is of the same opinion, stating that actiones noxales manifest a primitive way of thinking according to which there is a unique source of offence, whether for humans and animals.

However, there was a radical line of thinking in Roman studies. Biondi was the first to deny any relationship between the actio de pauperie and noxal actions. Haymann had previously taken a similar stance, but the scope of his theory is considerably narrower.

Biondi has not had many followers. However, among them are two authors who have written voluminous monograph-like articles on the actio de pauperie, the Italian Romanist Ubaldo Robbe and his South African colleague, Kerr Wylie.

84 The Basilicae refer to the idea of a delict committed by an animal. See Basilicae 5 259 ad D 9 1 1 12: “Quia noxalis actio animalium ratione mota caput delinquentis animalis sequitur (my emphasis).” However, nothing is said about the delict referring to the breach of provisions of natural law.
85 See Zimmerman (n 4) at 1104.
86 Méleze-Modrzejewski “Hommes libres” (n 4) at 97.
87 Mommsen (n 27) at 834.
88 Girard (n 78) at 318; Lenel EP (n ? 52) at 195; Lenel (n 4) at 2-17; De Visscher (n 4) at 193; Kaser (n 4) (Das römische Privatrecht, 1971) at 633; Giangrieco Pessi (n 4) at 255, 259.
89 Lenel (n 52) at 318.
90 Girard (n 78) at 318.
91 The first chapter of Biondi’s voluminous study on noxal actions is dedicated to this question; see Biondi Actiones noxales (n 4) at 1-41.
92 Haymann (n 4) at 372.
93 Basically, Robbe (n 4) at 369 shows a less rigid attitude in his attempt to separate the actio de pauperie from noxal actions.
94 Kerr Wylie (n 4) at 467-468 relies completely on Biondi’s theses and arguments. His concept of the classical actio de pauperie is essentially identical to that of Biondi, which is based on the modern concept of the owner’s liability for the damage caused by dangerous things.
For these authors the recognition of the noxal character of the actio de pauperie proves that the Romans were irrational, a view which conflicts with the usual belief that the Romans were more rational than other peoples in ancient civilisations. They refute the very idea that the Romans looked on an offence committed by a person in the same light as an offence committed by an animal. They admit that in the earliest period of their history the Romans, like other ancient peoples at the beginning of civilisation, may have had irrational ideas about animals when it came to fault and punishment. However, they deny that any such ideas existed in classical Roman law. Since the purpose of noxal actions was to punish the wrongdoer they could not accept that the actio de pauperie had a noxal character. These authors’ prejudices are so strong that in order to eliminate anything that might jeopardise their views they have arbitrarily changed the relevant sources in a manner more drastic than that of Justinian’s compilers themselves, who were the main target of these authors’ criticism.\footnote{There is also a specific reason why Biondi endeavoured to prove the non-noxality of the actio de pauperie. He is the most radical of all Romanists in presenting noxal actions as a means of imposing liability on an offender. One of the boldest and most disputed theses in Biondi’s study of noxal actions is his claim that the slave is liable \textit{civiliter ex delicto}. He presented a thesis on the slave’s limited legal subjectivity. Noxal actions were instituted against the holder of power as auxiliary and subsidiary to the actio ex delicto which was brought directly against the wrongdoer, but were suspended because of the person’s incapacity to stand trial. See Biondi \textit{Actiones noxales} (n 4) at 170-182.}

Biondi’s theory has been the target of much criticism, while the views of his critic Lenel have been largely accepted.\footnote{Lenel (n 4) at 3ff. For recent criticism see Giangrieco Pessi (n 4) at 226-229, 282ff.}

However, whilst not denying the noxal character of the pauperian action, some Romanists point out that there are differences between such an action brought because of damage caused by animals and other noxal actions. Max Kaser points to the main difference, namely, the sanction. While the victim in a noxal action may claim not only noxal surrender, but also a fine, according to Kaser this sum of money constitutes damages in the actio de pauperie.\footnote{Kaser (n 4) (\textit{Das römische Privatrecht}, 1971) at 163, 165, 631 and 633.}

Hans Ankum, largely following Kaser’s opinion, set out the differences between noxal actions, especially the actio legis Aquiliae noxalis and the actio de pauperie, although indirectly and only in a footnote. This he did systematically, enumerating five points.\footnote{Ankum (n 4) at 14-15 and see n 4.} First, basing his opinion on Ulpian’s famous text (D 9 1 1 3: “pauperies est damnum sine iniuria facientis datum: nec enim potest animal iniuria fecisse, quod sensu caret”), Ankum points out that an animal, unlike a slave or filius, is incapable of committing an unlawful act. Secondly, if a slave or filius has committed an offence and is freed or becomes \textit{sui iuris} before a noxal action is brought, a direct action may be brought against him. This is not possible if the wrongdoer is an animal. Thirdly, a noxal action is brought against the person who has authority over the slave. But, if the slave is set free, the proceedings based on the noxal action will turn into a direct action against the wrongdoer himself. This so-called “translatio iudicii” is not possible if the proceedings involve \textit{pauperies}. Fourthly, if a slave or filius dies after \textit{litis contestatio} through no fault of the sued owner or head of the family, the \textit{pater familias} may hand over the body or
part of it to the person who sued. However, handing over an animal’s carcass would not have such a liberating effect. The procedure based on the actio de pauperie will therefore continue until judgment has been given. Finally, Ankum also points out that the actio legis Aquiliae noxalis, like the actio legis Aquiliae directa, has a penal character differing from that of the actio de pauperie, which is not a penal action.

None of the above five suggested differences refer to the main feature that gives a noxal action its specific character. There are undoubtedly some differences but they stem naturally from the differences in character of the wrongdoers. This applies to the second and the third suggested differences, as well as to the first one, with some explanation. The fourth suggested difference is based on an unreliable source, Gaius Augustodunensis 4 83, and cannot therefore be accepted unreservedly. The last point of difference highlighted by both Max Kaser and Hans Ankum seems to be incorrect.

The statement that an animal cannot commit an unlawful act undoubtedly derives from Ulpian’s text (D 9 1 1 3). Despite Ulpian’s statement, an animal’s behaviour was judged according to criteria similar to those that applied to human behaviour.

One of the texts from Gaius’ Institutes that were found in the French town of Autun (4 83), deals with the difference between noxal actions and the actio de pauperie. Although the text has been damaged, what it says about this question is clear; it is possible for the person against whom a noxal action has been brought to hand over the body of the slave, or filius and to release himself from further liability. On the other hand, in the pauperian action noxae deditio relates only to live animals. The possibility of handing over the body of the slave or the filius is not mentioned in any other source, while Ulpian’s text in the Digest (D 9 1 1 14) supports what has been said about handing over an animal: “noxae autem dedere est animal tradere vivum”. In the sources dealing with noxal actions there is no text with the same content as that of Ulpian that would contradict the abovementioned fragments by Gaius of Autun, but there is also no text supporting Gaius’ words. However, it is strange that the sources ignore such an important condition for carrying out the noxae deditio, even though they discuss a number of details concerning the legal aspects of noxal actions. In addition to this, the reasons for such a solution may also be called into question. Is not Gaius’ idea of handing over the offender’s body in conflict with the outstanding noxa caput sequitur rule? The offence follows the offender while living, but if the offender dies before proceedings have been instituted, that is before litis contestatio, the noxal action comes to end. If the offender’s liability and the noxal hand-over are related to the idea of punishing the offender, it is necessary that the offender be alive. However, if it is also possible for revenge to be carried out on the offender’s body, contrary to the rule, there is no reason why this cannot be done if the offender died before an action was brought against him or if he died during proceedings. Moreover, if it were possible to hand over a body at any moment during the proceedings, there would not be much sense in the alternative payment of a litis aestimatio and it would apply only in exceptional circumstances. For example, only where the animal’s value is greater than the damage inflicted or when the animal’s effective value to the offender is high.
source, and the idea of handing over the body of a slave, or of a filius, should be treated with a great deal of reserve.

The fifth point focuses on the penal character of noxal actions as against the reipersecutory character of the pauperian action. The sources do not deal directly with the penal character of noxal actions, which have some features that differ from the usual characteristics of penal actions; they are passively inheritable and, according to certain jurists, particularly Paul, they are applied electively. However, noxal actions are ultimately penal. They derive from delicts and are a special variation of the existing direct actions for offences. They preserve the same delictual character even if the litis aestimatio, which is an alternative to noxal hand-over, has a reipersecutory purpose and character rather than that of a fine or composition.\footnote{100}

In addition, we find direct support for the penal character of the actio de pauperie in the sources:

Just Inst 4 9 1: “praeter has autem aedilicias actiones et de pauperie locum habebit: numquam enim actiones praesertim poenales de eadem re concurrentes alia aliam consumit.”

There are several reasons for associating the word “praesertim” with the pauperian action and not with that of the aediles. The actio de pauperie is identified as mainly (not purely) a penal action, because of its noxal character. Also, noxiam sarcire may be considered as compensation for damage rather than a punishing fine.\footnote{101}

The actio de pauperie undoubtedly has a noxal character since it displays all the characteristic features of noxal actions. First of all, the well-known rule noxa caput sequitur and the liberating effect of noxal surrender which is closely related to it, apply both to this action and to noxal actions in general.\footnote{102}

Both the actio de pauperie and noxal actions take into account absence of fault on the part of the owner who is sued. The sources clearly indicate that the action is available provided that there is no fault on the part of anyone who could have directly or indirectly influenced the damage caused by the animal.\footnote{103}

\footnote{100} Boudewijn Sirks has a more complex approach to the problem. He holds that what defines a penal action is not necessarily the punitive character of its litis aestimatio, and that penal actions can be divided into penal actions with a penal object and penal actions with a reipersecutory object, with some subcategories. See B Sirks “The delictual origin, penal nature and reipersecutory object of the actio damni iniuriae legis Aquiliae” (2009) 77 Tijdschrift voor rechtsgeschiedenis 303-353 at 304, 324.

\footnote{101} The reasons why the Aquilian action cannot be regarded as a claim for damages are explained by Ankum (n 4) at 56-59. This view is challenged by Sirks (n 100) at 351. A recent contribution to this discussion was made by Wallinga who holds that in Justinian law too the rei persecutio was only a side effect of poena. See T Wallinga “Actio legis Aquiliae – Buße oder Schadensersatz?” in H Altmeppen et al Festschrift für Rolf Knütel zum 70. Geburtstag (Heidelberg, 2009) at 1385ff.

\footnote{102} D 9 1 1 12, Ulp 18 ad ed: “Et cum etiam in quadrupedibus noxa caput sequitur, adversus dominum haec actio datur, non cuius fuerit quadrupes, cum noceret, sed cuius nunc est.” See, also, D 9 1 1 16, Ulp 18 ad ed.

\footnote{103} Sources cite examples of an overloaded mule throwing off its burden, a dog that was not held tightly on a leash and bit someone, an animal that was provoked and then caused damage, or a horse that was
Anthropomorphism and rationalism

Anthropomorphic ideas about animals are not rare in the general and legal history of mankind. Some illustrative examples may be mentioned.

Ancient Jewish law contains famous criminal provisions relating to the ox that gored and killed a free man. It was sentenced to death by stoning. If the owner had known that his animal was in the habit of doing this and had not guarded it, both he and the animal would be sentenced to death.\footnote{Exodus 21:28-32. See, in this regard, R Yaron “The goring ox in Near Eastern Laws” (1966) 1 Israel LR at 396-406; (1966) 1 R Yaron Laws of Eshnunna (Jerusalem, 1969) at 291-303; BS Jackson “The goring ox” in BS Jackson (ed) Essays in Jewish and Comparative Legal History (Leiden, 1975) at 108-152; R Westbrook Studies in Biblical Law and Cuneiform Law (Paris, 1988) at 39-88.}

In addition to these criminal-law norms, there were provisions in Mosaic law concerning patrimonial damage caused by an animal’s spontaneous act. One of the cases cited (Exodus 21:35-36) refers to damage caused by oxen fighting. In determining liability for damage, it was important to know which ox was the aggressor and whether its master was familiar with its aggressive nature. The sanction is prescribed only against the owner. It involves civil liability consisting of compensation for damage.

The old Jewish law is closely related to the other ancient laws of the Middle East, which, however, display a higher degree of rationality than Mosaic law. For example, the Code of Hammurabi regulates the well-known case of a goring ox (at 250). Whilst in biblical law, the ox or both the ox and its owner are punished by death, the Code of Hammurabi prescribes a fine for the owner.

While the Code of Hammurabi stands out among the laws of the Middle East as being very rational considering the circumstances of that time, one cannot say the same of the law of ancient Greece. With reference to patrimonial damage, Greek law – like the laws of all agricultural societies – was preoccupied by the issue of damage caused by pasturing cattle on somebody else’s field, and it presumed that the owner had to pay damage.\footnote{Plato Laws 843d.} However, a more general provision that pertains to all patrimonial damage caused by animals prescribes that the owner can surrender the animal that has caused the damage, and also pay compensation for the damage. The issue is regulated in the same way as damage caused by slaves.\footnote{Plato Laws 936d-e.} Surrendering the animal demonstrates that the idea of an animal being liable as offender is present in the law of ancient Greece. Plutarch also informs us that a statute passed in Solon’s time in Athens provided that if a dog bit somebody it should be surrendered with a chain four ells long tied around its neck.\footnote{Plutarch Solon 24.}

Furthermore, the criminal law of ancient Greece treated animals as capable of being responsible and punished them for delicts. In his Laws, Plato prescribes capital punishment for an animal that causes the death of a man.\footnote{Plato Laws 873e.}
Modern man would find it even more unacceptable to consider inanimate things (αψύχα) as killers and treat them in the same way as animals, but in ancient Greece secular proceedings were instituted against both animals and inanimate objects.\textsuperscript{109} An animal proven to have caused death had to be killed and its carcass thrown out of the city.\textsuperscript{110} It is difficult to say whether these proceedings were vindictive, repressive or sacrificial.\textsuperscript{111}

The most unusual practice was that of our ancestors in Europe during the medieval and even modern period.\textsuperscript{112} Two types of proceedings were available against animals: on the one hand, sacrificial proceedings against the whole animal species in ecclesiastical courts involving the penalties of anathema and excommunication; and on the other, secular criminal proceedings against individual domestic animals that were considered to be criminal and were sentenced to death (by hanging, burying alive, burning, decapitation). This practice continued for a long period in France, namely from the thirteenth to the nineteenth centuries, but all western European nations were familiar with it.\textsuperscript{113} In the Slavic world this practice was known as early as the beginning of our age.\textsuperscript{114}

This practice of our close ancestors has been neglected to a certain extent and can even be said to have been concealed within the framework of social history and history of the law. However, it cannot be considered a mere curiosity, because there are historical documents covering a long period, relating to most nations of present-day Europe that refer to numerous secular as well as spiritual procedures against animals. Probably the main reason why this problem has been marginalised is that it is hard for modern, rational people to believe that these things happened, and even more difficult for them to understand and accept our ancestors’ reasons and motives for such actions.

There were also some philosophers who followed Pythagoras, according to whom there is nothing that separates man from the world of animals. There were some medieval theologians who explained and defended the practice of bringing charges against animals. However, the most prominent philosophical influence in the western world on the so-called rational attitude towards animals was exerted by the Bible, which, in its interpretation of \textit{Genesis}, ascribes to man the special role of a creature of God, to whom God gave His own appearance and whom he made the master of animals\textsuperscript{115} in the hierarchy of creatures who have a soul.

Another crucial influence derives from the Greek philosophical tradition. In ancient Greece, the prevalent concept was that of Aristotle who claimed that there was a hierarchy

\begin{itemize}
\item \textsuperscript{109} Aristotle \textit{Constitution of Athens} 57.4.
\item \textsuperscript{110} Plato \textit{Laws} 873e.
\item \textsuperscript{111} Düll “Archaisches” (n 4) at 4 considers the proceedings to have been real, while Von Amira considers them as the acts of a cult. See, also, K von Amira \textit{Thierstrafen und Thierprocesse, Mitteilungen des Instituts für oesterreichische Geschichtsforschung} vol 12, no 4 (Innsbruck, 1891) at 576.
\item \textsuperscript{112} EP Evans \textit{The Criminal Prosecution and Capital Punishment of Animals. The Lost History of Europe’s Animal Trials} (1906, repr London, 1987) at 336. The most recent attempt to explain this practice is by M Slabbert “Prosecuting animals in Medieval Europe: Possible explanations” (2004) 10 \textit{Fundamina} at 159-179.
\item \textsuperscript{113} Von Amira (n 111) at 559, 570ff.
\item \textsuperscript{114} \textit{Idem} at 572-573.
\item \textsuperscript{115} \textit{Genesis} 1:26.
\end{itemize}
in nature and that man was unique in relation to animals, being more social than other animals. This was because man was the only creature among all the animals that had intellect and the power of speech. Therefore, only man was able to distinguish between good and evil and between what was just and unjust, and that was the basis for creating human society.\textsuperscript{116} The influence of these ideas can be seen, for example, in Cicero’s works\textsuperscript{117} as well as in some Roman legal texts.\textsuperscript{118}

In ethics and law different anthropomorphic and supposedly rational concepts concerning animals existed side by side in the past. Is it still so today?

It should be noted that some views in modern ethics and law about animal rights have shifted the moral and legal horizon of man beyond the limits of his own species. An example is the concept that animals were not created in order to serve man but rather have their own interests that should be considered.\textsuperscript{119} These ideas have had a significant influence on the animal rights movement. Could these ideas be considered anthropomorphic? Are they rational or irrational? They seem to be completely in conflict with the practice of instituting actions against animals. However, what links the contemporary struggle for animal rights with the practice of punishing animals in the past, is that in both cases the animal is not treated as a thing, but recognised as having the status of a subject of the law in a certain sense and to a restricted extent.

\section*{Abstract}

Unlike modern law, antique law provided for the possibility of an animal, itself, being responsible for its harmful act, whereby the animal was treated not only as an object, but, to a certain extent, as the subject of the law. The regime of the actio de pauperie points to the fact that the idea of delictual liability of an animal was not unfamiliar to the Romans. This is indicated primarily by the noxal character of the action, and also by some other features of its legal regime which could be traced as follows: The actio de pauperie was initially applied in cases where a domestic quadruped from the category of \textit{pecudes} or \textit{res mancipi} had caused damage on slaves and livestock. The application of the action was extended to cover all domestic quadrupeds, such, as, for instance, the dog. The praetors’ activities contributed to the introduction of the actio utilis, based on which the application of the action was extended to incorporate other domestic non-quadrupeds. It is also likely that the term \textit{pauperies} acquired its legal-technical meaning – damage caused by a domestic animal. Republican jurists, Quintus Mucius Scaevola, Servius Sulpicius Rufus and Alfenus Varus dealt with the problem of circumstances under which an animal caused damage. The unique conclusion deriving from the examples was that the domestic animal should cause damage by its own instinctive behaviour. Servius

\begin{itemize}
\item \textsuperscript{116} Aristotle \textit{Politics} 1253a.
\item \textsuperscript{117} Cicero \textit{De officiis} 1 16.
\item \textsuperscript{118} D 9 1 1 3, Ulp 18 ad ed: “Pauperies est damnum sine iniuria facientis datum, nec enim potest animal iniuria fecisse, quod sensu caret.” Likewise in D 9 2 5 2.
\item \textsuperscript{119} One of the most prominent supporters of this idea, Peter Singer \textit{In Defence of Animals} (Oxford, 1985) at 6, calls the current relation of man towards animals a kind of racism – \textit{speciecism}.
\end{itemize}
named it sudden rage — *feritas commota*. Relying on his predecessor, Ulpian formulated the famous principle *contra naturam*. It is difficult to negate a certain anthropomorphism among the Romans in their approach to animals despite many attempts of criticism in romanistic literature. In ethics and law different anthropomorphic and supposedly rational concepts concerning animals existed side by side in the past. And it is still so today having in mind especially contemporary struggle for animal rights.