THE PROBLEM OF THE MATERIAL DAMAGE IN THE CASE OF KILLING A FREE MAN IN CO.1.11[1]

Prof. dr. sc. Samir Aličić
Full Professor
University "VITEZ", Bosnia and Herzegovina
University of East Sarajevo, Bosnia and Herzegovina
Scientific Collaborator of the Institute for Comparative Law of Belgrade, Serbia
samir.alicic@unvi.edu.ba
ORCID ID: 0000-0003-2323-9076

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Abstract

In this paper a case of homicide of a free person has been analysed, in which case the roman law prescribed, beside the punishment of exile (for crime), paying of a certain sum of money to the father of the deceased person as a compensation for material damages caused by killing (for tort). The author is trying to find answers on questions, by which action the perpetrator is liable for tort, and by which criteria the sum of money to be paid has been calculated.

Keywords: obligations, *delicta privata*, *lex Aquilia*, assessment of damages, roman law.

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PROBLEM MATERIJALNE ŠTETE U SLUČAJU UBISTVA SLOBODNOG ČOVJEKA U CO.1.11[2]

Sažetak

Predmet analize ovog članka je jedan slučaj ubistva slobodnog čovjeka u rimskom pravu u kojem je, pored kazne izgnanstva (za javni delikt), određeno i plaćanje izvjesne sume novca ocu ubijene osobe na ime naknade za materijalne gubitke prouzročene ubistvom (na ime građanske odgovornosti). Autor pokušava da ponudi mogući odgovor na pitanja, po osnovu koje tužbe je učinitelj odgovoran za naknadu štete, i po kojim kriterijima je izračunata suma novca koja treba da bude plaćena.

Ključne riječi: obveze, *delicta privata*, *lex Aquilia*, procjena štete, rimsko pravo.

1. Introduction

CO.1.11 SCRIBA: ULPIANUS LIBRO ET TITULO QUI SUPRA (ULP. 7 OFF.): *1. Cum quidam per lasciviam causam mortis praebuisset, conprobatum est factum Taurini Egnati proconsulis Baeticae a Divo Hadriano, quod eum in quinquennium relegasset. 2. Verba consultationis et rescripti ita se habent: " inter Claudium, optime imperator, Euaristum cognovi, quod Claudius Lupi filius in convivio, dum sago iactatur, culpa Mari Euaristi ita male acceptus fuerit, ut post diem quintum moreretur. Atque adparebat nullam inimicitiam cum Euaristo ei fuisse. Tamen cupiditatis culpa coercendum credidi, ut ceteri eiusdem aetatis iuvenes emendarentur. Ideoque Mario Euaristo Urbe Italia provincia Baetica in quinquennium interdixi et decrevi, ut impendi causa duo milia patri eius persolveret Euaristus, quod manifesta eius fuerat paupertas ". 3. Verba rescripti: " Poenam Mari Euaristi recte, Taurine, moderatus es ad modum culpae; refert enim et in maioribus*

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delictis, consulto aliquid admittatur an casu. 4. Et sane in omnibus criminibus distinctio haec poenam aut iustam provocare debet aut temperamentum admittere. [3]

The well-known *epistula* of the emperor Hadrian (117-138)[4] is known nowadays thanks to a citation in the VII volume of the Ulpian's book *De officio proconsulis*, which was, in turn, cited in *Comparison of the Laws of Moses and of the Romans* (*Collatio legum Mosaicarum et Romanarum*, herafter *Collatio*),[5] in the chapter *On casual homicides* (*De casualibus homicidiis* – CO.1.5). There are fragments of the Ulpian's book used by the compilers of the Digest of Justinian that contain direct or indirect mention of the case analysed in the CO.1.11, which fragments thus confirm the authenticity of the text in *Collatio*.[6]

The meaning of the text is this. Egnatius Taurinus, proconsul (governor) of the roman province of Baetica,[7] asked instruction from emperor Hadrian (117-138) how

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[3] CO.1.11 SCRIBA: ULPIANUS LIBRO ET TITULO QUI SUPRA (ULP. 7 OFF.): *1. Cum quidam per lasciviam causam mortis praebuisset, conprobatum est factum Taurini Egnati proconsulis Baeticae a Divo Hadriano, quod eum in quinquennium relegasset. 2. Verba consultationis et rescripti ita se habent: " inter Claudium, optime imperator, Euaristum cognovi, quod Claudius Lupi filius in convivio, dum sago iactatur, culpa Mari Euaristi ita male acceptus fuerit, ut post diem quintum moreretur. Atque adparebat nullam inimicitiam cum Euaristo ei fuisse. Tamen cupiditatis culpa coercendum credidi, ut ceteri eiusdem aetatis iuvenes emendarentur. Ideoque Mario Euaristo Urbe Italia provincia Baetica in quinquennium interdixi et decrevi, ut impendi causa duo milia patri eius persolveret Euaristus, quod manifesta eius fuerat paupertas ". 3. Verba rescripti: " Poenam Mari Euaristi recte, Taurine, moderatus es ad modum culpae; refert enim et in maioribus delictis, consulto aliquid admittatur an casu. 4. Et sane in omnibus criminibus distinctio haec poenam aut iustam provocare debet aut temperamentum admittere.* The roman legal sources in this paper are cited according to the electronic database *BIA – Bibliotheca iuris antiqui*, Integrated information System on Ancient Law, editor in chief Nicola Palazzolo, Rome 2000.

[4] Of our earlier works on this text see for example Aličić 2013 and Aličić 2017, 171-178.

[5] A well-known roman postclassical legal compilation, that contains the comparison of roman and jewish law, probably created in the time of Diocletian's or Constantine's rule, with some later interpolations. The oldest known study of comparative law in history, most probably made by some Jew or cristian with intention of showing that the basic principles of the roman law can be found in much older Laws of Moses, probably with intent of showing the superiority of Jewish law over the roman. Although more religious and apologetic than legal in nature, this book is today one of important sources on the roman law. Of numerous modern scientific works dedicated to origins and character of this compilation see for example: Schulz; Scherillo; Masi; Cervenca; De Francisci; De Dominicis; Lauria; Barone Adesi; Pugliese; Frakes.

[6] D.48.8.4.1ULPIANUS libro septimo de officio proconsulis *Cum quidam per lasciviam causam mortis praebuisset, comprobatum est factum Ignatii Taurini proconsulis Baeticae a divo Hadriano, quod eum in quinquennium relegasset.*; D.48.19.5.2 ULPIANUS libro septimo de officio proconsulis *Refert et in maioribus delictis, consulto aliquid admittatur, an casu. et sane in omnibus criminibus distinctio haec poenam aut iustam elicere debet aut temperamentum admittere.*

[7] The proconsular province of *Hispania Baetica* is a roman administrative unit that approximately corresponds to modern-day Andalusia, the southernmost province of Spain. The emperor Hadrian himself was a descendant of roman citizens colonized in this province and was possibly born there. As Wacke notes, the whole case, although happened almost two millennia ago, has a strong Spanish spirit, even by modern criteria. The names like *Ignatius Taurinus* and *Marius Evaristus* are still common in modernized form (Ignazio Del Toro and Mario Evaristo), and the play of throwing on a cloth remained popular throughout centuries, becoming a part of Spanish folklore. For example, in *Don Quixote* Sancho Panza gets thrown in this way as a punishment for not paying the bill in a pub. The famous painting of Francisco de Goya *The Straw Doll* (*El Pelele*, 1791/1792) that can be seen in Prado

to resolve the following case. A group of youngsters gathered on a party was throwing, for fun, one of their friends, Claudius, son of Lupus, on a cloth (*sagum*) in the air.[8] They were holding together the ends of the cloth, throwing Claudius in the air, and catching him on the cloth. By negligence of one of the youngsters, Marius Evaristus, Claudius did not land safely on the cloth after one of the throws, presumably because Marius Evaristus did not hold properly the edge of the cloak. Consequently, Claudius was heavily injured and died after five days.

Evaristus and Claudius were in friendly relations, so the possibility of intentional homicide was excluded. Taken in consideration the fact that the homicide was done negligence, as well as the young age of Evaristus, the proconsul condemned him to five years of exile, during which period he must stay away from Rome, Italy, and his native province of Boetica, and payment of an indemnity of two thousand (presumably sesterces) to Lupus, the father of the deceased Claudius.

The proconsul asked the Emperor to confirm, if the punishment was adequate. The Emperor confirmed that the case was resolved according to law, noting that a punishment established by law can be mitigated by judge if a crime has been committed by negligence.

The text CO.1.11 is well known in the science of roman law. It is considered important especially by the researchers interested in roman criminal law, for two reasons.

The first reason is the punishment mentioned in the text, which is much lighter than the one prescribed by the roman law for homicide. The mitigation of the punishment prescribed by law is explained, as mentioned above, by young age of the perpetrator, and the fact that the delict has been committed by negligence.

The second reason is that in the roman law a person that has committed a wrongdoing by negligence would normally not be held liable for a crime (*delictum publicum*). Roman penal law is generally applicable only if a wrongdoing has been

museum in Madrid shows four girls in Andalusian costume throwing a male figure, a masked straw doll, into the air on a stretched cloth. Wacke, 1991, 375-376. As a game or prank, it was, however, popular in Rome too. Svetonius refers that the emperor Otho used to throw people on a blanked while roaming drunk the streets of Rome by night (*Otho*, 2). He also passed a part of his life in Iberian Peninsula as governor of Lusitania (*Otho*, 3), but we are being told by Svetonius that Otho practiced this at very young age, so it excludes the possibility that he picked up this habit abroad.

[8] The cloth is indicated with the word *sagum* – a term usually used for the roman military cloak. The Latin term for this type of game or prank, *sagatio*, derives most probably from the fact that throwing a person on a piece of cloth was originally a soldier's habit, and does not imply that the persons in this case used indeed a soldiers cloak, and even less that they were soldiers. The same term we find at Svetonius, when describing the erratic behavior of young Otho.

done intentionally. Otherwise, the perpetrator could only be liable for a tort. In this specific case however, he seems to be held liable for a crime, although it was committed by negligence. It shows that the rule that the public wrongdoing could be committed only by intent had exceptions.[9]

In this paper we shall leave the question of the criminal liability aside. We shall concentrate our attention on the problem of civil liability. We will try to offer possible answers on the following questions:

First, on the basis of what action the judgment that prescribed pecuniary penalty (or, compensation for damages) has been passed?

Second, based on which criteria has been assessed the amount to be paid?

Without ambition to definitively resolve the questions mentioned above (it seems to be impossible with the present state of the sources), we will try to offer possible answers.

2. The problem of the type of action

The fact that the money is to be paid to the father of the deceased youngster, and not to the public treasury, indicates that an action for tort, and not an action for crime, has been used. But which action? The possibility of use of *actio iniuriarum* is to be excluded for two reasons: first, because *iniuria* cannot be inflicted by negligence, second, because the payment is explicitly said to be made for expenses (*impendi causa*) and because of obvious poverty of the father of deceased person (*quod manifesta eius fuerat paupertas*)..

Logical candidate would be the aquilian action,[10] but there are several problems too. First of all, it is highly questionable if the Aquilian action has been applicable at all in the case of a killing of a free person in classical roman law.[11]

[9] A. Wacke, 1979, 525-530. See also: Wacke, 1991, 375-376.
[10] By the action for unlawful damage (*actio damni iniuriae*), in sources alternatively called action of Law Aquilia (*actio legis Aquiliae*), the owner of the damaged or destroyed thing can ask from the perpetrator of the delict a compensation corresponding to the highest value that the destroyed or damaged thing had in the year preceding the delict (in the case of killing of slaves or quadruped cattle animals - D.9.2.2pr) or in the thirty days preceding the delict (in the case of destruction or damaging of other things - D.9.2.27.5). The classical jurisprudence estimated the damages taking in consideration the entire patrimonial loss of the plaintiff (*quod interest, utilitas*). It means that not only the value of the damaged or destroyed thing was taken in consideration (*quanti ea res erit*), but also all the present and future patrimonial loosses (*quod aut consequi potuimus aut erogare cogimur* - D.9.2.33pr).
[11] Feenstra, 141-160.

In the chapter of the Digest *On law Aquilia* (*Ad legem Aquiliam* - D.9.2) there are multiple references on application of the first chapter of the Law in the case of a homicide without the specification if the victim is a slave or a free person. (D.9.2.4.1; D.9.2.5pr; D.9.2.7.1; D.9.2.7.7; D.9.2.7.8; D.9.2.8pr; D.9.2.9pr; D.9.2.9.1; D.9.2.11.3; D.9.2.11.5; D.9.2.25pr; D.9.2.27.22; D.9.2.33pr; D.9.2.45.3; D.9.2.45.4; D.9.2.51pr; D.9.2.52.1). Not even one, however, mentions explicitly the application of *actio damni iniuriae* in the case of the killing of a free person.

There are a number of texts confirming that the Aquilian action is applicable when a free person is injured, but it is always an action *utilis causa*. The *actio damni iniuriae* is not applied directly because the direct action is given only to the owner of a thing, and the body of a free person cannot be object of the right of ownership:

D.9.2.13pr ULPIANUS libro octavo decimo ad edictum *Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur. fugitivi autem nomine dominus habet.* [12]

In the case when the injured person is under paternal power of the head of family (*alieni iuris*), the action *utilis causa* is given to *pater familias*. The best-known testimony of this situation is the famous case of a shoemaker that injured his apprentice, a free man *alieni iuris*, by hitting his neck[13] with a last and consequently destroyed his eye. It came to us in three different sources.

The first one is an Ulpian's paragraph in the chapter of the Digest *Ad legem Aquiliam*:

[12] This text suggests that the *actio utilis* is being allowed in the case of injury of a free person *sui iuris* because the action is being brought *suo nomine*. Some modern authors doubt that the classical jurisprudence would allow this and attribute it either to an interpolation, or to the fact that in this case the injured person was a *homo liber bona fide serviens* (Wittmann, 75-82.). Some authors think that the fragment D.9.2.38 also refers to *homo liber bona fide serviens* (De Robertis, 193-194). It seems interesting as a hypothesis, but there is not a single text that would suggest that *homo liber bona fide serviens* ever had an action *suo nomine*. The text D.9.2.11.8 refers to the use of action by a *bona fide possessor* of a *homo liber bona fide serviens*, but not to the use of the action by a putative slave, and the action was *in factum*, not *utilis causa* (ULPIANUS libro octavo decimo ad edictum *Sed si servus bona fide alicui serviat, an ei competit Aquiliae actio? et magis in factum actio erit danda*.). Albanese, 307.

[13] The fact that he was hit in neck and not in head caused a discussion among modern authors, was the eye knocked out by the blow, or did the boy shake his head in fear and injured his eye hitting with his head some object; because in the first case the injury was inflicted *corpore*, in other not. Which discussion has no importance for the object of our research. See for example: Ginesta-Amargos, 133-135.

D.9.2.5.3 ULPIANUS libro octavo decimo ad edictum *Si magister in disciplina vulneraverit servum vel occiderit, an Aquilia teneatur, quasi damnum iniuria dederit? et Iulianus scribit Aquilia teneri eum, qui eluscaverat discipulum in disciplina: multo magis igitur in occiso idem erit dicendum. proponitur autem apud eum species talis: sutor, inquit, puero discenti ingenuo filio familias, parum bene facienti quod demonstraverit, forma calcei cervicem percussit, ut oculus puero perfunderetur. dicit igitur Iulianus iniuriarum quidem actionem non competere, quia non faciendae iniuriae causa percusserit, sed monendi et docendi causa: an ex locato, dubitat, quia levis dumtaxat castigatio concessa est docenti: sed lege Aquilia posse agi non dubito:*

The second, also from Ulpian's Book on Edict but from another volume, we find in the chapter of the Digest *Locati conducti*:

D.19.2.13.4 ULPIANUS libro trigesimo secundo ad edictum Item *Iulianus libro octagesimo sexto digestorum scripsit, si sutor puero parum bene facienti forma calcei tam vehementer cervicem percusserit, ut ei oculus effunderetur, ex locato esse actionem patri eius: quamvis enim magistris levis castigatio concessa sit, tamen hunc modum non tenuisse: sed et de Aquilia supra diximus. iniuriarum autem actionem competere Iulianus negat, quia non iniuriae faciendae causa hoc fecerit, sed praecipiendi.*

The third source is a short fragment found on a piece of parchment from Egypt in Biblioteca Medicea Laurenziana and published by Arangio-Ruiz in 1957, today marked by *Papiri della Società Italiana* as PSI.14.1449:[14]

PSI XIV. 1449. recto II. 1-9:

....

g*[* esse actionem ex]*

locato pa[tri eius Iul(ianus)]

dicit, iniu[riarum a(u)tem ne-]

gat, quia no[n iniuriae fa-]

ciendae c(ausa) id [fecerit,]

[14] Ginesta-Amargos, 131-132.

sed praeci[piendi. Se]-

d et de Aquil[ia quid sen-]-

tiamus alio [(com)m(en)tario

tradi-]

dimus.

Si servum[*

s fecero**[*

rius scribit[

esse actio[nem

si cus[t]o[

Most probably, the portion of the text that is possible to reconstruct was originally something like:

esse actionem ex locato patri eius Iulianus dicit, iniuriarum autem negat, quia non iniuriae faciendi causa id fecerit, sed praecipiendi. Sed et de Aquilia quid sentiamus alio commentario tradimus.

The three texts are obviously connected, referring to the same case discussed by Ulpian several times in the same book. In PSI.14.1449 is explicitly said that the case was also reported in another volume of the same book (*quid sentiamus alio commentario tradimus*).

The central question discussed in all three texts is, which action should *pater familias* use?

The answer is centred around the problem of fault. All three texts unanimously state that *actio iniuriarum* cannot be brought, because there was no intention to make an offence. They seem to somewhat disagree on the possibility of the use of *actio locati*. It brought suspicion that some of the texts might have been interpolated, which question, interesting by itself, is not of importance for the object of our research.[15]

As of *actio legis Aquiliae*, in D.9.2.5.3 Ulpian has no doubt that it can be brought (*sed lege Aquilia posse agi non dubito*). In D.19.2.13.4 (*sed et de Aquilia*

[15] Ginesta-Amargos, 127-166, especially. 141-160.

supra diximus) and in PSI.14.1449 (*Sed et de Aquilia quid sentiamus alio commentario tradimus*) he simply refers to the previously expressed statement.[16]

In none of the three texts is explicitly stated that the Aquilian action is an *actio utilis*. It could make think us that it was a direct action.[17] But it would be in contrast with abovementioned text D.9.2.13pr, which states that in the case of the injury of a free man an *actio utilis* is to be brought, because a free man does not have property rights of his own body. At the other hand, the source D.9.2.13pr speaks about an action brought by the injured person *suo nomine*, so, presumably, by a person *sui iuris*. There is a number of paragraphs in the same chapter of the Digest where the injured person is clearly indicated as *filius familias* (D.9.2.5.3; D.9.2.7 pr, D.9.2.7.3), and the *actio utilis* was not mentioned even once: these texts speak only about *actio legis Aquiliae*, without any further specification.

There is a theory in modern science of the roman law that the first chapter of the *lex Aquilia* sanctioned, among other things, the killing of a person *alieni iuris*.[18] It could mean that, by interpretation of the law, it has been accepted that for the injuries inflicted to such persons a direct action could have been brought by chapter three of the Law. It was possible if the word *erus* in the original text of the law was meant to mean *master* in a broader sense rather than *owner* (*dominus*), and if we accept *res* to mean the object of the legal action, rather than a thing in the sense of object of real rights.

Although this theory cannot be completely dismissed, there are enough arguments not to accept it unconditionally either.[19] The dominant opinion in contemporary science of the roman law is, that in all cases of application of Aquilian action in the situation of an injury of a person *alieni iuris* the action is given as an *actio utilis*.[20] Even if the original meaning of the Law permitted indeed a direct action in the case of injury or death of the persons *alieni iuris*, in classical period it could

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[16] The supporters of the interpolationist critique generally doubt the classicity of the fragments mentioning the application of aquilian action in the case of the injury of a free man. Pringsheim, starting from the observations previously made by Gerke (Gerke, 61-118) is convinced that in the classical law only the assessment of the damaged or destroyed thing was taken in consideration (*quanti ea res erit*) and that everything that contradicts to this theory is an interpolation. So, the words *sed lege Aquilia posse agi non dubito* in D.9.2.5.3 are to be considered interpolated, because no action has been given in the classical law in the case of injury of a free man, while in the postclassical law a direct action has been given, and not *actio utilis*. (Pringsheim, 1-13.) Still, this hypothesis would also require marking as interpolated a number of other texts.
[17] del Portillo, 161-162.
[18] Kelly, 76-77.
[19] Against: Wittmann, 37-46.
[20] Ginesta-Amargos, 161-165.

have only be an *actio utilis*. The substitution of the word *erus* by *dominus* in the text of the law made clear that there was a consensus in the classical jurisprudence that a direct Aquilian action could be brought only by an owner of a thing (D.9.2.11.6). If there is no specific mention of the nature of the action in some texts of the classical lawyers, it is rather because they had no doubt on the fact that the action is given as an *actio utilis*, than because they would eventually permit a direct action. So, if the action in CO.1.11 is the Aquilian one, it is most probably an action *utilis causa.*

3. Assessment of damages

There are many roman legal sources mentioning the injury of a free person and examining the conditions for bringing actions in this situation, either Aquilian action, or other actions like *actio iniuriarum*. But the text CO.1.11 give us a concrete sum to be paid by the sentence of the court: 2000 (presumably sesterces). The text leaves no doubt that it is to be paid as a compensation for material losses caused by death (*impendi causa*).

This is the only known case of a penalty in a form of paying a sum of money in the case of killing a free man,[21] left aside the *actio de effuses et de iectis*. It is assessment of damages to be paid to the father of the deceased, not a fine to be paid to the treasury. Resolving the problem of assessment of damages in this case would give as a new insight to the problem of assessment of damages in the case of killing a free man in general.

The fact that the material value of the body of a free person cannot be assessed (D.9.3.1.5), does not mean that cannot be assessed the material damage resulting from injury or death. Classical jurisprudents generally take in consideration the damage that the *pater familias* suffered as a consequence of injury of a person *alieni iuris.*[22] Same is true in the case of the apprentice injured by the shoemaker. In the text D.9.2.5.3 that follows the abovementioned case in the chapter of the Digest *Ad legem Aquiliam* (after a Paulus's fragment D.9.2.6 inserted by the Justinian's compilers), Ulpian, maybe still citing Julian, says that to the father of the injured boy belongs compensation for medical treatment expenses, and compensation for lost earnings that his son could have earned in the future:

[21] Wacke, 1991, 376.
[22] Feenstra, 154-156.

D.9.2.7pr ULPIANUS libro octavo decimo ad edictum *Qua actione patrem consecuturum ait, quod minus ex operis filii sui propter vitiatum oculum sit habiturus, et impendia, quae pro eius curatione fecerit.*

The texts of Gaius confirm that the damage was assessed in the same manner in the case of injury of a free man (without specification if he was *sui* or *alieni iuris*), in the case of injury by animal or by throwing or pouring a thing from a window or a balcony.[23]

Now, let's get back to the case „Lupus vs Evaristus". The term *because of expenses (impendi causa)* used by proconsul Egnatius Taurinus indicates the compensation of some expenses being made as a consequence of the delict, like medical treatment or costs of funeral, and this is exactly how some modern authors interpret this sum.[24]

How much funeral expenses and medical fees were in ancient Rome?

A sumptuous funeral and building of a mausoleum for a wealthy person could of course cost a fortune; but on average, it would be around 250 sesterces.[25] So, for a poor person it could be even less.

And as of medical fees in antiquity, the only data that we have in the literary sources are those about enormous earnings of famous physicians, which were worthy to be remembered exactly because they were unusually high. That a certain Stertinius, accepted to be private physician of the emperor for salary of "only" 500.000 sesterces a year, although by his private praxis he could earn more,[26] or that a certain doctor got 100 talents for only one successful treatment of the king Antiochus,[27] is just an interesting curiosity, and doesn't help us at all to establish what the ordinary medical fees were. The only data that we have come from Egyptian papyri. An II century

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[23] D.9.1.3 GAIUS libro septimo ad edictum provinciale *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, sed impensarum in curationem factarum et operarum amissarum quasque amissurus quis esset inutilis factus*; D.9.3.7 GAIUS libro sexto ad edictum provinciale *Cum liberi hominis corpus ex eo, quod deiectum effusumve quid erit, laesum fuerit, iudex computat mercedes medicis praestitas ceteraque impendia, quae in curatione facta sunt, praeterea operarum, quibus caruit aut cariturus est ob id, quod inutilis factus est. cicatricium autem aut deformitatis nulla fit aestimatio, quia liberum corpus nullam recipit aestimationem.*

[24] See: Wacke, 1991, 376.

[25] Станојловић, 872.

[26] Pliny, N.H. XXXIX, 5

[27] Pliny, N.H. XXXIX, 3; Cleombrotus, H. N. VII, 37

papyrus suggests that routine surgical operations could range from 20 to 34 drachmas. Two papyri from III and IV century mention debts owed to physicians of 20 drachmas and half gold solidus, respectively.[28] In first two centuries, the debased Ptolemaic drachma in the first two centuries was more or less of a value of a roman sesterce. In the third century, inflation diminished both the value of both Egyptian and the roman currency.[29] There is not a single recorded case that an ordinary person paid medical treatment anything more than several dozen sesterces. Only the elite could spend more.

So, two thousand sesterces seem to be too much for a modest funeral and five days of medical treatment combined. Also, it is to be noted that the proconsul says that the sum of two thousand has been determined taking in consideration the obvious poverty of the father of the deceased (*quod manifesta eius fuerat paupertas*). If this is a compensation for expenses that have been objectively made for funeral and medical care, why would the material conditions of the plaintiff be important at all? Wouldn't it be more logical to simply reimburse the expenses that have been made? Although it couldn't be completely excluded that 2000 sesterces were compensation for medical fees and costs of funeral, it seems to be unlikely.

It seems that the words *impendi causa* should be rater interpreted as *for spending*, i. e. that they are to be paid to the plaintiff to be spent in the future. Most probably, the deceased son was contributing with his earnings to the father's maintenance, and the assessed sum could be a compensation for the money that father could have got in the future from his son's earnings.[30] This interpretation is

[28] According to: Underwood, 359.
[29] How much was it in roman currency? Egypt had a closed monetary system since Hellenistic age. The Ptolemaic drachma was based on different standards than the silver currency of other Hellenistic states which generally followed attic standard, and Egypt maintained a closed monetary system even under roman rule. The roman denarius was to be changed to Egyptian currency upon arrival in Egypt and could be rarely seen in circulation there. It is difficult to say what exchange rates were. Both currencies were subject to debasement in the first two centuries, but the inflation of Egyptian drachma was faster than the one of the roman denarii. In the age of Hadrian, a roman denarius was reduced to only 3,41 grams but still had 93,5 percent of silver, so contained roughly 3,18 grams of silver. At the other hand, already at the Cleopatra's age, the Egyptian drachma that originally contained 3,55 grams of almost pure silver was reduced to only 25 percent of content of silver (less than 0,9 grams in total). Under the roman rule, the Egyptian drachma was mostly a bronze coin, that derived its value from the fact that it could be exchanged by guaranteed rates for occasionally struck silver drachma, or for standard tetradrachm, or for the roman silver denarius. The tetradrachm was generally equated to roman denarius in exchange, although it weighted around 13 grams and contained only (2,185) grams of silver. One Egyptian drachma was approximately one quarter of tetradrachm (although sometimes less or more, calculated in obol), and was more or less equated to the roman sesterce. On monetary system of early roman Egypt see for example Christiansen, 264-266; Geissen-Weiser, Johnson.
[30] For modern aspects see Mrvić Petrović – Petrović 2021 and Ćorić 2017.

accordance with the rules of assessment of damages in the case of the injury of a free person that we mentioned above, in which the earnings that could be make in the future were always taken in consideration, alongside the medical fees.

But there is a reason why modern authors often refuse the possibility that the 2000 sesterces also include the compensation for the son's earnings that could possibly be made in the future: 2000 sesterces just seem to be too small amount, and this is the reason why it could't be anything else but assessment of medical treatment expenses and of funerary costs. As Wacke notices, the roman law known for conventional penalties of 10.000 sesterces, and assessment of damages for killing a person of 2000, is almost ridiculous.[31]

First, we should underline, again and again, that this is not the penalty for a killing but a compensation of damages. Very high fines like those of 50.000 sesterces for killing a free person by throwing a thing through a window (D.9.3.1pr) were determined to protect the public interest, and they were directed to punish all the inhabitants of an *insula*, a multi-store apartment building. An average citizen which would be forced to pay such a sum would most probably go bankrupt. Evaristus is punished by five years of exile for homicide, not by fine. The 2000 sesterces are just a compensation for damages, in addition to punishment. Also, the fact that it seems, from emotional point of view, to be almost offensively low compensation for killing someone's son doesn't matter. It is assessment of material damages, not of what we would call "immaterial damage", the one that the Romans would ask to be made good by *actio iniuriarum*.[32]

But what did indeed economic importance of 2000 sesterces for an ordinary Roman? The legal texts are not a good indicator. The sum of 10.000 sesterces makes sense as a conventional penalty for a contract of very big value. But to know what 2000 meant for a poor inhabitant of the Roman Empire in the II century A. D. we have to step out of the legal texts, into the field of the economic history. We will try to show that the sum of 2000 sesterces were not small at all, and that it possibly could be compensation for lost earnings in the future.

Data about earnings in ancient Rome are rare and sketchy. Only on the earnings of the state officials, who had fixed wages and salaries, we can say something for

[31] Wacke: *ibid*.

[32] For comparison, in the case of killing of a slave who was natural son of the master, the affectionate value is not taken in consideration, but only the material value of the destroyed "thing" (D.9.2.33pr).

sure. Still, this data does not help us a lot. Civil and military servants in the Roman Empire had huge earnings in comparison with those of other ancient states.[33] Their living standard was miles away from ordinary person, and their salaries are of no use as an indicator of how much an average free worker earned.

Salaries of roman soldiers could give us somewhat clear idea, how much an average free worker in ancient Rome earned. The sum of 2000 sesterces correspond to a 20-months basic salary of a rank and file roman legionary.[34] Still, the legions were elite troops of the roman army, and only very physically fit, free-born roman citizens of good conduct were allowed to become legionaries. Their yearly salary of 300 denaria (1200 sesterces) was much higher than what other military branches earned. The basic salary of marines, rowers and sailors of the war navy was only 200 denaria, and for the soldiers of the auxiliary (*auxilia*) infantrymen it could be as low as 100 denaria (400 sesterces) per year.[35] So, the compensation that in our case the father got for his son's death equaled for what a professional soldier could earn in five years. Needless to say, it is too much for costs of five days of (unsuccessful) medical cure and costs of a mode's funeral combined. But is it too little for son's expected earnings in the future?

The only roman province from which we have a plenty of testimonies on wages and salaries, thanks to the abundance of the papyrological material, is, again, Egypt. In theory, an unskilled fully employed adult male worker from early II century Alexandria could earn, according to Scheidel's assessment, around 288 Egyptian drachmas, or something less than 300 roman sesterces, a little bit less than a professional roman auxiliary soldier.[36]

So, the sum of 2000 sesterces that were ordered to be paid for killing corresponds to almost seven years earnings of a fully employed worker from one of

[33] For example, in China in the period of the Han dynasty a governor of a province with 500.000 inhabitants had a salary which, calculated in the units of grain, would equal the worth of a salary of a contemporary roman centurion which commanded a unit of 80 legionaries, while the highest Chinese state officials could earn no more than 5 % of the income of contemporary roman proconsul. Scheidel, 2006, 3-4.

[34] The basic salary of the roman legionary, without increases and bonuses, was established at the time of Octavianus Augustus at 10 asses per day (Tacitus, *Annales*, I.17), or 2,5 sesterces. On the year level, a roman legionary would earn 900 sesterces, or 225 denaria. Domitian increased the soldier's salaries to 300 denaria by year, mostly to cover the inflation because of graduate debasement of denarius. In the age of Augustus from one roman pound (*libra*) of silver 85 denarii were minted, and in the age of Hadrian 105. Duncan-Jones, 45, 217.

[35] On earnings in the roman army see for example, Brunt.

[36] Scheidel estimates that a fully employed unskilled adult male worker from Egypt in the early Empire could make around 288 drachmas a year. Scheidel, 2010, 433-435. So, an Egyptian worker would normally earn equivalent of less than 300 sesterces by year.

the richest roman provinces, or five years earnings of a professional soldier. Even if we suppose that the defunct Claudius earned even less than that, still, the sum to be paid would be too small to represent the entire earnings that he could earn during his father's life. It is hardly probable that the father was expected to live only several years more.

But we should not suppose that the father took all the earnings of his son, but only a part of it, after deducting of what needed for the maintenance of the son, or even less than that. The proconsul mentioned the poverty of the father, so most probably son contributed to his maintenance. So, could the the sum of 2000 sesterces be the maintenance that father could expect in the future?

Economic historians say that only a quarter of a wage of a legionary (in II century, it would be 300 sesterces) would be normally spent on food and other costs of maintenance, while the rest would be spent in other way or saved.[37] So, with a sum of 2000 sesterces a legionary could survive for almost seven years. But the standards of living of a roman legionary, and their needs for more abundant nutrition taken in consideration exhausting working and training, were probably above those of an average person. For comparison, the system of state-sponsored alimentation of poor children (*alimenta*) developed by emperor Nerva and his heirs no throne paid 16 by month for male, and 12 sesterces to female children up to the eighteenth year of life.[38] So, with 200 sesterces a male child or adolescent could live more than ten years and a female almost fourteen years. Data from contemporary roman Egypt show that an average person could cover the most basic expenses with even less money. According to Scheidel, a person could live with something more than 100 drachmas (corresponding to approximately 100 sesterces).[39] With a sum of 2000 sesterces one could live modestly for 20 years.

Besides, Lupus didn't have necessary to spend the money: he could invest it. The interest rates on loans in early imperial age were fluctuating somewhere between

[37] Duncan-Jones, 33–41.
[38] Maškin, 423.
[39] With that money, he could almost cover the most basic necessities of a small family, which would cost somewhere around 355 drachmas a year. Basic food, clothing, lighting and fuel for a single person would cost somewhere between 102 and 113 drachmas per year. For that money one could bay, for example: 172 kg of wheat, 20 kg of beans, 5 kg of meat, 5 l of oil, 3 m of linen cloth, 1,3 kg of candles, 1,3 l of lamp oil and a certain quantity of fuel. For somewhere between 200 and 300 drachmas a year, a person could live comfortably and provide abundant nutrition with reasonable quantities of meat, cheese, eggs and wine, and buy other products which, according to the criteria of the time, were considered non-essential for survival, like soap. Scheidel, 2010, 429-435.

4 and 12 percent.[40] The famous norm on interest by Justinian, several centuries later, set the interest on common loans on 6 percent by year.[41] So, if he would loan his money, Lupus could normally get 120 sesterces per year, possibly more. It would be, as we saw above, enough to survive. Also, 2000 sesterces were a normal price for a common slave without special qualifications of characteristics, but most probably enough to substitute work force of the defunct son. What if judge had exactly this in mind?

At the end, we should all the time hold in mind that we cannot be sure that Lupus didn't have any sources of income other than his son's subsidies. The sum of 2000 sesterces could simply be the sum that the defunct son contributed to father's maintenance, and not the only source of his maintenance.

4. Conclusions

The case described in the text CO.1.11 is probably the only known case of application of the *lex Aquilia* in the case of a killing of a free man. There is no mention of Aquilian action in the text. Our conclusion is based on negative arguments: it is the only possible solution, because no other known action could be brought in this case. The Aquilian action, if really took place in this case, is most probably an *actio utilis*, and not a direct action.

But even if it was not an Aquilian action but some otherwise unknown legal remedy, the text is still important as the only known case in which a compensation for damages caused by death of a person *alieni iuris* was conceded to *pater familias*.

It is by no means clear what the sum of 2000 (presumably sesterces) meant. Interpretation that it was not a compensation for costs of medical treatment and funeral, doesn't seem plausible, but cannot be completely excluded. It seems more plausible that it was assessment of entire patrimonial loss caused by killing, including, if not specifically referring to, an assessment of lost income that the father of the defunct person could gather in the future from son's earnings.

I wouldn't dare to claim that I know in which way this sum calculated. Was it entire expected earning of the son during father's expected lifetime? Or was it what the son would give him as a subsidy, beside other incomes? Or was it what was

[40] Maloney, 92
[41] C.4.32.26

assessed to be necessary for maintenance of the father during his remaining lifetime? If so, was it expected to slowly spend it until the end of life or to invest the money and gather the rent? Or was it the minimum amount to permit a buying of a slave as a substitute for work of the deceased son? I don’t know that.

But what I can say for sure is, that the sum of 2000 sesterces permit any of these possibilities. The argument that the modern romanists sometimes use, that the said amount is too small, is not true. The 2000 sesterces were by no means an insignificant sum of money in the II century.

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D.9.2.27.5

D.9.2.11.5

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D.9.2.11.6

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