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Athletics in Ancient Law

Abstract: In this article David Ibbetson takes a perspective from the ancient world. A number of texts of Roman law are concerned with injuries arising in the course of athletics. They are particularly concerned with blameworthy killings, and constitute some of the most fundamental texts at the historical base of modern negligence liability. Behind them there may lie questions discussed by Greek orators, where they were fitted into a rather different framework from that of the Romans.
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The revival of the Olympic Games in 1896 was associated with, and perhaps even triggered, a scholarly interest in the history of athletic sports in the ancient world. They sparked the interest of lawyers too, particularly of Roman lawyers. Curiously, some of the most fundamental of the Roman texts dealing with the nature of liability for causing personal injury to slaves or their death, are concerned with issues which arose in the context of athletics.[1] The examination of these texts is not a purely antiquarian exercise, for the elements of the modern tort of negligence and its equivalents in continental European legal systems can unmistakeably be traced back to Roman law and hence to the jurists' discussions of sporting accidents. Even English law owes a good deal to this legacy from the ancient world, far more than is generally realised.



David Ibbetson

This article looks at four of these texts, all from the Digest of Justinian, a compendium of the writings of earlier lawyers completed in Constantinople in 533 AD. They cast light both on the law itself and also on the way in which the Roman lawyers worked.

The earliest of the texts is attributed to the late-Republican jurist, Alfenus:

> When some people were playing with a ball and one of them pushed a slave boy who was trying to pick up the ball, the slave fell and broke his leg. It was asked whether the owner of the slave could bring an action on the lex Aquilia [the Romans' action for property damage] against the person by whose push he had fallen. I replied that he could not, since it appeared to have happened by accident rather than through any fault.[2]

It is likely that the game here was *harpastum*, a sport very much like the modern game of rugby.[3] It involved a good deal of pushing and shoving, and injuries to players were not uncommon; even spectators ran the risk of injury if the sport spilled over from its roughly marked-out pitch. We know that it had some rules, but it seems that a good deal more latitude was given to players than in the modern game. In such a world, it is easy to understand Alfenus's conclusion that the broken leg was simply an accident for which no compensation could be claimed. From a lawyer's point of view, though, the text has significance beyond the actual conclusion reached by the jurist. The foundational statute on which liability was based, the *lex Aquilia*, said nothing about fault, but looked rather to whether the defendant had acted unlawfully. The most important achievement of the Roman lawyers in this area was to make the transition away from a rather undefined idea of unlawfulness, which probably connoted the lack of any lawful excuse, constituting fault as the primary determinant of liability. Alfenus's text shows that this transition had already been made by the end of the Roman Republic, a century or so before the great flowering of Roman juristic thinking, though it was never wholly to displace the analysis in terms of unlawfulness in appropriate cases.

This is not the only Roman text to have been concerned with injuries suffered when young people were playing ball games. Very well known, is a discussion of Ulpian, one of the leading jurists of the late Classical period (c200 AD), again looking back to discussions of earlier writers:

> Mela writes, if some people were playing with a ball and one of them hits the ball rather hard and knocks it onto the hands of a barber, and hence the throat of a slave whom the barber was shaving, was cut by the jerking of the razor; whichever of them is to blame is liable on the lex

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> Aquilia. Proculus says the blame is on the barber; and clearly if he was shaving where people customarily played, or where people frequently walked, it should be imputed to him; though it is not stupidly said that if someone puts himself in the hands of a barber who has set up his chair in a dangerous place, he has only himself to blame.[4]

The game being played here was probably something like the modern game of hockey, in which a ball was hit with sticks; contemporary reliefs of such a game are preserved.[5] At any event, the ball must have been able to be projected at some speed, and probably over some distance. This text has been seen as the progenitor of the modern rules of contributory negligence, though this is not its original focus. Its central concern is not with the slave's fault, but with the determination of whether liability should attach to the person hitting the ball or to the barber. The most interesting feature is that the earliest layer of discussion, attributed to the early Imperial jurist Mela, does not answer this question; it merely says that in order to decide *who* is liable we need to assess the comparative blameworthiness of the participants. Fault is not being seen as something which grounds liability, but something which enables us to cut through the problems of causation when an injury has been brought about by the concurrence of two or more people's acts – here the barber's siting of his chair and the player's hitting of the ball. It is only with the slightly later jurist, Proculus, that we find any attempt being made to answer Mela's question. For him it was the barber who should bear the loss. But behind this, there seems to have been an assumption, made explicit by Ulpian, that the barber should not have set up his stall where he did; something which could have been easily accepted if the game was being played on a designated playing area (which would commonly have been the case), but which would not have been so clear, if the players were simply having a knockabout in the forum. The three layers within the text illustrate graphically, the way in which classical Roman law developed: the identification of the relevant question; the provision of an answer to the question; and the formulation of a sharp reason for the answer, coupled in this case with an undeveloped suggestion that the answer might not have been quite right.

It was not only ball games that raised legal issues; pugilistic injuries did so too, unsurprisingly so, given the brutality associated with boxing and wrestling in the Roman and Greco-Roman world. The leading text here includes a reference to the three forms of fighting in the ancient Olympics; wrestling, boxing and *pankration*. *Pankration*, or *pancratium* when translated into Latin, was an originally Greek mixture of martial arts where everything was allowed apart from gouging the eyes and biting. Unlike boxing and wrestling, it was expressly excluded from the modern Olympics on their revival in 1896 and has never been reintroduced into them.

> If someone kills [a slave] in a wrestling bout or in the *pancratium*, or while boxers are fighting; if the one kills the other in a public contest, the Aquilian action does not lie, because the loss seems to be brought about in the cause of glory and virtue, not wrongfully. However, this does not apply to a slave, because only freemen are accustomed to enter the contest; it applies to a wounded *filiusfamilias* [son of the family]. Clearly if he wounds someone who is giving in, there will be room for the Aquilian action, or if he kills a slave not in the contest, unless this was done when the master was putting him up; then the Aquilian action will not lie.[6]

The text, again attributed to the great jurist Ulpian, is a mess (the original Latin is worse than the English translation given here); its mangling is probably the work of later lawyers or students who were trying to get to grips with it. The idea at the core of the text is clear, though; that killing someone in the course of one of these contests does not entail liability. The defendant does not act wrongfully, since what he is doing is 'in the cause of glory and virtue' and is not blameworthy. The reference to glory and virtue points strongly towards a formal contest in which the victor was awarded an olive or laurel wreath rather than a fight organised by the competitors themselves; it may even be a reference to the Olympic games themselves. We would probably use different language today, but the idea would be the same: a boxer or wrestler operating within the rules of the sport would not be liable civilly or criminally if his opponent died as a result of a lawful blow. As with the texts already looked at, the athletic contest is the setting for the consideration of an important legal principle relating to fault.

We should not overlook the fact that the last of these texts is in a very bad state. The problem at the heart of it is that Ulpian took as his starting point, an impossible situation; the killing of a slave in a contest which only free men were allowed to enter. Clearly it could not have been a real case, but it is improbable that Ulpian, one of the most intellectually sophisticated of all the Roman jurists, would have used a completely impossible scenario, if he had just made up the case in order to illustrate his principle. The most likely explanation, the only one with any degree of plausibility, is that he was taking a set-piece situation and discussing it in terms of the law. If this is so, it is unlikely that it was something which had been discussed by previous generations of Roman lawyers. It would have been as impossible a situation for them as it obviously was for Ulpian, and if there had been earlier juristic discussion we might expect Ulpian to have referred to it. More probably it was a standard example of something discussed by philosophers or orators exploring the nature of responsibility for killing, where the identity or status of the victim would not have been relevant, translated by Ulpian into a more purely legal context. 'Take the *pancratium* case; there, there would be

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no liability …' The question, and perhaps even its answer, might not have had its origins in Rome but in Greece, since according to Demosthenes, this precise case, the unintentional killing in the course of an athletic contest, was one of the situations in which homicide was expressly not punishable in Athenian law.[7]

The last of the Roman sources to be looked at, again a text of Ulpian, involves a different form of Olympic athletic exercise, javelin-throwing. Classical javelins, unlike modern ones, were not simply hurled. Attached to them, in the middle of the shaft, was a leather thong or thongs, which caused the weapon to rotate around its long axis, hence making it more accurate and more deadly in the hands of an experienced user. The risk to passers-by and spectators was therefore that much the greater.

> And if a slave is killed when people are throwing javelins for enjoyment, there is a place for the Aquilian action; but if when others are throwing javelins in a field, a slave walks across the place, the Aquilian action will not lie, because he should not have made his way across the javelin throwers' field at an inappropriate time. However if someone deliberately throws at him, then he will be liable on the Aquilian.[8]

A degree of interpretation is necessary in order to make sense of the text. The first case presumably involves a slave who was simply spectating or passing by, otherwise there is no contrast with the second case. When he is hit and killed, the javelin must have been misdirected, presumably by an unpractised thrower. And while we cannot say for certain that the Aquilian action for wrongful killing would inevitably have succeeded, there would certainly have been a prima facie case for it. The second situation is more precisely formulated. Here the slave is not simply a spectator, but is walking in front of the javelin throwers; and the reference to 'their' field may suggest that they were practising in a place set aside for the purpose. The slave should not have been there, and there is no liability if he is killed unless the thrower has deliberately aimed at him. As with the case of the barber, the modern lawyer might think of this as a case of contributory negligence, though the Roman lawyers would probably not have seen it in quite the same way.

Ulpian's text says nothing explicit about fault, but when the case was discussed in Justinian's Institutes – the basic teaching manual completed in 533, the same year as the Digest – its focus has shifted onto this.

> And this law does not affect the person who kills by accident, provided there was no fault in him; for this law punishes fault as well as deliberate wrongdoing.
>
> So, if someone playing or exercising with a javelin hits your slave as he is crossing, there is a distinction. For if it is done by a soldier in the field or place where it is normal to exercise, it is accepted that there is no fault in him; but if another person does it, he is guilty of fault. The same applies to a soldier if he does it somewhere other than a place set aside for military exercises.[9]

The main contours of the story are the same, but the details have changed with the relocation of it in terms of military exercises rather than looking simply at whether the slave was crossing at an inopportune time. So too has the legal explanation changed, with fault now having taken over as the sole requirement of liability for non-deliberate killings.

While this might easily have been a hypothetical case dreamed up by Ulpian to illustrate a point and picked up from there by Justinian, there is very good reason to believe that – probably like the *pancratium* case – it was a set-piece situation regularly discussed in the schools of oratory. We can trace it back from the Romans to the Greek schools of rhetoric. Plutarch speaks of a Sophistic discourse around the question:

> A certain athlete had hit Epitimus the Pharsalian with a javelin, accidentally, and killed him, and Pericles, Xanthippus said, squandered an entire day discussing with Protagoras whether it was the javelin, or rather the one who hurled it, or the judges of the contests, that 'in the strictest sense' ought to be held responsible for the disaster.[10]

Clearly this was a standard case for discussion. It forms the basis for set-piece legal arguments in the *Second Tetralogy* of the fifth-century Athenian orator Antiphon, revolving round the case of a boy who was killed when, at the behest of the instructor, he walked across the gymnasium where javelins were being thrown.[11] Athenian law at this time allowed an action in any case of killing, whether deliberate or accidental, so the question here was not whether the boy who had thrown the javelin was to blame for the death but simply whether he had killed.[12] Alternative possibilities were that the boy who had walked across the gymnasium had killed himself, that the javelin had killed him (if, for example, it had swerved off course for no apparent reason), or that the instructor was the killer. Behind it lie deep-rooted ideas that the killer, or the thing that did the killing, was polluted:[13] hence the possibility referred to expressly in the discussion between Pericles and Protagoras, that it might have been the javelin that ought to be treated as responsible for the death.

As in the case of the barber, yet more clearly, we see here the way in which ideas of causation could mutate into ideas of fault. Ulpian would undoubtedly have been aware of this, and in transplanting the Greek discussion into a Roman context, where fault was relevant, he was able to bring out the relationship between them. In doing so, the course was set for the development of the law of civil responsibility as we know it today.

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It is probably not a coincidence that sporting cases feature so prominently in the discussions of non-deliberate killings in the writings of the Roman jurists. The great Roman and biblical lawyer David Daube, once pointed out that there is only one single case of negligent killing in the whole of the Old and New Testaments, successfully challenging his learned audience to identify it.[14] Before the age of fast roads and machinery, wrongful killings would nearly always have been deliberate, and sporting accidents would have constituted one of the commonest contexts in which non-deliberate killings would have occurred in the Roman world.

No doubt all of these texts were based on hypothetical situations, if realistic ones. It is to Greece that we must turn for a real case that deserves to be remembered in Olympic year, if only for the wrong reasons. According to the Greek writer Pausanias, the Thessalonian Eupolos has the distinction of being the first athlete to have been fined and disqualified for cheating.[15] A boxer, he was said to have bribed his leading opponents to lose against him in 388 BC so that he could gain the Olympic crown. The fines paid by him and those who accepted the bribes, were used to erect statutes of Zeus, with inscriptions exhorting competitors to play fairly, to win by fleetness of foot and strength of body.

Footnotes

[1] See in particular A. Wacke, "Accidents in Sports and Games in Roman and Modern German Law" (1979) 42 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 273.
[2] Digest of Justinian; available at http://www.fordham.edu/hassall/Source/Corpus1.a 9.2.52.4.
[3] Wacke, *op cit*, 278.
[4] Digest, *op.cit* 9.2.11.pr.
[5] Wacke, *op cit*, 277.
[6] Digest, *op.cit* 9.2.7.4.
[7] Demosthenes *Against Aristokrates*, 53; available at http://www.perseus.tufts.edu/hopper/text?doc=Dem.+23+53&fromdoc=Perseus%3Atext%3A1999.01.0074.
[8] Digest, *op.cit* 9.2.9.4.
[9] Institutes 4.3.2, 3; available at http://www.fordham.edu/hassell/basis/535 institutes.asp
[10] Plutarch, *Pericles* 36; available at http://www.perseus.tufts.edu/hopper/text.jsp?doc=Plut.+Per.+36&fromdoc=Perseus%3Atext%3A1999.01.018.
[11] Antiphon, *Second Tetralogy*, 3; available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0020:speech=3&default.scheme=speech:tetralogy:section&default.type=speech.
[12] We should note that this case fell outside the exclusion of liability for killing in the course of an athletic contest referred to above.
[13] D M MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester University Press, 1963).
[14] D Daube, *Roman Law: Linguistic, Social, and Philosophical Aspects* (Edinburgh University Press, 1969), 148; 1 Kings 3.16 ff.
[15] Pausanias, *Description of Greece*, 5.21; available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0160%3Abook%3D5%3Achapter%3D21.

Biography

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