The Aquilian Action

THE Supreme Court was faced with an interesting problem in the case of Wijeratne *vs.* Gabriel.[1] The plaintiff alleged that he had at all relevant dates been the headmaster, and the defendant an assistant master, of a school, that the defendant ' falsely and maliciously in order to put the plaintiff into trouble and to cause him loss falsified ' certain attendance registers of the school on 15th June, 1944, that in consequence of an investigation by the plaintiff's employers into these irregularities, his services as headmaster were discontinued on 1st December, 1947, and that he suffered consequential loss and damage which he assessed at Rs. 7,500.

The plaintiff instituted the action on 28th May, 1948. The defendant pleaded that the action was prescribed and also raised an issue as to whether the averments in the plaint disclosed a cause of action against him, but the latter plea was eventually withdrawn. On the issue of prescription the District Court held in favour of the defendant and the plaintiff appealed to the Supreme Court against the judgment.

According to § 9 of the Prescription Ordinance, an action of tort cannot be maintained unless it was instituted ' within two years from the time the cause of action shall have arisen '. The Supreme Court allowed the appeal, holding that the plaintiff's cause of action, assuming the facts pleaded by him to be true, did not become complete until 1st December, 1947 and that the action was therefore not prescribed. The case was accordingly remitted for trial according to law on its merits. It was unfortunate from the point of view of students of law that the defendant withdrew the plea that the plaint did not disclose a cause of action. For, if that plea had been fully argued before the Supreme Court and the Court below, considerable light would have been thrown on the principles of delictual liability in Ceylon and particularly on the principles of Aquilian liability. This, no doubt, would have involved the parties in additional expense, but in most countries the authoritative exposition and development of the law proceed largely at the expense of litigants.

Nevertheless, the issue of prescription afforded an excellent opportunity for an exposition of principles, for, as the judgment of the Supreme Court states, ' we must first analyse the averments in the plaint (after discounting its unnecessary and irrelevant flourishes) so as to ascertain the true nature of the cause of action on which the plaintiff based his claim . . . In this country, if an aggrieved party's claim is based on an actionable wrong, the question as to when his cause of action first arose must of course be answered with reference

1. 55 *N.L.R.* 433.

to Roman-Dutch law '. Incidentally, though our law of delict is the Roman-Dutch law, the influence of English law has been very strong. Dr. Lee says on this subject, ' The adoption of English nomenclature has accompanied the adoption of much of the substance of English law . . . The Union of South Africa is most retentive of the Roman-Dutch Common Law. In Ceylon the reception of English law has gone much further '.[2] And Justice Van den Heever observes of the law of South Africa, ' English influence has been so strong that to trace it adequately would require a volume by itself. Unfortunately this is not necessary—it stares one in the face from practically every text-book and every volume of the law reports '.[3] In Ceylon the influence of English law is so strong that it would seem almost pedantic to speak of a Ceylon law of delict. ' Ceylon law of torts ' would be more appropriate.

In order to decide the question of prescription, then, the Supreme Court had first to determine ' the true nature of the cause of action on which the plaintiff based his claim ', in other words, it is submitted, the requisites of the particular tort or delict under which the facts averred by the plaintiff entitled him to sue. On this point Dr. Mc Kerron says of the law of South Africa, ' Subject to what is said below in regard to the power of the Courts to extend existing heads of delict and even to create new ones, the plaintiff must bring his case within some established category of liability . . . That the established heads of delict have been and can be extended by the courts, and new heads of delict created, is not open to doubt . . . But the power of the courts to create new heads of delict or to extend existing ones must not be overrated . . . Our law, like English law, recognises various heads of delict, and, subject to what has been said in regard to the power of the courts to create new heads of liability or extend existing ones, requires the plaintiff in order to make out a cause of action, to bring his case under one or other of these heads '.[4] These observations are applicable in Ceylon, too, since neither the English law of tort nor the Roman-Dutch law of delict recognises a general principle of liability, as most of the modern codes do.

The judgment in the present case does not expressly state what particular delict the facts pleaded by the plaintiff constitute. From various passages, however, it may be inferred that it was the delict of *damnum iniuria datum*, the remedy for which is the *actio legis aquiliae* or the Aquilian action. It was clearly not the delict of *iniuria*, since it was held that damage or patrimonial loss was the gist of the action, and the following passage from Coetzee *vs.* S. A. R.[5] was cited with approval : ' Now in delict, a wrongful act or omission

2. *Introduction to Roman-Dutch Law*, 5th ed., p. 320.
3. *Aquilian Damages in South African Law*, p. 34.
4. *The Law of Delict*, 4th ed., pp. 18, 19, 20.
5. (1933) *C.P.D.* 565.

does not always by itself entitle a person complaining of it to judgment. There are many cases where it does, e.g., where *contumelia* is involved ', and *contumelia* is an essential element of the delict of *iniuria*.[6]

It is doubtful whether the facts alleged by the plaintiff in the present case entitle him to maintain an Aquilian action under Roman Law or Roman-Dutch law since damage to corporeal property or physical injury is one of the requirements of an Aquilian action under either system and this requirement does not seem to be satisfied. There does not appear to be any case of an Aquilian wrong mentioned by Roman or Roman-Dutch jurists in which the facts are similar to those averred in the present case. It may, however, be argued that the documents cases provide an analogy. In the Digest it is stated that the extended Aquilian action will lie where a *chirographum* which records a debt owing to the holder subject to a condition is expunged, and we are also told that an action for unlawful damage lies in favour of heirs and legatees if a person has destroyed a will.[7] Voet states that if a person obliterates another's note of hand, will, accounts or similar documents he will be liable in the extended Aquilian action at the suit of the legatees, heirs and other persons who have a pecuniary interest in the matter—provided the deletion takes place after adiation ; if it is made before adiation, the *actio doli* will lie according to the better view.[8] If this analogy is considered to be too fanciful, the plaintiff can still have an Aquilian action, but under modern South African Law—provided that South African Law is applicable in Ceylon.

In Roman Law, the Aquilian action, even after its vast expansion by *actiones in factum* and *actiones utiles* required physical injury to the person or damage to, or at least deprivation of, corporeal property whereby the plaintiff suffered material loss, but the damages recoverable by him included all the consequential loss suffered by him in consequence of the defendant's wrongful act.[9]

In regard to the scope of the Aquilian action in Roman-Dutch law Mc Kerron states, ' It must not be forgotten that in Roman and Roman-Dutch law the Aquilian action lay only where there had been damage to a corporeal thing or physical injury '.[10] In the case of Cape of Good Hope Bank *vs.* Fisher,[11] de Villiers, C.J., expressed a contrary view: ' The Aquilian action (in the time of Voet and Mattheus) had received an extension by analogy to a degree never permitted under the Roman law . . . The action *in factum* was no longer confined

6. Voet's Commentary on 47. 10 of the Pandects, § 1.
7. *The Digest, Ad Legem Aquiliam*, IX. 2, 40, 41 pr.
8. Voet's Commentary on IX. 2 of the Pandects (on the Aquilian Law), § 26.
9. *The Digest* IX. 2 ; Lawson : *Negligence in the Civil Law*, pp. 24, 25 ; Van den Heever : op. cit., p. 29.
10. Op. cit., p. 14.
11. 4 *S.C.*, p. 368 at p. 376.

to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another '. Maasdorp cites this passage without dissent and with apparent approval.[12] McKerron's view, it is submitted, is undoubtedly the correct view. As that learned author says, ' No statement to that effect is to be found in the Commentaries of Voet or Matthaeus on the Aquilian action, nor any passage indicating the recognition of such a wide extension of the action '.[13] Matthaeus' work is not available, but Voet in his Commentary on the Lex Aquilia (IX. 2) does not mention any case of an Aquilian action being given for pecuniary loss unaccompanied by damage to corporeal property or personal injury.

In South Africa it is settled law that damage to corporeal property or physical injury is not a requisite of the Aquilian action in the present law of the country. ' It is not open to doubt that in the modern law the (Aquilian) action is recognised as affording a general remedy for every kind of loss sustained by a person in consequence of the wrongful acts of another '.[14] Just as in Roman law, the Aquilian action swallowed up the remedies for unlawful damage to property existing at the passing of the Aquilian statute, so in modern South African law the Aquilian action has been so extended as to ' comprise in itself a host of former Roman actions : interdicts, and *actiones negatoriae ;* large phases of the *actio iniuriarum ;* actions between neighbours such as the *aquae pluviae arcendae ;* the pretorian popular actions—provided the two elements are present : unlawful conduct and patrimonial loss '.[15] Wille says, ' *Damnum iniuria datum* is constituted whenever one person infringes the legal rights of another person and thereby causes patrimonial loss to the latter. The latter person is entitled by an action under the Lex Aquilia to claim from the offender the amount of the pecuniary loss he has sustained . . . The action under the Lex Aquilia extends to every kind of patrimonial loss sustained by a person, not only to injury or damage to person, life or corporeal property, but also to incorporeal rights '.[16]

There is some difference of opinion, however, in regard to the requirements of the Aquilian action in modern South African law. The view widely accepted by modern writers in South Africa is that an essential element in an Aquilian action for damage caused *culpa* is the existence of a duty of care owed by the defendant to the plaintiff. According to McKerron, the requirements of the

12. *Institutes of South Africa*, Vol. IV, p. 7.
13. Op. cit., p. 9.
14. McKerron : op. cit., p. 10.
15. Van den Heever : op. cit., p. 33.
16. *Principles of South African Law*, p. 468.

Aquilian action in South African law are (1) ' a wrongful act by the defendant ; (2) patrimonial loss resulting to the plaintiff ; and (3) fault on the part of the defendant '.[17] ' Fault ' is defined as either ' *dolus* (wrongful intent) or *culpa* (negligence) ' and ' negligence ' is said to involve two elements (1) a duty of care owed by the defendant to the plaintiff and (2) a breach of that duty.[18] Wille,[19] Maasdorp,[20] Macintosh and Scoble[21] are other writers who hold the same opinion.

The chief exponents of the minority school appear to be Justice Van den Heever and Professor Price. Price points out that the first of the requirements of the Aquilian action in South African law according to McKerron is tautologous with the third of these requirements[22] and denies the necessity of importing into South African law ' a concept so alien and undesirable ' as the duty of care concept of the English tort of negligence which a line of writers from Holmes to Stallybrass have criticised. This learned writer also considers that the cases do not show that the concept has been in fact explicitly adopted judicially in South Africa and concludes : ' In so far as the conception of duty is linked up with negligence in our law it is a general duty to everyone not to damage him by failure to behave as a reasonable man would behave in the circumstances. As Buckland says, " The duty is not absolute. It is limited, e.g. by the rules of contributory negligence, remoteness . . . It might also be confined to consequences which could be foreseen, but that is a matter of public policy on which opinions might differ and it is not to be settled by propositions about the relativity of negligence ".[22] According to Van den Heever, ' an Aquilian obligation arises directly out of wrongful conduct : the infringement of a right which the injured person has against all the world, namely, not to be made to suffer patrimonial loss unlawfully, and entitles the injured person to compensation for such loss '.[23]

McKerron replying to Price's criticism[24] meets the points made by the latter and maintains that the matter may now be regarded as settled law in South Africa, citing *inter alia* the case of S. A. R. *vs.* Marais[25] in which Greenberg, A.J. said, ' I do not propose to enter into a discussion from an academical point of view, whether the doctrine that liability in cases of negligence depends on

17. Op. cit., p. 21.
18. McKerron : op. cit., pp. 37, 41.
19. *Principles of South African Law*, 3rd ed., p. 469.
20. *Institutes of South African Law*, Vol. IV, p. 35.
21. *Negligence*, 3rd ed., pp. 7, 11, 12.
22. The conception of duty of care in the Actio Legis Aquiliae : 66 *S.A.L.J.*, 171, 269.
23. Op. cit., p. 35.
24. The Duty of Care in South African Law : (1951) *Ceylon Law Students' Review*, p. 5.
25. (1950) 4 *S.A.* (610) *A.D.*

a duty of care to the person injured *should* be part of the English and our law, as in my opinion the question whether it *is* part of our law has been answered by judgments in this court '. Commenting on this, Van den Heever observes, ' Our case law on the subject (of Aquilian wrongs) is an undigested conglomerate of English law and misconceived Roman-Dutch law '.[26]

It is doubtful whether the Court regarded the present case as one of Aquilian liability under Roman-Dutch law. It is more probable that the Court had in mind the Aquilian action of South African law. If this view is correct, a third system would appear to be added to the systems already operating within the not very extensive sphere of our law of delict. Sufficient had been said to indicate that the modern South African law of delict is a distinct system, a blend of parts of the English law of torts and of the Roman-Dutch law of delict, neither the one nor the other, but partaking of both. A few words on the subject may be added. McKerron states, ' The Aquilian action and the *actio iniuriarum* are the foundation stones of the law of delict (in South Africa) —the former affording a general remedy for wrongs to interests of substance, the latter a general remedy for wrongs to interests of personality. Instances of liability falling outside the scope of these two remedies may be treated as exceptional '.[27] All writers in South Africa agree with this view. The same view cannot be taken of the English law or of Roman-Dutch law of delict. The English law of torts still consists of large number of specific wrongs each governed by its own rules. ' It seems clear that English law recognises no general right not to be damaged by another—not even if that other acts in bad faith and intending to cause damage '.[28] In Roman-Dutch Law, too, the field of actionable wrongs cannot be brought under one or two heads : It consists of crimes or delicts, quasi-delicts and a number of other wrongs, although the delicts of *damnum iniuria datum* and *iniuria* cover between them the major field of liability. Some comment on the inclusion of crimes here is needed. Roman-Dutch jurists frequently used the term ' delict ' to denote both a civil and a criminal wrong. Grotius says, ' Delict is an act or omission which is from its own nature unlawful or prohibited by some law . . . wrong can give rise to two obligations : the one to suffer punishment, the other to redress the inequality resulting from it '.[29] Van Leeuwen: ' Crime, in a general sense is every punishable violation of the law, and with an evil intention . . . A two fold obligation arises from crime, one of punishment and fine for the prosecutor, the other to make compensation to the person injured '.[30] Huber: 'obligation

26. Op. cit., p. 35.
27. Op. cit., pp. 11, 12.
28. *Salmond on Torts*, 11th ed., p. 19.
29. *Jurisprudence*, Lee's translation, p. 458 ; Book III, Ch. 32.
30. *Roman-Dutch Law*, Kotze's translation, p. 247 (Ch. XXXII).

springs from two causes, contract and crime or delict'.[31] Van der Linden: 'Another source of obligations is crime by which is meant a voluntary act or omission, contrary to law, and punishable on that account. From crime arises two kinds of obligations: the one to undergo punishment, the other to pay compensation for the damage caused by the crime'.[32] It is worthy of note that Van Leeuwen classifies *damnum iniuria datum* based on negligence as a quasi-delict;[33] Huber regards it as a delict or crime.[34] One of the many beneficial results of the influence of English law on the law of South Africa, and our law, too, is the differentiation of crime and tort.

There can be no doubt that the introduction of a third system will add to the confusion and uncertainty which already exist. The adoption of the South African law of Aquilian wrongs must result in the adoption of a great deal of the South African law of delict since in that law Aquilian wrongs constitute the major portion of delictual liability; and a portion of one branch of a system of law cannot be understood without a due understanding of at least that branch. There is also a very valid objection to the discarding of one of the requisites of the Roman-Dutch delict of *damnum iniuria datum*, viz. the requirement of damage to corporeal property or physical injury, in order to extend its scope, and substituting for it a conception peculiar to the tort of negligence in English law, in order to keep the new delict within reasonable bounds. With respect, it is submitted that the only satisfactory course to adopt is that in cases in which it is considered the Roman-Dutch law to be applicable, the Roman-Dutch authorities themselves should be resorted to. If this is done and if our courts give their own views on the principles of delictual liability in our law, a coherent system of our own can be built up.

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31. *Jurisprudence of our Time*, Gane's translation, Vol. 2, p. 381; (Book 6, Ch. 1).
32. *Institutes of the Laws of Holland*, Morice's translation, p. 209; (Book 2, Ch. 1, §1).
33. Op. cit. (Ch. XXXIX).
34. Op. cit.: Book 6, Ch. 4.