VOL 49 ISS 2 | II | JUDICIAL LIABILITY IN ROMAN LAW

In ancient Rome, the concept of judicial liability developed as one means of self-correction within the judicial process. Judges enjoyed a kind of immunity from acts of misconduct arising out of their official duties in an effort to protect the independence of the judiciary. Roman law, however, held judges liable for dishonest and wrongful conduct relative to their resolution of cases brought before them. Over time, a system of self-correction for judicial misconduct developed within the Roman judiciary.

In the Roman legal system, parties established liability based upon fault in a cause of action called the delict, which means "wrong." Generally, actions that arose ex delicto were civil as opposed to criminal wrongs and usually threatened the security of an individual's rights. Originally, a violent retribution requited a delictal wrong; eventually, less violent means, such as monetary recompense, satisfied requital for such a wrong. Significantly, the delict encompassed injury to an individual's rights as well as harm to the state, and thereby served both a civil and criminal function in society.

The ancient Romans also established tort-like judicial liability in actions that arose "as if from a delict" or quasi ex delicto. The quasi-delicts encompass liability for careless conduct including liability for judicial dishonesty. In Roman law, judicial liability was created by a quasi-delict termed the iudex qui litem suam facit, which translates as a judge who "make[s] a case his own.[84] This legal action has garnered substantial scholarly recognition, but only in an attempt to reconcile it with the other three quasi-delicts.[85] Scholars, however, have given less attention to a detailed study of the legal significance of the iudex qui litem suam facit, which merits a close examination. This Article analyzes this action as it developed from the Republican through the post-Classical Periods in Roman law. The scope of the iudex qui litem suam facit and its corresponding sanctions during each period will receive particular scrutiny.

A. Republican Period: A Focus on Intentional Misconduct

During the Republican Period, beginning in approximately the fifth century B.C. and extending to about 200 A.D., Rome defined itself as a strong political entity both in Italy and abroad.[86] At this time, the Romans codified centuries-old legal customs and traditions into a formal written expression of the law known as the Twelve Tables. The Twelve Tables is the source for one of the few proceedings in the Republican Period that accomplished a limited type of judicial review.[87] Roman law invoked this proceeding against the iudex qui litem suam facit. The Twelve Tables states:

> *Dure autem scriptum esse in istis legibus quid existimaripotest? nisi duram esse legem putas, quae iudicem arbitrumve iure datum, qui ob rem dicendam pecuniam accepisse convictus est, capitepoenitur...?*[88]
>
> How is it possible that these laws be considered harsh? Unless you think that a law is harsh that punishes a judge or arbiter with capital punishment, if he had clearly been shown to have accepted money to influence his decision.[89]

The tone of this passage implies that the Romans considered capital punishment a suitable penalty for a judge who accepted a bribe. An understanding of the Twelve Tables in their entirety clarifies the appropriateness of the sanction during the Republican Period. Many of the customs codified in the Twelve Tables reflected a primitive culture that often used the death penalty as a means of retributive vengeance.[90] The sanction of capital punishment against a misbehaving judge preserves this retributive purpose. As a legal penalty, it formally gave a wronged litigant the opportunity to requite an injury caused by a judge's misbehavior.

Significantly, in the Twelve Tables, the sanction focuses on the manner in which the judge acted rather than the correctness of his opinion. The text does not discuss whether the decision of the corrupt judge is legally correct.[91] Rather, the passage stresses the behavior of the judge by use of the Latin phrase ob rem dicendam accepisse convictus est. This phrase means that the judge took money "for the purpose of making a biased opinion." The Latin makes it very clear that the judge must have acted intentionally because the grammatical function of the gerundive clause, ob rem dicendam, indicates the purpose behind the verbal action of accepting money. Hence, by accepting the money with the purpose of favoring one party, the judge committed an intentional wrong.[92] Thus, the Romans limited judicial liability during the Republican Period to the intentional deviation from judicial impartiality motivated by the acceptance of a bribe.

It is significant that the scope of judicial misbehavior subject to punishment during the Republican Period was so limited. No system of appeal existed during this period, and the alternative type of judicial review available was narrow in scope.[93] The combination of these factors explains why a misbehaving judge endured such a severe sanction. By creating an action that harshly punished judicial misconduct, Republican Rome produced a strong deterrent against such misconduct while giving some means of recourse to litigants.

B. Classical Period: Judicial Liability Extended

The scope of judicial liability broadened during the Classical Period of Roman law.[94] A review of the sources from this period reveals that during the Classical Period, a judge was liable for intentional, and perhaps unintentional, acts of judicial malfeasance. One of the Classical sources for the iudex qui litem suam facit is a passage in the Digest attributed to Ulpian:[95]

> *Iudex tunc litem suam facere intellegitur, cum dolo malo in fraudem legis sententiam dixerit (dolo malo autem videtur hoc facere,si evidens arguatureius vel gratia vel inimicitia vel etiam sordes), ut veram aestimationemlitispraestarecogatur.*[96]
>
> A judge makes the case his own when from evil intent, that is a bias due to friendship, hatred, or corruption, he gives a fraudulent judgment, and he is condemned to pay the market value of the thing in dispute.

Of central importance to this passage is the fraudamsentientiam or the "fraudulent judgment" rendered by the judge. Inthe context of this passage, a fraudulent judgment is not necessarily a legally incorrect opinion. Rather, the Latin word fraudam implies that the opinion was in some way tainted or cheated of honest and impartial deliberation by the judge.

Ulpian further clarifies the nature of the fraudulent judgment by stating that the judge must intentionally depart from his duty to judicial impartiality. Ulpian establishes this by the phrase dolo malo, which means injurious "evil intent."[97] Dolus, a noun that refers to the judge's state of mind, is in the ablative case, which functions here to stress the conditions under which the fraud was committed. Thus, regardless of the legal correctness of the decision, the judge would incur liability if a deceitful or evil state of mind tainted his opinion.

To underscore the fact that the judge's perspective or evil intent is the gravamen of the offense, Ulpian lists particular circumstances that may have motivated the fraud: friendship (gratia),hatred (inimicitia),and corruption (sordes). For example, the judge's impropriety may have involved an affirmative action, such as the taking of a bribe. Under such circumstance, the presumption of dolus on the part of the judge would be great.[98] Alternatively, the judge's behavior could involve a less obvious wrong, such as a narrow or harsh decision in a case due to a personal bias.[99] Because Ulpian establishes dolus malus as the source of fault for the iudex qui litem suam facit, a number of different circumstances involving intentional judicial partiality may give rise to judicial liability. Consequently, the Classical Period witnessed a broader scope of judicial liability than the Republican Period, which limited the scope to intentional fraud, such as accepting a bribe of money.

Another passage of Ulpian speaks of the need for judicial liability due to the possibility of unfairness or unskillfulness of a judge.[100] Still, Ulpian does not mention the necessity of dolus. This passage reveals that one should not read the foregoing passage of Ulpian as a definitional limitation upon the iudex qui litem suam facit as it was known during his lifetime. Rather the inconsistencies between the two passages evidence a transitional state of the law of judicial liability during the Classical Period.[101]

A passage in the Digest, attributed to Gaius, illustrates this fluctuation in the state of the law:

> *Debet autem iudex attendere,ut cum certaepecuniae condemnatio posita sit, neque maioris neque minoris summa posita condemnet, alioquin litem suam facit; item si taxatio posita sit, ne pluris condemnet quam taxatum sit; alias enim similiter litem suamfacit. Minoris autem damnareeipermissum est.*[102]
>
> When a certain sum is laid in the condemnatio, a judge must be careful not to condemn the defendant in a greater or lesser sum, else he makes himself

> liable to damages: and if there is a limitation he must be careful not to exceed the maximum, else he is similarly liable.

If a judge improperly set damages, the judge assumed liability for damages, which would be determined in accordance with the judge's degree of fault.[103] Curiously, Gaius makes no mention of intent in this passage. Such silence as to the judge's state of mind would allow liability to attach whether the judge acted with dolus or mere negligence in the performance of his duty.

Another passage attributed to Gaius, further defines the scope of the iudex qui litem suamfacit. It reads:

> *Si iudex litem suam fecerit, non proprie ex maleficio obligatus videtur. Sed quia neque ex contractu obligatusest, et utiquepeccasse aliquid intellegitur licet per imprudentiam: ideo videtur quasiex maleficio teneri infactum actione, et in quantum de ea reaequum religioniiudicantisvisum fueritpoenam sustinebit.*[104]
>
> If a judge make a case his own, the obligation he incurs is not created by delict,nor yet by contract, but as he commits a fault, though it may be without intention, he is liable in an action in factum for a quasi-delict to such damages as may be assessed.

The difficulty presented is that Gaius extends judicial liability to acts that occurred unintentionally (per imprudentiam). Because Ulpian and Gaius were contemporaries, it is unlikely that the former would limit judicial liability to intentional acts, while the latter would extend such liability to negligence. To reconcile this inconsistency, scholars have regarded the portion of Gaius' passage from "the obligation" to "quasidelict" as an interpolation, or an insertion of text from an outside source.[105] Such reasoning is persuasive not only from a linguistic perspective, but also from an historical one.[106]

One scholar regards the interpolation itself as evidence of the transitional state of the law during the Classical Period.[107] Nevertheless, even if one disregards the interpolated portions of the passage, Gaius still makes no specific reference to the necessity of dolus. The lack of such specificity leads to differing interpretations of the passage. One may read it with strict adherence to prior custom and argue that if the quasi-delict were to extend its liability to unintentional acts, the author would have mentioned it specifically. An alternative reading favors the trend of the law at that time and argues that because the quasi-delict broadened its scope over time, the vagueness of Gaius' passage intended to allow for broad interpretations including both intentional and unintentional acts.

Based on this passage of Gaius, however, the scope of judicial liability was probably the same during the lifetimes of Gaius and Ulpian because both authors of the Digest aimed to collect and interpret legal customs as they had developed up to the second century A.D. As the empire grew, a system of appeals began to emerge;[108] Gaius and Ulpian wrote during a transitional period between the Republican Period, when there were no appeals, and the later empire, when a system of appeals was fully developed. A legal system that lacked a system of review, as in the Republican Period, posited greater power in the judiciary. Correspondingly, the legal system of that period provided an alternative to a right of appeal, the iudex qui litem suam facit, which provided a remedy for a specific judicial misbehavior, i.e., bribery. The death penalty sanction underscores the importance vested in this remedy during the Republican Period.

Similarly, during the Classical Period, the iudex qui litem suam facit existed as a remedy that served as an alternative to appeals. However, because a system of appeals began to emerge during the Classical Period, the pressure was not as great on that society to provide an alternative method of review. Thus, although the iudex qui litem suam facit was still a very viable action against a misbehaving judge, its symbolic value as the guardian of judicial integrity diminished. Reducing the sanction from the imposition of the death penalty to the assessment of a fine clearly illustrates this point.[109]

C. Post-Classical Period: Focus on Unintentional Misconduct

A final source of the iudex qui litem suam facit, which establishes judicial liability during the post-Classical Period, appears in the Institutes of Justinian.[110] The text is almost identical to that of Gaius in the Digestand commentators have long agreed that Justinian relied heavily upon Gaius' work.[111] It is certain, however, that by Justinian's time the scope of judicial liability extended to unintentional acts of the judge.[112] A close reading of the Institutes elucidates what types of judicial misbehavior the Romans included within the ambit of the iudex qui litem suam facit during the later empire.

During that period, Roman law held the judge responsible for a maleficium although he was viewed as not having acted strictly from maleficium. The word maleficium is very close in meaning to delict, that is, a wrong or an evil deed. Because the "male" part of the word means evil, maleficium means a deed that is evil in and of itself. In the Institutes of Justinian, maleficium refers to judicial bias.[113] Justinian introduces the idea of fault by use of the verb pecasse, which means to do amiss, to mistake, or to transgress. Thus, during the post-Classical Period, the judge was liable for an error that rose to the level of a maleficium even though he may have committed it through ignorance or imprudence.

Clearly, the scope of judicial liability broadened during the later empire. The phrase per imprudentiam(unintentionally), which is definitely a part of the Justinian passage and not an interpolation as it was during the time of Gaius, imposed additional liability on a judge for a good faith procedural error such as missing the day of trial or making a minimal error in setting damages.[114] Because the law required neither proof of harmful intent (dolus) nor any mention of the degree of harm to a litigant, the judge's vulnerability to suit was great. Two developments during the later empire, however, balanced this vulnerability. First, litigants had recourse to an appellate court if they felt wronged by a decision.[115] Such a development would reduce the number of actions for personal liability against a judge. Second, the sanction imposed upon the judge was a fine in the amount of the litigation (if caused by dolus) or set by the judge himself (if prompted by negligence).[116] The lack of severity of this sanction is inversely related to the broadness of the judge's liability.

> Therefore, while the scope of judicial liability was broadest during the post-Classical Period, the penalty for judicial misbehavior was most lenient.

Footnotes

[84]. J. INST. 4.5. The Institutes of Justinian are the source for the term quasi-delict. According to Justinian's compilation, a quasi-delict imposes liability on a defendant regardless of whether that defendant caused the harm in question. See id.; see also BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 224-25 (1962); J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 377-79 (1976).

[85]. The four quasi-delicts are: iudex qui litem suam facit; res deiectaevel effusae; res suspensae; and nautae caupones stabularii. See J. INST. 4.5; see also WILLIAM W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN, 598-99 (1950); R.W. LEAGE, ROMAN PRIVATE LAW 421 (1961); Peter Stein, The Nature of Quasi-delictal Obligationsin Roman Law, in 5 REVUE INTERNATIONAL DES DROITS DE L'ANTIQUITE' (1958); 8 DRAGONIR STOJCEVIC, SUR LE CHACTERE DES QUASI-DELITS EN DROIT ROMAIN 57-58 (1957).

[86]. For extensive treatments of ancient Roman history, see generally 2 DONALD KAGEN, PROBLEMS IN ANCIENT HISTORY (1966), CARL ROEBUCK, THE WORLD OF ANCIENT TIMES (1966), MICHAEL CORANT, HISTORY OF ROME (Prentice Hall 1978), and DAVID JOHNSTON, ROMAN LAW IN CONTEXT (Cambridge 1999). The historical background for this Article is derived from these sources.

[87]. Besides the iudex qui litem suamfacit the only proceedings in the nature of review were the revocatio in duplum and a restitutio in integrum. Neither of these proceedings addressed the wrong of judicial misbehavior. See ROSCOE POUND, APPELLATE PROCEDURE INCIVIL CASES 7 (1941).

[88]. AULUS GELLII, NOCTES ATTICAE, 20.1.7.

[89]. All of the English translations in this text are from the following texts, with some modification: THEODOR MOMMSEN, DIGEST OF JUSTINIAN (Paul Krueger & Alan Waston eds., Univ. of Pa. Press 1985), and EDWARD POSTE, INSTITUTES OF ROMAN LAW BY GAIUS (Oxford 1890).

[90]. See HANS JULIUS WOLFF, ROMAN LAW, 57-58 (1951).

[91]. See J.M. KELLY, ROMAN LITIGATION 110 (1966); see also RUDOLPH SOHM, THE INSTITUTES, A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 424 (1907). See generally OTTO LENEL, DAS EDICTUM PERPETUUM 136 (1927).

[92]. See KELLY, supra note 91, at 108-112.

[93]. See SOHM, supra note 91, at 288-89, 300-01.

[94]. See WOLFF, supra note 90, at 103-17. The Classical Period of Roman Law extended from the coming of the Principate to around the middle of the third century B.C. See id. at 103.

[95]. See H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 398-99 (1932). Ulpian's works are dated around the third century B.C. See id.

[96]. DIG. 1.15.1 (Ulpian, Edict 21).

[97]. See A.M. HONORE, GAIUS 103 (1962).

[98]. For a full discussion of dolus type situations, see the chapter on The Misbehaving Judge in KELLY, supra note 91, at 102-17.

[99]. See id.

[100]. See DIG. 49.1.1. (Ulpian, Appeals 1).

[101]. See KELLY, supra note 91, at 111-13.

[102]. G. INST. 4.52; see POSTE, supra note 89, at 501-02.

[103]. See POSTE, supra note 89, at 510.

[104]. G. INST. 44.7.5; 50.13.6.

[105]. See Stein, supra note 85, at 569-70.

[106]. See KELLY, supra note 91, at 111-14.

[107]. See id. at 112-14.

[108]. See POUND, supra note 87, at 8; see also THOMAS, supra note 84, at 121 n.25.

[109]. For a discussion of the death penalty as an appropriate sanction, see KELLY, supra note 91, at 109. For the evolution of the sanction to a monetary penalty, see DIGEST OF JUSTINIAN 1.15.1, and POSTE, supra note 89, at 510.

[110]. The post-Classical Period begins with Diocletian and ends with Justinian's compilation in 534. See FRITZ SCHULTZ, HISTORY OF ROMAN LEGAL SCIENCE 262-65 (1946).

[111]. See WILLIAM W. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 341 (1931).

[112]. See KELLY, supra note 91, at 114-15; see also WILLIAM W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 330 (1925); JAMES MACKINTOSH, ROMAN LAW IN MODERN PRACTICE 169 (1934).

[113]. For a discussion of maleficium, see HONORE, supra note 97, at 101-04.

[114]. See SOHM, supra note 91, at 424.

[115]. See THOMAS, supra note 84, at 121; see also POSTE, supra note 89, at 632.

[116]. See POSTE, supra note 89, at 510; see also J.B. MOYLE, INSTITUTES OF JUSTINIAN 172-73 (Oxford 4th ed. 1906).