V O L E N T I   N O N   F I T   I N I U R I A

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INTRODUCTION

The topic of this dissertation is primarily concerned with evaluating the practical and jurisprudential merits of the modern principle of volenti non fit iniuria as it is applied in the context of the South African Delictual Law on patrimonial loss. Though a similar evaluation of the volenti doctrine in respect to the modern Actio Iniuriarum falls outside the scope of this dissertation, reference will also be made to the Volenti defence in that context.

The main questions which will be examined here concern (1) whether the doctrine constitutes an anomaly within the framework of modern South African jurisprudence concerning delictual culpability and (2) the extent to which the doctrine effectively decides every-day issues of such delictual liability. On the basis that Roman and Roman-Dutch jurisprudence constitutes the fons et origo of the modern delictual action for compensation for patrimonial loss[1/] two factors will be considered under (1) above. viz.

(a) the relevancy of the present defence of volenti non fit iniuria to the actio legis Aquiliae and the equivalent Roman-Dutch Aquilian action and

(b) the extent to which the Aquilian notion of fault is referred to as the basis of the delictual obligation in such modern actions.

The jurisprudential evaluation of the volenti doctrine will consequently indicate the degree to which the modern delictual law on patrimonial loss has retained its original Civilian characteristics.

The effectiveness of the doctrine as a means of determining delictual liability for patrimonial loss will be examined with reference to South African and English case law and discussed in terms of Civil and Common Law jurisprudence.

VOLENTI AND MODERN DELICTUAL JURISPRUDENCE ON PATRIMONIAL LOSS

THE ORIGIN OF THE MAXIM

There are two possible sources of this maxim as it is applied to the South African delictual law on patrimonial loss, both being ultimately derived from two Digest fragments by Ulpian on the Praetors Edict.

1. The first source is found in the Canon Law, in Regula 27 of the Liber Sextus of Boniface VIII, which states that 'scienti et consentienti non fit iniuria neque dolus'. This regula may have been based on a fragment taken from Ulpian Book 66 ad Edictum, and cited as a rule of the ancient jurists in D.50 17 145; namely 'nemo videtur fraudare eos, qui sciunt et consentiunt'. In context, in Book 66 ad Edictum, it follows a discussion on the edictal remedy for creditors in cases of fraud. Ulpian points out, however, that where the creditors were aware of, and consented to, any transaction between the debtor and a third party, the question of fraud did not arise.[2/]

This regula is cited frequently by the Roman-Dutch jurists in respect of cases of consent to deliberate acts of wrong-doing causing non-patrimonial loss. Thus Groenewegen inserts a reference to it in Grotius' 'Inleidinge tot de Hollandsche Rechtsgeleerdheid' at 3.35.8.[3/] In this section, Grotius deals with the question of whether recompense ought to be paid to virgins who consent, after persuasion, to extra marital intercourse. Though consent ought to bar such a claim in these cases, he adds that the customary law of Holland provides otherwise. Van Leeuwen also refers to the regula when considering the criminal aspects of the same situation in 'Roman-Dutch Law' 4.36.4.

2. The second possible source of the maxim is a fragment from Ulpian

Book 56 ad Edictum, cited in D47.10.1.5 (de iniuriis et famosis libellis). In context, Ulpian distinguishes, in the delict of Iniuria, between the liability of a person to a paterfamilias and a filius, where the latter has willing consented to be the subject of a sale.

'Patri suo quidem nomine competit iniuriarum actio, filii vero nomine non competit quia nulla iniuria est quae in volentem fiat.'

Van der Keessel cites this fragment and D50.17.145 in his 'Praelectiones ad Ius Criminale' 47.10.12 when discussing situations in which a person is understood to have suffered a personal wrong, sufficient to constitute a remedy for private redress. It is important to note that neither of these two references to consent by Ulpian deal specifically with the delict of Damnum Iniuria Datum; the former being concerned with Dolus and the latter with Iniuria.

In the decisions of contemporary cases in South African Law, on the delictual action for patrimonial loss and also the civil wrong of defamation there has been a tendency for the judiciary to consider the wording of the latter fragment by Ulpian on the Delict of Iniuria in both contexts. Thus with respect to Defamation, De Villiers, C.J. directly applied Ulpian's 'rule' in D.47.10.1.5 when absolving the defendant on the ground of consent in Bennett v Morris 1893 10S.C.223 at page 227.[4] On the other hand, in the case of Lampert v Hefer N.O 1955(2)S.A.507 A.D. where the plaintiff raised an action for damages based on the delictual action for patrimonial loss, Fagan J.A. also referred to D47.10.1.5 when considering whether the allegation of a voluntary assumption of risk constituted a competent defence in South African Law. It might be noted in passing that reference has been made to Digest Fragments other than those discussed above, where the issue of consent has arisen in an action for patrimonial loss. In

Davids v Mendelsohn 1898 15S.C.367, for example, De Villiers, C.J., after stating the present-day form of the volenti maxim, added that it was 'not taken verbatim from the Roman Law, but the principle which underlies it was fully recognised. One of the rules of law, for instance, cited in the Digest (50.17.203) is that a person who sustains damage through his own fault is not deemed in law to have sustained any damage at all'.[5/] D50.17.203, however, is clearly further from the particular notion of consent as a defence, due to the emphasis placed on ex culpa sua, than the two fragments from Ulpian mentioned above. Consequently, of the two Roman Law sources, i.e. Ulpian D50.17.145, which can be considered the basis of Regula 27, and Ulpian D47.10.1.5, recognition might appear to be given to the latter by the judiciary today as the prototype of the modern maxim applied in both delictual actions for patrimonial loss and defamation. The D47.10.1.5 fragment,like that of D50.17.145, however, supplies no indication in context of the proprity of applying such a defence to the delict of Damnum Iniuria Datum.

Regula 27, Implied Consent and Volenti

Professor McKerron in his book on the 'Law of Delict' gives the following definition of the effect of the volenti maxim on present-day South African law on patrimonial loss :

> 'No man can complain of an act which he has expressly or impliedly assented to. The maxim is applicable to cases where a person has consented to suffer something which would otherwise be an intentional wrong. But the maxim is used in a wider sense and is applied to cases where a person has consented to run the risk of unintentional harm which would otherwise be attributable to the negligence of the person who caused it.' [6/]

The second part of this definition is an extension of the first to cover the contingency of patrimonial loss arising from unintentional acts considered delictual. If Regula 27 can be considered to embody the

mediaeval notion of consent as a defence to delictual actions for the recovery of a patrimonial loss, the question which then arises is whether 13th Century Canon Law provided a defence of consent based on both implied and express assent.

Firstly, it would appear that Regula 27 could have been applied to 13th Century reipersecutory Canon Law actions due to the use of the word 'dolus'. For example it is stated in the Decretals of Gregory IX in the title De Iniuriis et Damno Dato[7/] that, 'si culpa tua est damnum, vel iniuria irrogata, seu aliis irrogantibus opem forte tulisti, aut haec imperitia tua, sive negligentia evenerunt, his satisfacere te oportet'. From the commentary of the 13th century Canonist Hostiensis[8/] on this chapter it is clear that the 'iniuria' referred to above was considered in terms of the Roman Delict of Iniuria and not in terms of Damnum iniuria datum.[9/] Damnum on the other hand is suffered 'tua culpa' which Hostiensis says, referring to Justinian's Institutes 4.3.7, includes the concepts of imperitia and negligentia.[10/] However, we know from the Civil law glossator Azo whose writings preceded the publication of Gregory IX's Decretals,[11/] that culpa was considered to include deliberate wrong-doing or dolus. Thus he states in his 'Summa'[12/] that : 'Culpam semper intelligo sic, ut et dolus culpae contineatur', which he says is apparent from D9.2.5.1[13/] and D.4.4.9.2[14/]. Consequently it would not be unreasonable to suppose that in Thirteenth Century Canon Law questions of Damnum involving deliberate acts of wrong-doing were considered in terms of dolus and subsumed, along with issues of imperitia and negligentia under the concept of culpa. If this were the case, it could be said that though the dolus of Rule 27, to which knowledge and agreement is a good defence, is derived from a passage in Classical law specially dealing with the delict of dolus[15/] (D50.17.145) when taken out of context and restated in a

general legal maxim, it affords ostensible evidence of a similar defence to reipersecutory actions founded on deliberate wrong-doing in the 13th Century Canon law.

On the other hand, there is no clear indication from the Canon law that the regula was also applied to cases of unintentional wrong-doing at that time. From this it may consequently be assumed that the regula was primarily considered in terms of deliberate acts to which consent might be a factor determining the issue of civil liability.

Secondly, several cases within which the Regula is envisaged as operating under the Canon law all involve situations where express rather than implied consent is a vital factor, e.g. as late as the 1541 edition of the Liber Sextus[16/] the explanatory gloss states 'scienti et consentienti non fit iniuria neque dolus - an hac regula figuratur per ll.ff. de actionibus empti et venditi' (D19.1.1.1 Ulpian).

The illustration which follows shows that no dolus has been perpetrated and hence no actio ex empto can arise where an emptor gives his express consent to purchase a house over which he knows an urban servitude to exist. Similarly,there is no dolus where an ingenuus consents to many a woman whom he knows to be a slave and the rule is stated to be in accordance with the provisions of the Aedilician Edicts. This tends to indicate that so far as the Regula may have applied to reipersecutory delictual actions, not only was it restricted to deliberate acts giving rise to loss, but that consent to such acts was only considered in formal terms.[17/]

With respect to the nature of consent, the difference between the probable effect of Regula 27 on reipersecutory delictual actions, and the effect of the volenti maxim on present day patrimonial cases, is

substantial. The present day interpretation of the volenti maxim to include implied consent would appear to indicate a major difference in outlook on the nature of a plaintiff's consent in delictual cases. The present day interpretation of the volenti maxim would appear to place such consent in a special category from the juristic act involving volition which is traditionally considered consent. The question which must now be asked is whether this present day interpretation of volenti in respect to implied consent, owes its currency to the development of some delictual principle of consent in the system from which Regula 27 is ultimately derived, i.e. Roman law, or from some other source. In other words, whether or not volenti, as a principle of modern South African delictual law on patrimonial loss is an anomalous concept with respect to the source and basis of the patrimonial action.

Consent in Roman Delictual Law on Patrimonial Loss (the Lex Aquilia)

There is reasonable evidence to suggest that in 13th century Canon law the defence of express consent to the Aquilian action could have existed albeit restricted to intentional acts. In classical Roman law, as in Byzantine law, however, there is no specific statement on the effects of consent in the lex Aquilia (as there is in respect to the delicts of dolus,[18/] furtum and iniuria). Consent could, in the case of agreements not specifically recognised by the Civil law and those stricti iuris, counter the defendant's exceptio doli.[19/] However, though nothing is expressly stated in the lex Aquilia it may be that some of the juristic solutions to questions of liability were influenced by the notion of express consent as it was applied elsewhere in Delict. On the other hand, situations in which liability today would be considered in terms of implied consent[20/] were specifically determined on recognised

grounds of Aquilian liability i.e. culpa or dolus, without any reference being made to the notion of consent where none expressly existed. Generally, the notion that consent to an act, which would otherwise incur delictual liability, absolves the defendant, would appear to be a fairly natural and expected conclusion to arrive at both in Roman law and present day law. In order to throw more light on the question of consent in the lex Aquilia it is worthwhile examining the Roman law texts involving consent in the delicts of dolus, iniuria and furtum in order to establish exactly why consent is regarded as a good defence in these delicts.

The main reason which emerges to indicate why consent was regarded as a good defence in all three delicts is that it prevented the delictual obligation from arising.[21/] In other words, from the substantive 'case' law built round these delicts, it is apparent that consent would render it impossible for a plaintiff to prove all the requisite factors demanded before a iudex could give effect to his formulary demands, i.e. when a plaintiff admitted consent he would cease to have a legally relevant case on which a iudex might reach a factual conclusion. For example, in furtum three facta probanda could be said to exist, i.e. proof of the thief's intention to steal, the execution of that intention and the fact that the act of appropriating or handling of the plaintiff's goods was done invito domino.[22/] Hence though a consenting plaintiff might be able to establish the first two requirements his consent would preclude the third. In dolus a defendant who had acquired an advantage with the plaintiff's full consent could not subsequently be said to have acted with deceit.[23/] As regards iniuria though the plaintiff's consent would not necessarily affect the defendant's intention or execution, as in furtum, it would render impossible proof of the third factor i.e. contumelia or insult.

Having regard to consent in terms of the facta probanda to ground these three Delicts, it is probable that the Roman jurists looked to the concept of consent (as developed under the bilateral consensual contracts) either as a general guide as to what should generally constitute effective consent to the delict at hand or as a matter of necessity arising from the particular circumstances of the case.

In the former case it is unlikely that the classical jurists formulated any abstract notion as to what constituted effective consent in Delict[24/] as is found in the present day interpretation of volenti. Strauss[25/] states that although in classical and post classical law consensus was sometimes used to denote unilateral assent, consensus to the Romans generally meant the concurrence of wills, as the Roman jurists did not speculate in abstracto on the meaning of voluntas, (i.e. as used in D47.10.1.5)[26/] Thus, as Strauss suggests, the question of consent, to the jurists, would probably have been more of a factual matter determined by pre-existing ideas on consent than a speculative one. As a remedy for redress was afforded under the consensual contracts to those who had exhibited unqualified signs of consent and agreement it would not appear unreasonable to suppose that the same quality of willingness was looked for when an action for redress was to be denied under the law of delict. In both cases, consent either bound or exculpated the defendant in terms of the vinculum iuris. However, it is obvious from the Digest texts on Delict that the classical law jurists displayed a reluctance to theorise on even more fundamental questions than consent.[27/] In the latter case, where the constitution of a delict involved the proof of an actual bilateral contract, the tendency of the jurists to consider the question of delictual consent in terms of contractual consent would have been quite natural, in the absence of any special delictual notion of

willingness. An example would be where the defendant's initial act of deceit under a contract also enables a third party to sue with the actio doli, as in the situation discussed by Ulpian in Book 66 ad Edictum where a debtor sells in fraud of his creditors. Since the constitution of the delict depends on the constitution of a contract of sale, it is unlikely that the jurists would have adopted a different approach to the question of the creditor's alleged consent, from that employed in ascertaining whether the debtor had consented to the sale. Even the words 'sciunt et consentiunt' used by Ulpian[28/] savour of contract, in the emphasis placed not simply on consent but knowledge.[29/]

In cases under the delict of iniuria which involve consensual contracts, the same tendency can be seen. In D.47.10.1.5 for example the allegation of contumelia by a filiusfamilias and the defence of consent involve the determination of consent in what could almost be considered two agreements, before delictual liability can be fixed. In the first place, it would be essential to determine whether or not the filius had been sold, irrespective of his intention. For, provided the buyer remained ignorant of his true status, a sale in classlical law would have been perfected.[30/] Thus, proof of the seller's willingness to sell would found the delict ex facie. Secondly, in order to determine the delictual defence of consent it would have been necessary to discover whether or not the filius had given his consent to the seller to be sold. From the circumstances of D47.10.1.5 as the contractual consent of the seller constitutes the elements of intention and execution in the delict of iniuria[31/], it would be difficult to imagine that in any early legal system consent less than that demanded by a similar express act of volition would be sufficient to exculpate him by removing the third requirement of contumelia. Thus, as it is unlikely that the jurists adopted any abstract

approach to the question of the Filius's consent as opposed to the seller's, the fact that the filius in such cases would have been incapable of so depriving the paterfamilias of his potestas might explain Ulpian's choice here of 'in volentem fiat' rather than the more contractual consentit or permisit even though he might actually have bargained for part of the sale price.

It would appear that the classical law generally lacked any abstract principle of consent, similar to that of implied consent of the present day volenti principle of patrimonial law. This in part may have been due to the fact that the basis of establishing the delictual obligation to compensate centered round the factual situation in which the loss was inflicted, and unlike the present day duty of case principle in delictual law no requirement was placed on the plaintiff to show, in abstracto, that the defendant was under an antecedent duty to act with care towards him. Consequently, the question of consent would have been a strictly factual consideration, as in the consensual contracts, due to being considered in terms of an obligation arising after the execution of a particular act, rather than in terms of a duty arising antecedent to that act (i.e. where, under the modern duty of case principle, consent may in fact preclude the existence of such a duty).

The absence of implied consent might also have been due to the concurrence of remedies in certain cases where the defence of consent to one remedy might have been equated with the requirement of consent for another. This would follow where in early law delictual and contractual remedies overlapped. Not, of course, that this was entirely peculiar to Roman law. Buckland and McNair state that

'A glance at our books (English law) will show that many acts of negligence and most actions of deceit are based on acts connected with a contract between the parties. Roman law shows a similar concurrence of remedies in contract and delict.'[32]

Thus, in the consensual contract of emptio venditio for example the words of the formulae empti and venditi would bring into issue any dolus with which either party could be charged 'consequently the actio doli was usually unnecessary and therefore inadmissible',[33] i.e. si dolo malo aliquid fecit venditor in re vendita, ex empto eo nomine actio emptori competit nam et dolum malum eo judicio aestimari oportet.[34] Hence, as in the case mentioned by Ulpian in Book 66 ad Edictum[35] it would have been considered unnecessary for the jurists to think of the question of the creditor's consent on a different footing from that of the buyers.

At this point it might be worthwhile to investigate further the extent to which the lack of any principle of implied consent in Delict might be attributed to contractual concepts, bearing in mind Professor Beinart's statement that ' the role of the inarticulate major premise on the minds of the jurists is much greater than is generally imagined.'[36] As the jurists developed their most detailed doctrines in relation to emptio venditio[37] it might be best to look at this consensual contract first.

Gaius defines the nature of the consensual contracts as follows :

'istis modis consensu dicimus obligationes contrahi quia neque verborum neque scripturae ulla proprietas desideratur, sed sufficit eos qui negotium gerunt consensisse'.[38]

Though the contract is perfected by consent, Watson correctly points out that 'this did not mean in fact that the parties dispensed with all formalities, rather it means that in event of an action, any method of proof of agreement could be used'.[39] Thus, in any such action evidence

of arra or writing could be led not to imply, but prove that consent had been given. In other words, since in Classical Roman Law, emptio venditio was considered perfected when a specific agreement had been made about the pretium[40/] consent could not otherwise be constituted from the general conduct of the parties. This is contrary to Professor De Zuleuta's comment that 'no doubt it (consent) could be proved from conduct'[41/] which would imply that the consensisse of Gaius referred to an abstract notion of agreement. However, it is difficult to see how this could have operated in the absence of any doctrine of implied reasonable price.[42/] Thus it would be better to read consensisse as referring only to the express manifestation of agreement,[43/] e.g. a nod of the head, or the exchange of words, rather than the more general notion of willingness to agree, arising without any such assent merely from the general conduct of the parties. It might be suggested that this question of implied consent could only have been a factor in the Roman law of sale when agreement as to the pretium ceased to perfect certain contracts of sale i.e. after Justinian's constitution of A.D. 528.[44/] Before this enactment, it is submitted only express consent would perfect the contract of sale, and found the contractual action, implied consent being insufficient.[45/] After this enactment where it was agreed between the parties to put the sale contract in writing, the probative writing of the parties, rather than their consensus would perfect the contract and found the action. It would not have been material in these contracts where a price was stated in the writ, whether agreement to it had been expressly stated or simply implied.[46/] The constitution of A.D. 528 however did not alter the existing law on perfection where there was no agreement to reduce the contract to a written form.[47/]

If one takes the same interpretation of consensisse to apply to the other three consensual contracts[48/] one sees why, in relation to the

contract of mandatum, the institution of negotiorum gestio would have been necessary. As Pothier says : 49/

> 'When a person administers the affairs of another in the absence of an instruction and without his knowledge no contract of mandate comes into existence, mandate like all the other contracts being an agreement formed only by the consent of both parties and with the concurrence of their wishes'.

Thus in negotiorum gestio

> 'there is a kind of fictional and presumed mandate there being the presumption that he whose affairs were administered would have ordered it to be done, since it was in his interests that it should be done.'

Thus, if in classical law express consent was the essence of the consensual contracts, one can understand why the jurists could have been influenced, consciously or otherwise, to construe consent in the other head of obligations, viz., Delict, in a similar fashion.50/ Such contractual influences on the minds of the jurists might also explain Paulus' decision in D.9.2.28.1 which appears to impute a certain amount of implied knowledge to the plaintiff. According to this text a person who digs bear or deer pits by a road will only be liable where he has failed to give adequate warning to passers-by of the danger; otherwise summovetur petitor,si evitare periculum poterit. Comparing this with the decision of Ulpian in D.21.1.14.10 where a seller is not held liable for an unmentioned defect qui omnibus poterit apparere, it might be said that the developed contractual notion of implied knowledge, barring a remedy for patent defects in sale, may have influenced delictual decisions in situations where the factors complained would have been obvious to the plaintiff.

Though contractual consent has the opposite legal effect on consensual obligations than consent in delict the recurrence of such elements as

expression,[51] communication[52] and the concurrence of the time factor[53] in the juristic discussions of both forms tends to indicate that the jurists may have considered the latter type of consent as a species of the former. The question of time for example clearly distinguishes the defence of consent to the Actio Iniuriarum from that of dissimulatio, though the difference at first glance might not be apparent as both negative contumelia. Dissimulatio, however, either involves condonation or the lack of any show of outrage after the commission of the injurious act, whereas in all cases involving consent the question of willingness always precedes the act.

The whole question of the contractual influence on delictual defences, however, is largely a matter of speculation, arising primarily from the fact that 'the classical jurists were still influenced to look upon and treat private law from the point of view of legal remedies for enforcing the law'.[54] Thus, especially in the Digest fragments on the lex Aquilia, the jurists tend to be more preoccupied with the specific form a remedy should take in a given situation, i.e. the direct or the utilis action, than with working out any detailed formulations of delictual liability.

Another reason why consent precluded the obligation from arising in these delicts[55] may be said to lie, not so much in the strict application of legal reasoning by the jurists to the case in hand, as in their wish to prohibit types of behaviour which though not strictly illegal were considered contra bonos mores. In other words, due to public law considerations no delictual obligation was said to exist in certain cases.[56] Gaius, for example, states the following problem:

> 'Cum Titius servum meum sollicitaverit ut quasdam res mihi subriperet et eum perferret et servus id ad me pertulerit, ego, dum volo Titium in ipso delicto deprehendere, permiserim servo quasdam res ad eum perferre, quaesitum est utrum furti an servi corrupti judicio teneatur. Titius mihi an neutro'. 57/

Bearing in mind what was required to found an actionable cause in furtum one might have expected Titius to be liable for theft, though probably not under the actio servi corrupti, since the consent of the owner was not intended to apply to Titius but to his slave, over whom he had complete control. Thus from the point of view of furtum, Titius' intention to remove the goods invito domino had not been altered. Also, as the owner would probably have wished to catch Titius shortly after the goods had been removed, i.e. in furtum manifestum, the requirement of actual appropriation or handling would presumably have been present. This appears to have been the view taken by Pomponius, viz., that all the ingredients required to be proved before a remedy was available,were present.[58/] However, Gaius's answer to the case is that responsum neutro eum teneri.[59/]

This answer, it is submitted, was arrived at by the jurists by considering the question not simply from a legal but also from a social point of view. Perhaps this is an early example of a case in which there being no immediate legal precedent, a solution is chosen which specifically suits a contemporary social need, in this case, primarily, the prevention of the corruption of slaves.[60/] This would appear to be the view of Rieffenstuel[61/] when he compares the later Canon law rule, affording a remedy in furtum with the classical Roman Law solution. He states the reason for the Roman decision as follows :-

> 'Tum ad terrorem aliorem, ne servos alienos facile corrumperent ne ex huiusmodi impunitate et alium servum qui facile possit corrumpi. hoc facere pertentet 62/ tum etiam quia dominus non retentum sed obligationem dumtaxat rei suae consensit animo experiendi malitiam iniqui suasoris et scelere in effectum. cum deducto cum actione furti et corrupti servi securius convenit posset.'

As public policy would have primarily sought the prevention of the

corruption of slaves, the decision not to allow the actio furti would (a) place an onus on the owner of personally ensuring that his slaves were not corrupted by the persuasions of others, and (b) deter an owner from employing his slaves in schemes which might involve an element of corruption. Hence consent would be a good defence, arising more from social considerations than legal theory, to the action.

In D47.10.17 pr. a similar situation involving contra bonos mores conduct of a plaintiff arises, but the existing requirements founding the actio iniuriarum are sufficient to place a social prohibition on it. Here Ulpian states that where a person strikes a slave with the permission of one owner, whom he believes to be the sole owner, he is not held liable under the actio iniuriarum either to the consenting owner or the joint owner.[63/] However, si scii plurium ei quidem qui permisit non competit iniuriarum ceteris competit. The act which would appear contra bonos mores here is, of course, the trapping of the defendant into striking a jointly-owned slave and thus rendering him potentially liable to the co-owners. However, consent is a good defence to the action of a consenting owner in accordance with the requirements for iniuria[64/] and similarly the defendant cannot be held liable to co-owners of whom he has no knowledge.[65/] In D47.10.15.15 a problem of particular interest arises in this connection since its treatment by the jurists not only affords further evidence of their attempt to curb undesirable activities by denying a legal remedy but also indicates that that they formulated no delictual notion of implied consent.

For example, Ulpian says that a person who speaks to a married woman, or attempts to take away her attendants when she is dressed up in clothes similar to those worn by a prostitute, is not liable to the action. On a strict legal analysis of liability under the delict of iniuria one would

say, today, that such a woman had impliedly consented to the risk of being insulted.

Thus in terms of the modern law principle of volenti, though the woman had not specifically consented to run such a risk or had not even considered the risk, her action would fail on the grounds of fictitious or deemed consent. However, here the defendant is said to be relieved from the obligation in delict not on the grounds of implied consent but on account of the plaintiff's deceit. Consequently, this might indicate that where no specific evidence of real consent existed, the jurists were reluctant to imply it. Again as in the case considered by Gaius[66/] it is submitted that the defence of deceit was allowed, not primarily as a result of applied reasoning from legal principle,[67/] but simply to provide a solution in a situation not previously dealt with under the delict, which would prohibit a certain course of conduct; that is by ensuring that husbands would in future take sterner measures against this type of 'trapping' conduct of their wives. Had the corruption of slaves and married women not been considered serious enough to warrant urgent domestic action then doubtless when such cases first arose the delictual obligation would have been maintained.

From this examination of consent as a defence to dolus, iniuria and furtum the following conclusions can be drawn about it with regard to these delicts :

(a) Consent prevented the delictual obligation from being established rather than simply rendering it unforceable, i.e. consent rendered the case ab initio, legally irrelevant by precluding a particular delictual requirement.

(b) As express consent evolved to regulate obligations in contract,

consent in delict may also have been considered in similar terms, hence, the references to specific and ostensible acts of volition.[68/]

(c) There is no indication that the jurists envisaged or formulated any defence of implied consent (see D.47.10.15.15).

We revert now to the discussion specifically of consent in relation to Aquilian Liability. Firstly, it may be said that though the Digest 9.2 texts do not specifically mention it as a defence, at least three texts[69/] turn on the notion of express consent. On the other hand, situations which today would be recognised as involving implied consent are determined on specifically Aquilian grounds, i.e. solely on a culpable assessment of the defendant's act without any reference to the actions of the plaintiff.

The absence of discussion by the jurists in the D.9.2 texts of the question of consent as a defence to the Aquilian action as opposed to its treatment in connection with dolus, iniuria and furtum is to a certain extent natural. These three delicts dealt with intentional courses of conduct, i.e. deceit, insult, and theft, to which the defence of consent would have had immediate application. The developed Aquilian action was primarily concerned with the notion of loss, brought about by fault, irrespective of whether the fault was deliberate or not.

It may be said that three factors tend to prevent the jurists from discussing the defence of consent in those texts on the lex Aquilia in D.9.2 which deal with the deliberate infliction of loss and in which one might have expected to find some mention of this defence, as it is found in connection with the other three delicts. The first and main reason is that in the majority of texts dealing with dolus, consent is not factually

present in the cases considered, consequently the jurists simply elucidate the particular points at issue in terms of the lex rather than hypothetically discuss delictual defences. For example, the meaning of occidere[70/] as it appears in chapter one of the lex;[71/] the question of the actio in factum for damage not done corpore corpori datum;[72/] liability where the defendant has a right to act;[73/] liability in the case of several co-defendants;[74/] liability under chapters one and three where two mortal blows are given by two defendants;[75/] the criminal action (Actio legis Corneliae) and lex Aquilia;[76/] the concurrence of other delictual actions;[77/] the meaning of usserit and ruperit in chapter three of the lex;[78/] The liability of a municipal magistrate;[79/] the question of interesse;[80/] and the defence of necessity.[81/] Thus, in most cases involving dolus in D.9.2 the question of consent is not the point in issue.

But even in those texts where liability turns on consent the jurists never make the same explicit reference to it as a defence as is found in, for example, D.38.5.11. For example, in D.9.2.27.30 a text which involves ruperit, Ulpian merely states that a wife who pierces beads given to her by her husband is liable under the lex Aquilia where she acted invito vel inscio viro. Similarly in D.9.2.7.4 a text on occidere, there is liability for killing a slave in a contest, nisi si domino committente hoc factum sit.

It might be concluded that a second reason, that which took the defence for granted, removed the need for any discussion thereon. It might appear unlikely in any event that the defence of consent would not be considered relevant against the allegation of culpa of the Aquilian iniuria, but yet be available against a remedy in respect of contumelia under the actio iniuriarum, as both culpa and contumelia we are told, developed from the same generic meaning of omne quod non jure fit.[82/]

Also, if consent was not considered a relevant defence to Aquilian liability potential 'trap' situations would have arisen in cases where the same act also gave rise to the actio iniuriarum.[83/] For example, where a dominus might consent to the torturing of his slave by one wishing to insult him, then later sue for the slave's highest interesse value in the preceding year.[84/]

A third reason for the absence of discussion on consent in the texts dealing with deliberate wrong-doing may be closely connected with Professor Beinart's theory that 'the jurists were anxious to suppress the earlier meaning of iniuria (as nullo jure) as much as possible'.[85/] If this were the case, it would be natural for them to play down the defence of consent since its effect on Aquilian liability would be to recognise that the defendant had inflicted loss on the plaintiff by virtue of a justification personal to him, in much the same way as the defence of self defence was justified by the Twelve Tables on the grounds of legal authorisation.[86/] For example, Greuber comments on D.9.2.7.4 as follows

> 'In virtue of the permission (of the dominus) he has a right to do the act and on that account the damage is not done iniuria cf.D9.2.4.1 (a case of the Twelve Tables' self defence) and D.9.2.5.3 (where a shoemaker has a right to chastise).' 87/

It is also interesting to note that Professor Beinart has shown that though the tendency of the jurists was to eliminate the earlier notion of iniuria in the lex Aquilia in favour of the broader concept of culpa as fault ('wherever possible and where bold enough') the earlier notion 'had by no means died out and in some cases even flourished'.[88/] Thus, in relation to the defence of express consent in the lex Aquilia it might be said that even though express consent could have been affected by the jurists ignoring the earlier meaning of iniuria as nullo iure, it clearly

survived as a recognised defence in certain cases; for example in contractual situations involving culpa and patrimonial loss.[89/] Its survival as a defence to the Aquilian action may also have been aided by the formal approval given to it by the jurists in the other delicts, i.e. iniuria, dolus, and furtum, which would later explain why the Canon law rule of the Liber Sextus as applied to the lex Aquilia may have arisen from a non-Aquilian source.[90/] However, it can be said that in one important respect its legal function in the Aquilian action, as opposed to its function in the other delicts, may have altered with the shift in Aquilian liability from the concept of a defendant acting without a right (nullo iure) to one acting with fault (culpa). For example, like self defence, the plaintiff's express consent to damnum would, where iniuria was construed as nullo iure, vest the defendant with a justification akin to a personal dispensation,which prevented his actions from being characterized as unlawful and hence precluded the existence of iniuria. However, consent would not have the same immediate effect on the question of legal relevancy where the basis of the delict rested on damnum and fault. As Professor Beinart suggests, actions of the defendant which previously had been carried out with impunity due to the exercise of a private right did not automatically exempt him from liability on the basis of culpa as fault. Consequently, with the development of culpa consent may be said to have developed into a defence which merely rendered the delictual obligation to compensate unenforceable under the lex Aquilia, rather than entirely precluded its existence. It might also be said, in relation to the juristic disregard of iniuria as nullo iure, that this may have indirectly affected cases which today would have been decided on the basis of implied consent, by preventing this defence from evolving in Roman law. On the other hand, by emphasising the issue of fault (culpa)

over that of the notion of a personal justification, the Roman jurists may be said to have laid the basis for the later-day defence in delictual law on patrimonial loss of contributory negligence, the development of which was facilitated by the glossatorial theory of culpa-compensatio.[91/]

Consequently, the modern law defence of express consent may be seen to have stemmed from a more ancient source than that of contributory negligence.[92/] In the three texts which may be said to turn on the question of express consent, it would appear that either ground of liability, i.e. culpa or dolus, might be excluded though consent to the risk of negligence arising would not constitute a valid defence where the defendant acted deliberately. For example, in reference to D.9.2.27.29 (where Ulpian states that it was usual, when entrusting to a craftsman a delicate object to be worked on, to agree that it should be done at the owner's risk) Grueber has pointed out that such consent would only exclude liability under the lex Aquilia and locatio conductio provided that artificer did not act dolo.[93/] Again in D.9.2.7.4 (where culpa has to be read as 'fault' generally) the consent of a dominus to his slave's participation in the games would deprive him of the right to recover were the latter injured, unless the opponent cedentum vulneraverit.[94/] Both these cases deal with consent to an unintentional damnum, but in D.9.2.27.30 there is evidence that consent would have acted as a defence in situations similar to those arising under the other delicts, albeit that in this particular case it could be argued that the Aquilian requirement of Damnum was lacking. Hence, it would appear if the wife had not pierced the beads invito vel inscio viro there would have been no liability, though, as Van der Heever has suggested on the analogy of D.9.2.27.28 the action of the wife may actually have enhanced their value.[95/]

The first apparent difference between consent in the delict of

damnum iniuria datum and in the other delicts considered above, lies in the expressions adopted by the jurists to describe its effect. In the other three delicts consent is discussed in terms which suggest that it was inconsistent with the existence of a particular delictual requirement. In relation to furtum for example Ulpian states that a person who takes something from another in the belief that the latter has consented to this, cannot be considered a thief, since :

> 'quid enim dolo facit, qui putat dominum consensurum fuisse, sive falso id sive vere putet ? is ego solus fur est, qui adtrectavit, quod invito domino se facere scivit'.96/

Similarly, in Institutes 4.1.7 it is stated in a similar discussion on consent that 'furtum sine affectu furandi non committitur'. In a rescript of Diocletianus and Maximianus the same view would appear to prevail in the wrong of dolus, as it is stated in absolute terms, that 'nec umquam volenti dolus inferatur'. 97/

Again Ulpian would also appear to consider that consent precluded the delictual obligation from arising under the delict of iniuria by stating in D47.10.1.5 that 'nulla iniuria est quae in volentem fiat'.

In the developed delict of damnum iniuria datum, however, the evidence tends to suggest that consent was not attributed with the same radical effect. The few juristic comments on it in the Digest would tend to indicate that it only affected the delictual obligation to compensate in respect to what would now be termed enforceability. For example, the words commonly used to describe its effect on the availability of the Aquilian action suggest that the remedy was simply barred than had never existed. Thus Ulpian states in D.9.2.27.29 where a cup entrusted to a jeweller sustains damage that 'plerumque artifices convenire solent cum eiusmodi materiae dantur, non periculo suo se facere, quae res ex locato tollit actionem et Aquiliae'. As an obligation would also arise

under the locatio-conductio contract in such cases, only a special agreement beforehand by the parties to a pactum de non petendo would ensure the craftsman's immunity from normal contractual and delictual liability.

Hence, on damage arising, the issue would not appear to involve the existence of the delictual obligation to compensate, but whether the right to enforce it had been taken away (tollit). Similarly, in D.9.2.7.4 Ulpian speaks of the Aquilian remedy being rendered inapplicable 'cessat' suggesting that a prior delictual obligation arose on the grounds of the injuries sustained by the slave in the arena.[98/]

The requirements of the delict itself, damnum iniuria datum, would also suggest that, unlike the effect of consent in the other delicts, it could not preclude the establishment of the delictual obligation. As damnum is discussed by the jurists in terms of what constituted a patrimonial loss, only the second requirement of the delict, iniuria, is susceptible to reduction or avoidance by consent.

Under the early meaning of iniuria as nullo iure, a strong case can be made for the view that consent prevented the establishement of this requirement by giving the defendant a justification as has been stated above. In the same way that consent was fatal to contumelia in the actio Iniuriarum, one might have expected similar juristic statements on the lex Aquilia to the effect the nulla iniuria est quae in volentem fiat.[99/] However, with the development of iniuria of the lex Aquilia by the jurists into the wider concept of fault (culpa) and away from the concept of liability based on actions of the defendant done without clear justification,[100] it is difficult to see how consent could latterly have affected the initial relevance of questions of culpa, in the same way, especially where factors such as imperitia and infirmitas came within the ambit of the lex. The

situations in which consent is discussed in the D.9.2 texts[101/] tend to suggest that its effect on damnum iniuria datum was of a non-specific nature (unlike its function in Furtum, Dolus, and Iniuria) in that it did not particularly bar the Aquilian action due to any unique effect on delictual culpa. On the other hand, it would seem more appropriate to view the effect of consent in terms of a separate, and , sometimes informal arrangement between the parties which precluded in certain circumstances the right of one of them to initiate any form of litigation, delictual or contractual, against the other.[102/] Thus, it might appear that in respect to the Aquilian obligation, consent may not have excluded the issue of culpa, but may simply have acted as a bar to recovery. This would explain why consent, even to an intentional act of wrong-doing is not fully discussed in Digest 9.2 as it is in the other delicts.[103/]

If we compare the conclusions reached on the form of effective consent required in the other delicts with the three Aquilian texts which contain most of the direct evidence we have, it can be said that they tend to confirm the fact that the jurists had not formulated any abstract notion of willingness without volition generally in the law of Delict, but were content simply to look to the express manifestation of consent in each case (e.g. a condition in a locatio conductio contract, [104/] or the words of a dominus in offering his slave for combat). Merely handing over pearls to one's wife for her use does not, apparently, imply consent to their piercing,[106/] though, apart from enhancing their value, it is difficult to see in what other way the wife could have used them.

In respect of this particular text of distinction must be drawn between knowledge in relation to the defendant's liability and knowledge in relation to the defence of consent, since it might appear that as

liability arises where the wife acts invito vel inscio viro there would consequently be no obligation where the husband agreed or knew of the act. However, this does not necessarily follow. Certainly, the husband's consent would constitute a good defence. It is submitted, however, that mere knowledge alone - though lack of it would found liability - would not support such a defence. This follows from the same jurist's[107/] statement in D50.17.145 in the delict of Dolus where he stresses that it is qui sciunt et consentiunt which constitutes the defence of consent not qui sciunt vel consentiunt, though lack of knowledge alone would also found the obligation.[108/] Again this emphasises the point that consent may have been thought of as having to be expressed; mere knowledge and sufferance, though implying consent, being insufficient in Roman law. It might be said that, as far as the lex Aquilia is concerned, the only instance of consent to an act being implied from knowledge and sufferance occurs in relation to the dominus' liability for the actions of his slave.[109/] Here, however, the question of the constitution of the delictual obligation is not a point at issue, since the defendant's consent determines the secondary question of the form of the action, i.e. direct or noxal, rather than the primary question of whether the slave's act, in relation to the plaintiff, constituted an iniuria. Indeed in these special situations, as for example in vicarious liability, the defendant's knowledge and consent may even be irrelevant.[110/]

That there has to be more than consent merely implied from the plaintiff's knowledge and conduct to constitute a defence based on his deliberate actions is suggested in Roman delictual law by texts other than D50.17.145 though perhaps not stated quite so succinctly. For example, in D38.5.11 Paul states that 'non videtur patronus fraudari eo quod consentit; sic et quod volente patrono libertus donaverit non

poterit Fabiana revocari'. Here a patron cannot recover certain donations, which he has previously given his consent to, under the will of a libertus. However, as such donations may so deplete the libertus' estate that in fact consent to them amounts to a renunciation of the patron's jura in bonis, [111/] it is very unlikely that this could be implied, especially as Justinian[112/] states that release from the rights of patronage generally is effected by narrationem ..... inter vivos actitantur vel in his quae ex testamento vel codicillis scriptis vel sine scriptis proficiscuntur. Similarly, in Codex 2.4.34 where a claimant is barred from recovering what was owed to him under a guardianship fund, his consent, which is a complete defence to the action for fraud, is specific as the rescript states that transactionis administratae tutelae indebiti vos obligationem fratri vestro remisisse. Where the deliberate act is an insulting one, the same can be said to apply as for example in D.47.10.17 where the consent to the striking of a common slave is said by Ulpian to be unius permissu. Thus, though there is no specific statement in the D.9.2 texts on the lex Aquilia as to what constitutes consent to an intentional act of wrong-doing, it would appear unlikely, especially in view of the pearl case in D9.2.27.30 that anything short of express consent would suffice as a defence. Certainly in relation to unintentional acts in the lex Aquilia the evidence in D9.2.7.4 and D9.2.27.29 would indicate that volition had to be spedifically manifest.

[When we turn to the question of consent in the Aquilian texts which involve damnum caused by unintentional acts, it can be said that though the jurists recognised express consent as a defence in certain cases where it was possible to have an agreement beforehand on the question of culpa,[113/] they developed no abstract notion of willingness in cases where today, by application of the volenti principle, consent would be implied.] In other

words, in these cases the defence of consent is inappropriate. As has been suggested above, this may have been due to the eagerness of the jurists to promote the concept of culpa liability over that of nullo jure. However, even assuming that this was not the main reason, the application of a doctrine of implied consent here would have involved a theoretical analysis of delictual consent contrary to the more pragmatic approach of the jurists.

It can be said that implied consent as we know it today might have arisen in two situations in these Digest texts (a) where the acts of the plaintiff and defendant or of the plaintiff alone are ostensibly culpable, and (b) where neither of their acts can be said to be culpable.

In the first case, however, we find that the Roman law approach to liability is that of quod quis ex culpa sua damnum sentit, non intellegitur sentire.[114/] For example, Ulpian in D9.2.9.4 relieves the javelin throwers of liability on the culpa basis that the slave non debuit per campum jaculatorium iter intempestive facere, and in D9.2.11 pr. suggests a similar possibility where a slave has his throat cut by a barber, stating that nec illud male dicatur si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere. Again Paulus in D9.2.28.1 mentions in a case where a person attempts to sue for injuries sustained as a result of falling into an animal pit dug in an unaccustomed place, that haec actio ex causa danda est. id est si neque denuntiatum est neque scierit aut providere potuerit, et multa hujusmodi deprehenduntur quibus summovetur petitor, si evitare periculum poterit. Though today, in these situations, it would also be possible to determine the question of liability in terms of a voluntary assumption of risk[115/] the jurists simply think of the question in terms of culpa, even to the exclusion of the suo jure defence in D9.2.9.4.

In the second case, which involves the situations in which today a voluntary assumption of risk alone would decide the issue,[116/] the jurists simply state the lack of liability and then go on to justify their decisions in a pragmatic fashion. Hence, in D9.2.7.4 Ulpian tells us that there is no liability for killing another in a public contest quia gloriae et virtutis causa, non injuriae gratia videtur damnum datum. Similarly, Alfenus, in D9.2.52.4 when asked about Aquilian liability in a case where a slave boy is injured in a ball game, replies that there is no liability cum casu magis quam culpa videretur[117/] factum. This second category clearly illustrates the lack of any formulated principle of implied consent to unintentional acts in the lex Aquilia, since here the lack of culpa[118/] in the defendant's acts and thus liability, is justified on different grounds rather than on the specific ground of volenti as in modern law.

In comparing the nature and scope of the defence of consent in the lex Aquilia in classical times with the present day patrimonial principle of volenti non fit iniuria it may be said that

(a) (i) Consent in the delict of Damnum iniuria datum rendered the Aquilian remedy unenforceable rather than precluded the establishment of culpa (as intentional and unintentional fault).

(ii) From the cases involving the application of volenti in modern delictual law on patrimonial loss both effects may be ascertained. The precise legal effect of consent in modern delictual law on patrimonial loss has yet to be fully resolved. In certain cases where consent is express, its effect resembles that of a pactum de non petendo [119/]

However, where it is said to be implied it has not been decided whether it renders the delictual remedy unenforceable or precludes the delictual obligation entirely. This lack of resolution is of practical significance in actions raised by dependants.)[120/]

(b) (i) Effective consent to the delict of Damnum iniuria datum would appear to have required some express indications of volition in conformity with consent in other branches of the law of delict. In the majority of cases involving unintentional fault the defence would have been inapplicable as such real consent would not have arisen.

(ii) In modern patrimonial law consent may either be express, as in Roman law, or imputed despite the defendant's lack of volition.

The lack of any theory of implied consent in the Roman law of Delict, similar to that found in the present day defence of volenti, may to some extent reflect the difference between the Roman law and Modern law approach to the whole question of the delictual obligation to compensate.

For example, as early Roman law sought to regulate the occurrence of talio following acts of violence by the monetary provision of the Twelve Tables for injuries such as os fractum and membrum ruptum, the act of wrong-doing itself gradually came to be considered as giving rise not only to liability to pay but to a legal obligation in delict. The abstract conceptualization of this as an obligation which arose ex delicto may probably have been drawn from the concept in the developed law of contract that agreement founded a legal relationship giving rise to obligations or iura in persona ex contractu.[121/] Hence, a similar legal relationship producin

a delictual ius in personam arose directly on the occurrence of a wrong. On the other hand, the delictual obligation in modern South African Law has been said to arise, not simply from a 'pure' wrong, arising in a particular situation, but from the existence of a duty of care,[122/] the breach of which constitutes a wrong and thus affords the plaintiff a remedy.[123/] In other words the delictual obligation to compensate owes its existence to the breach of a duty which the defendant owed the plaintiff and which was antecedent to the specific act which produced the loss. The modern concept of a delictual obligation to compensate would thus appear to be closer to the analogy of the obligation in contract to pay damages than that of the obligation to compensate the plaintiff in Roman Delictual law in that the remedy afforded to compensate the act of wrong-doing does not owe its existence specifically to the incidence of wrong-doing itself but to a prior legal relationship[124/] between the parties albeit implied from the conduct of the parties, by which the plaintiff acquires a legal right not to be deliberately or carelessly injured by the defendant. This relationship however, unlike a contractual one, is not consciously entered into between the plaintiff and the defendant and thus is not established by references to the volition of the parties but by reference to their general conduct. Consequently where a legal system such as English law is prepared to imply that duties or obligations exist between certain parties, prior to the actual incident of wrong-doing, without reference to their volition but merely in terms of their conduct, it is hardly surprizing to find a legal concept which recognizes the possibility that a plaintiff can consent to forego such duties, without any reference being made to his volition, or actual state of mind, but similarly in terms of his general conduct.

On the other hand, as the obligation which binds the parties vinculum iuris in Roman law only arises from the specific act producing the loss

itself, effective consent to forego the right to acquire compensation would appear more likely to require some express indication of the plaintiff's volition prior to the act of wrong-doing, rather than be satisfied by the mere implication of such consent from his general conduct. This would be especially so where the parties involved in such a compensatory action were total strangers.

From this it would follow that so far as the present day interpretation of volenti[125/] includes implied consent it would not supply a relevant defence to the actio legis Aquiliae, nor does it appear to owe its currency to the development of any delictual principle of consent in Roman law. Indeed, such an interpretation would only appear appropriate in circumstances in which the act producing the patrimonial loss ceased to supply the sole criterion for determining the existence of the delictual obligation to pay compensation.[126/]

Also, there is little indication that express consent was considered to preclude the developed delict of damnum iniuria datum as is sometimes the case in modern delictual law on patrimonial loss.[127/]

Since Roman delictual law on patrimonial loss cannot be considered to supply any foundation for the present interpretation of volenti which includes the concept of implied consent or for the view that consent may preclude the delictual obligation it must now be considered to what extent Roman-Dutch Delictual law on patrimonial loss provides an authoritative basis for this.

CONSENT IN ROMAN-DUTCH DELICTUAL LAW RELATING TO PATRIMONIAL LOSS

Adherence to Express Consent of Roman Law

It might first be said that like the defence of consent to the Aquilian action, there is no evidence of consent ever being implied in cases of patrimonial loss, as frequently arises under the modern volenti principle.[128/] In fact, due to strict adherence to the Digest texts on this point, the law of the Netherlands in the 17th and 18th Centuries varies little from that of Roman law, especially in cases of patrimonial loss occasioned in games. The evidence, for example, in cases of non-patrimonial injury or insult tends to show that consent in the delictual law of the Netherlands had to be express and was not considered in abstracto. Thus, though Schorer in the 1767 edition of Grotius' 'Inleidinge', commenting[129/] on a case of civil injury arising from sexual intercourse states that, 'salva tamen hoc casu puellae patri actione injuriarum quod aequitati vix consonum, nam volenti nulla fit injuria', this last clause, though similar in form to the present-day maxim 'volenti non fit injuria', cannot be attributed the same legal interpretation.[130/] Indeed, as Groenewegen's note in the 1738 edition of 'Inleidinge' refers to Regula 27 of the Liber Sextus at the same place, it would appear that Schorer's 'volenti nulla fit iniuria' simply expresses the Roman and Canon law notion of consent. This is perhaps apparent from the reference he makes in his Notes (3.35.8)to Puffendorf's 'De Iure Naturae et Gentium' 3.7.8 where the German mentions the effect, in civil cases, of consent to sexual intercourse; 'verum ubi ipsa consensit, iacturum quidem facit rei irreparabilis, de iniuria tamen sibi facta queri non protest'. Here it would appear that, as Puffendorf carefully uses the word 'consensit' in

relation to the woman's participation in the sexual intercourse, he denies the civil remedy not merely on the grounds of her general predisposition to participate in the act complained of, but more specifically in terms of her intention or resolution.[131/]

Schorer also affords some evidence in his notes in the 'Inleidinge' that implied consent was absent, in the law of the Netherlands, in certain cases of patrimonial loss which today would be considered in terms of the 'volenti' principle. For example, Grotius states in 'Inleidinge' 3.34.5 that a person who has voluntarily taken part in a fight is not entitled to compensation. From the use of the word 'voluntarily' one might be tempted to assume that Grotius had some form of implied consent in mind. However, Schorer justifies this denial of liability on specifically Roman law grounds by stating that 'the reason is because both are concerned in an unlawful act. Now by the lex Aquilia the action for damages ceases if there is fault on both sides'.[132/] He may possibly have been influenced in giving this 'contributory' culpa justification by Paul's statement in D9.2.10 that 'nam lusus quoque noxious culpa est'; that is, by similarly considering that a participant in a fight, which is criminally prohibited, indulges in a form of culpable conduct. Consequently, he adds by way of example : 'for instance if a person challenged to a duel accepts and is wounded he cannot sue the challenger even for medical expenses'.[133/] Though, today, liability in such cases might be said to be capable of being determined in terms of the voluntary assumption of the risk of intentional injury,[134/] it would seem that this justification for denying liability was unnecessary in the law of the Netherlands due to the fact that as in Roman law the act of wrong-doing or culpa, itself, constituted the obligation to compensate without any reference to the breach of a prior duty of care. Consequently, any defence to such an action, based on the general conduct of the plaintiff,

would inevitably involve the concept of culpa rather than that of the notion of implied consent to the breach of an antecedent duty.

Secondly, as delictual consent, following Roman law, was generally thought of in terms of specific communications, Roman and Canon law statements were sufficiently authoritative to preclude the need to formulate or refer to any new pronouncement on the civil effect of consent capable of a wider interpretation, as in the case of the present day maxim. Consequently, three of the standard references more frequently used by the Roman-Dutch jurists are to Ulpian D47.10.1.5 and D50.17.145, and to Regula 27 of the Liber Sextus of Boniface VIII. Thus, Matthaeus in Prolegomena 3.3 of De Criminibus cites D47.10.1.5 in answer to the question 'an volenti fiat iniuria?'[135/] , Van Leeuwen in Book 4, cl.36, s.4, of his 'Commentarius' on Roman-Dutch law , in a case of abduction cites Regula 27 in denying liability; Van der Keessel in 'Praelectiones ad Jus Criminale' 47.10.12 cites Book D50.17.145 and D47.10.1.5 when defining 'passus est', in relation to civil Iniuria; and again in 47.10.2 (p.265) D47.10.1.5 is cited in relation to the double action of a father on account of injury to his child[136/] - 'nisi forte filius sciens et volens injuriam passus sit'. Similarly, Voet cites D47.10.1.5 when stating in P.47.10-4 that defamation is suffered against one's will and without consent.

It might thus be concluded from the scanty references made to consent in the delictual law of the Netherlands (all of which incidentally relate to various forms of personal injury and insult) that the scope of the defence of consent as encompassing implied consent in delictual actions for patrimonial loss was not developed beyond that of its Roman predecessor. This may be attributed to two factors : (a) In order to have developed the scope of the defence the Roman-Dutch jurists would first have had to

have developed the existing concept of consent based purely on volition in order to produce a species of consent which was not dependent on or even referable to proof of a party's actual state of mind or volition. Only when this jurisprudential development had been achieved in respect to consent could the scope of the defence of consent in delictual actions have been extended to cover situations in which a plaintiff had been injured without consciously considering beforehand whether or not to agree to the risk of incurring the injuries which were later sustained.[137/] However there is very little abstract analysis of consent by the jurists, which such a development would have required, if only to justify court practice. On the other hand, as was said above, reference to Roman authorities on this subject seemed adequate. This is apparent in texts in which the jurists comment on consent generally in delict without referring to any specific incident of wrong-doing.[138/] Here they simply tend to state that consent precludes an actionable wrong and uncritically cite Roman authorities for this proposition. For example, Voet (in Pandects 47.10.4) when discussing Wrongs and Defamatory Writings states that 'a wrong of this type can be suffered by mere human beings against their will but not with their consent' and cites D47.10.1.5. Similarly,Van der Keessel unhesitatingly follows the Digest authorities when defining when a civil injury is said to be suffered (pausing only to comment on a point of translation in one of them).[139/] Perhaps the only example of a Roman-Dutch jurist actually analysing the legal concept of willingness is afforded by Matthaeus.[140/] However, this is done in an attempt to reconcile a fragment by Ulpian on delict[141/] with the effect of consent in contemporary criminal law and relates more to the quality of express consent than imputed willingness. Consequently, this conclusion that a wish or desire to be legally effective depends on 'notitia' and 'appetitus' without any 'disturbance of the reason'

provides a further example of the general acceptance, consciously or otherwise of Roman juristic notions on this point, i.e. that a deliberate act of volition was required. (c.f. Ulpian's statement that 'nemo fraudare eos, qui sciunt et consentiunt', D50.17.145, where on the analogy of contract only the consent of a sane person will have any legal effect.[142/]

The second factor which may have prevented any extension to the scope of the defence to include implied consent may simply have been that : (b) there was no practical requirement in any case to modify the Roman concept of consent in delict as the type of contemporary cases in which the defendant alleged consent, before the industrialisation of Western society produced a greater frequency of patrimonial claims, would still have been basically similar to those under Roman law, i.e. mainly involving non-patrimonial issues such as seduction[143/] and abduction.[144/] It is significant in this respect that the Roman-Dutch texts on consent relate to personal insult rather than to patrimonial loss. This tends to illustrate that, unlike today, where the bulk of the case law on consent in delict involves patrimonial actions, the frequency of such actions before the period of industrialisation was not sufficient compared to the volume of such cases after, to provide the law of the Netherlands with a substantial amount of case law on patrimonial consent from which some developed principle might have been formulated.

Non-adherence to Roman Law Concept of Damnum

Though it might appear that there was no need to modify the Roman law concept of consent and the scope of the defence in the law of the Netherlands since the main delictual situations in which that question would arise were still basically similar in both systems, it might be

noted in passing that a modification was made in the Dutch delictual action on patrimonial loss in relation to the concept of damages awarded on account of physical injury to the person.[145/] For example, Grotius states in 'Inleidinge' 3.34.2 that :

> 'apart from a wrong against the person giving rise to the obligation to pay the surgeon's bill and make good any loss of profits incurred, the pain and disfigurement of the body although not really capable of compensation have a money value put on them.'[146/]

This, of course, is contrary to the text of Gaius in D9.1.3 where he states in relation to the actio de pauperie that disfigurement is not to be taken into account in reckoning damages 'cum liberum corpus aestimationem non recipiat', though he does allow 'in curationem factarum et operarum amissarum quasque amissurus quis esset inutilis factus'.[147/] An interesting distinction arises in this respect between the laws of Holland and Friesland in that the former province would appear to have been more eager to modify the Roman texts on this point, and also to accept and modify certain others relating to the question of the monetary award in the Actio Iniuriarum, than the latter, which due to the continued importance of its Provincial Ordinances adhered more closely to the Roman precepts[148/] it incorporated. In the case of the action for profitable amends for example the law of Friesland prohibited the plaintiff from assessing his own penalty since the Provincial Ordinances which provided for the recovery of fixed sums in such cases excluded this recovery aspect of the actio Iniuriarum;[149/] on the other hand the law of Holland, in which similar Ordinances if they existed had probably fallen into disuse, incorporated personal assessment, but modified it by requiring the plaintiff to offer a special oath that he would not suffer slander for anything less than the sum sought.[150/] Though the addition of such an oath might appear natural in such a case, among God-fearing people[151/]

Van der Keessel correctly remarked on the inevitable textual modification required that:

> 'as to the Plaintiff offering an oath, not a single word occurs in our texts; although the eminent Voet does speak as if it was provided by the civil law (P.47.10.13). Nor do the arguments put forward by Matthaeus persuade me to the contrary.' (De Crim. 47.4.3.1).

Similarly, in the question of patrimonial damages for physical injury to the person, the law of Friesland though incorporating the utilis action of the lex Aquilia with the Ordinance fines, denied that an assessment of pain and disfigurement [152/] was possible under the former head of claim. As Huber says,[153/] 'The action for injury by deed is framed with a double scope - firstly, for the penalties fixed in the Ordinance, secondly, for the payment of all costs, damages and interest, which claim must really arise from the lex Aquilia on damages; but payment for pain is not awarded by the court;' the reason being that 'payment for pain or deterioration of the body can hardly be demanded (D.9.1.3) except in so far as a fixed tariff is placed in the Ordinance (Ord.2.2.5) on every limb and injury'.[154/] On the other hand, the law of Holland, though basing the assessment of reparation in such cases entirely on the analogy of the utilis action of the Aquilia without also referring to a system of fixed 'fines', allowed the recovery of damages on accouht of pain and disfigurement.[155/] In this case, it would appear that the departure from Roman delictual law was too obvious to allow Voet to impute such a construction to the interpolated text Ulpian in D.9.2.13[156/] princ; consequently, he merely states in 9.2.11 that 'by custom an assessment for scarring, pain and disfigurement falls to be made good, although no account was taken in Roman law of such things'. In this respect it can be said that the majority of Roman-Dutch jurists

unlike their later Scottish counterparts found it more convenient to rationalize the customary right of action on account of pain, suffering and disfigurement in terms of the Aquilian action[157/] and reipersecutory claims[158/] than under the aegis of the actio injuriarium. Though either approach jurisprudentially to these customary remedies would have been available, since such grounds of action were unknown in classical Roman law, the Roman-Dutch approach is to be preferred to the Scottish one. Apart, for example, from being in accordance with Natural Law concepts of loss,[159/] such a reipersecutory approach would have been more satisfactorily justified as a development of the freeman's actio utilis in D9.2.13 princ. than of the actio injuriarum, where such injuries were caused unintentionally.[160/] In the case of the dependant's claim for loss of support, the Scottish Institutional writers[161/] also considered this action comparable with the Roman action on account of Iniuria, than Damnum iniuria datum perhaps due to the retributory nature of the customary remedy for personal injury of Assythment. However, in both respects the Roman-Dutch approach has been recognised in modern Scottish law as being preferable though not now acceptable; for example, Lord MacMillan pointed out in 1943 in Stewart v L.M.S. Railway Company S.C. (H.L.) at page 39, that in respect to the action for personal injuries, 'the utilis actio legis Aquiliae was a nearer analogue of the modern action' (called the actio Injuriarum) but that it was 'evident from the authorities in Scotland that it was rather on the actio injuriarum that they founded themselves'.

The difference of approach between the law of Friesland and Holland in relation to the acceptance and modification of Roman law texts may perhaps have reflected the differing influence on the jurisprudence of both provinces of the Seventeenth Century concept of Natural Law. For example, as Grotius was both one of the foremost exponents of the theory

of Natural Law and a leading commentator on the Law of Holland it would have been appropriate for that province to have taken the lead in incorporating such theories through the medium of Roman law, rather than the other. Thus, in relation to textual modification, Lawson (remarking on the work of the natural lawyers) states that :

> 'the required practical results had been obtained, but they gave it a firm basis of theory. Henceforth it was possible even in a country which claimed to have received Roman law as a whole to justify departure from strict Roman doctrine.' 162/

The Approach to Liability in Games Cases

In relation to the question of implied consent, however, not only is this concept not discussed by the Roman-Dutch jurists in their commentaries on the patrimonial delict, but neither is there any evidence that such a concept was applied in practice by the Civil Courts when denying patrimonial liability.

For example, the approach to the question of liability arising in games situations clearly illustrates (when compared to the modern principle of volenti) the absence of any juridical application of implied consent in the patrimonial law of both Holland and Friesland.

The Roman law approach to the question of unintentional patrimonial loss arising from games may be briefly summarised as follows :-

(a) Where a non-player was injured, evidence of culpa, in the case of private sport or exercises, was looked for by the classical jurists in relation to both the nature of such activities (Paulus D.9.2.10) and their location (Ulpian on Melas' barber case D.9.2.11 princ.); if culpa was absent in both of these respects the participants were not deemed to be liable; cf. Ulpian's remark in D.9.2.9.4 and D.9.2.11 princ. that the

injured party was at fault himself. Hence, though no text states it, it would be logical to assume that a spectator unintentionally injured at the Public Games would have no remedy under the Aquilia since such contests involved neither aspect of culpability i.e. in respect to the location and nature of the sport.

(b) Where a participant was unintentionally injured in the course of such activities, a distinction would appear to have been made between public contests and private games. For example, in the former such injuries among legitimate contestants could never have been actionable, on the grounds that 'gloriae causa et virtutis, non iniuriae gratia videtur damnum datum' (Ulpian D.9.2.7.4); in private games, however, which were not undertaken with precisely the same object, but were more in the way of recreation, a culpa estimation would appear to have been applicable, if only for the purpose of denying liability: hence, Alfensus states in D.9.2.52.4 where a slave boy is injured in a ball game that 'casu magis quam culpa videretur factum'.[163/] In other words there is no fault for such an unintentional injury sustained within the rules of the game, the injury is simply accidental.

In respect to the deliberate infliction of a patrimonial loss outside the particular rules of the sport dolus grounded the Aquilian action in both private games and public contests where a contestant was injured. (Ulpian [164/] D.9.2.7.4) Dolus would similarly ground the action where a contestant deliberately killed a non-participant (D.9.2.9.4.)[165/]

A similar approach, unburdened by concepts of implied consent, consequently appears in the law of Friesland. Thus, Huber, adhering to the two Roman law tests for culpability in cases of private recreation involving non-participants,[166/] denies the delictual remedy for patrimonial

loss where a passer-by sustains unintentional injuries through 'some legitimate bodily exercise at a place set apart for the purpose'.[167/] The notion of implied consent determining the question of liability is similarly absent where the participants are themselves injured. For example, Huber, when discussing the D.9.2.7.4 text by Ulpian in 'Praelectiones Juris Romani et Hodierni' not only agrees with that jurist on the general unavailability of the patrimonial action in such cases by stating that 'Damnum huiusmodi occasionibus datum, non parit actionem, quod hodieque de omnibus publicis et licitis ludorum generibus dicendum videtur,[168/] but also appears to accept his justification for the denial[169/] by implying that the issue is not really one of culpa even where a contestant injures another by mistake during a game 'quia textus hic (D.9.2.7.4) non distinguit,[170/], et in ludum periti non magis quam imperiti veniunt'. On this last point the evidence tends to indicate that as in the case of public contests in Roman law, the determination of liability between contestants was basically a question of deciding whether or not the justification of taking part in a permitted and laudable activity existed, than whether the plaintiff had impliedly consented to the risk of sustaining an injury,actionable in terms of culpa.[171/] For example, it is difficult to see how the denial of liability could have been justified in the situation mentioned by Huber, solely on the ground of implied consent to culpa, as unintentional fault, when due to the varying degrees of competence of the players it would have been impracticable to formulate a general standard of conduct (of the average competent player) against which their unintentional acts could have been culpably assessed.[172/] On the other hand, it would seem more appropriate to say that liability for an injury caused by a contestant, in such cases, was denied on the basis of a specifically recognised justification akin

to a right of immunity which would entirely preclude the constitution of the Delict. This indicates that

(a) in Roman law the notion of culpa as unintentional fault, evolved by the jurists, was not taken as the test for the existence of the 'iniuria' of the lex Aquilia when the Aquilian remedy was sought on account of patrimonial loss suffered at public contests, i.e. the actions of one contestant giving rise to patrimonial loss in another during such a contest were still considered in terms of iniuria as nullo iure than culpa; consequently where it was shown that the loss was suffered 'gloriae causa et virtutis'the defendant could be considered to have acted in a justifiable manner i.e. iniuria was not present and the act was considered jure. (Thus the approach to the question of Aquilian liability in these cases where a contestant was injured without dolus, in accordance with the rules of the public contest would represent some of the few instances in which the jurists found it impossible to advance their notions of culpa or fault as the test for 'iniuria' against the earlier view of it as nullo iure.)[173/] and

(b) the law of Friesland adopted the justification or right of gloriae et virtutis causa relating to public contests under Roman law and applied it generally to all questions of liability in recreational activities (public or private) where one contestant injured another, i.e. the question of culpa as unintentional fault or dolus only arose after it was apparent that this justification did not apply. Thus, in the law of the Netherlands generally, the actions of a contestant giving rise to patrimonial loss were only said to be judged in terms of culpa, as unintentional fault or dolus where it was alleged that

(i) the contest was illegal[174/]

(ii) the contest though permitted was carried on outside the place specially provided for it [175/]

(iii) the act of injuring was deliberately contrary to the rules of the contest[176/]

(iv) a non-contestant was injured.[177/]

In the last case though Voet asserts (without reference to the imputability of culpa) that one contestant will incur no patrimonial liability where he injures another 'in the interests of glory and manly worth' if the same person injures a passer-by when taking part in a javelin contest on a parade ground, liability is denied on the grounds that 'there is not conceived to be any negligence on his part'.[178/] It can be added that though it might be said from D.9.2.7.4 that it is the consent of the master who puts his slave up to fight in the arena which determines the question of liability by precluding the delict, consent in this case simply has the effect of rendering the gloriae causa et virtutis justification operative in respect to any contestant who killed or injured the slave during the normal course of the contest; otherwise no right to inflict such injuries on a slave existed in such cases.[179/]

Even outside the ambit of the games justification, i.e. in situations (i) to (iv) above, there is no evidence to suggest that implied consent palyed any part in determining whether or not a defendant had acted culpably and was hence liable to compensate the plaintiff. For example, where a contestant is injured in an illegal contest, liability in respect of culpa is denied since, as Schorer points out, fault exists on both sides due to the illegal nature of the contest. (Note to Grotius' 'Inleidinge' 3.34.5). Again, when a non-contestant is injured[180/] at a tennis match played in an appropriate place, Huber states that he has only himself to blame for not keeping a proper look-out (Huber 6.4.7). In Pandects 9.2.24 Voet denies that a soldier can be held liable for culpa when a non-contestant is injured in a javelin match held on a parade ground.

Though Ulpian's reason 'quia non debet per campum iaculatorium iter intempestive facere' is not specifically mentioned by Voet, he refers to the D.9.2.9.4 decision.

Thus, it would appear that questions of liability in games cases in the law of the Netherlands were decided primarily in terms of iniuria as nullo iure, with questions of culpa, as unintentional fault and dolus only arising where the requirements of the games justification were not present to preclude the delict.[181/] Where this was so, implied consent played no part in deciding the issue of liability.

THE LEGAL EFFECT OF CONSENT ON THE DELICTUAL ACTION FOR PATRIMONIAL LOSS

So far as the modern defence of volenti, as implied consent is con concerned, there is no indication that this concept either supplied a relevant defence to the Roman-Dutch delictual action for the recovery of patrimonial loss or was a product of Roman-Dutch delictual jurisprudence. One question, however, which still remains to be investigated is whether or not express consent rendered the delictual obligation to compensate unenforceable, as in Roman law, or entirely precluded the delict from arising.

Criminal and Delictual Consent

It might first be said that there is a similar scarcity of reference by the Roman-Dutch jurists to the defence of consent to the delictual action for patrimonial loss, as there is by the Roman jurists to it in their discussions on the Lex Aquilia. However, unlike the situation in Roman law where reference can be made to juristic discussions of consent in other delicts in order to throw some light on its function in the delict ofDamnum iniuria datum, the Roman-Dutch jurists due to the influence of customary law only considered certain of the Delicta privata of Roman law (when drawn on as ius subsidiarium, vel auxiliare) in civil terms. Consequently, though consent in the Roman delicts is discussed in relation to the law of the Netherlands the context is not always civil, nor in this connection do some jurists adequately attempt to distinguish between the nature of a civil and criminal wrong.

In the work 'De Criminibus ad libros 47 et 48 Digestorum Commentarius' by the 17th Century jurist Matthaeus for example we find what might appear to the modern reader to be a curious discussion of the D47.10.1.5 fragment

by Ulpian on the delict of Iniuria, in which Matthaeus attempts to rationalize its import with his own view that consent is no defence to a contemporary criminal prosecution. In his day however, differences in the civil and criminal aspects of acts of wrong-doing were not always fully distinguished.

In prolegomena 3.3 for example he states his view on the effect of consent generally to acts which would otherwise be treated as criminal in his day by the following question and answer. 'Quid ergo si sanae mentis hanc voluerit se caedi aut de saxo praecipitari, an obsequi crimen est ? Est.'

He adds, however, 'sunt tamen, sateor, difficultates non leves; quae hanc sententiam cogitationem premunt, poterat enim opponi quod Ulpianus scribit[182/] volenti non fieri injuriam'. Strictly speaking, there is no reason to suppose that Ulpianus' statement is in opposition to Matthaeus' general view on consent in crime since in Book 56 ad Edictum from which the fragment is taken that jurist was discussing the Praetorian remedy by which anyone insulted could if he wished, personally recover a sum of money from the wong-doer; consent here being a matter between private citizens. On the other hand, in criminal prosecutions in the time of Matthaeus, as the matter at issue would have been between the state and the accused, consent between victim and accused would now-a-days be mainly considered irrelevant.[183/] Similarly though consent in Roman law was recognized as providing a good defence to an action on account of a delictum privatum it did not necessarily do so in relation to a crimen publicum.[184/] Thus, the fact that Matthaeus considers Ulpian's statement in D47.10.1.5 relevant to his argument indicates a certain failure in the contemporary law of his time to make a clear distinction between the civil and criminal aspects of acts of wrong-doing especially as he was not discussing crimen injuria, or crimes specifically constituted

by consent. This is also apparent from his subsequent attempt at reconciliation. For example, he states firstly that 'distinguemus utrum id quod pati quid vult, in eius potestate sit, nec ne. Sit in potestate sit passusque fuerit, nulla injuria est, nullum crimen contrahit, qui fecerit. Sin minus contra respondendum'. However, this reason, unqualified by the fact that it can only apply to certain crimes in which consent is a material factor, e.g. theft,rape, and criminal injuria, literally equates civil wrongs with public crime. The same can be said about his final conclusion in this connection which assumes that the quality of such consent is a relevant factor in ascertaining whether a crime has been committed or not. As he says 'Iniuria igitur cum volenti non fieri dicitur, de plena et perfecta voluntate[185/] id intelligendum'. In a restricted sense his reference to consent in the delict of Iniuria (D47.10.1.5) can be justified, i.e. in relation to those crimes which were constituted in the Criminal Customary Law by lack of consent. Thus, juristic statements on willingness in the delict of Furtum and in certain cases of Iniuria can be validly related to the crimes of theft, rape and criminal iniuria. Otherwise, however, from the modern point of view such statements ought to be strictly distinguished in the context of public crimes. In this respect, later Roman-Dutch jurists appear to have been more discerning in their treatment of consent in Roman Delictual Law and in maintaining the distinction between public and private wrongs. Thus, Van der Keessel for example in his 'Praelectiones ad Jus Criminale' after citing the above passage from Matthaeus adds that though the same act may give rise to both a delictual and criminal action in Roman Law 'propterea delicta privata cum publicis non sunt confundenda'.[186/] Consequently, he deals with Ulpian's statement in D47.10.1.5 strictly in relation to the civil action in the law of Holland for Insult,[187/] whereas

references to consent in Furtum[188] are treated in relation to the crime of theft.[189]

One reason for this early confusion in Roman-Dutch law between the effects of consent on civil and criminal liability, especially where reference is made to the Roman delict of Iniuria, may have arisen from the conflict of juristic opinion as to whether the customary private action brought in respect of hoon[190] i.e. scorn or derision, ought to be thought of as endowed with the penal characteristics of the Actio iniuriarum or have the reipersecutory nature of the actio legis Aquiliae. In essence, the problem lay in attempting to apply the Roman approach to questions of concurrence of actions to a situation in which the customary law produced both a civil and a criminal action. This problem was not so acute when other Roman Law Delicts were considered in terms of the indigenous laws of the Netherlands. For example, in cases of theft and robbery as the state maintained the sole right to prosecute an action,[191] the prohibitions on concurrent penal actions could technically be adhered to since no questions of concurrency could arise. In this respect the Frisian private action for robbery, granted to the victim in situations where the Attorney-General declined or was unable to prosecute, even displayed a limited similarity to the corresponding Roman scheme of actions. Again in the case of the delictual action for patrimonial loss, as it was generally accepted that like the actio legis Aquiliae this was a rei persequendae remedy,[192] no problems arose over the concurrency of a criminal proceeding. In connection with the actions available for insult, however, the customary law provided for both civil and criminal actions; the former, in Friesland being for the recovery of a fixed sum under the Ordinances, and in Holland for an amount estimated and sworn to by the Plaintiff. The victim in both of these provinces could also

add to his action for profitable amends an actio ad palinodiam, derived from Canon law procedure, for amende honorable. Not only was the problem one of simply attempting to apply clear Roman dicta on the concurrency of other actions with the actio Iniuriarum to the customary law on hoon. The Roman-Dutch jurists may have experienced further difficulties when comparing the writings of different Roman jurists on this question. In this respect, Buckland states that 'the law of Justinian was not the same as classical law, the mode of criminal prosecution having changed. The law may not have been the same for all cases of concurrence'.[193/]

In D47.10.7.1 Ulpian would appear to give an account of the operation of the principle of concurrence as it was finally accepted in relation to the actio Iniuriarum. Here he distinguishes the nature of the actio Iniuriarum from that of the Aquilian action by saying that the reason for bringing the former is on account of the actual incidence of wrong-doing whereas the action under the lex Aquilia arises from patrimonial loss suffered. This being so, the private action purely on account of the wrong-doing ought to be denied in favour of the public criminal action under the Lex Cornelia de Sicariis where a slave is killed; the reason being presumably that as both actions pertain to the same aspect of the case, i.e. the iniuria,[194/] and are final, the private action for a monetary sum ought not to render the matter res judicata, thus barring the action in the public interest imposing capital punishment.[195/] As the action under the Aquilia, however, arises to compensate damnum it would not act as a praeiudicium to the public action and thus may be allowed with it. Looking at this from another point of view it might simply be said that as Roman law did not usually allow two actions[196/] which were either both poenae persequendae or rei persequendae on the

principle nemo bis vexari debet de eadem causa,[197/] then where an act of wrongfulness gave rise to a public crime and a private wrong which could be pursued for a penalty, the former action in the public interest took precedence.

Thus, Voet in 47.10.24 states on the strength of D47.10.7.1 the view that:

> 'the Praetor, in exercise of his equitable jurisdiction under the Roman law could make an order that the Plaintiff should abandon the civil action and institute either an extraordinary action or a public trial, lest the private action should prove prejudicial to the public trial.'

There is other evidence, however, that suggests that in some cases penal actions were allowed to run concurrently with the Actio Iniuriarum in Roman Law; Marcian, for example, in D48.6.5.2 is quoted as saying that a person who ravishes a free-born woman is liable to the death penalty under the Lex Julia de Adulteriis and where the father does not prosecute on account of the iniuria any stranger has the right to do so since 'raptus crimen legis Juliae de adulteriis potestatem excedit'. This would appear to be contrary to Ulpian's statement in D47.10.7.1 above and to Justinian's remark in Institutes 4.4.10 that in relation to the delict of Iniuria 'In summa sciendum est de omni iniuria eum qui passus est posse vel criminaliter agere vel civiliter' and can probably only be justified on the grounds that in this type of offence the private action for a pecuniary penalty was also in the public interest in that it provided an added deterrent. Conversely, Gaius apparently confuses the situation in which the Aquilian and the public criminal actions are said to be allowed by denying the concurrence of these remedies. Thus, he states in Institutes 3.213 that the owner of a slave who has been killed by another is free to choose 'vel capitali crimine reum facere eum qui

occiderit' (under the Lex Cornelia de Sicariis) 'vel hac lege damnum persequi' (under the Lex Aquilia). This, of course, is contrary to Justinian, Institutes 4.3.11 and Ulpian, Book 18 ad edictum, cited in D.9.2.23.9 who specifically state 'et', - 'et'.

Matthaeus, himself, adopted the view held by a minority of Roman-Dutch jurists, that the remedy afforded by the Actio Iniuriarum in Roman law was essentially penal and that consequently a similar characteristic ought to be attributed to the private remedy on account of hoon, thereby excluding more than one action from arising.[198/]

The two obvious alternatives open to the Roman-Dutch jurists to overcome the difficulty of applying the developed Roman law principle on concurrency to the customary actions under the wrong of hoon were either

(a) to consider the civil remedy like the actio Iniuriarum as penal and thus a bar to any other poena persequendae form of action, thus perhaps requiring an alteration in the existing law, in respect to the avoidability of both civil and criminal actions, or,

(b) to treat the monetary sums recovered under the actio Iniuriarum as in fact an assessment of damages.

Matthaeus' view that the actio was essentially penal in nature though correct in conformity with Roman law, would have been less attractive in practice due to the difficulty involved in both altering the existing law and in deciding when the criminal or civil action was appropriate. On the other hand, though the notion of the actio as reipersecutory is theoretically difficult to justify in Roman law, it avoided any question of changing the customary law which received its precepts and tended to explain court practice in terms of natural law.

Thus, though one might reasonably question Huber's explanation of the civil fines of the Ordinances of Friesland (ord.2.2) as 'assessments of pain and suffering'[199/] or Voet's attempts to compare the action for insult with Aquilian remedy,[200/] the notion is nevertheless in accordance with Grotius' statement that 'a two-fold obligation may arise out of one and the same wrong; the one liability to punishment (by the sovereign) the other the obligation to remove the inequality'.[201/] De Villiers, however, tersely sums up the Roman-Dutch solution to this question of concurrence in the customary law by stating that 'the correct view appears to be that on this point the Roman law in its strictness was not accepted in the Netherlands.'[202/]

To Matthaeus and the group of jurists who held the view that the customary actions on account of hoon ought to adhere to the true nature of the actio Iniuriarum in Roman law, the notion of the one action, which would inevitably follow on the application of the concurrence doctrine, would, it is submitted, have been more readily thought of in terms of criminal punishment than civil redress.[203/] Hence, in cases of rape, for example, it may have been considered that a criminal rather than a private action was more appropriate. From this point of view Matthaeus' attempt to reconcile Ulpian's statement in D47.10.1.5 on the delict of Iniuria, with the proposition that consent generally to a crime involving personal injury does not nullify the criminal act, may not seem such a curious exercise.

Delictual Consent and Roman Law Precepts

As the earlier 17th Century jurists were consequently prone to discuss consent to questions of non-patrimonial injury or hoon, in terms

not clearly related to private law, discussions of the effect of consent on a private action in this field are best afforded by the later jurists. As has been said above, references to the effect of consent in this private remedy are necessitated by the lack of sufficient comment on it in the delictual action for patrimonial loss.

Generally, it would appear that the effect of consent in the non-patrimonial remedy of the Netherlands for hoon is consistent with its function in the Actio Iniuriarum of Roman law. Thus, as the consent of the plaintiff under the latter system would preclude the delictual requirement of contumelia, so Voet asserts that 'a wrong of this type (defamation) can be suffered by mere human beings against their will, but not with their consent'. 204/ There is even some indication that the Roman-Dutch jurists would have wished to go further than the Roman jurists in entirely precluding this civil action where consent was present. Schorer, for example, after either following customary law or Ulpian's statement in D47.10.1.5 comments in his notes to the 'Inleidinge' 3.35.8 that the availability of the remedy to the father, but not the daughter who consented to intercourse, is aequitati vix consonum since volenti nulla fit injuria. In other words, the function of consent in the Roman Actio Iniuriarum was so well understood by the Roman-Dutch jurists when applied to cases involving hoon that it appears to have presented a challenge both to the practice of the customary law and the doctrine of delictual iniuria which considered the infliction of insult on one person could produce in certain cases contumelia on another.

Thus, though the notion of an action on account of insult or hoon which did not involve patrimonial loss, came to be considered so far as the principle of concurrence was concerned as reipersecutory rather than

penal, the requirements of the wrong or injury still rested on the precepts of the Roman Delict of Iniuria. In Huber's discussion of hoon in 'Jurisprudence of My Time', Book 6, Chapter 8, the requirements of intention (Bk. 6.8.4) deliberate carrying out of the intention or execution (Bk.6.8.3) and contumelia (Bk.6.8.8) are faithfully adhered to, as are the Roman law modes of inflicting such injury, i.e. by acts, words and writing.[205/] All that can consequently be deduced from this, in relation to the function of consent in the patrimonial action, is that as precepts of Roman delictual law were eagerly incorporated with the customary law of the Netherlands as far as possible, consent in this latter action would be expected to have had the same effect as that indicated by its application in the delict of Damnum Iniuria Datum.

Two factors tend to suggest this conclusion. The first is that (as in developed Aquilian law) Culpa, as the intentional or unintentional fault of the defendant, and not iniuria as nullo iure, is the companion requirement of patrimonial loss in the Roman-Dutch action. Thus, Grotius in Book 3.37.1 of his 'Inleidinge' under the heading 'Van Misdaed Tegens goed' states that the misdeed may arise from fault-conduct which is either deliberate (moedwilliglyk) or unintentional (onachtzaamheid). Again, Voet in his commentary on Digest title, D.9.2 translates the nature of Aquilian iniuria in terms of 'faults of commission or of both commission and omission'.[206/] As has been said above in relation to the effect of consent on the actio legis Aquiliae,[207/] it is difficult due to the lack of any specific statements to the contrary (e.g. nulla culpa est quae in volentem fiat) not to conclude that consent in the Roman delictual actions for patrimonial loss merely rendered the plaintiff's right of redress unenforceable. The obligation, which included both the plaintiff's right and the defendant's duty to compensate under the developed Lex

Aquilia, bound both parties where (a) the plaintiff suffered damnum and (b) the defendant had acted culpably. When comparing the nature of the defendant's culpa with the concept of contumelia in Iniuria, deceit in Dolus and animus furandi in Furtum, one can see how the plaintiff's consent clearly constitutes an antithesis to these last three requirements, thereby breaking the delictual nexus; however, consent is not the antithesis of culpa as inexperience or unskilfulness (imperitia), or physical weakness (infirmitas). Nor does it deny the classification of a deliberate act of wrong-doing as dolus, under the concept of culpa as fault. Consequently, the express consent of the plaintiff, rather than breaking the nexus arising with the execution of a culpable act producing patrimonial loss, simply has the effect of an enforceable pactum de non petendo. Thus, Ulpian states that the consent of a customer to the risk of culpa, as unintentional fault, where he gives his cup to a craftsman to be filigreed, ex locato tollit actionem et Aquiliae; [208/] i.e. his consent constitutes a provision against the effect of a possible delictual nexus arising later.

The same considerations can also be said to apply to the Roman-Dutch delictual actions for patrimonial loss where the delictual obligation to compensate related directly to issues of fault and the incidence of damnum.

The second factor which tends to indicate that consent to the delictual action for patrimonial loss of the Netherlands was similar in effect to that of the actio legis Aquiliae is afforded by the total lack of reference to it by the Roman-Dutch jurists outside the delict of hoon. If, for example, the effect of consent to the sufferance of patrimonial loss in the Netherlands had undergone some jurisprudential

change, whereby it was attributed the function of consent in hoon or the delict of Iniuria, one would have expected the Roman-Dutch jurists to have presented some discussion on the matter. Clearly, this would seem appropriate where consent is considered as a factor which is fatal to the constitution of the delict in terms of fault. However, no such discussion appears. On the other hand, in the civil wrong of hoon it is repeatedly pointed out with reference to the delict of Iniuria that no injury is suffered by a consenting party; Ulpian's statement that, nulla iniuria est quae in volentem fiat being strictly confined to non-patrimonial assertions.

From this it would appear that so far as Roman and Roman-Dutch law is concerned there is no evidence of consent being considered as a factor which is inimicable to the constitution of culpa or fault, and hence being considered capable of precluding it. Indeed, it would only appear to affect the right afforded to the plaintiff of requiring compensation and the duty of the defendant to provide it, after such an obligation had in fact arisen.

If the owner is prepared to suffer an intentional infliction of harm how can conduct threatening exactly that infliction be unreasonably dangerous with regard to it? If I have a privilege to cause an invasion I am under no duty to guard against that invasion.

AQUILIAN FAULT AND NEGLIGENCE

Having arrived at the conclusions that neither the developed Aquilian law nor the delictual action for patrimonial loss of the Netherlands supplies any foundation for the present-day interpretation of volenti to

(a) include implied consent (such a defence being irrelevant in both systems) and

(b) counter the requirement of culpa or fault,

it must now be considered to what extent this current doctrine of volenti constitutes an anomaly in South African delictual law on patrimonial loss. If fault or culpa is still the basis of the companion requirement of patrimonial loss in present-day law, then in terms of modern civil Jurisprudence the volenti doctrine clearly constitutes not so much of an anomaly as a grave violation of that body of rules and principles evolved through the centuries to afford private redress for pecuniary loss. On the other hand, if the requirement of the present delictual obligation in cases of patrimonial loss does not rest on loss and culpa as fault, but on some other concept, then the doctrine of volenti may well appear a homogeneous concept.

As it has been suggested above in the discussion on the nature of consent in delictual actions for patrimonial loss and Regula 27 of the Canon law that the present interpretation of volenti, which represents a major change in the concept of consent from simply a deliberate act of volition, may be attributed to some non-Civilian source, the scope of the present investigation now requires to be extended beyond the sphere of the Civil law.

One of the main contemporary legal systems which has exerted an influence on modern South African delictual law on patrimonial loss is that of England

To the innocent Civilian casually browsing through the decisions of the South African courts in delictual cases, involving patrimonial loss the frequent use of such phrases as 'Duty of Care' and of such terms as 'Negligence' must produce a great deal of perplexity and incomprehension. Though legal commentators maintain that the Aquilian action is the 'foundation-stone' of the present patrimonial action[209/] references are seldom simply made in these cases to the nature of the obligation which arose under the Roman Law delict of damnum iniuria datum or to the obligation which arose in Roman-Dutch law where a defendant was found to have been guilty of delictually causing a patrimonial loss. In short, whereas in Roman and Roman-Dutch law the only obligation which a defendant might be said to have owed the plaintiff was one of compensating him on account of the patrimonial loss he had sustained, in modern South African law, due to the approach generally preferred by the judiciary in determining the issue of culpability, a guilty defendant is said to owe the plaintiff two obligations :

(a) a legally recognised obligation to act towards him with care at the time the loss was suffered, or to refrain from causing him loss and

(b) an obligation to compensate him for failing to fulfil the first obligation. [210/]

As the establishment of the first obligation is therefore crucial to the success or failure of the plaintiff's action (in that it will establish that he has a legally protected interest) this obligation may be considered as the major one with which the modern delictual law on

patrimonial loss is concerned. Like Roman and Roman-Dutch law the obligation which arises in these cases on the establishment of a delict is still an obligation to compensate the victim, however, unlike these former systems the establishment of the delict in modern law is dependent on the establishment of an actionable duty or obligation of care. In this respect the modern delictual action on account of patrimonial loss may be said to be analogous to the modern contractual action for damages in respect to a similar loss. For example, before a plaintiff can succeed in an action for damages for breach of contract he must first establish that the defendant was at the time at which the loss was occasioned, in a contractual relationship with him, and as such legally owed him certain rights and duties. Where such a contractual relationship is established and the defendant is found to have caused the plaintiff a patrimonial loss by failing to fulfil one of these particular duties then the plaintiff will succeed in his action for damages for the breach of that obligation. In the modern delictual law for patrimonial loss, in order for the plaintiff to establish that the defendant owed him an actionable duty or obligation of care it is also usually necessary to advert to the relationship which existed between the parties at the time at which the loss was suffered. Thus where it is shown that the plaintiff was a pedestrian and the defendant was a motorist driving down the road along which the plaintiff was walking the courts will infer that the defendant owed the plaintiff a legal obligation to drive carefully past him. Thus where the defendant fails to fulfill this duty and loss arises to the plaintiff, he will incur delictual liability. Not all types of relationships which exist between the plaintiff and defendant at the time at which the former sustains a patrimonial loss will establish such an actionable duty. In this respect

it is the function of the courts by referring to prior case law and to public utility to determine when such a relationship infers that an obligation is legally owed by the plaintiff to the defendant.

To the innocent Civilian unaccustomed to the concept of an obligation in delict arising prior to the incident of wrong-doing, this indeed would seem a very strange state of affairs were he not aware of the fact that the delictual law of South Africa on patrimonial loss, had, due to the political relationship which existed between South African and the United Kingdom of Great Britain, been under the indirect influence (for a period of over a century) of a foreign system of law, namely English Common law. This foreign influence of English law on a Civilly orientated system was not however, unique in South Africa. In Scottish law, for example, due to the Act of Union which incorporated the Kingdom and Parliament of Scotland into the United Kingdom of Great Britain, the influence of English law has affected almost every aspect of the delictual action for patrimonial loss, with the exception of the heads of claim. Unlike the influence of English law in South Africa, however, its effect on the Law of Scotland due to proximity and the absence of any constitutional change within the United Kingdom remains unabated.

That the concept of an actionable obligation to refrain from causing a person patrimonial loss is a foreign element in South African patrimonial law may be corroborated by the writings of the Common Law commentators themselves on the origin of the obligation. For example, Professor Winfield has shown[211/] that the emergence of a duty of care in the English Law of Tort was primarily on account of juridical confusion between the notion of contractual liability depending on assumpsit, or undertaking of the defendant, and the nature of Tortious liability. Thus, in the mid-nineteenth century when the concepts of contractual and Tortious liability

were being distinguished in English Case Law it was assumed that some factor similar to assumpsit had to be present before Tortious liability could be decided. Hence, the notion of an antecedent delictual duty or obligation of care.

The application of this delictual obligation in the modern South African law on patrimonial loss would, of course, appear quite strange to the innocent Civilian, whose study of the Roman Law of Obligations had shown him that the Roman jurists could only have developed the concept of culpa as unintentional and intentional fault in the Aquilian law by first fully appreciating the difference between contractual and delictual liability, i.e. that the former depended on a nexus or obligation created by the parties by means of the correct form of agreement, prior to the act complained of, whereas the nexus or mutual obligation in delict only arose with the act itself. (Hence, the juristic discussions on the nature of the act of furtum, and the incidence of Iniuria and Dolus.) Consequently, their development of Aquilian Iniuria into the concept of fault conduct or culpa not only shows their awareness of the difference between a contractual action for patrimonial loss and a delictual one, but also indicates their skill in formulating a jurisprudential concept which could be accurately applied to describe the multitude of acts by which such non-contractual loss can be suffered in a progressive society. A formulation, it might be added, which is still lacking in English jurisprudence on Tortious liability for patrimonial loss. [212/]

Indeed, the concept of an antecedent delictual obligation of care, based on relationship,which obliges the defendant to act in a certain manner or suffer the consequences if the plaintiff sustains a patrimonial loss, is more readily comparable with the early notion of the Aquilian

obligation based on damnum, plus iniuria, as nullo iure, than culpa. From the fact that this obligation of care precedes the act complained of in modern law, it might well be said that a defendant who has not acted in accordance with it is in fact liable for acting contra ius rather than has incurred liability solely in terms of culpable conduct. Hence, McKerron states in his discussion on South African law of culpable conduct which is unintentional :

> 'But negligence will not be a ground of civil liability unless there existed in the particular case a legal duty to use care. "A man cannot be charged with negligence if he has no obligation to exercise dilligence."' 213/

Thus, though a defendant may have acted in a manner classified as culpa, as unintentional fault, under Roman law, and though the plaintiff may have suffered a patrimonial loss as a consequence, the former will only be liable if it is shown that he acted in breach of an obligation, specifically existing between himself and the plaintiff without any right [214/] or justification.[215/] The emphasis on liability in Modern Patrimonial law appears to have shifted back from the concept of culpa and loss to that of actions contra ius et nullo iure giving rise to loss; the Aquilian concept of culpa being only equivalent to the breach of delictual ius than its constitution.

As a consequence of this line of thinking it is to be observed that modern delictual law on patrimonial loss by initially searching for a relationship between the parties which may give rise to the obligation of care, has, by concluding that some such relationship must exist between contestants in a game, (where one is injured without malice during the course of and within the rules of a permitted sport) endeavoured to consider their actions in terms of unintentional fault or negligence,

in determining whether a breach of the obligation had occurred.[216]/ This approach to such questions of patrimonial loss is, as has been stated above, foreign to Roman and Roman-Dutch delictual jurisprudence on patrimonial loss and it is submitted could only have arise in South African delictual law on patrimonial loss with the doctrine of an antecedent delictual obligation. In other words, unlike the attitude of the Roman jurists to such questions of loss occurring in the arena, which they found impossible to classify in terms of culpa, the English lawyers could not state outright that there was no negligence in such cases, due to the use of the antecedent obligation as a device for determining which unintentional actions involved fault.

The resultant effect of applying concepts of negligence or unintentional fault to such cases is one of considerable legal confusion. Firstly in order to determine the issue raised by the plaintiff that the defendant is liable to him in damages for the loss and injury sustained by him during the course of the game, the concept of implied consent has been resorted to by the courts ex proprio motu on the rationale that a competent player would be expected to foresee the probability of an injury occurring to him during the course of the game. Hence where it is found that the plaintiff sustained an injury which was reasonably foreseeable to him on participating in the game , then he is barred in terms of the general law of consent from enforcing his claim. Though the volenti doctrine conveniently enables the courts to reach an immediate decision on liability for damages in such cases where it is determined that the injury suffered was within the contemplation of the plaintiff, it affords no real clue to the jurisprudential question of whether a breach of the obligation of care had in fact occurred.

In some cases it is patently obvious that such a duty has been

breached; as for example where a motor cyclist of a motor cycle and side car combination is drunk and incapable before a race, yet nevertheless enters the race and subsequently injures his companion in the side car due to his erratic driving.

However, in the more frequent situations in which a player is injured by another within the rules of a contest or competition, as for example where one rugby player injures another in a legitimate tackle, the volenti doctrine, though it may determine the ultimate issue of liability for damages, affords no test for determining whether an obligation of care has in fact been breached. Logically in every action based on negligence arising from a games situation, the determination of the existence of negligence ought to precede the consideration of every other defence. However, in these cases where negligence is not obvious, that is where the injury is occasioned within the rules of the sport, as in the case of a legitimate rugby tackle, the jurisprudential difficulty of determining it can be circumvented and liability can simply be decided on in terms of implied consent to a foreseeable injury.

Now here is where the confusion arises in respect to the jurisprudential nature of injuries sustained during games. Since implied consent can be said to determine the issue of liability in cases where the defendant is obviously negligent and in cases in which there is extreme difficulty in determining the question in one way or the other, it has been assumed,even by some eminent commentators on South African law that in every case in which a plaintiff sustains an injury within the normal rules of the game that such injuries must have been attributable to the defendant's negligence. Thus MacKerron writes in respect to volenti :

> 'The maxim is applied to cases where a person has consented to run the risk of unintentional harm which would otherwise be actionable as attributable to the negligence of the person who caused it;for example consent to run the risk of being hurt in a football or cricket match or at a race meeting'. 217/

It is submitted that injuries brought about in games situations are not in general attributable to the culpa of the person who causes them where they are occasioned within the rules of a particular sport and had the doctrine of implied consent been unknown in South African law the judiciary would have been more zealous to make this point perfectly clear.

It follows that the introduction of a delictual obligation of care, based on considerations of relationship, on a system of law which primarily bases the patrimonial right of compensation on the Civilian concepts of culpable conduct and loss, can only indicate that inroads have been made on the delictual jurisprudence on patrimonial loss of the recipient system. It has been submitted above that the modern defence of volenti non fit iniuria so far as it relates to implied consent is not of the same species as the defence of consent to the actio legis Aquiliae of Roman law or to the equivalent Roman-Dutch Action. Consequently the question of whether the modern principle of volenti non fit iniuria constitutes an anomaly within the framework of the modern delictual jurisprudence on patrimonial loss can now be determined.

This issue is simply concerned with the question of whether or not the defence of volenti as implied consent has arisen as a natural inference from the jurisprudential concept of liability which is applied in modern South African delictual law for patrimonial loss. In other words, the relationship between the defence of volenti as implied consent and the modern South African concept of delictual culpability as negligence, which was introduced from late 19th Century English law, can now be determined.

IMPLIED CONSENT AND NEGLIGENCE

It is significant, I think, that questions involving the nature of the defendant's conduct, which bring about patrimonial loss to the plaintiff, are subordinated to the issue of whether the obligation of care has been breached and are not considered along with such loss as the source of the obligation to receive and to pay compensation. The notion of placing the delictual obligation in an antecedent position to the act producing the loss in both South African and English law and the notion of the delictual obligation arising from such an act in Roman law, illustrates a factor of major difference in these systems; namely, that later Roman law had a fully developed body of Aquilian jurisprudence from which the nature of an act of fault giving rise to patrimonial loss could be specifically designated as culpa (being either intentional, dolus, or unintentional fault), whereas early 19th Century English law had not (and still does not entirely possess) a comprehensive body of legal principles on non-contractual patrimonial loss, from which a similar deduction on the nature of fault could be made. Consequently, though Roman law could confidently base the obligation to compensate directly on the occurrence of culpa with damnum, English patrimonial law in the mid-nineteenth century, due to the piece-meal nature of the law under which patrimonial loss could be recovered, [218/] had not reached the necessary stage of development to do so. Indeed, only when the difference between contractual and tortious liability began to be classified in relation to unintentional acts producing patrimonial loss, in situations falling outside the scope of the existing Torts, was it necessary to evolve such a special body of Jurisprudence. [219/] Consequently, in the emerging Tort of negligence, which Winfield has attributed to the effects of the Industrial Revolution in Britain, [220/] the evolution of the antecedent obligation of care, in terms of relationship from the contractual notion of assumpsit, represented the first tentative

step in English law towards a general characterisation of the nature of acts of fault producing patrimonial loss for which a separate right of redress was given; albeit restricted to the unintentional variety.

The concept of an antecedent duty in the Tort of negligence can be said to have been a convenient vehicle, in that it exhibited the more wellknown attributes of the contractual obligation, on which English Common lawyers ventured into the unknown jurisprudential regions of the new Tort.221/

Whether the concept of a prior obligation of care has now served its purpose in English law, and whether the concept of negligence is now a sufficiently developed concept on its own to designate which unintentional acts producing patrimonial loss can be classified as blameworthy, giving rise to a right of compensation in the plaintiff, is beyond the scope of the present examination. However, it might be said in passing that the essence of the argument against its continued usage in English law by Common law commentators might tend to indicate that this stage has been reached. Thus, Winfield states :

> 'The Law in effect says : (a) Prove duty, i.e. show us facts which indicate that the defendant was bound to behave with reasonable care. We the court will say whether you have done that or not. If we hold you have, then prove breach of the duty, i.e. (b) show us facts which indicate that the defendant was bound to behave with reasonable care and which indicate it sufficiently enough to enable us to say that there is a prima facie case to go to the jury. If you cannot do that we will non-suit you. And here arrives the disquietening problem. Would it not be better to eliminate (a) altogether and to make (b) the sole requisite and cut out all reference to duty?' 222/

With the judicial preference for this device of English law for determining de novo the nature of unintentional acts giving rise to patrimonial loss, in South African law, which up till that time could

have drawn directly on the mature jurisprudence of Aquilian law, it can be said that the obligation to compensate for both unintentional and intentional acts producing loss ceased to be wholly Civilly orientated.[223/] The imposition of an approach to patrimonial liability developed by a system in which such issues were jurisprudentially in their infancy naturally brought about the introduction of other legal concepts into South African delictual law on patrimonial loss which had also been adopted, like that of the antecedent obligation, to aid the Common Law in the task of determining liability.

Here we may consider the principle of volenti non fit iniuria. As has been said above, the greatest innovation that this doctrine has apparently brought about is in respect to the alteration is has produced on the nature of consent in delict. In short, consent need not be an express act indicating volition, but may be implied. However, the use of the term 'implied consent' in the sense that the plaintiff is taken to have consented either to actual injury or to the risk of it, by his pedestrian actions, is a misnomer. Were one to ask a person who knowingly enters a dangerous building or ascends defective scaffolding or employs defective tools, whether he agreed that his right to compensation ought to be rendered null by such action, the answer would rarely be in the affirmative. Such actions do not indicate consent unless before they are taken by a plaintiff, the question mentioned above is in fact put to him. Even then, they are not conclusive of the existence of consent and may be rebutted by other factors. Consequently the 'implied consent' of the volenti doctrine is not implied consent at all, it is quasi-consent.[224/] Only the former term, other than its use in respect to volenti, relates to actual consent derived from volition, the latter term can simply be described as a legal fiction in that the true intention of the plaintiff is

not considered. As such quasi-consent can be considered as an exceptional species or category of consent rather than as a development of the traditional volition based concept.

The Origin of Quasi-Consent or the Voluntary Assumption of Risk

Where any particular branch of a legal system previously undeveloped is given the stimulus to expand, due to rapidly changing social requirements, such a phenomenon is usually indicated by the use made of legal fictions. The 19th Century patrimonial law of England would not appear to be an exception to this. It is thus submitted that the concept of volenti as quasi-consent is just such a fiction which owed its origin and development to the application in the piecemeal law of Torts of general propositions on consent in English law; the primary source of such propositions being, as was suggested above, Regula 27 of the Canon law, which in turn can be traced back to the Digest fragments (D50.17.45 and D47.10.1.5) which contain Ulpian's remarks on the effect of consent on the delicts of Dolus and Iniuria. In Bracton's 'De Legibus Angliae' for example, the maxim 'volenti et scienti non fit iniuria' appears and would seem to owe its wording to Regula 27 of the Liber Sextus.[225/]

The concept of quasi-consent can be seen to have arisen by a natural inference from the development of negligence in English law in that it provided a very useful device for readily settling the practical question of patrimonial liability in cases under the newly emerging Tort without any resort being necessary to detailed jurisprudential reasoning for denying liability in terms of either the lack of negligence in the defendant's act or the blameworthiness of the plaintiff's conduct. In this respect, the development of the constituent elements of the formal concept of quasi-consent as the voluntary assumption of risk [226/] - denoted

by the maxim, volenti non fit iniuria, - may be attributed to the familiarity of the 19th Century Common lawyers with the approach to questions of liability in some of the earlier Torts in English law in which volenti maxims were referred to. In the early 14th Century case of Randolf v de Richmond for example (1305 Rolls Series 33-35 Ed 1 at page 9) the maxim as it is worded now is cited against an action under the writ Prise des avers or taking of beasts. At this time, actions for compensation for a wrong or possession, which in later law were considered under specific Torts, were dependent on specific forms of writs. Under later English law the case would probably have fallen under the Tort of trespass to chattels. The plaintiff averred that the defendant had seized his sheep while they were being pastured on a certain piece of land. The defendant retorted that he had a right to seize them since they were in fact being pastured on his land. An argument then ensued as to who had the right of seisin and pasture or common in the land. At this point the defendant referred to a previous action between the parties over the same piece of land where it had been held that the plaintiff in the present case had no right of seisin over it, and proceeded to argue :

> 'nay volenti non fit iniuria, and you yourself purchased the (previous) writ of Novel Disseisin after the defendant had objected to you pasturing your sheep on the same ground in question.'

In other words, it was being argued that the plaintiff had no right to complain that his sheep had been seized since he knew at the time of pasturing them, by virtue of the previous action, that they had no right to be on the particular land in question. This case consequently illustrates that concepts of willingness and knowledge were considered appropriate elements against an action in Tort, merely for possession, at an early period in English law.

The comparatively later Tort of the occupier's liability, however, more than any other English Tort, would appear to have exerted the greatest influence on the formulation of the defence based on quasi-consent to an action on the Tort of negligence. For example, proof that the plaintiff had entered the defendant's premises with the full knowledge of the dangers therein was fatal to the constitution of this Tort in the same way as consent precluded the delict of Dolus or Iniuria in Roman law. The basis of this Tort, though it effected a patrimonial remedy, was not fault or negligence in terms of the breach of an obligation of care. (Indeed, it was only with the 1941 decision in Hazeldine v Daw & Sons Ltd.[227/] that the occupier's liability under the Tort was recognised as a subhead of negligence. Before that date, the denial of liability in terms of contributory negligence would hence have been incompetent.) The Tort was based on the narrower concept that a person in control of property had a duty to make it safe in respect to the entry of three classes of people, i.e. an invitee, a licensee, and a trespasser. Where however, the plaintiff entered and sustained loss in the knowledge of the dangerous nature of the defendant's property, his action on the Tort failed as the duty did not extend to making such property safe in respect to persons who were aware of its condition.[228/] Conversely, warning the plaintiff of the danger was sufficient to discharge the duty under the Tort. In the case of Thomas v Quartermaine,[229/] for example, where an employee was scalded when he fell into an open vat on the defendant's premises, Bowen C.J. stated that :

> 'The duty of an occupier of premises which have an element of danger upon them reaches vanishing point in the case of those who are cognisant of the full extent of the danger and voluntarily run the risk - volenti non fit iniuria. This is not new law; it is as old as the Roman Digest and has been accepted by courts of this country.'

The reference to volenti non fit iniuria in this Tort is analogous to its use in the Roman Delict of Iniuria. As such however, it effectively rendered unnecessary any culpable assessment of the occupier's omission in respect of maintaining his property in a safe condition. The use of volenti in terms of the requirements of this Tort turns on the concept of entry with knowledge of a danger, rather than on the more particular notion of delictual consent.

It is interesting to note that where the plaintiff has been injured by the dangerous state of the defendant's property without entering on to it, then he would have had to resort to a remedy under an entirely different Tort, i.e. that of nuisance. This fragmentation of the English law on non-contractual patrimonial loss into various independent Torts is of course quite curious to Civilian eyes, but illustrates before the development of the Tort of negligence how devoid their law was of any general principle on the nature of unintentional acts producing a patrimonial loss. In the Civil law for example such a distinction regarding the locus of the injury is irrelevant, in that the basic criterion for liability is whether the defendant had acted in a manner which could be classified under the general concept of culpa. Thus Mucius, quoted by Paul in D.9.2.31 Princ. states that where a person has been killed by something falling on him in a public place - 'etiam si in privato idem accidisset posse de culpa agi, culpam autem esse quod cum a diligente provideri poterit, non esset provisum, aut tum denuntiatum esset, cum periculum evitari non possit'. The entire delictual system of English law apparently developed in this fashion due to the early practice of only granting a civil remedy in terms of a writ than a wrong.[230/] Unlike Roman law, which in certain aspects also developed in this manner, there were few commentators or jurists in the law of England until the 19th Century

who could have rationalized court practise in this respect in terms of a coherent body of jurisprudence. Even the teaching of law as a university subject was a comparatively late development.[231/]

Since the concept of volenti non fit iniuria in the Tort of the occupier's liability could determine the outcome of an action in respect of patrimonial loss without recourse having to be made to a pronouncement on the culpability of the defendant's conduct (it simply being sufficient in terms of the established requirements of the Tort to compare the state of the property with the defendant's knowledge on entry) volenti as the more particular concept of quasi-consent or the voluntary assumption of risk of injury in cases of alleged fault can be seen to have adopted its requirements from that Tort. For example, rather than attempt to decide in a case of first impression under the Tort of negligence whether the defendant's actions amounted to a breach of the obligation of care in that they were negligent, a judge could state that due to certain actions of the plaintiff in encountering a known danger, either no obligation of care existed or that, if it did, the action for its breach was unenforceable. Determining Tortious liability by this approach was familiar to such judges from cases on the occupier's liability; determining it solely on the negligent conduct or culpability of the defendant, or on the contributory negligence of the plaintiff was not.

Though the concept of negligence, as characterising unintentional fault-conduct producing patrimonial loss, gradually grew more sharply defined in the English law of Torts, the notion of determining liability for such conduct in terms of quasi-consent from the model of volenti in the occupier's Tort may be said to have been given an impetus in the years 1875 and 1880.

On 1st January 1875, for example, the 1873 Judicature Act came into force and finally removed from the English law of Tort the predominance of the form of a remedy over that of the substance of the case and empowered courts to apply principles of law and equity alike in determining whether the facts of the dispute itself warranted a remedial action. Consequently, cases which prior to the operation of the 1873 Act had been thought of as being determined solely under the Tort of the occupier's liability, i.e. where a person was injured by another's property after entry, could now also be determined by the emerging jurisprudence of the Tort of negligence. Conversely, where principles of negligence were drawn on in such cases, the defence of volenti non fit iniuria, from the plaintiff's knowledge, under the occupier's Tort was also allowed to be considered.

The 1873 Act can be said to have greatly facilitated the application of the concept of volenti as knowledge and actions of the plaintiff in the occupier's Tort, as a defence to actions based on the Tort of negligence for fault.

In 1880 the scope of cases in which this process was taking place was greatly enlarged. As has been suggested above,[232/] the effect of the industrial revolution in Britain may have provided the legal requirement for the characterisation of unintentional acts producing patrimonial loss. However, in one major sphere of activity which was highly susceptible to the occurrence of such losses, i.e. in master and servant situations, where the latter was injured due to the former's defective plant or machinery, liability was determined with reference to a condition of contract rather than to volenti of the occupier's Tort. Thus, Lord Esher remarked in Yarmouth v France[233/] that : 'the maxim volenti non fit iniuria was not wanted as between master and servant. It was only wanted, if at all, where no such relation as that of master and servant existed.' The

reason being that :

> 'there was this implied condition in the contract of hiring that if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk.'

Where there was some doubt as to whether the plaintiff was in fact a servant of the defendant, e.g. where an independent contractor was involved, then provided the injury took place on the defendant's premises the defence of volenti under the occupier's Tort was still available. Hence, in Woodley v Metropolitan District Railway Company [234/] where the plaintiff had been severely injured by a train while employed in the defendant's tunnel, it was held that even if the plaintiff could not be considered to be a servant of the defendant, thus rendering the purely 'contractual' defence irrelevant, he had voluntarily encountered the risk by entering the defendant's premises in the full knowledge of the dangers involved, i.e. volenti not fit iniuria. S.1. of the 1880 Employer's Liability Act, however, stated that 'the workman shall have the same right of compensation and remedies against an employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work'. Lord Lindley commenting on the effect of this Act stated in Yarmouth v France [235/] that :

> 'it must be taken as settled that the words at the end of sec. 1 do no more than remove such fetters on a workman's right to sue as had been previously held to arise out of the relation of master and servant - that in each of the cases specified in sec. 1 the maxim volenti non fit iniuria is applicable.'[236/]

Hence, in cases where a servant incurred patrimonial loss on his master's premises the concept of volenti as knowledge and entry was now allowed as a valid defence. The identification of this concept of the occupier's Tort with the defence of fictitious consent in the Tort of

negligence which was aided by the 1873 Act was now completed by its application to this major class of patrimonial cases in which principles of liability from both Torts were allowed to be considered.

It thus afforded no great difficulty after the 1880 Act to interpret quasi-consent into cases where a servant was injured outside his master's premises due to the latter's negligence, in terms that he had voluntarily encountered or risked a danger of which he had knowledge and appreciation. Nor after this identification had been completed was there any reason to restrict this interpretation either to situations under the occupier's Tort, where principles of negligence were applied, or to master and servant cases. Henceforth, it could be applied in the multitude of cases which gradually became subsumed under the Tort of negligence on the basis of relationship, e.g. games cases.

It is consequently submitted with respect to the superimposed notion in the delictual law of South Africa of liability for unintentional acts based on an antecedent obligation of care (which in turn is dependent on relationship) that the concept of volenti as quasi-consent is not a jurisprudential anomaly. Both volenti and the antecedent obligation were considered necessary devices, in their system of origin, for attempting to determine questions of liability in a branch of the law hitherto undeveloped to any extent.

The anomaly which arises on the application of volenti as quasi-consent in the delictual law of South Africa is not one which can be described in terms of jurisprudence, but rather in terms of legal history. While it is not suggested that the comprehensive concept of Aquilian culpa could determine whether a right to compensation existed in all incidences

where patrimonial loss arises today[237] without refinement and modification, it is submitted that this broad and distinct concept of fault (encompassing both deliberate and unintentional acts) affords a more lucid and coherent basis for the construction of the modern delictual action for patrimonial loss.

The historical anomaly which arises with the application of volenti as quasi-consent stems from the fact that it represents a fictional device for determining fault-liability which was produced by a body of jurisprudence (based on the customary law of a foreign system and restricted to unintentional loss) which has virtually supplanted the jurisprudence of the developed lex Aquilia in the delictual law of South Africa, without either being fully cognisant of, or having attained the same degree of resolution on fault.

VOLENTI AND THE DETERMINATION OF DELICTUAL LIABILITY FOR PATRIMONIAL LOSS

The question of how effectively the doctrine of volenti non fit iniuria determines practical issues of liability in modern South African delictual law on patrimonial liability remains to be considered. As no coherent theory has yet been propounded on the exact legal function and effect of the volenti doctrine in this area of the law it is proposed to examine the South African case law on patrimonial loss brought about by acts of delictual wrongfulness in which the doctrine is considered and

(a) to state its effect when applied, on the requirements of the modern concept of delictual culpability, i.e. the obligation of care and the breach of the obligation of care, and

(b) to consider how the Civil law would have determined similar cases.

The bulk of the cases in South African law in which the volenti doctrine has been pleaded as a defence to the delictual action for patrimonial loss can be divided into two main groups; that is cases in which volenti is specifically considered in terms of real consent of the plaintiff and those in which it relates to his quasi- or fictitious consent. The latter group of cases are considerably more numerous than the former and for the purposes of the present examination can be sub-divided into (a) cases in which the requirements of the 'patrimonial' delict have been fulfilled and (b) cases in which such requirements have not been fulfilled.

Volenti as Real Consent

The first group of cases involving the notion of volenti as real consent are typified by two common factors

(a) the allegation of unintentional wrong-doing by the plaintiff in

situations in which a contract exists between the litigating parties, and (b) the emphasis placed by the court on evidence of the existence of the plaintiff's consent, rather than that of the defendant's wrong-doing.

In the 1883 case of Spires v Scheepers[238/] the fact that the plaintiff's express consent had been established, to the risk of patrimonial loss arising under this contract of employment was sufficient to reject his conclusion for compensation, without determining whether or not the actual loss sustained was of a delictual nature, i.e. caused by the defendant's breach of the antecedent obligation. Proof of the plaintiff's volition to risk the loss he actually suffered was established by the fact that he had stated to the defendant when entering into a service contract with him that 'I will manage that' referring to the latter's ostrich which he knew to be particularly aggressive towards him.

Consequently, Buchanan J. determined the question of patrimonial liability in terms that :

> 'By his own contract he (the plaintiff) has precluded himself from recovering damages for any injury resulting from the very danger he agreed to encounter; and there is nothing to justify us in saying that the the agreement entered into by him was an illegal one or not binding on him.'

A similar approach involving an emphasis on proof of the plaintiff's volition rather than the delictual quality of the defendant's act is illustrated in Morrison v Angelo Deep Gold Mines Ltd.[239/] Here the court determined the question of liability simply in terms of whether or not a mineworker's agreement to risk injuries arising from the negligence of his fellow workers was in existence at the time of his injury and if so whether it was contra bonos mores. Again proof of actual negligence in respect to the defendant's breach of the obligation of care was not

found to be necessary.

This emphasis on the plaintiff's volition or real consent as the determining factor in cases of alleged negligence is quite vividly demonstrated in three South African cases involving what would have been considered as a contract re in Roman Law, that is a Contract of Bailment. In all three cases as the evidence relevant to the question of consent was that the plaintiff had entered into a contract of bailment with the defendant, the question of liability fell to be determined by ascertaining whether or not the plaintiff had also given his real, as opposed to quasi-consent, to risk the loss he had in fact suffered. Consequently, the court in each case was more concerned with reviewing the principles of bailment than with the question of the defendant's fault. In the first two cases their review concerned the power of the bailor to surrender his right of redress and in the third the mode by which a bailee could effectively intimate his denial of liability.

Thus, in Essa v Divaris[240/] where the plaintiff had entered into a verbal agreement with the defendant over garaging his car on the latter's premises,in the full knowledge that this was done at his own risk, it was held that real consent to such a risk had been effectively given. Similarly, in Rosenthal v Marks [241/] in which the facts were identical with the exception that here the plaintiff's car was stolen and not destroyed by fire, Murray J. in denying liability stated 'it is competent for a bailor to waive rights created for his protection and to agree to rest content with recourse of less extent against the bailee'. [242/] In the third case, Frocks Ltd. v Dent and Goodwin (Pty) Ltd.,[243/] one of the main points at issue was whether the real consent given at the

time of a verbal agreement with the defendant over the storage of bales, also existed in respect to the loss suffered, since the plaintiff alleged that it was only after such an agreement that the defendant's denial of risk was brought to his notice, i.e. printed on the back of an invoice form. Clearly, if the question of consent here had been decided on purely fictional terms the plaintiff might well have failed. However, the court by only considering the question in terms of real or express consent, i.e. in the contractual context, proceeded to find the defendant liable.

It would seem that in these cases where real, as opposed to quasi-consent is alleged that considerations of whether the defendant was in breach of the obligation of care only determine liability after it is shown that the plaintiff had not given his real consent to risk the type of loss he in fact sustained. In other words, the primary issue to be determined is the scope of the real consent in respect to the injury and not whether the act complained of,falls within the category of negligence. In Cardboard Packing Utilities v Edbro Transvaal Ltd. 244/ for example, the defence of volenti was allowed to be considered by a special application before the proof of the defendant's breach of the antecedent obligation. Here it was agreed that the plaintiff had in fact given his consent, during an agreement on a land-lease contract with the defendant, that the latter should not be liable for damage incurred by 'rain, storm, water, wind, hail, lightning, fire, riots and strikes'. However, as the damage was allegedly caused by the defendant's negligence in allowing a fire to break out on his adjoining land it was found necessary, on the issue of volenti being raised, to first determine whether this clause was wide enough to cover the nature of the loss sustained. In other words, had the defendant succeeded in its applications in the case, a subsequent proof would have been considered

unnecessary since the patrimonial loss was one which had been encompassed by the scope of the plaintiff's consent. The judicial approach of giving priority to the determination of the issue of real consent where it is specifically alleged is perhaps better illustrated by the case of Hughes N.O. v S.A. Fumigation Co.(Pty) Ltd. 245/ Here, where no special application was involved, the establishment of the plaintiff's real consent to the risk of fire damage to his house during the operation of eradicating beetles from it by the defendant rendered proof of such negligence unnecessary, since as Herbstein J. stated, 'the words "no responsibility for fire damage" are wide enough to include damage caused by the negligence of the defendant's servants.' 246/ Consequently, no determination of the culpability of the actual actions of the defendant was required in order to decide on liability.

Even in cases which include an averment of intentional as well as negligent wrong-doing in contractual situations, the same emphasis on the proof of volenti remains where the issue of real consent is raised. In Esterhuizen v Administrator of Transvaal 247/ for example the plaintiff averred that the defendant was liable both in respect of unintentional and deliberate wrong-doing on account of injuries she had received during a course of X-ray treatment for Kaposi's disease; her counsel maintained an action in damages on the grounds of negligence and assault, based on the Actio Iniuriarum. To both allegations the defendant contended that there was relevant evidence to imply that real or 'proper' consent had been given, consequently Bekker J. considered that 'the sole question to be answered is whether it has been shown that the treatment to which the plaintiff was subjected took place without lawful consent.' 248/

The following observations can be made on these cases :

(a) Though consent is always thought of in terms of volition or real consent in this group it need not always be express but can be implied. For example, in the Esterhuizen case counsel for the defence failed to show that the consent of the plaintiff's mother to a previous course of X-ray treatment of a lesser intensity implied real or 'proper' consent to a later course of greater intensity;

(b) Irrespective of whether the real consent is express or implied it arises in situations in which the plaintiffand the defendant have deliberately created a special relationship with each other which the civil courts will recognise and implement if necessary, e.g. that of master and servant, lessor and lessee, retainor and retainee;

(c) The defence of consent is not unique to the delictual action for the recovery of loss, but can similarly debar the plaintiff from attempting to recover the same loss on contractual grounds too;

(d) Consent has no effect on the requirements of delictual culpability. In none of these cases is it stated that consent affects the delictual relationship of the parties in that no obligation of care is owed by the defendant to the plaintiff, nor does it determine the question of whether a breach of such an obligation exists. The issue of negligence will not indeed be required to be determined in cases where the scope of the plaintiff's real consent is found to be wide enough to cover any act of loss whether negligent or not on the part of the defendant. Where consent does not encompass the actual incidence of loss sustained, as in Cardboard Packing Utilities v Edblo Transvaal Ltd., the determination of liability in terms of negligence proceeds without further reference to it.

From these observations it is submitted that the function and effect of volenti in this first group of cases is simply that of an arrangement not to litigate. As such the application of the volenti doctrine here,

would appear to afford an effective and practical means of determining patrimonial liability in modern South African law. The phrase that the plaintiff 'consented to the risk of injury' literally means that he has agreed not to initiate any form of litigation, delictual or contractual, against the defendant for the recovery of patrimonial loss on the contingency of a certain event happening. This interpretation of consent would appear appropriate especially when the act complained of occurs in situations in which both parties have formed a relationship which can in any case be regulated by the civil courts. In other words, since one would expect the parties to come to some agreement over the question of future litigation in such situations, volenti can be considered specifically as a willingness not to litigate rather than simply to suffer injury.

Certain remarks made by the judges in the cases themselves would appear to substantiate this. For example, Innes C.J.'s statement in Morrison v Angelo Deep Gold Mine at p.779 that 'It is a general principle that a man contracting can, without duress or fraud, and understanding what he does, freely waive any of his rights'. Similarly, Murray J.'s remark in Rosenthal v Marks at p.177 that 'it is competent for a bailor to waive rights created for his protection'.

As one would expect where an agreement curtailing one party's right to litigate against the other is alleged, the enquiry of the court is directed towards the initial question of ascertaining whether the plaintiff has in fact restricted his capacity to litigate rather than whether his case falls within the particular requirements of the branch of the law from which he seeks a remedy. Consequently, where it is found that the plaintiff has no capacity to litigate for the recovery of the loss in question, the defendant is absolved from the allegation of liability under

the remedy sought on grounds other than those required to deny the existence of such a remedy in the branch of the law from which it arises. Consent in these cases renders the remedy ineffective in the same way as a successful plea on the question of the competency of the court's jurisdiction would.

Professor Price has criticised this approach of determining liability in terms of volenti without fully investigating whether all the requirements of the particular remedy sought in fact existed. Thus, he maintains in Spiers v Scheepers that Buchanan J. overlooked the point that a prima facie case of culpa or dolus must be made out before the defence of volenti can be considered. [249/] However, as it has been suggested above that the defence in these cases where real consent is alleged is not one which is peculiar to the requirements of the patrimonial delict, but rather peculiar to the plaintif in his capacity as a litigant, it is submitted that there is even no necessity to show that the first requirement of a delictual relationship in the form of the obligation of care existed between the parties before the question of real consent can be considered. Proof of the existence of the plaintiff's real consent (i.e. based on his volition) either in an express or implied form, can be said to justify the court in absolving a defendant from all liability for loss, without considering whether or not his actions were culpable.

A point an be made in passing on the effect of volenti in the Esterhuizen case. If the defendant had successfully established that implied 'proper' (real) consent existed at the time of the injuries complained of, though such consent would have constituted an agreement not to litigate in respect to the defendant's unintentional and deliberate

acts, it would also have precluded a delictual requirement in respect to the plaintiff's averment of assault based on the Actio Iniuriarum. As has been suggested above, the establishment of real consent to the allegation of iniuria in Roman law precluded the requirement of contumelia; hence Ulpian's statement that 'nulla iniuria est quae in volentem fiat'.[250/] This would also appear to have been accepted into modern South African law based on the Roman delict of iniuria since De Villiers C.J. in Bennet v Morris [251/] quotes Ulpian's statement in D47.10.1.5 verbatim when absolving a defendant on the ground of consent from the allegation of defamation. Thus, though real consent in the Esterhuizen case, if established, would have constituted an agreement not to litigate, ascertainable without specific reference to the requirements of either of the two heads of claim involved, it would also have had the dual function of removing at the same time a requirement of the second head based on the Actio Iniuriarum.

The effect of consent on the delictual action for patrimonial loss in these cases would thus appear the same as that of real consent on the actio legis Aquiliae of Roman law. Real or implied real consent, it was suggested, was not inconsistent with the establishment of culpa under the delict of Damnum iniuria datum, unlike its effect in the delicts of dolus, furtum and iniuria.

From the juristic statement we have on its effect it appears to have rendered the Aquilian remedy unavailable rather than precluded a delictual requirement.[252/] Consent might also be express as in the case of the Jeweller in D9.2.27.29 or implied as in D9.2.7.4 where the dominus agrees to his slave going in to the arena.In both these cases it is submitted the Aquilian remedy was only rendered unenforceable rather than precluded by a

prior pactum to exclude litigation, which might be expressly concluded as in contracts of Locatio-conductio or informally agreed on. In this latter case, the contestant who wounded or killed the slave in D9.2.7.4 could have added to the justification defence of gloria et virtutis causa, averments of the existence of a pactum in rem, in respect of any contestant, from the dominus consent to the slave's entry.

This last situation is worthy of further comment in modern delictual law on patrimonial loss. Though it was stated that volenti could be interpreted as an agreement not to institute litigation in certain circumstances since the situations in the cases above in which consent was given were ones in which one would expect the parties to come to some agreement on the question of future litigation, simply from the fact that they had created a relationship which could be regulated by the Civil Courts, it does not necessarily follow that such a relationship has to exist before volenti can be interpreted in these terms. For example, it is obvious that proof of the plaintiff's express consent not to litigate on the continguency of a certain loss arising due to the conduct of the defendant, would be equally as effective whether both parties were in an existing contractual relationship or not. Thus, there is no reason to suppose that real consent in modern delictual law on patrimonial loss cannot be implied from certain unequivocal acts of the plaintiff where no specific contractual relationship exists, provided of course that the question of liability is actually put to the plaintiff by the defendant.

For example, where on friend offers another a lift in his car on the condition that the latter agrees to waive his normal delictual rights against him in the event of an accident, then though the passenger may have only expressly consented to this agreement before setting out on the

first of such lifts, such real consent can be implied to cover subsequent journeys unless he specifically withdraws his consent on subsequent occasions or the driver abandons the requirement. This type of situation it is submitted, marks the boundary between the function and effect of volenti, as a real agreement not to sue, rendering the delictual remedy unenforceable in the first group of cases, and its function and effect in the first subdivision of the second group of cases. The cases which will now be considered involve situations in which the intentional actions of the plaintiff fall short of unequivocably implying real consent. In this class of cases consent to the risk of injury is not real consent involving volition, but is fictional or quasi-consent.

Volenti as Quasi-Consent

It was attempted to show in the previous discussion on the question of whether the doctrine of volenti constituted a jurisprudential anomaly in modern delictual jurisprudence on patrimonial loss that the practice of denying liability under the occupiers liability Tort, in English law on the grounds of the plaintiff's deliberate entry with knowledge, gradually produced the formal requirements for the defence of quasi-consent in the Tort of negligence. It was also suggested that such consent represented a useful if not necessary device for determining liability in the early cases of negligence under the emerging Tort. The first series of cases now about to be considered represent, it is submitted, the operation of quasi-consent i the manner most appropriate to the analogue of real consent to the risk of patrimonial loss; not that this necessarily implies that the concept of quasi-consent is an appropriate or effective method of determining delictual liability for patrimonial loss.

Cases in Which Negligence is Established

The case of Waring and Gillow v Sherborne[253/] might first be considered in this series since it illustrates the influence of English case law on the South African delictual action for patrimonial loss at a time when the influence of the United Kingdom of Great Britain on South Africa was equally as strong. The process by which the defence of quasi-consent to an action under the Tort of negligence in English law was incorporated into the delictual law of South Africa for deliberate and unintentional acts giving rise to patrimonial loss is consequently indicated. Here a workman was killed when a derrick which he was using to remove a crane from the top of a scaffold collapsed. His widow sued as dependant on the grounds that the defendants were vicariously liable for the negligence of their employee who had erected it. The defence contended, however, on the grounds of three English cases that the deceased, who was an expert rigger, by following the instructions of his foreman to use the derrick in question, had indicated that he had consented to take the risk of unintentional injury on himself and as such prevented the plaintiff from recovering on the grounds of volenti non fit iniuria.

Two of the English cases referred to, Woodly v Metropolitan Railway Company[254/] and Thomas v Quartermaine[255/] were determined in terms of the Tort of the occupier's liability; only the third one, Yarmouth v France[256/] fell squarely under the Tort of negligence. Though the notion of a Tort under the law of England was not the same as that of a delict under the law of South Africa[257/] nor the scope of an action under the Tort of negligence identical to that of a delictual action for the recovery of a patrimonial loss,[258/] Innes C.J. accepted that the defendant's averments where competent under South African law and proceeded to classify the requirements necessary

to successfully establish the defence. From the lack of discussion on the question of competency it would appear that the English doctrine of quasi-consent was acceptable to South African law simply from the fact that it had undergone sufficient jurisprudential development in the law of England by this time to render it applicable as a general principle of delictual law outside of the peculiarities of Tort. This generality of application of quasi-consent, as 'implied' consent to the risk of injury, in all patrimonial actions based on fault (the formulation and scope of which it is submitted was latterly aided in the Tort of negligence by the 1872 Judicature Act and the Employer's Liability Act of 1880) was emphasised in the 1917 case of the Union Government v Matthee [259/] when it was stated that :

> 'The maxim volenti non fit iniuria is generally set up in an action brought by servants for injuries sustained in the course of their employment. But its operation cannot in principle be confined to such cases. It is a defence distinct from contributory negligence though in practice it may cover the same ground. But its essential elements are well known, knowledge and appreciation of the danger and free consent to undergo it'.

In this case it was held that a person who was injured while unloading logs from a lorry did not voluntarily assume such risk as he was unaware that the logs had been negligently loaded.

The following cases in this first subdivision of the second group can now be considered. Though volenti in these cases purports to determine liability on the analogue of real consent, as found in the first group of cases, there are certain points of difference which may be noted here. Firstly, the approach of the courts to the question of liability under the delictual action for patrimonial loss apparently differs when quasi-consent is alleged from the approach adopted when real consent is

averred. In respect of the first group of cases it was apparent that the courts primarily tended to concentrate on the question of real consent and only to determine the question of whether negligence existed when such consent either did not exist or did not encompass the injuries in question. 260/ In the present subdivision of cases, however, the question of the existence of the obligation of care and its breach were determined before the issue of quasi-consent was considered. Thus, in the case of Durban City Council v S.A. Board Mills Ltd. 261/ Van Blerk J.A. upheld the ruling of the Natal Provincial Division that the defendant had, on the balance of probabilities, contributed to the destruction of the plaintiff's factory due to its negligence in allowing combustible material to be left on its dump without proper supervision, before considering the plea of volenti. Similarly, in Rosseau v Viljoen 262/ Van Winsen J. found that the defendant, a midget car driver who collided with a flag marshall at a racing competition, was 'undoubtedly negligent in the way in which he handled his car' before the question of the plaintiff's volenti as quasi-consent was examined. This tends to indicate that where the consent can be shown to be based on the plaintiff's volition i.e. where the question of liability has been specifically put to him the courts, as in the first group of cases, appear to consider it as a determining factor of primary relevance or as a preliminary plea to the relevancy of the plaintiff's case. As such it is not a plea which is confined to delictual actions in particular. Where volenti is simply based on the actions of the plaintiff, however without any reference to his true intentions or volition the courts appear to consider the issue of culpability as the factor of primary relevance and not volenti. In short the difference in the court's treatment of the volenti defences appear to turn on the presence or absence of any manifestation of the plaintiff's actual intention in respect of the issue of liability. Secondly, in all the

cases in the subdivision, not only is the question of the defendant's negligence considered first, but it is also in fact established. From this it follows that a subsequent denial of liability in terms of volenti in these cases renders the obligation to compensate unenforceable. Comparing this with the effect of volenti as real consent in the first group of cases, it can be said that quasi-consent here operates in the manner most similar to that of real consent. In the first group of cases involving real consent it was submitted that such consent acted as a preliminary plea since it could render the plaintiff's action irrelevant and unenforceable whether or not the presence of culpability or negligence could be established. For example, in Morrison v Angelo Deep Gold Mines Ltd. [263/] the plea of volenti in terms of real consent was upheld though no breach of the established obligation of care existed due to the finding that the relevant mining regulations were complied with. A similar absence of a breach of the antecedent obligation occurred in Essa v Divaris since Tindall J.A. found that the defendants were not negligent in respect of (a) preventing the fire occurring, (b) its origin, and (c) the steps taken to extinguish it.[264/] In the case of Hughes N.O. v S.A. Fumigation Co.(Pty) the question of the delictual requirement of breach of the obligation was not considered by Herbstein J. as the case proceeded on the sole consideration of the defendants'special plea in respect of the fire risk clause.[265/] In the present series of cases volenti as quasi-consent can also be attributed with the same unenforceable effect with the difference that this effect is produced only after the issue of culpability or negligence has been considered and of course established.

Thirdly,volenti as quasi-consent is a defence peculiar to the patrimonial delict and the same actions of the plaintiff necessary to constitute this defence would not similarly establish a successful

defence to an action on contract. In this respect the actions of the plaintiff's mother in the Esterhuizen case which would have been required to maintain the defence of implied 'proper' (real) consent can be distinguished from those necessary to maintain the delictual plea of quasi-consent. For the constitution of both real and quasi-consent, actions not ostensibly adverting to the question of consent, can be founded on to impute the existence of consent in a particular situation. However, in the case of implied real consent the actions impute the existence or extension of real consent given previously in another situation to the issue at hand, whereas in the case of quasi-consent such actions alone impute the existence of consent. Since no reference is made to the volition of the person to whom consent is imputed in the latter case, it is submitted that in respect to a contractual action, a defence based on such actions would fail. Indeed, such actions may in fact found the plaintiff's case in an action for contractual damages. For example, in the delictual case of Lampert v Hefer [266/] the plaintiff failed to recover damages for an injury which she sustained while being conveyed as a passenger in a motor cycle side car, from the executrix of the motor cycle rider. In denying liability it was held that by entering into the side car and allowing herself to be driven by an obviously drunk driver the plaintiff had voluntarily assumed the risk of injury. However, consider such a case in a contractual context. Assume for example that the plaintiff and the cyclist have entered into an agreement that he will collect and con ey her home every Friday night for a certain period in return for a certain sum of money and that careful driving is a term, expressed or implied, rather than a condition of the agreement. When the driver arives in a drunken state he is consequently in breach of a material term of the contract. In this situation it is open to the

plaintiff to elect to rescind the agreement by refusing to perform her counter-obligations. That is, by refusing to be conveyed home by the driver and by withholding payment for such conveyance in this instance, and on future Friday nights for the unexpired period agreed on. Or she may elect to maintain the contract and fulfil the counter-obligations imposed on her. Consequently, when she enters the side car, without expressing any intention on the question of the risk of injury arising (e.g. by saying that she would 'risk it') such actions in a subsequent claim for contractual damages following an accident would, it is submitted, constitute a tacit election to maintain the contract and hence establish that at the time of the accident the defendant was under an unqualified contractual obligation towards her to drive carefully. Due to the difference in nature [267/] and origin between contractual and delictual obligations, actions of the plaintiff which in one branch of the law would constitute a valid defence may not necessarily do so in the other. [268/] The defence of volenti as quasi-consent in the present subdivision of cases can be considered peculiar to the patrimonial law of delict unlike the defence of consent in the first group of cases considered, from the fact that in this latter group the defence is one which can be maintained against the plaintiff in respect to any form of litigation for the recovery of the loss in question, whereas in the former subdivision it only relates to delictual claims. Hence, the approach in the present subdivision of cases of only considering the defence after the delictual requirements have been established.

The circumstances of the cases in this sub-division also tend to differ from those in the first group in that in the majority of them no special relationship exists between the parties prior to the incident

of loss occurring. The exceptions to this being master and servant cases such as Waring and Gillow v Sherborne and cases involving lease contracts as in Durban City Council v S.A. Board Mills Ltd.

Though the above differences in the approach to, and nature of, volenti as real and quasi-consent exist between this present series of cases and the former, the effect of the defence as stated above appears to be the same in both contexts. Since, for example, questions of volenti are only considered after the requirements of the patrimonial delict have been established, the defence as in the first group of cases has no effect on either the issue of relationship between the parties from which the antecedent obligation of care can be determined, or the question of breach of such an obligation As the unenforceable effect of volenti in the first group of cases can be said to be attributed to the establishment of an agreement not to litigate,it is now proposed to examine the issue of unenforceability further in the present series of cases in order to ascertain whether the unenforceable effect of volenti here is based on the analogue of a prior pactum de non petendo.

In Waring and Gillow v Sherborne for example Innes C.J. stated generally at page 344 'The maxim volenti non fit iniuria embodies a principle which when confined within right limits is both just and equitable. A man who consents to suffer an injury can as a general rule have no right to complain'. As the statement indicates the effects of what would appe-r to be the normal form of consent, i.e. real consent, as depriving the plaintiff of the right to complain, it would not be extravagant to assume that Innes C.J. intended the same effect to apply without qualification to quasi-consent too. The 'right to complain' it is submitted, being synonymous with the 'right to litigate'. Perhaps a

clearer statement on the effects of volenti in these cases is afforded by Van Blerk J.A. in the case of Durban City Council v S.A. Board Mills Ltd. Though a contract of lease existed between the parties, volenti was not considered in a contractual context, as in the first group of cases. The plea of volenti rested simply on the allegation that the plaintiff had gradually stored inflammable material nearer to the defendant's dump which contained combustible waste. The question of actual trespass by the plaintiff on to the defendant's dump could not be determined due to insufficiency of proof of the dump's boundaries. Van Blerk, however, at page 407 made the following unambiguous remark on the effect of quasi-consent on the patrimonial action :

> 'It is clear that for this defence to succeed it must be shown that the respondent (plaintiff) not only appreciated the magnitude of the risk which it is alleged to have assumed, but it must also have had full appreciation of the scope and nature of the resultant invasion of its rights; otherwise it cannot be held to have waived any rights. The invasion of its rights by appellant must have been within the limit of its consent.'

As in the case of real consent to the risk of injury, where the plaintiff waives his right to seek redress by any form of litigation for the loss in question, so in these cases (where the patrimonial delict has been established) it appears that the plaintiff is deemed to have waived his right to seek compensation by a delictual action.

A further indication that quasi-consent in these cases functions in a manner appropriate to the analogue of real consent not to litigate may be afforded by the manner in which the court approaches such pleas. For example, in the case of Rosseau v Viljoen where a flag marshall was injured by a midget car, driven by the defendant, Van Winsen J. stated that when quasi-consent is alleged there must be :

'(a) an inquiry into the nature and extent of the risk which the defendant claims plaintiff understood and accepted and whether the harm suffered by plaintiff flowed from the occurrence of events the risk of the happening of which was so accepted;

(b) the question of whether, and this is a subjective inquiry, an inference arises from all the evidence that the plaintiff must have understood and accepted the risk.' 269/

Apart from the fact that in these cases under the first subdivision of group two, the existence of culpability or negligence is first determined before volenti is considered, the investigation envisaged by Van Winsen J. under heading (a) above is similar to that carried out by Herbstein J. in the case of Hughes N.O. v S.A. Fumigation Co.(Pty.) in determining the primary issue of whether the fire risk clause consented to by the plaintiff could effectively act as a defence to any patrimonial action. Only the subjective inquiry under heading (b) made necessary due to the lack of any ostensible manifestation of the plaintiff's actual intention on the issue of liability distinguishes the approach in these cases to questions of volenti from those in the first group, where an objective inquiry into the existence of the plaintiff's real consent is necessary.

One final factor which indicates that quasi-consent in these cases can be considered to be analogous to a real agreement to dispense with the litigation arises in connection with the finding in all of these cases that the defendant was negligent, that is from the fact that in some of these cases quasi-consent can successfully relieve the defendant of liability after the primary question of fault has been established against him. In the legal system from which the concept of quasi-consent as a delictual defence evolved, i.e. English law, it can be noted that there has been a reluctance to impute such a positive function to the plea.

Though in cases of real consent, volenti is considered to render the defendant's established negligence unenforceable it would appear from English case decisions and the comments of certain text-book writers that no such function is similarly attributed to quasi-consent.

For example, in cases of delictual loss incurred during games in English law the defence of quasi-consent is said to be applicable provided the defendant has not acted in a manner which could be considered negligent. Thus, in Cleghorn v Oldham [270/] where the plaintiff was struck in the face by a golf club during a demonstration stroke, Swift J. stated on the question of the assumption of risk that 'So long as negligence could not be brought home to somebody, a plaintiff could not recover; he had taken the risk incident to the game.' [271/] A similar approach was adopted in the later case of Wooldridge v Sumner [272/] where a photographer at a horse show was injured by a galloping horse, with the refinement that the participant's error in judgement or lapse of skill need not constitute negligence in respect to the plaintiff's safety. [273/] In cases involving master and servant situations the same negative function can be said to apply to the defence of volenti. Thus in Smith v Baker (1891 A.C. 325) where a quarryman was injured by falling stones, which were being swung over his head by a crane on the instructions of his employer, Lord Herschell stated that where 'a risk to the employed which may or may not result in injury has been created or enhanced by the negligence of the employer - mere continuance in service with knowledge of the risk' - does not - 'preclude the employed from recovering. I cannot assent to the proposition that the maxim "volenti non fit iniuria" applies to such a case'. It is interesting to note in connection with the effect of established negligence on the defence of volenti in these master and servant cases that Pollock, in his text book on 'Torts' at page 131 attempts to justify the decision in the

early case of Thomas v Quartermaine [274/] maintaining the defence of volenti on the grounds that the plaintiff's injuries were really caused by pure accident rather than by the defendant's negligence.

In cases involving car accidents in English law, the same approach is adopted. Thus, in the case of Dann v Hamilton [275/] where a woman suffered injuries in a motor accident after accepting a lift from a driver whom she knew to be drunk, Asquith J. came to the conclusion that :

> 'the plaintiff by embarking in the car, with knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to, or absolve the driver from liability for any subsequent negligence on his part whereby she might suffer harm.' 276/

The comments of English text book writers also tend to support the view that the plea of volenti, as quasi-consent, constitutes a negative defence to the allegation of negligence, in that it can only succeed in the absence of fault in the defendant himself. Pollock for example states that 'the whole law of negligence assumes the principle of volenti non fit iniuria not to be applicable';[277/] and Winfield declares that :

> 'For the defence to succeed it is necessary for the defendant to establish not simply that the plaintiff consented to the physical risk, i.e. the risk of actual damage,but to the legal risk, i.e. the risk of actual damage for which there will be no redress at law.' 278/

This latter writer, however, suggests that it might now be possible to succeed with the defence of quasi-consent on proof of negligence on the basis of the case of Imperial Chemical Industries Ltd. v Shatwell. [279/] Here the plaintiff and his brother were employed in the defendant's quarry as shot firers. Both agreed to test a firing circuit for continuity in a manner contrary to their employers' orders and certain statutory regulations. As a result, both brothers were injured. One brother now

sued his employer on the grounds that they were vicariously liable for his brother's conduct. It was held that as the defence of volenti could have been maintained if one brother had sued the other, the same plea was a complete defence to the employer if he was not himself at fault and only liable vicariously. Winfield's suggestion that the defence of quasi-consent might now consequently succeed against the establishment of negligence is however doubtful from this case.

This is simply due to the fact that the plaintiff in this case gave what amounted to real consent to the proposed operation.

For example, it was proved in the case that before the brothers commenced the testing operation (which both knew would be carried out in an improper and dangerous fashion) George said to his brother, 'Must we test them?' meaning shall we test them, and James said 'Yes'. [280/] Had James said 'Yes, let's risk it' there would have been no doubt that he had given real consent to risk the injury sustained, which could be interpreted as an actual agreement not to litigate. However, it is doubtful whether the English courts, when presented with the single affirmative answer of a plaintiff, agreeing to participate in an activity which he knew and appreciated to be dangerous, would consider such a statement merely as quasi or 'implied' consent to the risk of injury rather than as real consent.

In the present subdivision of cases in South African law, however, the plea of volenti, as quasi-consent can constitute a positive defence to the establishment of negligence and thus in this respect can be said to exhibit the attributes of a real argument to dispense with litigation. In the case of Lampert v Hefer, [281/] for example, which in almost all respects is similar to the English case of Dann v Hamilton, Fagan J.A. accepted the findings of the trial judge that 'Hefer was unable to exercise due or proper care in the management of or control over the cycle', but

nevertheless maintained that the plaintiff would have no reasonable prospect of success in an appeal against the decision that she had voluntarily assumed the risk of the injuries sustained.

The civil law approach to the question of liability in the cases which fall under the present subdivision would not, as has been stated above, have involved any consideration of the question of 'implied' or quasi-consent. The cases in which this defence failed could, in terms of Aquilian jurisprudence, have been simply determined on the grounds of culpa, with possible reference to the question of whether the plaintiff's own actions or omissions had facilitated his loss. For example, at least five of the fragments in D.9.2 appear to indicate that in cases where a plaintiff himself acted in a manner which could be classified as fault, he was prohibited from seeking a remedy against the defendant.[282/] The reason for this is given by Paulus in D.9.2.28 princ when discussing the case of injuries arising from falling into animal traps; 'Hanc tamen actio ex causa danda est, id est si neque denuntiatum est neque scierit aut providere potuerit; et multa huiusmodi deprehenduntur quibus summovetur petitor, si evitare periculum poterit'. To the Glossators this indicated that some principle of culpa-compensatio operated in determining liability,[283/] and in modern delictual law for patrimonial loss it can be said to have supplied the basis for the pre-1956 defence of contributory negligence dependent on a mixture of both fault and causation.

As the situations which are dealt with in the present series of cases are not so fundamentally different from those arising under Roman law, it is possible to say that generally where the defence of quasi-consent fails in present day cases, a Roman plaintiff would have been considered to have had a good ground of action under the Lex Aquilia.

For example in Waring and Gillow v Sherborne it was found that the plaintiff, a rigger, had no knowledge of the dangerous condition of a derrick which he was required to use in dismantling a crane from the top of a scaffold and had thus not consented to the risk of injury. Similarly, in Roman law where such a plaintiff was not aware of the presence of an inherent danger, caused by the fault of another, in some aspect of his normal activities (where he would not expect to encounter it) he would have a good cause for recovering damages on sustaining a patrimonial loss. Thus, Mucius states that a pruner will incur Aquilian liability when he acts without dolus, where he throws down branches from a tree without warning onto a place where people usually walk, but not elsewhere. 284/ Again, as the flag marshall in Rosseau v Viljoen was not considered to have waived his right to recover damages, in terms of volenti, from a midget car driver who carelessly drove at him after retiring from a competition, the master of a slave on hire as an arena attendant would have a good cause for Aquilian redress where the latter was injured by the carelessness of a chariot driver in leading his team from the arena. 285/

On the other hand, cases in which the defence of quasi-consent is successfully pleaded in defence of established negligence would have been decided in Roman law on the basis that the plaintiff had no just cause of action on account of his own conduct. Thus, the Lampert v Hefer decision in modern law can be compared with the view in Aquilian law that if there was any uncertainty due to the plaintiff's conduct over the issue of which party was to be considered responsible for the loss complained of, then the Aquilian remedy was not allowed. Thus, Paulus states in D9.2.45.3 where one slave collides with another when leaping over burning straw that 'nihil eo nomine agi, si non intellegitur uter ab utro eversus sit'. Similarly, Mela remarks after stating that a barber might have been

at fault in a hypothetical case of a slave who has his throat cut after allowing himself to be shaved in a dangerous thoroughfare that 'si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere'. 286/ In terms of Paulus' statement in D9.2.28 princ these situations could be rationalised as ones in which the plaintiff had failed to foresee a possible danger to himself. In modern legal terminology the Civil determination of such cases would employ the concept of contributory negligence rather than quasi-consent.

From the case of Lampert v Hefer it is obvious that in modern law the defences of contributory negligence and quasi-consent may both compete in determining liability in the present subdivision of cases where the defendant's negligence is not disputed. 287/ Thus, Fagan J.A. states at page 514 that :

> 'Where the defence is that the plaintiff voluntarily became a passenger in a motor cycle controlled by an intoxicated driver, the degree of intoxication may be of importance in considering whether the plaintiff either in fact appreciated, or was negligent in failing to appreciate, that the intoxication was such as to involve the risk of an accident'

that is, where such a person appreciates such a danger, but nevertheless does not alter his conduct to avoid it, the defence of quasi-consent arises; whereas if he fails to appreciate the danger and proceeds normally he is guilty of contributory negligence. 288/ Now from the Civilian point of view the legal classification of the plaintiff's acts, on the basis of appreciation, into that of quasi-consent and contributory negligence seems very odd indeed. For example, though under Aquilian law a plaintiff could not recover damages where he was unaware of or failed to foresee an obvious danger, 289/ he was similarly prevented where he did. Thus, in D9.2.9.4 the owner of a slave who is killed crossing a javelin field is unable to recover 'quia non debuit per campum iaculatorium iter intempestive

facere'. [290/] Consequently, in modern law the defence of contributory negligence is really also relevant to both situations irrespective of appreciation. What can thus be said of the practice of allowing both volenti and contributory negligence to be pleaded on the same facts in situations where a plaintiff has appreciated or foreseen a danger ?

Quasi-Consent and Contributory Negligence in Cases of Established Negligence

The most obvious justification for this would appear to lie in the notion that where the actions of such a plaintiff who appreciates a danger, cannot be said to amount to contributory negligence, the defendant should be given the opportunity of showing that the same acts alternatively constitute quasi-consent. In other words, that the defendant who has been found to be negligent should be able to avail himself of every relevant legal defence even though it may involve different pleas on the same facts. However if this can be said to be the justification for allowing both defences to be considered in these situations it might be said that it appears to militate inequitably against a blameless plaintiff. The practice of allowing both defences on a similar set of facts, in cases where the defendant has been found to have acted negligently exposes the plaintiff to the risk that his own actions, though scrupulously in accordance with the best rules of conduct and thus not in any way blameworthy may nevertheless cost him his case by being construed in terms of quasi- or fictitious consent; this might appear especially inequitable since before the introduction of fictitious or quasi-consent into South African law the actions of a plaintiff, which were without fault, would in no way bar him from recovering.

The realisation that such an injustice might be perpetrated against a blameless plaintiff where both pleas were later allowed on a similar set of facts might account for the frequency with which the judiciary

reject the alternative plea of volenti where that of contributary negligence fails and go out of their way to state that the particular facts constituting this latter plea could support no delictual defence at all. In other words, where the plea of contributory negligence fails the courts tend to stress the impropriety of any other plea based on similar facts.

In the case of Waring v Sherborne, for example, where the requirements of the new defence of quasi-consent were reviewed for the first time in South African delictual law on patrimonial loss the defendant pleaded both contributory negligence in respect to the workman's alleged fault in not cutting a stay-rope before ordering a crane to be removed from its bearings and volenti non fit iniuria on account of him willingly using a defectively constructed derrick. The omission on which the former defence was based upon was a constituent part of the workman's overall conduct on which the latter defence rested. Innes C.J. found that the plaintiff was not guilty of contributory negligence and rejected the plea of volenti. However, though contributory negligence was based on a particular omission, the trial judge went out of his way to state that even if contributory negligence had been pleaded on the identical facts which constituted the unsuccessful plea of volenti, the plea would still have failed. 'There was nothing either done or left undone on Sherborne's part which could be considered as having nullified the negligence of the company.' 291/

In other words, the same factors which constituted the plea of volenti as quasi-consent, were not simply said to be unable to maintain that defence, but also any other delictual defence, viz. contributory negligence.

It could equally be said, of course, that the particular facts of this case were simply productive of neither defence, which is quite true. However, this rejection ex proprio motu of the plea of contributory negligence as if it were based on the identical facts of the volenti plea may have indicated a subconscious unwillingness on the part of the judge to consider the new alternative plea, based on the fiction of consent, as an appropriate aid in the equitable determination of liability where on the same facts the plaintiff would have been said to have acted blamelessly.

In this respect, it might consequently be suggested in cases of this nature where both defences were averred on the same facts that the plea of quasi-consent was in fact considered by the courts before 1956 [292/] to be tautologous to that of contributory negligence in that it merely described the same allegedly blameworthy acts of a plaintiff by substituting the fiction of consent for the more concrete notion of fault. [293/]

Fagan J.A., in the case of Lampert v Hefer, would appear to have recognised this in his discussion of the plea of the voluntary assumption of risk, which can be considered synonomous with the quasi-consent referred to above. In this case the defendant pleaded amongst other things that the plaintiff could not recover since she had entered the side car of the motor cycle after realising that the driver was drunk. As this plea did not specifically refer to volenti or contributory negligence the court had to decide on its relevance. Fagan J.A. in stating that the voluntary assumption of risk was a relevant defence in the South African law of delict to the establishment of negligence provided the following example :
Two cars collide at an intersection. The defendant A, is found to have been grossly negligent in driving too fast; however, it is also established that plaintiff B observed the defendant approaching at high

speed, appreciated the danger, but nevertheless proceeded to assert his right of way. 'It might be viewed from one angle' he says 'that the plaintiff had voluntarily submitted himself to such damage as would fall within the scope of the risk to which he was exposing himself, or from the other angle, it might be said to be negligence to submit himself to such a risk.'

However, in the opposite situation from that in Waring v Sherborne where it might be said that the new plea of volenti was rejected since the plaintiff,on the same facts would not have been guilty of contributory negligence, the plea of quasi-consent in this case ought correspondingly to succeed. 'Could it be argued' he asks, 'That B would be entitled to recover because his act was not a negligent one, but was deliberately done, with full knowledge of the risk and may even have been done with great skill so as to try to escape or minimise the damage ? Or that the plea would be excipiable if it made no allegation of negligence on B's part, but averred that he had deliberately proceeded into the intersection with full appreciation of the danger. The negative answer to both of these questions should be obvious.'

As in Roman Law which simply considered the acts of the plaintiff solely in terms of what might now be called contributory negligence, the issue of the plaintiff's own fault may be said to have been the leading factor which the courts looked to before 1956 when determining liability in these cases, in which both pleas were allowed; any finding on the plea of volenti which adversely affected the plaintiff's case being dependent on a finding of contributory negligence.

In other words, up until 1956, it is submitted , that a plea of volenti on the same or similar facts as one of contributory negligence

was in fact considered tautologous with this latter defence. This approach provided a simple guideline for the courts in determining liability without producing an inequitable result for a blameless plaintiff.

Prior to 1956 it was immaterial to the outcome of the plaintiff's case, where he was found to have been at fault, whether the court sustained or rejected the alternative plea of volenti. After 1956, however, the issue of volenti in these cases now became as important from the point of view of a damages award as it was in cases where the plaintiff could not have been considered to have acted with fault. In 1956, the South African Parliament passed the Apportionment of Damages Act which was intended to alleviate the severity of the former law on contributory negligence whereby, if the plaintiff was considered to have contributed to his own loss, he would fail to recover damages despite the extent of the defendant's negligence. The act was designed to eliminate the difficulties which had arisen over the application of the plea of contributory negligence due to the English notion that the ultimate issue of liability ought to be determined primarily as a matter of causation. [294/]

Section 1(1) thus provided that where both plaintiff and defendant were considered to have been at fault, damages should be awarded to the former in proportion to the degree to which he was negligent.

Consequently, if the courts now follow the pre-1956 guideline and consider an alternative plea of volenti tautologous in terms of contributory negligence, the effect and intention of this equitable piece of legislation in respect to the blameworthy plaintiff would be nullified.

Whichever way it is viewed, the practice of allowing both contributory negligence and volenti to be pleaded on the same set of

facts, after the establishment of fault in the defendant, is clearly undesirable in South African delictual law on patrimonial loss. Indeed, Schreiner, J.A. in the case of Lampert v Hefer may have glimpsed the legal future when he stated that though it is usual to include both quasi and real consent in the plea of volenti non fit iniuria, 'Upon further consideration it may be found more convenient to treat cases of the risk type always as examples of contributory negligence'. 295/

It is thus submitted in respect to the cases considered in this group, where negligence of the defendant has been established that the application of the doctrine of volenti, as quasi-consent affords no practical advantage in the determination of patrimonial liability.

Since contributory negligence is an adequate concept on its own for determining liability in situations where the plaintiff's actions are at issue, and fault has been established in the defendant, it is further submitted that reference to the doctrine of quasi-consent on similar facts should be disallowed as unnecessary and inequitable. Other legal systems, for example, based on the Civil law, find no reason to allow reference to quasi-consent in such situations. In French law, cases similar to that of Lampert v Hefer would have been simply decided on the basis of the plaintiff's fault. 296/ Nor, as has been stated above, 297/ is there precedent for it in the delictual law of the Netherlands. Indeed, as the development of the formal doctrine of quasi-consent can be said to have been concurrent with the development of the Tort of negligence in mid-Nineteenth Century English law, where, it is submitted, it was considered a useful device for determining liability in cases of first impression before the concept of negligence was fully worked out, it would appear (especially in the present series of cases) to be an unnecessary encumbrance on the delictual law of South Africa.

Finally, in respect to the practice of allowing reference to volenti as quasi-consent on facts similar to the defence of contributory negligence, it might be said that from a practical point of view it doubles the complexity of the court's task in equitably determining the issue of liability and in certain cases may obscure the correct legal analysis of the case at hand. In other words, not only is it unnecessary for the determination of liability in these cases, but it also creates unnecessary legal problems which can facilitate an incorrect legal analysis. For example in Netherlands Insurance Co. of S.A. Ltd. v Van der Vyver [298/] a private detective, hired by the defendant's wife, had thrown himself onto the defendant's car in order to bring it to a halt. Instead of stopping, however, the defendant increased speed and attempted, by swerving the car from side to side, to throw the plaintiff off. Against the allegation of established fault,defence counsel pleaded both volenti and contributory fault or intention. From the facts of the case it could be said that by throwing himself on the defendant's car Van der Vyver acted in an intentionally inappropriate manner which could be interpreted as either giving his implied consent to risk any negligence on the part of the plaintiff or any dolus on his part; or looked at from the point of view of fault he had been negligent in acting as he did. [299/] In dealing with the defences Van Blerk, representing the majority of the judges held that the plaintiff could not be held to have consented to the risk of injury simply by lying on the bonnet of the car and was neither guilty of contributory fault or intention. The dissenting judge, Milne A.J.A. on the other hand, held that the plaintiff had accepted the risk of the injury which he sustained. Neither view it is submitted reflected the correct legal analysis of the case. For example, by removing the notion of volenti as quasi-consent one can

see that the case simply involves a situation where though the plaintiff had in fact been negligent,the defendant had acted with dolus. Consequently, an inquiry into whether the plaintiff impliedly consented to the risk of the defendant's culpa as dolus, from the act of leaping onto the car bonnet would appear unnecessary since, as the act was clearly negligent, it would hardly form the basis of any successful defence against the established dolus of the defendant. 300/ Thus, though volenti was an available defence, under the substantive law, on the same factors as that of negligence and contributory intention, it would seem to have obscured the real question at issue here; namely of deciding whether the plaintiff deliberately threw himself onto the car in order to injure himself (contributory intention) or to stop the car (negligence). Though the majority decision was in fact a correct one in relation to liability, it is submitted that it did not represent the true legal analysis of the case. 301/

Cases in Which Negligence Cannot be Established and in Which Volenti is Referred to

The second subdivision of cases in this group in which volenti is considered in terms of the plaintiff's actions as 'implied' or quasi-consent can now be examined. This present subdivision can be distinguished from the first discussed above in that in none of the cases which constitute it are the requirements of the delict on account of patrimonial loss fulfilled. Consequently the defence of contributory negligence is inappropriate. In the former subdivision though liability was sought to be denied on the grounds of the plaintiff's quasi-consent, his actions were considered in these terms where it was clear that the defendant's conduct amounted to negligence. In the present subdivision, however, the issue of negligence and ultimate liability appear to be considered

in terms of the plaintiff's conduct alone. A distinction should be noted here between the application of the volenti principle as quasi-consent in this (second) subdivision of cases and its application in the first group of cases in terms of real consent. In both instances the issue of volenti appears to be a determining factor of primary relevance taking precedence over any detailed consideration of the defendant's conduct in terms of negligence. However only in the first group of cases which involve real consent can this be truly said to reflect the state of affairs. In this present subdivision the application of the volenti doctrine as quasi-consent is, unlike its application as real consent, peculiar to the law of delict for the recovery of patrimonial loss. In other words it can only affect the issue of liability in so far as it may be said to affect the establishment of negligence (where the patrimonial loss was sustained by some unintentional act of the defendant). Consequently in these cases which involve quasi-consent, if no plea such as lack of jurisdiction or res judicata is put forward, the issue of the defendant's negligence remains to be considered as one of primary relevance in the determination of liability. In this respect the plaintiff's actions may or may not be deemed to affect the establishment of negligence depending on whether they amount to quasi-consent, or not.

In this present subdivision of cases, it is submitted that on a jurisprudential analysis of volenti as a factor capable of deciding liability, quasi-consent unlike its function in the first subdivision of cases, appears to determine the issue of liability on the basis of precluding negligence, rather than as a bar to enforcing litigation for the loss sustained. If the issue of negligence had, for example, also been expressed in terms of the defendant's conduct in these cases, it would have been possible to argue that reference to the actions of the

plaintiff which constituted his quasi-consent simply amounted to an alternative ground for denying liability based on the analogue of a pactum de non petendo, i.e. that the effect of such consent, as in the first subdivision of cases, was to prevent the plaintiff litigating on the contingency of a particular loss arising. However, as the issue of fault is determined solely in terms of the plaintiff's conduct, without any reference to that of the defendant's, the effect of quasi-consent on liability in these cases is less readily identifiable with that of a fictitious pactum. Thus, the effect of referring to the doctrine of volenti in this subdivision of cases is more susceptible to being analysed as that of a factor which precludes the delictual right, afforded by established negligence to recover compensation from arising than one which renders such a right unenforceable. For example, in Burnett & Taylor v De Beers Consolidated Mines Ltd. 302/ where the defendant was alleged to have been negligent in not working down its claim adjoining the plaintiff's, thereby causing the latter patrimonial loss when a landslide resulted, Solomon J. stated, with reference to the plaintiff's action of proceeding to mine their lower claim that :

> 'Having commenced work in these claims with the full knowledge of the danger, and having given notice of the danger, neither to the defendants nor the Inspector of Mines, I am of the opinion that they cannot now be heard to complain of the damage which they suffered by the fall of February 6th. Surely, in such a case, if ever, the maxim volenti non fit injuria should apply.' 303/

The defence of quasi-consent was not in fact pleaded by the defendant since it was contended on the basis of the 1885 Law of the Duitoitspan Mining Board and on the principle of Damnum Infectum that it had displayed no negligence. Now both of these defences, if sustained, would have established in terms of Roman-Dutch law that the defendant's

omission of not working down its claim was not sufficient to indicate that a delictual obligation to compensate had arisen on the occurrence of the landslide in question; or, in relation to Aquilian culpa of Roman law, such an omission would not have been said to constitute conduct contrary to that of a Bonus Paterfamilias.[304/] Consequently, as Solomon J. accepted the view that the plaintiff's loss arose from a situation analogous to that which could have produced an action on the cautio damni infecti, yet no notice of the inherent danger had been given to the defendant, his remark that 'surely in such a case, if ever, the maxim volenti non fit injuria should apply', can be said to indicate that he considered its reference appropriate in respect to rejecting the allegation of negligence rather than rendering a right to litigate unenforceable.

A similar view can be elicited from the case of Davids v Mendelsohn[305/] Here, where a tenant was injured by a falling roof after being warned of the danger and being told to quit, De Villiers C.J. held that "The injury was occasioned by her own fault in remaining on the premises with full knowledge of the danger; if ever there was a case to which the maxim of English law, volenti non fit injuria would apply, this is one.'[306/] The defendant's pleas were not summarised in the appeal case, but it is clear from the plaintiff's rejection of contributory negligence that they were framed with the establishment of a breach of duty in mind. The magistrate at first instance determined the question of liability on the grounds of no negligence. Consequently, as De Villiers C.J. upheld the decision of the lower court on the issue of fault, his reference to the appropriateness of applying the principle of volenti to the case would seem to relate to a determination of liability based on the absence of negligence rather than on a finding of a fictitious pactum. Even assuming that this was not the role of quasi-consent in these two cases, but

like that of real consent it did act as a form of pactum de non petendo to the risk of injury occurring generally, one would nevertheless expect to have seen reference to some comparison between the plaintiff's fictional consent and the defendant's conduct; e.g. the question of whether the plaintiff's actions amounted to a waiver of liability in respect to the risk of loss as it in fact arose. However, as no such comparison was in fact made, the application of quasi-consent, in these cases, it is submitted may be more accurately described jurisprudentially as precluding some requirement of the modern delict on patrimonial loss in the same way, for example, that real consent in Roman law was inimicable to the establishment of contumelia in the delict of Iniuria. If this is so, the question which now arises is, which of the two delictual requirements, excluding the necessity to prove patrimonial loss, is so precluded by quasi-consent. The requirement to establish a relationship between the parties giving rise to an obligation of care, or the requirement that a breach of such an obligation has occurred.

Though it might appear reasonable and in keeping with accepted modern legal terminology to state that a plaintiff by his own actions had indicated his consent to release the defendant from an antecedent obligation, arising by implication from the finding that a certain relationship existed between the parties, [307/] it would seem somewhat difficult to provide a rationale for the statement that the same acts could be viewed as preventing a breach of such a duty from arising. As the issue of the existence of an antecedent obligation is theoretically considered in terms of whether the relationship existing between the parties at the time of the injury was legally sufficient to have required the defendant to act with care towards the plaintiff, it would not appear unreasonable to determine this primary question by examining the actions of both parties immediately prior to the

incident in question. The conduct of neither of the parties in theory being considered in terms of fault or blameworthiness at this stage. Only where such a legally significant relationship has been established and where nothing had been done which indicated that the plaintiff had relieved the defendant of the implied obligation of care can the element of fault or breach of the antecedent obligation be considered. In this consideration, however, since only the defendant owes the obligation to the plaintiff and as only the defendant's conduct can constitute a breach of such an obligation, it is difficult to see (where such an obligation has not been dispensed with) how the plaintiff's actions can be relevant to this determination. Consequently, where the requirements of the delict for patrimonial loss are being considered, the actions of a plaintiff can only be relevant to the primary issues of relationship and 'effectiveness' of the obligation, rather than the requirement of establishing the defendant's unintentional fault. Thus, cases in which quasi-consent alone is referred to in preventing a plaintiff from recovering damages without any finding of negligence in the defendant can only be rationalized, it is submitted, by stating that volenti has rendered inoperative an otherwise effective antecedent obligation of care due by the defendant to the plaintiff by virtue of the legal implication of their relationship at the moment of injury.

In other words, in terms of a delictual requirement, quasi-consent would appear theoretically to discharge the antecedent obligation which would have been otherwise owed to the plaintiff. (Where the relationship of the parties is not found to be one which gives rise to the antecedent obligation, references to the absence of liability in terms of volenti are, it is submitted inappropriate.) Where the defendant has been found to have breached an effective antecedent obligation of care as in the first subdivision of cases in this group, quasi-consent as a defence to established

negligence, renders the subsequent right to base litigation on such a breach, unenforceable.[308/]

Though both Solomon J. in Burnett v De Beers Consolidated Mines Ltd. and De Villiers C.J.in Davids v Mendelsohn might not have been aware of the precise legal effect on the antecedent duty of care doctrine of referring to volenti as the factor excluding liability, it is submitted that, jurisprudentially volenti could only support a finding of no negligence in the defendant by rendering inoperative an obligation otherwise due by him to the plaintiff rather than by excluding a consideration of the former's actions in terms of the breach of an operative obligation.

In what manner would these cases in which volenti appears to absolve the defendant from the allegation of negligence have been decided under Aquilian law ?

The delict of Damnum injuria datum required the plaintiff to establish culpa and damnum. This meant (disregarding the requirement of damnum) that unlike modern law there was no preliminary requirement of having to establish an antecedent obligation of care. In other words the determination of liability in respect of culpa could proceed directly to the stage of inquiry in modern law where the breach of an established and effective duty is considered. As in modern law this issue and that of culpa could only be determined in relation to the defendant's conduct; the real consent, or actions of a Roman plaintiff [309/] which today might constitute quasi-consent as used in the first series of cases above could not, it is submitted, preclude the requirement of culpa in terms of discharging an antecedent obligation; [310/] such conduct, however, could effectively take away the right of the plaintiff to seek redress by way of the Aquilian remedy and its analogous extensions

for any loss allegedly caused by culpa. This has been pointed out above in situations which may be said to involve real consent in Roman law from the language used by the jurists i.e. D9.2.27.29, D9.2.7.4. The same may also be said to apply to the actions of a Roman plaintiff which under modern law could be considered in terms of quasi-consent as in the first series of cases; for example, where he is at fault along with the defendant. [311/]

In D9.2.28 princ., Paulus states that the right to the remedy afforded by the lex Aquilia for the recovery of loss is only given where the plaintiff could not have avoided the hazard caused by the defendant's culpa. As the fragment is concerned with loss arising from falling into animal pits, it would appear that the obligation arising under the lex Aquilia to compensate the effects of culpa (fault) would be unenforceable in the case of a plaintiff falling into such a pit by a roadside, which though not displaying any specific warning to passersby,would have been ascertainable to all but a reckless road user. The same notion of the plaintiff's imprudent actions preventing him from enforcing his right under the lex Aquilia to be compensated for loss caused by culpa, can be seen in the hypothetical case discussed by Ulpian in D9.2.11 princ. Here a person hits a ball rather hard which strikes the hand of a barber about to shave a slave. The slave's throat is consequently cut. On the issue of culpa Mela states that 'in quocumque eorum culpa sit, eum lege Aquilia teneri'. Ulpian, however, adds that if the slave voluntarily entrusted himself to a barber who carried out his business in a dangerous place 'ipsum de se queri debere'. In other words, though culpa (fault) may be attributed to either or both the player and the barber, as the plaintiff might have avoided the injury he may be unable to enforce the Aquilian obligation for compensation.

As the actions of a plaintiff in Roman law could not preclude the delictual requirement of culpa (fault) but like those actions considered in modern law as a defence to the breach of an established and effective duty of care could only render the Aquilian remedy for damages unenforceable, what would have been the approach in Civil law to cases in the present series involving quasi-consent in which it can be said to discharge the antecedent obligation of care ?

The nearest approach to these types of cases in the Civil law would appear to indicate that the issue of liability was simply considered in terms of the defendant's conduct; for example, in D9.2.52.1 Alfenus states that a shopkeeper who knocks out the eye of a passerby after the latter carries off his lantern and beats him with a whip containing a spike in it will not be liable unless it is done deliberately. Here it may be possibly argued that the passerby does not intend to steal the lantern for gain but merely wishes to make use of it for a time without the shopkeeper's consent. [312/] In any case, Alfenus appears to be of the view that it is only appropriate for an owner (defendant) to counter such violence in order to retain his goods rather than to maliciously inflict serious injuries. This case can perhaps be compared to that of the shoemaker's apprentice mentioned by Ulpian in D9.2.5.2 since it would appear that the jurists in both contexts are required to assess the amount of violence necessary to constitute culpa under the lex Aquilia in situations normally warranting the use of force by a defendant.

Again in D9.2.52.4 when the same jurist is asked his opinion on the prospect of an Aquilian action against a player who injures a slave boy during the course of a ball game, the issue of culpa is determined in relation to the conduct of the person injuring rather than the injured.

Hence, he states that as the act of pushing over the slave as he was going for the ball ought not to be considered culpa, the incident would be more appropriately viewed in terms of casus.[313/]

In both of these situations, there is no finding of culpa on the part of the person inflicting the injuries complained of after an assessment is made of his actions which give rise to them. The application of modern delictual law on patrimonial loss to these cases could however produce a similar finding of no negligence expressed in terms of the plaintiff's actions. For example,by applying present-day terminology to the situations which arise in D9.2.51 and D9.2.52.4, it could be said that a plaintiff who breaches the criminal law and employs a dangerous weapon on a defendant in an attempt to carry off his goods, impliedly exempts the latter from a duty of care towards him and hence no negligence arises in respect of unintentional injury which is sustained by the plaintiff when the defendant attempts to restrain him. Similarly, where a player is injured during the course of a game, the player inflicting the injury may not be said to be liable to pay compensation on the grounds that by voluntarily entering the game the injured player impliedly exempted him from a duty of care with respect to any injuries he might receive in accordance with the game.

This use of volenti to express the absence of negligence in cases in which a similar result on liability could be arrived at in terms of the defendant's actions alone is illustrated in South African law by the two cases previously referred to in this sub-section, i.e. Burnett & Taylor v De Beers Consolidated Mines Ltd. and Davids v Mendelsohn.

For example, though both Solomon J. in the former and De Villiers C.J. in the latter were of the opinion that the doctrine of volenti, as quasi-

consent, could be referred to in justifying the absence of negligence, both inferior courts, whose decisions were upheld, appear to have arrived at their findings of no negligence in terms of the question of the defendants' omissions, that is, since neither these courts, nor the defendants, referred to the issue of volenti, the allegation of negligence could only have been determined as if there was in existence an effective antecedent obligation against which the defendants' conduct could be assessed.[314]

If the Appeal Court in these cases could produce a finding of no negligence, in terms, it is submitted, which jurisprudentially could only indicate that a duty of care, though existing, was rendered inoperative by the plaintiff's quasi-consent, yet the inferior courts could arrive at a similar finding by considering that an operative duty of care was unbreached, are these operative and inoperative duties theoretically the same ? It is submitted that they are not and that by substituting volenti as the ratio decidendi for the finding of no negligence in these cases in place of one based on the defendant's conduct, the appellate court may have unwittingly allowed a concept of care into South African law which is strictly speaking, not based on the notion of unintentional fault at all.

Firstly, it might be said that no question of a difference between the duties would arise if it were possible to say that the plaintiff's quasi-consent could determine whether a defendant had acted in breach of an operative duty of care. However, it is submitted that there is simply no legal basis on which the issue of whether A's conduct constitutes the breach of a duty owed to B can be determined solely by considering B's conduct. Such an approach even in cases of omission is clearly absurd.

Secondly, South African law normally attempts to reconcile the Roman and Roman-Dutch concept of culpa, as 'pure' fault, which is considered the historical basis of the delictual action for patrimonial loss, with the formalised 19th Century requirements of duty of care and breach of duty of care, in terms that culpa is equivalent to a breach of duty or negligence and that this in turn subsumes the notion of the antecedent obligation. [315/] Consequently, in situations involving remoteness of damages or questions of causation, a finding of no duty of care is synonomous with a finding of no negligence since there is no duty in existence which the defendant is capable of breaching. A finding stated in terms of a duty which is inoperative, however, does not authomatically indicate that the actions of the defendant would not otherwise have been negligent had the duty been considered operative. The finding of no negligence in terms of volenti, indicating no operative duty, produced by the Appellate Court in the two cases above, is not strictly equivalent to the finding of the Lower Courts that there was no negligence on the grounds that the defendant's actions did not constitute the breach of an operative duty. The former finding cannot be said to assume automatically that the latter would also have been the case.

In other words, the reference by the Appellate Courts to the doctrine of quasi-consent in sustaining the decisions of the Lower Courts affords no basis for assuming that the duties of care considered by the two courts, in both cases, were identical.

Thirdly, neither the Appellate Court nor the Lower Court in these cases were required to examine the issue of volenti. As the same actions of a plaintiff theoretically rendered the duty of care applied by one court inoperative, yet operative in another, a difference of approach by

both Courts to the question of the duty of care considered appropriate to the particular circumstances of both cases would appear to be indicated. In Davids v Mendelsohn the actions of the plaintiff considered by the Appellate Courts were those of remaining on the defendant's premises after notice to quit had been given to carry out repairs; and in Burnett v De Beers of continuing to work the claim leased from the defendant without informing it that a danger existed by doing so from its higher claim. In both cases the duty of care which such actions would appear to render inoperative is one based on the duty to warn or inform the plaintiff of certain dangers existing on the defendant's land.

As has been already sumbitted above, the 1873 Judicature Act of English law greatly facilitated the identification of volenti in the Tort of the occupier's liability with that of quasi-consent in the Tort of negligence. Consequently, late 19th Century South African judges, especially of the Appellate Court, would have been aware of the tendency of English courts to determine cases raised under the head of negligence on the basis of volenti, irrespective of whether there were specific pleadings to that effect. They may not however, have been fully aware of the fact that though an English plaintiff had raised his action on the basis of negligence in terms of a duty of care, the English courts would on arriving at a finding of no duty of care, alternatively consider the other legal duties imposed on the defendant by virtue of the circumstances of the case. This occurred especially in circumstances in which the Tort of negligence had not been applied before. Consequently, a finding of no negligence in terms of volenti invariably meant in these early cases that :-

(a) the court was not prepared to extend the concept of the antecedent duty of care to the case at hand; and

(b) even considering the defendant as an occupier with a duty under the Tort of the occupier's liability towards the plaintiff there was no liability to compensate the latter since he had acted in the knowledge of certain dangers, i.e. volenti non fit injuria.

Thus, by considering the English concept of volenti a relevant factor in Burnett v De Beers Consolidated Mines Ltd. and Davids v Mendelsohn, which involved situations giving rise to co-existing duties under the Tort of Negligence and the Tort of the occupier's liability in English law, the Appellate Courts may have unwittingly denied liability for negligence in terms not strictly based on the concept of negligence or fault, but, in terms of the 19th Century occupier's Tort.

A notable example of the way in which English Courts could produce a decision in terms of volenti after maintaining that no duty of care was owed to the plaintiff is afforded by the 1887 case, referred to earlier of Thomas v Quartermaine [316/] Here the plaintiff who was an employee of the defendant stumbled and fell into an unfenced vat which he was required to use during the course of his employment. This case had amongst other issues to determine for the first time whether an action on the Tort of negligence could be sustained against a master by virtue of the 1880 Employer's Liability Act for injuries to a servant which had not been occasioned by the breach of any statutory duty imposed on him. The majority of the court held that the action must fail. Bowen L.J. representing the view of the majority stated that S1(1) of the Act, which afforded a workman the right to sue an employer on account of a defect in the condition of his works :

> 'Cannot be distorted into the meaning that a new standard of duty is to be imposed upon the employer as regards a workman, which would not exist as regards anybody else - if the Act had been intended to prescribe some new measure of duty, the least one might expect would be that it should define it. What sort of duty could it be which does not exist at law and which is not defined by statute ?' 317/

> 'The true view in my opinion is that the Act has placed the workman in a position as advantageous but no better than that of the rest of the world who use the master's premises at his invitation on business.' 318/

> 'The Common law imposes on the occupier of premises no abstract obligation at all as to the state in which he is to keep them. In the case of premises that contain an element of danger a duty arises (under the Tort of the occupier's liability) as soon as there is a probability that people will go upon them. The duty of an occupier of premises which have an element of danger reaches vanishing point in the case of those who are cognisant of the full extent of the danger and voluntarily run the risk. Volenti non fit injuria.' 319/

By equating the plaintiff to a casual visitor, the question of negligence, in terms of whether it was reasonable to foresee that a servant continually working at an unfenced vat might eventually be injured, was of course precluded by the majority.

Notably, the Master of the Rolls, Lord Esher, dissented on the issue of the duty required of a master in such circumstances. After discussing the implications of the 1880 Act he stated that

> 'The case is reduced, therefore, to a personal action founded on negligence.' 320/

> 'It is put in argument that the duty of the master is either to take reasonable care that there shall be no defect or to tell the servant that he does not mean to do so. To me it seems an unnatural doctrine that merely telling a servant of the defect should absolve the master from liability, (as under the occupier's Tort) and unless there is some authority which binds me to accept it, I cannot do so ...' 321/

The fact that the English judiciary generally misunderstood the effect of this case to be that the doctrine of volenti had prevented the plaintiff from recovering on the grounds of negligence and was not

restricted to the alternative consideration of the occupier's duty is evident from Lord Esher's remarks in the case of Yarmouth v France which appeared in the same year. 322/ (Here in a situation which would not have involved the duties of an occupier, the plaintiff who was employed to drive the defendant's carts,was injured by a kicking cart-horse.)

> 'The judge of the City of London Court did that which I believe many County Court judges have done since the decision of the Court of Appeal in Thomas v Quartermaine. The moment it was proved before him that the plaintiff knew the horse to be vicious but continued to drive him, the judge said it was useless to inquire further, for that alone disentitled him to recover upon the application of what is called "volenti non fit injuria". 323/

Consequently, he proceeded to review the concept of volenti as quasi-consent in terms of the Tort of negligence. His observations on the issue of volenti, it is submitted, have not been fully appreciated or followed by subsequent courts either in Britain or South Africa.

For example, he would appear to have considered that the degree of consent required by a plaintiff for the defence to succeed had to approximate to almost real or implied real consent. Thus, he states about the maxim 'volenti non fit injuria':

> 'I do not doubt that if we put this maxim into plain English, part of it is true, that is to say that if a thing is put before a workman and he is told, "Now, I do not ask you to do this unless you like, but I will give you more wages if you do. You see what it is. There is a rotton ladder, it is ten to one that it will break under you; but if you choose to run the risk, I will give you higher wages".
>
> "If the workman on seeing the risk elects to incur it no-one could doubt that he could be precluded from recovering. But does the maxim volenti non fit injuria go this length that the mere fact of the workman knowing that a thing is dangerous and yet using it is conduct to show he voluntarily incurs the risk ?'

He refers to Bowen L.J.'s comment in Thomas v Quartermaine 324/ that

> 'The maxim is not scienti non fit injuria but volenti. There may be a perception of the existence of the danger without appreciation of risk'

and retorts '

> 'So that a dull man may recover damages where a man of intelligence may not !'

Consequently, in concluding in relation to the Tort of negligence that 'there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent', he would appear to have considered that such assent required a greater degree of manifest volition than is looked for today in delictual law on patrimonial loss. 325/

His views on the effect of volenti, as quasi-consent, on the concept of negligence also indicate that, unlike the effect of volenti considered by Bowen L.J. on liability under the occupier's Tort, quasi-consent could only render actionable negligence unenforceable. Thus, he states that in the Tort of negligence 'there is a duty, though I agree that there is no actionable breach of that duty if the person injured, knowing and appreciating the danger voluntarily elects to encounter it.' 326/

What then do references to quasi-consent amount to in this second subdivision of cases in modern delictual law for patrimonial loss ? When theoretically analysed, it would appear to preclude the court from considering the defendant's conduct in terms of an operative antecedent duty of care. To achieve this the duty of care considered to have been rendered inoperative can be said to be narrowly viewed in terms of informing the plaintiff of a certain danger which he might otherwise have been unaware of. Where he is cognisant of it and voluntarily encounters it, the effect on liability for negligence appears similar to that of volenti on the pre-1957 occupier's duties under English law. 327/

For example, in the case of McMorrow v Colonial Government [328/] where an attendant at Valkenberg Mental Asylum sustained injuries on being attacked by a lunatic in his charge, de Villiers C.J. absolved the defendant of liability in the following terms:

> 'Every person who undertakes a duty, like that of an attendant at an asylum, must know he would be exposed to sudden attacks of this nature. It is in the nature of the occupation. I do not say there would have been a case if E had been (considered) a dangerous patient, but I do say that in as much as there is no proof that E was a dangerous patient, there was no necessity for giving the plaintiff a caution as to E, and that when the plaintiff was assulted it was one of those matters which he might have expected and which does not give him a legal claim against the government for damages'.

Considering the issue of alleged negligence as a breach of an operative duty of care, would have required the court to state its findings in terms of whether or not the defendant had failed in fulfilling a duty of care towards the plaintiff by not ascertaining that E was in fact a dangerous patient requiring special measures to be taken to prevent the risk of serious assault to members of the hospital staff. However, reference to this broader issue of negligence in the context of the defendant's omissions is side-stepped by the court; (e.g.'I do not say that there would have been a case if E had been a dangerous patient' i.e. was capable of being so classified beforehand .) The question on which the decision on culpability is purported to turn is narrowed down to whether it was the particular duty of the defendant to warn the plaintiff of the inherent danger of serious assault from some of the inmates of the asylum including the patient E. The court answered this question in the negative by stating that when the assault occurred 'there was no necessity for giving the plaintiff a caution as to E - it was one of those matters which he might have expected (in the course of

of his employment) and which does not give him a legal claim'. In other words, the plaintiff's own actions of applying for and assuming the post of asylum attendant implied that he was aware of such dangers and consequently the defendant was relieved of the particular duty of so warning him which it would otherwise have been subject to. By the omission of any reference to negligence on the part of the defendant in the decisions of these early cases in the present series and by expressing the denial of liability solely in terms of quasi-consent the courts can be said to have adopted the same approach to the issue of culpability which was strongly disapproved of in English law by Lord Esher in Yarmouth v France and Thomas v Quartermaine since it involved the 'unnatural doctrine' that merely informing the plaintiff of a danger was sufficient in itself to absolve the defendant from culpability.

It should be noted however, that all of the cases referred to in the present series involve decisions given on appeal by the late 19th Century and early 20th Century appellate courts. Also the findings of the inferior courts, which where upheld, that the defendants had not been negligent were arrived at on a consideration of the latter's acts without any reference to volenti. For example, though de Villiers C.J. in McMorrow v Colonial Government denied liability on appeal on the basis of a dangerous undertaking it is clear that by considering the duty of care owed to the plaintiff in respect of injuries from assault to be more extensive than merely the obligation to warn, the defendant's conduct would still not have amounted to negligence. There was for example, no evidence which indicated that the hospital authorities could have anticipated that patient E was potentially dangerous. Consequently, as the assault was unforeseeable their conduct could not have amounted to the breach of any wider duty of care.

Again, the case of Burnett v De Beers Consolidated Mines presents an example of a case in modern law which in similar circumstances under the Roman and Roman-Dutch law the defendant would only have been considered liable to compensate the plaintiff on grounds of fault where the latter had previously brought the danger in question to his notice. Alternatively, in modern law it could be said that it was entirely unforseeable that a plaintiff on ascertaining a potential danger in his proposed actions would nevertheless pursue them without either informing the defendant of or seeking him to remove the hazard.

Consequently, it might be said that in the cases in the present series the Appellate Courts fully agreed with the inferior courts that no negligence existed in terms of a more extensive duty than merely warning the plaintiff, but with the knowledge of contemporary trends in the English law of Torts, in cases in which the plaintiff was aware of a danger, ex proprio motu referred to the doctrine of volenti in affirming the denial of liability. Thus De Villiers in Davids v Mendelsohn states at page 368 'The injury was occasioned by her (the plaintiff's) own fault in remaining on the premises with full knowledge of the danger, if ever there was a case to which the maxim of English law, volenti non fit injuria would apply, this is one'. In Lord Esher's view on the applicability of volenti in English law however, such a reference to quasi-consent though generally coined by the inferior English courts would have been far from appropriate. In short it is probable that in these cases volenti in fact played no practical roll at all in assessing the issue of culpability, reference only being made to it where no negligence could be imputed to the defendant on an examination of his actions. [329/] It is submitted however that references to volenti in these case probably supplies the basis, in modern South African law, for references to it in

denying liability in games cases.

For example, in the cases involving injuries sustained either by a spectator or player during the course of and within the rules of a permitted game carried out in an appropriate place, a defendant can hardly be said to have been in breach of a duty of care towards the plaintiff where on occasioning the injury he also acts in the manner required of him by the game. Any other view, it is submitted, is simply absurd. [330/] When one player injures another, either as the result of a deliberate act of violence (as in boxing) or unintentionally as in contests in which the primary aim is not to display the player's skill in injuring his opponent and such injuries arise from actions which are considered necessary to achieve the aim of the contest, it would seem paradoxical to say that he was in breach of any so-called delictual duty of care. Since sports such as boxing or football are permitted by law in the knowledge that serious injuries can arise even with strict adherence to the rules of the game, it would be illogical to consider all cases of such injuries as prima facie wrongs. [331/] In other words, the legal approach to delictual liability for patrimonial loss in this class of cases should be against the presumption of the existence of negligence as the breach of an operative duty of care; as was submitted above in the case of Roman and Roman-Dutch law, liability for such injuries can be more appropriately determined in terms of a legal justification. [332/]

It is lastly submitted that were it not for references to volenti in the present series of cases in which no negligence could in fact exist, the problem over the effect of volenti, as quasi-consent in cases involving defendants' claims would not have arisen. Volenti for example, can simply be considered as a 'short-hand' method of expressing the absence of

culpability in the cases in this series rather than as factor capable of excluding culpability. If this is accepted, then the only effect which may be attributed to volenti as quasi-consent is that of a factor which can render established negligence unenforceable. This was submitted to be its function, based on the analogue of real consent, in the first series of cases in this group.

From the above discussion of volenti as a factor determining patrimonial liability, the following conclusions may be briefly stated :

(a) In cases where it is considered as real or implied real consent (as in the first group of cases above) its effect on liability is that of a pactum de non petendo. In this respect it can be closely identified with Roman and Roman-Dutch law, and can be considered to afford a practical and effective means of assessing liability for patrimonial loss.

(b) In cases where it is considered as quasi or fictitious consent two functions may be discerned :

(i) As an analogous pactum de non petendo, restricted to delict, in cases where the defendant's actions can be said to amount to negligence (as in the first series of cases in the second group above).

(ii) As a concept which merely describes a legal situation in which though culpability is absent loss has been sustained (as in the second series of cases in the second group above. To attribute volenti with the positive function in these cases of excluding culpability would involve the unacceptable proposition with respect to the concept of fault, that quasi-consent is capable of precluding the existence of negligence by rendering a restricted duty of care, as merely a duty to warn, inoperative.

(c) Volenti as quasi-consent does not, it is submitted, afford a practical means of effectively assessing liability in the cases in the second group. In the first series of such cases liability can be ascertained simply and with less difficulty by the doctrine of contributory negligence; however where volenti is allowed to be considered on the same facts, the courts face the added difficulty of reconciling their decisions on both pleas with the ultimate issue of liability and damages. In the second series, liability could have been simply expressed that reviewing the defendant's conduct on the basis of no negligence without any reference to quasi-consent at all. Reference to it in these cases, which can be said to have been derived from a misunderstanding of its application to certain English cases of first impression raised under the Tort of negligence, [333/] constitutes it is submitted, not only a redundant but a retrograde element in the developing South African delictual law on patrimonial loss.

EPILOGUE

Generally, the question of the practical effectiveness of the doctrine of volenti non fit injuria when applied to determine liability in delictual cases arising under South African law today ought to be approached by considering the type of consent on which a defence based on it, is pleaded. For example, in the cases examined in the first group above in which volenti could be related to either the real or implied real consent of the plaintiff, the effect and function of such a defence on alleged negligence can be readily ascertained. Here, it is submitted, it simply constitutes a pactum de not petendo which is capable of excluding the plaintiff's rights to litigate on account of a loss incurred unintentionally by him, irrespective of whether it was due to the defendant's negligence, his breach of a contractual duty, or by accident. From the decision in the case of Jameson's Minors v Central

South African Railways [334] there can be little doubt of the effect of a volenti defence based on such consent on the issue of negligence and the dependants' claim. In this case, an action was raised on behalf of the minor children of Dr. Jameson who had been killed in a train crash which was allegedly due to the defendant's negligence. The deceased had travelled on the train by virtue of a free pass which contained a condition excluding liability for any injuries which he might sustain during such journeys. As this document can be said to have constituted an agreement, under which the defendant undertook to convey the deceased free of charge if he consented to bear the risk of injury, his acceptance of it can be said to have constituted his real or implied real consent to waive the normal rights to pursue litigation on account of injuries he might later receive during the course of a free railway journey. Innes C.J. made it clear in this decision that the only effect on negligence which such consent was capable of producing was that of a pactum de non petendo. For example, he firmly rejected the view that such consent was capable of exempting the defendant from liability in terms of a more restricted duty of care, as was suggested in the cases above falling within the second division of the second group. Thus, he stated that :

> 'The question is whether the fact that Dr. Jameson was travelling on a free pass relieved the administration from exercising the same degree of care towards him in in relation to the safe running of the train as would have been required of it in the case of an ordinary passenger. I cannot see that it does.[335]
> It is clear to me that it owed a duty to every person on the train whether he travelled free or not.' [336]

Consequently, as the effect of a defence based on factors involving the plaintiff's real or implied real consent can be said to be unambiguous in relation to negligence, the doctrine of volenti would

appear to afford a practical means of determining the issue of liability in these cases involving a dependant's claim in the delictual law of South Africa for patrimonial loss. Due to the ascertainability of the function of the volenti defence here, the principle can be said to provide an appropriate test for the determination of liability in all cases where such consent is alleged, irrespective of whether the patrimonial action is derived from the lex Aquilia or considered sui generis.[337/]

Where the function of the volenti defence, however, appears ambiguous when pleaded on factors belonging to the same category of consent [338/] and where the concept of negligence alone or that of another legal principle based on the same facts as the volenti defence could be considered equally capable of deciding the issue of liability, then the practical effectiveness of the doctrine would appear to be limited. For example, in the cases considered in the second group above where volenti can be considered in the category of quasi-consent [339/] the effect of the defence on negligence in the first division of such cases can be interpreted differently from its possible effect in the second. Thus, in Lampert v Hefer, a case of the first division, the exclusion of liability in terms of the plaintiff's voluntary assumption of the risk of the injuries which she sustained could be taken to mean in view of the finding of negligence that she had given her quasi-consent to waive any rights to recover compensation for the loss sustained. [340/] From the references to volenti in the second division of cases in this category, however the effect of quasi-consent, if indeed it can be attributed with an effect at all, is less susceptible to such an interpretation. The findings of no negligence in these cases in terms of volenti ostensibly indicate that the courts did not base their decisions on any consideration of the defendant's conduct in terms of an operative duty of care. If, on the other hand, this was the case, it could be argued

that references to volenti simply amounted to an alternative ground for denying liability based on the plaintiff's conduct, i.e. that in any case, as in the first division of such cases, it amounted to a waiver of the right to seek the recovery of damages. However, as has been submitted above, a finding of no negligence expressed without reference to the defendant's conduct can only be rationalised theoretically on the grounds that the plaintiff's actions relieved him of an operative duty of care, in the restricted form of a duty to give warning of a possible hazard.

Thus, though the type of consent considered in the cases comprising the second group above can be considered in the same category (i.e. that of quasi-consent, since it is simply imputed to a plaintiff from actions which cannot be related to any prior, real consent which is relevant to the injury in question) the effect of such consent on negligence in these cases is ambiguous. Also, in the first subdivision, it would appear that the concept of contributory negligence could have determined the issue while in the second liability could have been simply decided by reference to the concept of negligence in terms of the normal duty of care. This difficulty of ascertaining the function of a defence based on the plaintiff's quasi-consent can consequently be said to limit the practical effectiveness of the volenti doctrine in respect of all cases in which such consent is alleged. For example, though the establishment of this category of consent may determine liability in actions derived from the lex Aquilia, its effect on liability for negligence in the dependant's action is undecided. The answer to this latter question may be said to depend on which of the two effects on negligence attributed to quasi-consent will eventually be selected by a court in a future decision, i.e. a factor theoretically capable of rendering a restricted duty of care

inoperative or as an analogous pactum. 341/ As the effect of a defence based on real consent can be said to be that of a pactum and, it is submitted, that this is also the effect of such consent on Aquilian culpa, the latter choice would seem more appropriate in respect to the Civil basis of the South African delictual law on patrimonial loss. Resolving the problem by this approach would, it is submitted, have to be carried out by arbitrary selection since the cases in which the defence of quasi-consent can be attributed with different effects on negligence afford little ground for rationalizing its function under one head alone.

The issue could perhaps be better settled by stating 342/ that any defence based on the plaintiff's quasi-consent is irrelevant to an action on negligence. This would remove the practical difficulties created by considering both volenti and contributory negligence on the same set of facts in the first division of cases above and at the same time excise, from delictual jurisprudence on patrimonial loss, any trace of the 'unnatural' notion that a plaintiff, by inadvertence, can relieve a defendant of a restricted duty of acting towards him with care. 343/

The origin of the present difficulty of ascertaining the function and consequently the relevancy of the volenti defence in this non-real category of consent in actions raised by dependants can be said to have been primarily due to references to the doctrine of volenti in early South African cases on patrimonial loss in which there was in any case no possibility of a finding of negligence. Without these judgments 344 / the effect of such consent could have been simply construed in modern law on the analogy of a pactum de non petendo. The denial of liability in these cases by reference to the plaintiff's conduct was, it is submitted made on the erroneous assumption that a finding in terms of volenti was

appropriate where no negligence could be imputed to the defendant.

This assumption in turn arose from the general, though misunderstood, view in English case law of the period that the doctrine of volenti, though in fact capable of denying liability under the occupier's Tort, could preclude the existence of negligence itself. 345/ As was submitted above, however, though an English Court, in a negligence case of first impression, might find that no legal precedent existed for imposing an antecedent duty of care on the defendant, it was open to it, after the operation of the 1873 Judicature Act, to consider what other legal duties, less than the duty of care, the common law might attribute to the parties' relationship. Thus, where a defendant could also be considered as an occupier of premises the issue of the plaintiff's right to a remedial action would alternatively have been considered in terms of the occupier's Tort, where volenti at this time precluded the latter's duty in respect to visitors. 346/

Though this Tort was a precursor in English law to the Tort of negligence, its rigid classification of duties owed to certain types of person prevented it, in the late 19th Century, from assimilating the broader notion of fault as the basis of liability.

SUPPLEMENTARY NOTES

1. Though the modern action in South African Law may be termed an action for compensation on account of patrimonial loss, damages may be nevertheless awarded under it in respect to non-patrimonial causes. For example, though the actio legis Aquilae provided no remedy for pain and disfigurement suffered by a free born man, a reipersecutory remedy was awarded in Roman-Dutch Law on that account together with a compensatory remedy for patrimonial loss. The former remedy probably originated from the customary law of the Netherlands^ see Paul Voet, Inst. 4.5.1 and Johannes Voet, Pandects 9.2.11.

2. Stein, "Regulae Juris" p.149 states that this fragment was a source of the regula and adds that the form was influenced by the decision in Codex 2.4.34 of Maximian and Diocletian "nec umquam volenti dolus inferatur". Reiffenstuel also cites D50.17.145 as the source in "Ius Canonicum" p.67.

3. See the 1738 and 1767 editions. Schorers note to 3.35.8 in the 1767 edition ends "nam volenti nulla fit injuria". He cites in turn Puffendorf (Ius Nat. et. Gent 3.7.8) who does not use this particular phrase.

4. See also Strauss "Aspekte van die Begrip Toestemming in die Strafreg en die Deliktereg" p.4.

5. Pomponius Book 8 ad Quintum Mucium "Quod quis ex culpa sua damnum sentit non intellegitur damnum sentire".

6. Page 67.

7. Book 5, title 37 Chapter 9,(Lancellotti's 1618 Paris Edition).

8. "Decretalium Commentaria" (1581 Edition)

9. This phrase is absent in Chapter 9 of the decretals also Hostiensis. states in Book 5(title 37 chapter 9. sec.4 that;"INIURIA FIT AUT RE AUT VERBIS; RE, QUOTIES MANUS INFERTUR; VERBIS, QUOTIES CONVITIUM DICITUR" which is similar to Labeo's reported statement on iniuria in D47.10.1.1 and 2. Hosteinsis also refers to the actio iniuriarum in this section.

10. Book 5 (title 37) chapter 9 sec. 2.

11. Azo having died four years before the Decretals of Gregory IX appeared in 1234 AD.

12. Book 3 on the Codex, De Lege Aquilia; sec.10 (Page 231 of the 1610 Varrens Edition).

13. Where Ulpian distinguishes between Aquilian iniuria, and the iniuria of the Actio Iniuriarum.

14. Where Ulpian states that a woman who has been separated from her husband on account of her own fault should not obtain restitution. To which Azo adds "NAM IBI MULIERI DENEGATUR RESTITUTIO QUIA CULPA DIVERTIT A MARITO, ID EST, DOLO."

15. Though dolus is not specifically listed as a delict by Gaius 3.182, or by Justinian in Inst. 3.88 it is clear from its penal nature that the actio doli could be described as a delictual remedy. Thus Buckland "Text Book on Roman Law" 3rd edition at page 593, commenting on the four delicts of Justinian states that "there were others (delicts) which gave rise to what may for later law be called actiones ex delicto". See the delictual nature of the acto doli in D47.2.62.15 and 21 where the actio furti is inappropriate.

16. Lugdunum Edition. (Lyons)

17. Reiffenstuel has suggested at p.67 "Jus Canonicum" that the 'scientia' required by Regula 27 may not have been actual knowledge but knowledge that, from the facts of the situation, the plaintiff was assumed to have possessed. Consequently, despite the rule being inapplicable to culpa as an unintentional act, it could be argued that the regula is still one of the forerunners of the modern volenti defence in that, in delict, the concept of implied knowledge would logically precede that of implied consent.

18. See footnote 15 supra.

19. For example, where the plaintiff demands fulfilment of an agreement additional to a stipulation. Here the exceptio doli is countered by showing that the defendant was in full knowledge and had consented.

20. e.g. During a game or in the course of employment, where consent is implied to have been given by the plaintiff, though he might not have considered such consent at all.

21. Or as a wrongful act gave rise to the obligation to pay money by way of penalty and compensation, consent would preclude the obligation, and thus the particular action derived from it, from arising.

22. Gaius. Inst. 3 195. FURTUM AUTEM FIT NON SOLUM CUM QUIS INTERCIPIENDI CAUSA REM ALIENAM AMOVET, SED GENERALITER CUM QUIS REM ALIENAM INVITO DOMINO CONTRECTAT. The Justinianic approach to "trap" cases, as for example the one referred to by Gaius in Inst. 3 198, can be considered an exception to the rule that the element of INVITO DOMINO was required to found the delictual action on theft.

23. Codex 2.4.34 nec umquam volenti dolus inferatur.

24. In the texts volens is not widely used. We find consentit D.38.5.11 (dolus); consentiunt D.50.17.195 (dolus); convenire D.9.2.27.29 (damnum injuria datum); permisit D.47.10.17 (injuria); and permiserim, Gaius 3.198 (furtum), according to Berger, Encyclopedic Dictionary of Roman Law voluntas only "acquires importance in the legal life of an individual when it is expressed orally or in writing or is manifest in some other manner in a clear, unambiguous way".

25. Op. cit. chapter 2.

26. Consequently in the present day where voluntas is treated abstractly, consensus is only "the external manifestation of the mental state described" and thus what is done "without consent need not be invariably against the will (voluntas) of the victim" (op. cit. chapter 2).

27. See Schulz "History of Roman Legal Science" p.130.

28. D.50.17.145 which contains the extract from Book 66.

29. Cf. Ulpian's discussion in D.19.1.1.1 about a concealed servitude over land sold; non videtur esse celatus (and thus deceit) qui scit.

30. D.18.1.4; Inst 3.23.5.

31. See discussion on facta probanda; page 6 above. It is submitted that iniuria against the paterfamilias would be committed without actual traditio but merely on the conclusion of the sale agreement.

32. Roman Law and Common Law (2nd ed.) p.350-1.

33. De Zulueta; The Roman Law of Sale p.8.

34. Pomponius Book 9 ad Sabinum cited in D.19.1.6.8. See also for Dutch Law, Voet: Commentarius ad Pandectas 4.3.4.

35. Where even though the act of the debtor would constitute deceit as against two parties when the buyer is innocent, only the creditors could sue delictually since contractual bona fides excluded such a course in the case of the buyer.

36. "The Relationship of Iniuria and Culpa in the Lex Aquilia". Studi Aranzio - Ruiz, 1, page 279.

37. Stein "Fault in the formation of Contract" p.163.

38. Gaius, 3.135 and 136.

39. "Law of Obligation in the later Roman Republic" p.46.

40. Gaius 3.139.

41. Op. cit.p.20.

42. Later introduced, probably under Justinian, in relation to land Codex 4.448.

43. As when people plot together; Belgis reliquis consensisse, neque contra populum Romanorum omnino conjurasse, Caesar De Bello Gallico 2.3.

44. Codex 4.21.17.

45. Ulpian 18.1.2 sine pretio nulla venditio est.

46. e.g. in cases where there was a regular course of trading between the parties.

47. Institutes 3.23.

48. Viz locatio-conductio, societas and mandatum.

49. Du Quasi Contrat Negotiorum Gestorum, Appendice au traite du Contrat de Mandate 167.181.

50. Gaius 3.88 omnis obligatio vel ex contractu nascitur vel ex delicto. It is interesting to note that Gail, Observantien van Kayserlyke Practyke, observantie 65, perhaps, comes full circle in applying what is in essence a form of Rule 27 to support a contractual obligation.

51. e.g. A nod of approval that the correct amount has been counted out in emptio ab mensuram; Gaius D.18.1.35.5; or in delict, the handing over of a cup to a jeweller after the latter denies responsibility for any damage it may suffer while he works with it; Ulpian D.9.2.27.30.

52. See where there is no direct verbal communication; e.g. in contract, by letter; Gaius D.18.1.2 and in delict (Furtum) through a slave; Gaius Institutes 3.198 the result being in both cases as if there was.

53. Always prior to any event giving rise to the Actio.

54. Schulz Principles of Roman Law p.41.

55. i.e. Dolus, furtum and injuria.

56. This was not unusual. In early Roman Law the private right might even be totally excluded by Public law, e.g. the provisions of the Twelve Tables which punished singing of Mala Carmina with death.

57. Gauis 3.198.

58. As in D.47.2.47.1.

59. The decision was later reversed by Justinian Inst. 4.1.8.

60. Especially in the early Empire where dealings in slaves increased and ownership might rapidly change hands.

61. Op. cit. p.67.

62. Presumably in an attempt to make the owners cognisant of their social duty of safeguarding their slaves from corruption.

63. Insult to a master through his slave, D.47.10.15.49. (Ulpian): servum complurium cecidero competere injuriarum actionem omnibus plus quam manifestum est.

64. D.47.10.1.5 (Ulpian): nulla injuria est quae in volentem fiat.

65. D.47.10.3.2.

66. Gaius 3.198.

67. Though the question of the victim's true status would be important to the constitution and degree of contumelia.

68. Contrary to that which is stated in present day text books e.g. McKerron op. cit. p.67.

69. D.9.2.7.4. D.9.2.27.29. D.9.2.27.30.

70. D.9.2.7.1. D.9.2.7.3 - 7.

71. Gaius' account in Book 7 of the Provincal Edict.

72. D.9.2.9.1 - 3. D.9.2.11.1. D.9.2.11.5. D.9.2.29.5.

73. D.9.2.4. pr. - 1. D.9.2.5. pr. D.9.2.9.4.

74. D.9.2.11.2 D.9.2.51.1.

75. D.9.2.11.3.

76. D.9.2.23.9.

77. D.9.2.27 pr.

78. D.9.2.27.6 - 8. D.9.2.27.12. 27.14. 27.17. 24-32.

79. D.9.2.29.7.

80. D.9.2.33 pr. D.9.2.55 pr.

81. D.9.2.49.1.

82. D.47.10.1 (Ulpian)

83. D.9.2.5.1. D.9.2.27.17. D.9.2.27.27. D.9.2.41.1.
Note especially where there was no bar to both actions on equitable grounds cf., Buckland, "A Textbook of Roman Law" (3rd ed.) at p.717.

84. Especially where the slave formed part of a troup.

85. Op. cit. p.297.

86. D.9.2.5 pr. D.9.24.5.4.

87. "The Lex Aquilia" p.22.

88. Op. cit. pp.295-6 p.300.

89. See D.9.2.27.29.

90. i.e. Ulpian Book 66 on fraud.

91. See for example the "barber' case, D.9.2.11 where Ulpian adds after a discussion on who was at fault 'si quis commiserit, ipsum de se queri debere'. Also D.9.2.9.4 if 'non debuit per campum iaculatorium inter intempestive facere' can be considered as fault on the part of the plaintiff. Apparently the glossators thought so; the gloss to the decision reading 'ergo culpae culpa compensata dissolvitur'.

92. Being appropriate against the allegations of nullo iure and later culpa in Aquilian Law.

93. Op. cit. p.106.

94. Interpreting D.9.2.7.4 differently from Grueber, who thinks domino committente hoc factum sit applies simply to his consent to the killing as opposed to Lawson's translation (Negligence in the Civil Law) p.87 where it refers to the owner's consent to the slave being put up to fight.

95. Lawson op.cit. p.109, where he refers to van der Heever's book, "Aquilian damages in South African Law".

96. D.47.2.46.7. BK; QUADRAGENSUMUS SECUNDUS ad Sabinum.

97. Codex 2.4.34.

98. D.9.2.7.4.'si domino committente hoc factum sit tunc Aquilia cessat'.

99. Ulpian D.47.10.5. on the delict of Iniuria.

100. Ulpian D.9.2.5.1. 'iniuriam hic accipiemus culpa datum etiam ab eo qui nocere noluit'.

101. Especially D.9.2.27.29 involving the contract of locatio-conductio and D.9.2.7.4 where the dominus agrees to enter his slave for combat.

102. see the recognition of such pacts by the Twelve Tables in Table 1 rule 7 in relation to any form of civil action.

103. D.9.2.27.30 does not specifically consider the effects where the husband has consented. N;B; the incidence of 'trap' situations involving a discussion of consent would also be less common under the Lex Aquilia due to the fact that as actual damnum had to be suffered in order to found the action and as only an interesse value was normally awarded, owners may have been less likely to indulge in the type of 'trap' conduct mentioned by Gaius in the case of furtum (Gaius 3.198) where (a) the goods could be recovered unharmed and (b) in the case of furtum manifestum, damages amounting to four times their value were awarded.

104. D.9.2.27.29.

105. D.9.2.7.4.

106. D.9.2.27.30 does not imply that the husband had merely forewarned his wife against this since the text reads invito vel inscio and not et inscio.

107. Ulpian.

108. Reiffenstuel op. cit. p.67 states that the words scienti et consentienti of Rule 27 Liber Sextus should similarly be read conjunctively; eam intelligendam esse copulative non disjunctive. Similarly Cujacius; non est satis scire, sed consentire est necesse (Operum Postumorum Liber 3.2446).

109. D.9.2.44.1. D.9.2.45 pr. D.9.4.2 pr. Lawson (op. cit. p.14) suggests that the lex Aquilia had an expression provision rendering the master liable where he knew of but did not prevent the act.

110. As for example in quasi-delict cf. Lawson op. cit. p.70.

111. In this case from the Praetor's Edict. Inst. 3.7. pr.

112. Codex 6.4.3.the same holding good for the earlier law.

113. D.9.2.27.29. D.9.2.7.4.

114. Pomponius Book 8 on Quintus Mucius, curiously out of context in the passage on legacies cited in D.50.17.203.

115. 'Although voluntary assumption of risk and contributory negligence are separate and distinct defences they sometimes overlap; for the voluntary assumption of risk may amount to contributory negligence'. (McKerron op. cit. p.70).

116. i.e. games situations.

117. Lawson op. cit. p.132 states 'one would have expected the solution to turn on the assumption of risk, but it is perhaps reasonable to say that a man who plays normally does not do damage negligently'.

118. Reading injuriae in D.9.2.7.4 as unintentional fault and hence culpa.

119. See Morrison v Angelo Deep Gold Mine: 1905 T;S; p.775. and Rosenthal v. Marks 1944 TPD 172.

120. See Professor McKerron's view at p.70-71 'Law of Delict'.

121. League, Roman Private Law (3rd ed.) p.310 adds that 'it is almost certain that this line of thought occurred after the notion of an obligation arising ex contractu and the idea of delict as a source of obligation was always subsidiary to the contractual idea'. For example though Professor Jolowitz in his Historical Introduction to Roman Law Pages 162-163 correctly points out that contract in early law may have emerged from delictual situations it is probably as League suggests that in later law the idea of a delictual ius in personam may have been arrived at by analogy by considering the contractual obligationes. Some credence may be given to this view from the fact that though the verb OBLIGARE is certainly old, the noun OBLIGATIO only dates from early classical times.

122. Not unexpectedly this is subject to some controversy in South African Law cf. Professor Price (1949) 66 S;A;L;J; p.171. However it would appear to be a necessary requirement of the substantive law of delict which has to be established in any such action for patrimonial loss, see for example the remarks of Schreiner, J;A; in Union Govt. v Ocean Accident Corp. 1956 57IAD at page 585 'to succeed in an action for damages for negligence the plaintiff must show that the defendant owed him a duty of care'.

123. The same applies in Scottish Law; thus Lord Kinnear in Dougall v. Damgavil Coal Co. Ltd., 1909 S;C; p.1319 states that 'a man cannot be charged with negligence if he has no obligation to exercise diligence'.

124. a Particular Duty of Care.

125. as derived from Regula 27.

126. i.e. where the delictual obligation is considered in terms of a duty of care as in Modern Patrimonial Law.

127. i.e. where implied consent leads to no duty of care owed.

128. e.g. where consent is implied to have been given by the plaintiff in situations where he may not have actually thought of himself as consenting to an injury; e.g. during a game, or in the course of his employment.

129. Notes (3.45.8).

130. Later insertions of 'volenti non fit iniuria' into the text of the 'Inleidinge' may possibly be attributed to Maasdorp cf. 1878 edition since the maxim in that precise form was being coined widely in late nineteenth century English Law (see p.63 - 64 supra) a fact which Maasdorp would not have been unaware of; also this form of the maxim is not generally found in Roman-Dutch Law.

131. However a distinction can be made in relation to the action on account of Hoon (which may be considered as a form of iniuria) between prior consent to a personal insult and subsequent reconciliation, since though it might appear from the texts that consent had to be specific, Huber points out in Jurisprudence of my Time 6.10.17 that forgiveness for insult may be both express or tacit by familiar intercourse, friendly greetings etc. The same distinction applies in Roman Law between consent and dissimulatio.

132. Notes 3.34.5; he cites D.9.2.11 and D.50.17.203.

133. Both in this passage 3.34.5 and the passage from his notes cited above, i.e. 3.35.8 Schorer cites Puffendorf op. cit. 3.7.8. However the reference in 3.34.5 is to Puffendorf's notion of the unenforceability of a pactum illicitum (disagreeing with Grotius - but followed by Pothier 'Obligations' 1.1.3) where he says that a person who consents to the hire of an assassin and later fails to pay him, can only blame himself if he is injured. The following example by Puffendorf of the consenting woman is cited in relation to 3.35.8.

134. It is doubtful whether the modern concept of contributory negligence would also apply since though the defendants conduct might be termed negligent, the injuries sustained would be the result of an intentional act. cf. McKerron 'The Law of Delict', p.58 and 297(a). It might also be said, however, following English views (Windfield, Law of Torts, 7th ed. p.31 and note (69) and perhaps Puffendorf's remark in op. cit. 3.7.8 that the hirer of an assassin had no remedy for injuries received from the latter; that though implied consent might be otherwise applicable, in modern law, the action would be barred initially on the grounds of contra bones mores. On this point Professor Price in 1952 T.H. - R.H.R. p.79 suggests that South African Law awaits elucidation.

135. In this work he uses the term 'iniuria' to denote personal or civil injury and 'crimen' to denote any public prosecution might arise on the commission of such iniuria. His work has to be treated with caution however since, unlike later Roman-Dutch writers he is prone to blurr the distinction between civil and criminal liability.

136. According to Voet p.47.10.6 the double action only lay where the child was unemancipated under the Law of Holland, cf. also Huber op. cit. Bk. 6.7.20.21.

137. e.g. in games and employment.

138. All such texts being concerned with civil wrongs, other than patrimonail ones.

139. Prae ad ius crim. 47.10.12 perhaps with less justification than Voet, as he was primarily explaining the Dig. titles 47 and 48 in relation to criminal jurisprudence.

140. Prog. 3.3 De Crim.

141. D.47.10.15.

142. Gaius 3.106 'Furiosus nullum negotium gerere potest quia non intellegit quid agat'.

143. Schorer Notes 3.35.8.

144. Van Leeuwen op. cit. Bk. 2. p.296.

145. Probably brought about by the rationalization of liability under existing customary law remedies in terms of principles of Natural Law e.g. Grotius 2.17.1. De Iure Belli ac Pacis states 'Fault creates the obligation to make good the loss. By a wrong here we mean every fault which is in conflict with what men ought to do. From such a fault an obligation arises naturally that it should be made good'. Feenstra, for example Acta Juridica 1972 p.239 is of the opinion that when Grotius set about formulating the above principle he was guided not only by texts on the Lex Aquilia but also by 'ideas from the customary law and from theological writers.

146. Similarly Voet 9.2.11 and Van Leeuwen p.293.

147. Lawson maintains that this ground for damages in relation to the Lex Aquilia was a post-classical development i.e. Ulpian's statement in D.9.2.13 pr. having been interpreted to give the utilis action; Neg. in the Civil Law. p.22.

148. Perhaps it was Friesland that Van Leeuwen referred to when he stated that the punishment for physical injury varied being 'in some places very slight according in the Ordinances formerly enacted and still observed in many places, especially in the country. R;D; Law. p.284.

149. Huber Jurisprudence of My Time 6.9.5. and 6.10.15.

150. Grotius' 'Inleidinge' 3.35.2 and 3.36.3 Van Leeuwen'Roman-Dutch Law'p.300.

151. cf. the Scottish Law of Divorce where an oath of Calumny is required against collusion; though again the presence of collusion may be assessed independently by the judge.

152. With the exception of disfigurement in the case of a young woman; but principally on pecuniary grounds in that she may be 'assisted by money in her marriage, the prospect of which has been set back by the injury'. Huber: 6.4.21.

153. Op. cit. 6.10.10.

154. idem 6.4.20.

155. Grotius' 'Inleidinge' 3.34.2. Voet 9.2.11. Van Leeuwen, 'Roman-Dutch Law'p.293.

156. Especially with the existence of texts specifically prohibiting such practices e.g. Gaius in D.9.1.3 and Dig. 9.3.7.

157. Voet 9.2.11; Groenewegen 'De Legibus Abrog. ad Dig. 9.3'; Van Leeuwen 'Roman-Dutch Law' 4.35.9; Van der Linden 'Institutes' 16.3

158. Matthaeus 'De Crim. 47.3.4; Grotius 3.34.2.

159. See Grotius' 'De Belli ac Pacis' 18.2

160. Though it is interesting to note what Justice Van Winsen states, at p.950 of Hoffa v. S.A. Mutual Fire and General Insurance, 1965 (2) S.A. on this; 'The juxta position of claims for compensation for pain and suffering with those that are clearly patrimonial in nature as found in the writings of the Roman-Dutch authors is not necessarily an indication that the authorities regarded the former claim as being Aquilian in its nature and partaking of all the incidents of such an action'.

161. e.g. Bell in his'Principles of the Law of Scotland.

162. Neg. in the Civil Law p.28. Lawson also suggests that one consequence of this was that there was no need to distinguish between personal injury and damage to property hence this might explain the greater amount of discussion by the Roman-Dutch as opposed to the Roman jurists on Patrimonial loss incurred with personal injury, than to property alone e.g. Damnum in Roman Law being considered primarily in relation to property only.

163. 'Gloriae causa et virtutis' perhaps only applying to Public contests thus placing some limit on the right to kill and wound in games with impunity.

164. 'si cedentem vulneraverit, erit Aquiliae locus'.

165. 'qui tamen data opera in eum iaculatus est, ubique Aquilia tenebitur'. Lawson on p.88 footnote 10 has pointed out however that data opera in this passage need not apply only to cases of deliberate killing or injuring but may also refer to gross recklessness.

166. i.e. concerning the nature and location of the sport.

167. 'Jurisprudence of My Time' 6.4.7.

168. Vol.2 p.826. He follows this with a reference to a case cited by William of the Hague J;C; in which a contestant in a prize fight apparently died after sustaining a serious leg injury during the contest.

169. 'quid gloriae causa et virtutis non iniuriae videtur damnum'.

170. The full text reads: 'Quid si gravi errore pilam aliquis plane deviam egerit in vultum, an culpae nomine (si oculum perfuderit) tenebitur?' To this Huber answers 'non videtur' and not 'non tenebitur', implying that 'it is not proper to hold such a person liable on account of culpa' rather than 'he is not liable on account of culpa.' This interpretation may be supported by the following reason given by Huber: 'quid textus hic non distinguit' which indicates that the text itself (D.9.2.7.4) took no cognisance of culpa (as unintentional wrong) in this situation due to the general justification of gloriae causa et virtutis'.

171. i.e. specifically recognised justifications which preclude a culpa assessment of the acts complained of. Thus, this approach in justifying the denail of liability when participants were injured was probably a direct consequence, in the Law of Friesland of the inability of the classical jurists to interpret the notion of culpa (as intentional and unintentional fault) into all cases previously decided on the basis of a private right. Though unintentional fault was 'artificially' presumed in D.9.2.9.4 according to Professor Beinart at page 291, 'The Relationship of Iniuria and Culpa in the Lex Aquilia', the situation arising in D.9.2.7.4 may have fallen into that category of cases of which Professor Beinart states, op. cit. p.302, 'in spite of the converting process of culpa there were still cases, albeit few, based on the lawful exercise of a private right'. Thus killing and wounding, 'gloriae causa et virtutis', by excluding patrimonial liability where it was done intentionally and unintentionally during the contest (with the exceptions mentioned by Ulpian in D9.2.7.4)would preclude any culpa (fault) assessment of iniuria (wrongfulness).

172. Though A;L; Goodhart, commenting on English Law actually suggests such a standard in relation to injuries to spectators; 1962 (78) L.Q.R. p.496 in Woolridge v. Summer (1963) 2 Q.B.; but rejected in the case itself; cf. of Diplock L.J.P.68.

173. See Professor Beinarts theory: Ulpian D.9.2.7.4. gloriae causa et virtutis, non iniuriae gratia videtur damnum datum.

174. Schorer, Notes 3.34.5 where he says that there is culpa (fault) on both sides: e.g. Roman Law approach in D.9.2.10. Thus where a contestant is unintentionally injured the fault pertains not so much to the act of injuring than that of taking part in such a contest, which itself can be thought of in terms of culpa as dolus.

175. Voet 9.2.24 following the French commentator Cujacius' interpretation of D.9.2.7.4 where he considers that an action would would have been granted (by the Praetor) on the grounds of culpa to the Paterfamilias or a filiusfamilias - 'cuius nomine si extra stadium, vel palaestram, vel pugitationem iniuria vulneratus fit, patri competit actio legis Aquilae' 'Opera Omnia' Tome 3 page 622: Observat, lb. 21 ch.20.

176. Voet 9.2.24 where one contestant kills another in the act of yielding: see also Huber's remarks on the case cited by William of the Hague op. cit. supra.

177. Huber op. cit. 6.4.7: where culpa may be imputed to the contestant on the grounds of (a) the nature of the game (b) its place of performance.

178. Voet 9.2.24. It would further appear that the restriction of the justification between contestants in Roman Law, to Public contests, (private recreation involving a culpa estimation; D.9.2.52.4) was not followed in the Law of the Netherlands from Huber's statement, op.cit. Vol.2. p.826, that 'hodieque de omnibus publicis et licitis ludorum generibus dicendum videtur'.

179. Though it is submitted that the denial of liability in respect to injuries occasioned by a contestant rests on a justification akin to a right to act with impunity, the doctrine of the abuse of rights would have been inapplicable to this concept of a right; (such a right could probably be classified as a privilege or qualified privilege by Hohfeld's analysis; Paton 'Jurisprudence' p.255, Note 28 and p.226. See also Lawson, op. cit. p.13, on the defence of necessity as incomplete privilege). For example as opposed to proprietary rights, such a right of immunity could not have been exercised maliciously since failure to prove that the contestant acted only for the purpose of glory and manly worth, would deny its existence, despite the fact that the injury was caused to a fellow contestant within the rules of a legitimate game played in an appropriate place. The right afforded to contestants being similar to that given to members of Parliament who are immune from the normal consequences of uttering defamatory statements. See Paton op. cit. p.226'.

180. a fag?

181. See also for example the approach of French Law, where in lawful games and pastimes nothing done in conformity with reasonable rules is wrongful. Lalou "Traite de la responsibilite civile" 6th ed. 339ff.

182. D.47.10.1.5

183. The modern approach may be summed up in this passage relating to the law of the U;S;A; 'The injury redeemed by every prosecution being an injury to the public. The consent of an individual that an act, criminal in its nature should be done is therefore no defence to a criminal prosecution. But certain crimes are a criminal act only if done without the consent of the individual'. Beale 8 H.L.R. 1895 317: Rape and Criminal iniuria being examples of the latter where consent would be relevant.

184. For example in relation to the Lex Julia de Adulteriis it was no defence to the accusation of adultery to say that the husband had allowed and profited by it; though this might mitigate sentence. cf. Ulpian D.48.5.2.3 and D.48.5.2.5. Similarly by a receipt of Hadrian the castration of a freeman or slave with or without his consent was punished under the Lex Cornelia de Sicariis. The willing party also receiving a punishment cf. Ulpian D.48.8.4.2. In relation to killing under the Lex Cornelia de Sicariis, non-malicious slaying was punishable, except where accidental D.48.8.16.

185. i.e. where the willing party possesses both knowledge (notitia) and desire (appepitus), something similar to Ulpian D.50.17.45 'qui sciunt et consentiunt'.

Professor Price in 1952 T.H. - R.H.R. page 78 suggests that the boundary between criminal and delictual liability was in any case generally indistinct in the time of Matthaeus.

186. Vol. 1, p.21, section 8 of translation.

187. Bk. 47.10.2. 'Iniuriarum actio datur ut nos in omnibus tueamur' 47.10.1.

188. Bk. 47.2.27; Bk. 47.2.25.

189. Likewise Voet in 47.10.23 is careful to add after citing Ulpian on the satisfaction of a delictual wrong D.47.10.17.6, that 'although the remission of an injury puts a stop to the civil action yet it is no bar to the public prosecution since a person may repudiate a right which is his but not a public law'.

190. Called 'Hoon' by Huber in the Law of Friesland and included insult, injury, seduction and adultery amongst other acts'. opus cit. 6 - 8.

191. Justified by Huber in the Law of Friesland on the grounds that thieves are seldom plutocrats. 'Jurisprudence of My Time'.

192. Matthaeus De Crim.Bk 47 Title 3 sec. 1. However Groenewegen in 'De Leg. Abrog'. 4.3.15 considered the Aquilian action penal.

193. Textbook on Roman Law p.718.

194. Both as Contumelia and in the general sense of nullo iure.

195. D.48.8.3.5.

196. Either allowing both delictual e.g. the Aquilian action and the action iniuriarum D.9.2.5.1 or delictual and extraordinary e.g. the Aquilian action and the criminal action of D.49.11. for breaching dykes, or Delictual and Publically criminal e.g. the Aquilia and the Lex Cornelia de Sicariis. D.9.2.5. princ.

197. D.47.10.6.1.

198. Hence he states that 'At actio iniuriarum Praetoria, actio civilis ex lege Cornelia, Actio ad palinodiam, actio ex lege dissamari cum omnes tendant vindicatum consequens est una electa aliquas consumi. Nec excipio actionem ad palinodiam ... nam eo ipso, quo cogitur adversarius in publico illatam injuriam recantare satis acerbum supplicium sustinet'. Bk 47. Title IV Sec.10.

199. Opus cit. 6.10.4.

200. Pandects 47.10.24 cf. the translations of Gane and De Villiers here.

201. 'Inleidinge' 32.7'.

202. 'Roman and Roman-Dutch Law of Injuries' p.249.

203. for example, in Bk 47 title IV sec. 20 of De Criminibus, when discussing the prescriptive period of the actio Iniuriarum (that of the Lex Cornelia de Iniuriis having been dealt with in section 19) he states: 'Quarta controversia est, an accusatio quoque injuriae annali praescriptione summovetur? Id non nulli simpliciter adfirmat, adeo ut licet actionem legis Cornelae (de Iniuriis perpetuam esse fateantur, accusationem tamen anno circumscribi asseverent'. The use of 'accusatio' in the sense of indictment as under a publicum crimen or the extraordinary criminal procedure tends to indicate that though the actio Iniuriarum in Roman Law was simply a means of private redress Matthaeus considers it in terms of public censorship and retribution. His treatment of the Actio Iniuriarum may be compared with that of the Aquilian remedy about which he states (sec. 1 of Title 3) 'Titulus de lege Aquilia qua vidicatur damnum iniuria datum, longo spatio ab accusationibus sejunctus atque remotus est'.

204. Pandects 47.10.1.5.

205. Compare Bk. 6.8.13 with Ulpian D47.10.1.

206. Pandects 9.2.3.

207. Page 21.

208. D.9.2.27.29.

209. McKerron Law of Delict, p.10.

210. Van der Merwe and Olivier, p.77 and 78. 'Die Onregmatige daad in die Suid-Afrikaanse Reg' correctly criticse his preference by the courts and text book writers for the English Law approach to the question of delictual liability in place of the diligens paterfamilias test of Roman Law, in that the former does not distinguish between unlawfulness (onregmatigheid) as simply the breach of a legal duty and the more particular concept of delictual fault or culpa. Also'Langs n omweg word dus dieselfde resultaat bereik as wat de geval sou gewees het indien die 'redelike man'. toets direk aangewend was.

211. Columbia Law Review 1934 p.42; see also Salmond's remarks in 'Torts' ch. 10 sec. 86. p.294.

212. Intentional acts of wrongdoing being considered under a separate Tort of Trespass and Nuisance. See also Salmond's comment p.266 'law of Torts', when discussing intention and negligence: 'The difficulty of this topic is due to some extent to the reluctance of English Lawyers to generalize about their basic conceptions. There is no general Part in the common law as in the Civil Law'.

213. P.26 'Law of Delict' he cites Lord Kinnear in the Scottish case of Kemp and Dougall v. Damgavil Coal Co. Ltd., 1909 s.c. 1319.

214. e.g. express consent of Plaintiff.

215. e.g. necessity.

216. See McKerron op.cit. p.67 where the doctrine of volenti renders such questions of 'negligence' non-actionable.

217. McKerron op.cit. p.67.

218. i.e. under the Torts of Trespass, Assault, Deceipt and Conspiracy.

219. For the law before such classification see Winterbottom v. Wright 10 M & W 109 (E;R;152) and Lord Abinger's judgement on this type of action as being one of first impression. A factor which also undoubtedly hindered the emergence of a Tort under the English Common Law, based solely on the concept that unintentional acts of a blameworthy nature giving rise to a separate right of redress, as in the developed Tort of Negligence was as Nicholas points out at p.226-227 of 'Introduction to Roman Law' that 'The English Common Law had no actions in rem in the Roman sense and no purely possessory interdicts. 'Thus if a possessor wishes to assert his possession against a person who disputes it, he must claim that the latter has committed the Tort of Trespass; if it is title to goods that is in issue he must allege the Tort of Conversion or detinue; or if it is his right to an easement, he must allege Nuisance - And since it must be possible to assert such property rights against even a defendant who acts in good faith or who is unaware that he is interfering with them, those Torts are of strict liability - they are independent of fault. On the other hand the remedies are not exclusively proprietary in function. They are two faced remedies, serving sometimes to assert title, sometimes to obtain compensations for a wrong. The Roman Law on the other hand keeps clearly distinct the two functions'.

220. In relation to intentional wrongdoings, the nature of this aspect of conduct producing Patrimonial loss was more clearly rationalized in the Torts under which it was pursued, viz: Trespass, Deceit and Conspiracy; only when the duty of care had been well established in the law of Tort, was Negligence made the basis of unintentional acts remedied by such Torts as Trespass.

220. Law Quarterly Review 1926 no. 42 p.195.

221. 'See Duty of Care in Negligence; a Comparative Study'. 1947, 22 Tulane Law Review 111, 113: Lawson.

222. 1934 Columbia Law Review, p.58.

223. See also the case of dolus where, going further than English Law where the duty of care concept is confined to unintentional acts, South African Patrimonial Law considers the question of liability in terms of an antecedent obligation. e.g. McKerron op. cit. p.13.

224. cf. the difference between implied contract and quasi-contract.

225. scienti et consentienti non fit iniuria neque dolus.

226. i.e. knowledge, appreciation and willingness.

227. 2 K;B; 243.

228. 'The basic pattern of the law relating to occupier's liability was laid down in a number of important decisions at a time when general broad principles of negligence liability were not fully developed' P. North p.1 'Occupiers' Liability'.

229. 1887 18Q.B. 685 at 695; the decision on liability being considered in terms of an occupier's liability to visitors.

230. Ubi remedium ibi ius.

231. After the works of Glanville and Bracton in the Twelfth and Thirteenth Centuries no commentary of authority appeared in English law until Littleton's treatise 'Of Tenures' in the late Fifteenth century. Thereafter only two further commentators of any note appeared before the Nineteenth Century i.e. Coke in the Seventeenth Century and Blackstone in the Eighteenth Century. After the Middle Ages Contemporary Law ceased to be taught as part of a university curriculum until the first modern English Law School was founded in 1826 at University College London; thereafter Oxford and Cambridge followed suit in 1852 and 1855 respectively. Until the Nineteenth Century legal instruction rested in the hands of practitioners through the Inns of Court.

232. per Winfield L.Q.R. 1926 No. 42 p.195.

233. 19 Q.B. 1887 at p.651 and 653.

234. 1877 2 Ex. p.384.

235. 19 Q.B. 1887 p.651.

236. Consequently the defence of common employment could not apply to such actions under statutory law.

237. See the scope of situations covered by the concept in Professor McCormac''s article on Aquilian culpa. P. 12 - 44. 'Essays in Honour of David Daube' to appear in 1974.

238. 3 E.D.C. 173

239. 1905 T.S. 775.

240. 1947 (1) S.A. 36 (A.D.).

241. 1944 T.P.D. 172.

242. P.177.

243. 1950 2 S.A. 717 (c).

244. 1960 3 S.A. 178 (W.L.D.) when the defendant applied to amend his pleadings to include the defence of volenti.

245. 1961 (4) S.A. 799 (C.P.D.).

246. P.805.

247. 1957 (3) S.A. 710 (T).

248. P.718.

249. TH. R.HR.P.61. 1952.

250. D.47.10.1.5 on the effect of consent in the Delict of Iniuria.

251. 1893 10.S.C. 233 at p. 227.

252. The verbs 'tollit' D.9.2.27.29 and 'cessat' D.9.2.7.4. relate to the Action rather than to Culpa.

253. 1904 T.S. 340.

254. 1877 2 Ex p.384.

255. 1887 18QB p.685.

256. 1887 19QB p.647.

257. As most Torts could enforce a proprietary right or provide compensation for a wrong.

258. Where the Aquilian Delict encompasses deliberate wrongdoing.

259. 1917 A.D. 688 at p.703.

260. e.g. Herbstein J. stated in Hughes v. S.A. Fumigation Co. (Pty) Ltd. at p.804 'I come to the conclusion that the contract embodies the "fire risk" clause and now turn to a consideration of the question of whether it covers negligent acts by the defendant or its servants;' in Essa v. Divaris at p.763, Tindall J.A. stated that 'I am of the opinion that for the purposes of this appeal it must be accepted that the contract was subject to the owners risk clause pleaded'. The question of negligence being decided at p.769; in Frocks v. Dent and Goodwin, Sutton A.J. stated at p.725 that 'I therefore find that the plaintiff was not bound by the conditions in question'. and then proceeds to determine the issue of negligence; similarly in the Esterhuizen case the question of lack of consent was decided in favour of the plaintiff at p.721 whereas the discussion on the defendant's negligence commenced on p.723.

261. 1961 (3) S.A. 406 A.D.

262. 1970 (3) S.A. 414 C.P.D.

263. 1905 T.S. p.715.

264. 1947 (1) S.A. pp. 771-773.

265. 1961 (4) S.A. C.P.D. 799.

266. 1955 (2) S.A. 507 A.D.

267. Contractual obligations are synallagmatic whereas in delictual ones there is no reciprocal duty in the plaintiff. See McKerron p.58 where he cites Viscount Simon's statement in Vance v. British Columbia Ry. Co. Ltd. 1951 AC at p.611 in relation to the defence of contributory negligence.

268. For an interesting situation in which a defence based on contractual consent would in fact succeed in a delictual action whereas on the same actions of the plaintiff one based on the voluntary assumption of risk would fail, see the recent English case of White v. Blackmore and Others 1972 3 AER p.158; here the deceased's act of entering a field in which 'jalopy' races were taking place by a gate exhibiting a notice stating - 'Warning to the Public. Motor-Racing is Dangerous', did not in itself constitute a voluntary assumption of risk since the notice alone did not specify the full extent of the danger. However, his wife was prohibited from recovering delictual damages on his death since by entering by the gate exhibiting the notice the defendant's liability towards him was excluded by virtue of the notice being deemed to constitute an implied clause in a licence granted to him as a competitor by the defendants.

269. 1970 (3) S.A. at p.417.

270. 1927 43 T.L.R. 465.
1927 Weekly Notes p.147.

271. P.147.

272. 1963 2 Q.B. 43.

273. Thus Diplock L.J. states at p.68 that 'A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game, notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectators' safety'. The decision was consequently criticised as giving sportsmen a charter to injure with impunity. See 1962 78 L.Q.R. 490.

274. 1887 18 Q B. 685: where the plaintiff fell into an unfenced vat on his employer's premises and was severely scalded.

275. 1939 1 K.B. 509.

276. At p.518. The reluctance of English Courts to allow the defence of volenti the positive function of rendering established negligence unenforceable may, it is submitted, be attributable to its origin as a Tortious defence in the Tort of the Occupiers Liability where it was synonymous with the finding that the defendant was not Toritously liable in any event due to the plaintiff's entry with knowledge. Consequently, when the defence was referred to in the Tort of Negligence it may have been considered inapplicable where fault in the defendant was established.

277. 'Torts' p.131. 14th edition.

278. 'Torts' p.741. 8th edition.

279. 1965 A.C. 656.

280. Per Lord Reid at p.669.

281. 1955 2 S;A; 507 A;D;

282. D.9.2.9.4; 11 princ; 28-29 princ: 30.4; 52 princ.

283. See for example Accursius explanatory gloss in the last part of fragment D.9.2.9.4. (Corpus Iuris Civilis Iustinianei, p.1062 1625 Geneva edition). 'Quia dolus praeponderat et sic non quod hoc casu solus dolus venit in Aquiliam non culpa ut (he cites D.9.2.31) et est ut dixi, quia culpa culpam abolet, sed non dolum.'

284. D.9.2.31.Princ.

285. D.9.2.52.2 Alfenus 'si quis asellum cum agitasset non retinuisset, aeque si quis ex manu telum aut aliud quid immisisset, damnum injuria daret'.

286. D.9.2.11 princ.

287. Unlike the position in English Law, as was stated above, where though both defences may be averred the Courts in fact decline to uphold the defence of quasi-consent, as opposed to contributory negligence, on the establishment of the defendant's negligence. For example Diplock L.J. stated in Wolridge v. Sumner 1963 Q.B. at p.69 that 'In any view, the maxim (cf. volenti) in the absence of expressed contract has no application to negligence simpliciter where the duty of care is based solely upon proximity or 'neighbourship' in the Atkinian case'. That is negligence based on a duty of care which arises from the relationship of the parties at the time of the injury under the Tort of Negligence proper. See also the statement of Pollock at p.131 of his book on Torts where he says that 'the whole law of negligence assumes the principle of volenti non fit iniuria not to be applicable'.

288. It is clear that it is quite competent for a Court to consider a plea of contributory negligence in relation to specific averments of negligence by the plaintiff which are undisputed. However, it was not entirely clear until the 1955 decision in <u>Lampert v. Hefer</u> that the principle of quasi-consent encompassed such actions. In the early case of <u>Waring v. Sherborne</u> for example this issue did not arise since the plaintiff had no prior knowledge of the defendant's negligence. Thus, the question of

whether the defence of quasi-consent would have succeeded where such knowledge existed was left open, i.e. the 'danger' of which knowledge and appreciation were considered essential by Innes C.J. in this case was not specifically said to be attributable to acts of negligence. As the issue was not settled until reviewed in the Lampert v. Hefer case it is suggested that South African Courts may have been influenced to a certain extent before 1955 simply to consider quasi-consent a relevant plea in cases where no negligence existed, e.g. see Davids v. Mendelsohn 1898 15 S.C. 367, or where a danger existed prior to the injury complained of due to casus. This may be said to have been due to the influence of English Law on this point which takes the view that a plaintiff cannot normally be assumed to have given his quasi-consent to relieve the defendant from the consequences of negligence which he was aware of. In the 1939 case of Dann v. Hamilton (1939 1K.B. 509) for example, in which the facts were almost similar to those of Lampert v. Hefer sixteen years later, the English Court held that the plaintiff though aware of the defendant's negligence and acting in a manner which placed her within the likelihood of injury from it, could not be assumed to have assented to relieving the defendant of its consequences. (Per Asquith J at p.515. Apparently this view can now be circumvented in English Law in cases involving drunken drivers, by ignoring the doctrine of volenti and by considering the plaintiff as a volunteer; see Insurance Commissioners v. Joyce 1948, 77 C.L.R. p.39. This is Salmond's view at p.293 of his book on 'Torts'. (The case cited by him is however an Australian one). In two South African cases in the 1930's, i.e. Colonial Mutual Life Assurance v. McDonald (1931 A.D. 412) and Coombs v. Mason (1931 N.P.D. 105) involving injuries to passengers occasioned by drivers, the plea of quasi-consent was firmly rejected - Roos J.A. stated in the former case at p.417 that 'Where respondent voluntarily allowed himselt to be driven by Brittain (the defendant), in order to receive a fee, it does not make the driver less liable for the negligence by which respondent sustained damage. Any other view could lead to ludicrous results'. In both of these cases, however, there was not sufficient evidence to indicate that the plaintiffs had a prior opportunity to appreciate the negligent driving of their drivers. Thus, the particular issue of quasi-consent being applicable to negligence of the defendant, which the plaintiff had prior knowledge of, did not arise.

289. D.9.2.28.1.

290. D.9.2.9.4. Ulpian.

291. P.348.

292. Before the pass of the Apportionment of Damages Act.

293. With the qualification that until the 1955 case of Lampert v. Hefer it might not have been entirely clear that quasi-consent was a competent defence in cases where the plaintiff had prior knowledge of a danger brought about by the defendant's negligence.

294. Which of course was basically illogical, see the article of 'Aquarius' in 1945 South African Law Journal; 'Causation and Legal Responsibility'.

295. P.508.

296. Thus Lalou states in Traite de la Responsibilite Civile, 6th edition p.248, that where there is fault 'de la personne qui prend place dan un vehicle dont le conducteur est simon jure, du moins dan un etat d'excitation dangereux'. See a similar approach in Roman Law, i.e. the Barber Case D.9.2.11. princ.

297. See pp. 31-33.

298. 1968 (1) S.A. 421 (A.D.)

299. Negligent in that he did not deliberately wish to injure himself.

300. Though express consent would have a different result, independent of the plaintiff's negligent act.

301. The very recent case of Santam Insurance Company v. Vorster 1973 (4)S.A.764 can be noted here. This judgment does not contain any new pronouncement on the availability to the defendant of the double defences of Volenti and Contributory Negligence. The main interest in the case lies in the attempt by counsel for the plaintiff (Respondent) to have the concept of volenti as the voluntary assumption of risk considered within the concept of fault as that term is used in Section 1. of the 1956 Apportionment of Damages Act. Had the attempt been successful it would have meant the virtual removal from the Law of the defence of Volenti as quasi-consent in cases of established negligence where the plaintiff was found to have been at fault. As such it could have been considered as the first step in the practical rationalisation of the Volenti doctrine in Modern South African Law. The facts were as follows; the plaintiff Vorster who was a car passenger was seriously injured in a collision which took place during the course of a car race along a public road for a wager. It was established that the car in which he was the passenger left the road after the car with which it was racing swerved into it at a bend on the road; presumably in order to prevent the plaintiff's car from gaining ground. Ogilvie-Thompson C.J. rejected the plea of the plaintiff's counsel; he conceded that generally the doctrine of Volenti as quasi-consent) was difficult to apply, especially in the case of the dependants action (p.777E-G) and that certain remarks made in Lampert v. Hefer especially those of Schreiner J.A. at p.508, tended to support counsel's contention; current trends in other legal systems, notably English Law also added weight to it (p.777H). However, the factor which decided him against sustaining the plea was his reluctance to deprive 'the defendant of the complete defence of Volens in a risk case of the present type' (p.778H). This is a factor to be considered but not, it is submitted, a valid one considering the provisions of Parliamen' for the apportionment of damages in respect to the same actions of the plaintiff viewed as Contributory Negligence. One suspects however that the respected Chief Justice had one eye on a peaceful retirement when he issued such a non-controversial decision. Having made his decision he proceeded to apply the apportionment provisions in the 'traditional' manner by rejecting the defendant's (Appellant) plea of Volenti. Though the plaintiff was undoubtedly at fault in taking part in a race which he must have known to have been dangerous from prior experience, the Chief

Justice found that despite prior knowledge of the road and the bend in question, the danger of his car attempting to overtake that of its opponent and of the subsequent swerving of this latter car to avoid being overtaken was not within the range of the plaintiff's reasonable contemplation nor of his consent. (pp. 782H - 783A) One can only hope that if a similar case appears before the next Chief Justice it will be at a time when the thought of retirement is still a distant prospect on the horizon.

302. 1895 H.C.G. p.5.

303. At page 20.

304. The action on the cautio damni infecti being given in Roman Law after a plaintiff who foresaw danger to himself from the conduct of a defendant (which would not have founded an action under any other head of liability on loss occurring) sustained loss after notifying the latter of its existence and obtaining a cautio from him. This usually applied in cases of damage sustained from dilapidated buildings.

305. 1898 15 S.C. p.367.

306. p.368.

307. e.g. that of pedestrian to motorist, motorist to other road users, player to spectator. See Schreiner J.A.'s remarks in respect to the duty of care and 'physical' and non-physical relationships between plaintiff and defendant in Government v. Ocean Accident Insurance Company 1956 1 S.A. at p.585. This is the theoretical approach adopted by English Law and incorporated into South African Law. However as was stated above it is indicative of the relative immaturity of the latter system and it ought only to be considered as a guide in determining fault, rather than as a delictual requirement in a system which can draw upon the more rational approach of Civil jurisprudence in this matter which assumes in these terms, such a pre-existing duty at all times. e.g. the concept of the bonus paterfamilias.

308. The references to quasi-consent in this second sub-division of cases as a factor justifying the denial of liability are only relevant, it is submitted, due to the requirement in Negligence of establishing an operative antecedent duty of care. If this requirement were dispensed with in Modern Delictual Law on Patrimonial loss the doctrine of quasi-consent could only operate as a defence against established Negligence, as it does in the first sub-division of cases referred to above; consequently the problem of the effect of volenti as quasi-consent in the case of the dependant's action would be resolved in terms of rendering a breach of a duty of care unenforceable on the analogue of real consent.

309. i.e. those which indicate that he may have acted with fault, (either alone or with the defendant) or not, as for example in casus cases. It is submitted that as stated above there is no indication that any notion of quasi-consent operated in Aquilian Law.

310. Unlike the effect of real consent in the delict of Injuria which would negative the plaintiff's contumelia.

311. It would appear appropriate to consider the actions of a Roman plaintiff which indicate imprudence on his part, in terms of quasi-consent today since apart from the issue of 'overlapping' defences, De Villiers C.J. states in David v. Mendelsohn that 'That maxim (volenti non fit injuria of English Law) is not taken verbatim from the Roman Law, but the principle which underlies it is fully recognised. One of the rules of law, for instance, cited in the Digest (D.50.17.203) is that a person who sustains damage through his own fault is not deemed to have sustained any damage at all (Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire).'

312. See Lawson 'Negligence in the Civil Law' p.131 footnote to D.9.2.52.1 otherwise under the 12 Tables a person is permitted to kill a thief by night who defends himself with a weapon. Coll. 7.3.2. Lawson suggests that if the passerby is a thief then the last clause of the fragment from sed si may be interpolated as it implies a restriction of the 12 Tables' justification. Alternately however, he states that if the taking of the lantern was for temporary use the circumstances of the case might fall outside of this justification and hence necessitate the juristic discussion on liability. Van der Keessel in his Prae. ad Jus. Crim. Bk. 48.8.543 (p.1079) simply considers the passerby to be a thief and considers the sed si clause to mean 'if the passerby had not defended himself with a weapon' thereby implying no restriction on the 12 Tables' justification. It is submitted that both views are relevant.

313. The fact that no blame is placed on the slave for attempting to pick up the ball would indicate, it is submitted, the removal of any doubt as to whether the slave was a player in the game or a passerby who tried to acquire the ball; see for example the case where a slave intrudes on a javelin contest in D.9.2.9.4 and is injured. There he is said to have been injured because he intervened at an inappropriate time: Unless the game was of a dangerous nature however (D.9.2.9.4) it is difficult to see how any blame could be placed on a player, injured during the course of it.

314. Solomon J at p.21. 'Surely in such a case, if ever, the maxim volenti non fit injuria should apply': De Villiers C.J. at p.368 'If ever there was a case to which the maxim of English Law, volenti non fit injuria would apply this is one.'

315 Thus Professor Price states in 1949 S.A.L.J. at p.292 that 'This so-called duty of care it tautologous with the definition of Negligence and no attempt has ever been made to suggest that it is anything else or that it might narrow the scope of liability'.

316. 18Q.B. 685.

317. P.692.

318. P.693.

319. P.694.

320. P.687.

321. P.690.

322. 19 A.C. 1887 657.

323. P.650.

324. P.697 of that case.

325. Especially, for example, in games cases.

326. P.656. As was submitted above it is impossible to supply a rationale for the view that quasi-consent prevents the defendant from breaching the duty of care; rather such breaches are unenforceable; see the role of quasi-consent in the cases considered in sub-division one of this group.

Section 2(1) of the 1957 Occupiers' Liability Act has now altered the duty of an Occupier of simply warning a visitor in certain circumstances of concealed dangers or traps; S2(1) for example states that he now owes the same duty as the 'common duty of care' i.e. a statutory duty of care to ensure that the visitor is reasonably safe, when visiting his premises; see North, page 6 'Occupiers' Liability'.

328. 1906 23 S.C. p.626.

Compare the application of volenti in these cases in this regard with the view taken in present-day English Law that volenti is only applicable where negligence cannot be proved to have existed see pp. 83 - 84 above.

i.e. that prima facie the breach of an operative duty of care has arisen.

This may be compared to situations in which the plaintiff as a beginner under instruction is similarly injured. In these cases unless liability is otherwise excluded, e.g. by contract, the instructor or coach who failed to warn him of the danger might be held responsible for Negligence rather than the player causing the injury, i.e. where the latter did not know he was a beginner.

See pp. 38 and 39.

333. Notably Thomas v. Quartermaine 1887 18 Q;B; 685, where from the remarks of Lord Esher in Yarmouth v. France 19 A;C; at p.650 the South African judiciary were not alone in misinterpreting and misapplying volenti.

334. 1908 T.P.D. 575.

335. p.587.

336. p.588.

337. e.g. the dependant's action as in the case of Jameson's Minors.

338. In this case the category of quasi-consent.

339. i.e. where the defence is neither based on the plaintiff's real consent nor on his actions which may be said to imply the extension of such prior consent to the contingency of the loss sustained; as was argued for example in the case of Esterhuizen v. Administrator of Transvaal.

See also the comments of Van Blerk J;A; in Durban County Council v. S.A. Board Mills Ltd. 1961 3(S.A.) A.D. at page 407, in respect to volenti as such a waiver in cases of established negligence.

McKerron at p.67 of his book on delict states the problem as follows - 'the question is whether the doctrine (volenti) operates as a bar to an action by the injured party because it releases the other party from a duty of care, or because it merely deprives the injured party of the right, which he would otherwise have, of holding the other party liable for a breach of such a duty'. It must be noted however that he does not distinguish or rather confine his doubts on the function of a defence based on volenti to the issue of quasi-consent but also questions the effect of real and implied real consent in the passage above.

342. Either in a judgment on the effect on Negligence of a defence based on quasi-consent or by an Act of Parliament. Perhaps preferably by Act of Parliament since the latest judicial comments on this question by Ogilvie-Thompson C.J. in Santam Insurance Company v. Vorster (1973)(4) S.A. 764) at p. 777(G-H) of his judgment deliberately afforded no classification of the law.

Per Lord Esher, Thomas V. Quartermaine 1887 18 Q.B. at p.690 e.g. Where a plaintiff who appreciates a hazard (which is a later source of injury to him) without being specifically told of its existence by the defendant, cannot recover.

344. Notably Bennett and Morrison v. De Beers Consolidated Mines Ltd. 1895 and David v. Mendelsohn 1898.

Especially after the decision in Thomas v. Quartermaine 1887 18 Q.B. p.685. See also McKerron's argument at p.71 of his book on delict where he also mistakenly believes that in Thomas v. Quartermaine, Bowen L.J. discussed the defence of volenti in relation to the Tort of Negligence rather than the Tort of the Occupier's Liability.

346. See the judgment of Bowen L.J. in Thomas v. Quartermaine at p.694.

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