CHAPTER TWO

ROMAN LAW IN ANTIQUITY

2.1 INTRODUCTION

2.1.1 Subject and purpose of this chapter

It is commonly argued that until the nineteenth century the injured party could not recover damages in a legal procedure when his negligence contributed to the occurrence of the injury, unless the wrongdoer had acted intentionally. This idea should already have been present in Roman law, but one has argued that the foundation of this rule in Roman law was unclear.\footnote{Smits 1997, p. 214f.}

In this chapter clarity will be provided with regard to both aspects. While I will argue that the first statement should be regarded as oversimplified, even untrue, I will clarify whether the second statement is true, \textit{i.e.} whether such a foundation indeed existed.

The main subject of this chapter is the role of the conduct of the injured party. Questions which will be dealt with are: what was the approach of legal practice of the Roman jurists dealing with what we would now call the ‘contributory negligence’ of the injured party? If this notion was recognised in legal practice, then what were the consequences of such ‘contributory negligence’?

The purpose of this chapter is twofold. Firstly, a good understanding of the relevant texts of Justinian’s legislation\footnote{The number of differences between Justinian’s legislation and modern codifications and their importance is so great that it is better to avoid the term codification; see Ankum 2001 (reprint 2007, p. 399ff.).} (later called the \textit{Corpus Iuris Civilis}) is necessary in order to understand the later developments in the period of \textit{ius commune}. Secondly, an exegesis of the relevant texts in the context of classical Roman law is important not so much because of the significance for the \textit{ius commune} but because of the influence of this law on legal humanism \textit{(e.g. the Dutch Elegant School)}.\footnote{Besides, it is also important because of the influence of classical Roman law on modern scholarly (Romanistic) studies.}
With regard to classical Roman law, the main sources on the effect of contributory negligence of the injured party on the liability of the wrongdoer in Roman law (in Antiquity) can be found in the compilation of Justinian, more specifically in title D. 9.2 and also in one fragment of the last title of the Digest, namely, D. 50.17.203. The maxim of D. 50.17.203 is nearly always used as a relevant provision; however, in this chapter it will be argued that this text did not represent a general rule⁴ and that it was not generally applied in the classical period. With regard to classical Roman law, all the other fragments of the Digest have to be interpreted bearing this fact in mind; this situation changed in Justinian law. Many texts are linked to the subject of contributory negligence, and obviously not all of them can be discussed.⁵ After dealing with the above-mentioned text of D. 50.17.203, this chapter continues with three sections in which three important texts, namely, D. 9.2.9.4, D. 9.2.11pr. and D. 9.2.52.1, will be critically examined (sections 2.3, 2.4 and 2.5). This examination will start with an exegesis of D. 9.2.52.1 because this text includes the oldest legal reply (i.e. advice of Alfenus, a jurist from the late Republic), followed by two fragments by Ulpian viz. D. 9.2.9.4 and D. 9.2.11pr.

After the exegesis of these texts in classical Roman law, a comparison with the approach in Justinian law will be made. Justinian included the above-mentioned fragments by Alfenus and Ulpian in his Digest. He made these fragments as well as the text from the Institutiones (Inst. 4.3.4) all equally applicable, promulgating them as law.⁶ They have to be interpreted in connection with each other, being provisions of one and the same piece of legislation.

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⁴ This was defended in earlier times, e.g. by Heilfron 1920, p. 245; Holdsworth 1937 (repr. 1966), p. 459; see also Looschelders 1999, p. 7.
⁵ Recently, Travis Laster wrote an article in which he discussed six cases in the Digest where the conduct of the victim was, according to his opinion, clearly relevant (Travis Laster 1996, p. 203). According to Travis Laster, the cases ‘uniformly show that the victim's conduct was considered as one contingent fact in an overall contextual inquiry into blame; The fragments I have chosen were selected based on the frequency of occurrence in Romanistic literature and on their influence later in ius commune. The cases of the bear pits (D. 9.2.28-29pr.) only very implicitly concern the contributory negligence of the injured party. The texts concern more the overall discussion of the blameworthiness of the defendant. Also in the case of the tree pruner (D. 9.2.31), the role of the victim's conduct is taken into account in the overall discussion of the blameworthiness of the tree pruner; this text will frequently be dealt with in this chapter because it could indeed be interpreted as considering contributory negligence. More information on this text will follow later. Because these two texts together with the cases of the javelin throwers all seem to illustrate a contextual fault-based inquiry (Travis Laster 1996, p. 203), I have chosen the most important one, D. 9.2.9.4, for an integral treatment in this chapter to show the way classical jurists treated this matter. The last case, which Travis Laster discussed and which I do not, D. 9.2.52.4, seems to have been considered more within the context of the distinction and the boundaries between culpa and casus.
⁶ As to the concept of contributory negligence of the injured, apart from fragments from the Institutes and Digest, also Codex title 3.35 could be relevant (De lege Aquilia), but, after closer examination, the respective texts appear not to be relevant for my topic.