

B & B ESTABLISHMENTS, HOTELS AND THE PRAETORIAN
EDICTUM DE NAUTIS CAUPONIBUS ET STABULARIIS:
CESSANTE RATIONE LEGIS CESSAT LEX IPSA?

CHARNELLE VAN DER BIJL

Senior Lecturer in the Department of Mercantile Law, Stellenbosch University

INTRODUCTION

The most significant action in terms of which innkeepers could be held liable for the theft of their guests' property can be traced back to the praetor's edict de nautis cauponibus et stabulariis. The actio de recepto was a remedy granted to give effect to a form of guarantee known as the receptum, to protect a customer who had to deliver his possessions into the custody of mariners, innkeepers or stable-keepers, the so-called nautae, caupones and stabularii (see *Davis v Lockstone* 1921 AD 154 at 157; *Gabriel & another v Enchanted Bed and Breakfast* CC 2002 (6) SA 597 (C); Reinhard Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 515). The sinister dealings of unscrupulous innkeepers who colluded with thieves to steal the property of their guests was one of the factors that made the enactment of the actio de recepto necessary in order to repress such dishonesty and to make travelling a viable option (see *Swart v Shaw t/a Shaw Racing Stables* 1996 (1) SA 202 (C) at 204H–I; Zimmermann op cit 515). Zimmermann states in this regard (at 516):

'Obviously, nautae, caupones and stabularii did not enjoy a very high reputation. One suspected them of conspiring with potential thieves against their customers, and even though there must have been differences in the moral and social standing of innkeepers and shipowners, Pomponius lumped them all together, somewhat scornfully, as "hoc genus hominum".'

The receptum was granted as an additional agreement and guarantee, which was supplemental to the other civil actions available based on the underlying contracts of deposit or letting and hiring (Voet *Commentarius* 4.9.2, 4.9.7; Zimmermann op cit 517; *Davis v Lockstone* (supra) at 163). This special form of remedy could arise either quasi ex contractu or quasi ex delicto. An action quasi ex contractu could arise for the return of goods where innkeepers, mariners or stable-keepers received the property of any person for safekeeping and the property was then stolen from their custody (see *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 (2) SA 521 (C) at 529A–C; *Gabriel* (supra)). The law has since developed and it is accepted that liability is not only confined to goods specifically entrusted to innkeepers for safekeeping, but extends to goods, including luggage, brought onto the premises of the inn (see *Davis v Lockstone* (supra) at 158, 160 and 164; Zimmermann op cit 515; Voet 4 9 2). An action quasi ex delicto could arise where goods were stolen from a guest and where it was proved that the innkeeper or his servants directly caused the loss of the goods.

Of significance is that the actio de recepto provides for strict liability (Zimmermann op cit 520). Consequently the position has been such that a nauta, caupo (a caupona was a combination of hotel or pub but often

included a brothel) or stabularius could be held liable in terms of the edict, regardless of fault, as it was often difficult to prove whose fault contributed to the loss (Zimmermann op cit 515 and 516n51; *Stern and Ekermans* (supra) at 529C–D). Liability for the loss of property would ensue where innkeepers, stable-keepers or carriers by sea had received the property of their customers, unless such liability was specifically excluded by the parties. *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 756B and 759E, Voet 4.9.7, Zimmermann op cit 520 and *Davis v Lockstone* (supra) at 154 are authority for the view that there had to be a receipt of goods either expressly or tacitly before the innkeeper could be held liable to the guest.

Various defences could be raised by the hotel-keeper to avoid being held strictly liable in terms of the edict. These defences are vis major, casus fortuitus, which includes vis major and ‘lesser accidents’ (Zimmermann op cit 525; *Stocks & Stocks* (supra) at 760G; *Davis v Lockstone* (supra) at 158–9 and 161; *Tregidga & Co v Sivewright NO* (1897) 14 SC 76 at 81), and damnum fatale, as was potentially the case through shipwreck or damage done by pirates. Voet further extended this latter defence to include cases of burglary where a hotel is broken into and the traveller’s goods stolen, subject to the proviso that there should not have been accompanying negligence by the innkeeper. The incident must further have been of an unavoidable nature even if due diligence was exercised, as would be the case with violent robbery. Robbery is specifically distinguished from theft, as the latter would afford no defence (see Voet 9.4.2; Percival Gane *The Selective Voet, Being the Commentary on the Pandects* (1955) 4.9.2 at 767n9g and 768; *Davis v Lockstone* (supra) at 166; Zimmermann op cit 525). Should a thief outsmart the proprietor by wit rather than by force which the proprietor could not oppose or prevent, one would think that this should have consequences similar to when force is used. However, it would appear that a thief’s adroitness is specifically excluded as inevitable loss (Voet 9.4.2; Gane op cit 767n9).

The cardinal question to be examined in this note is whether the edict can still be meaningfully applied to modern innkeepers. The scope and principles of the edict obviously also encompass the so-called nautae and stabularii, but the liability of carriers at sea and stable-keepers would merit separate study. The focus here is on modern-day caupones with specific attention to the liability of hotels and B & B establishments. If the edict is still relevant, a further issue calling for clarification is whether the liability under it is perhaps too broad in scope, and should therefore be restricted. Alternatively, if it is no longer relevant, it should also be considered whether the edict may have to be abolished by legislation or by the judiciary as an anachronism, something defunct and obsolete, on the grounds of cessante ratione legis cessat lex ipsa.

THE MEANING OF ‘CAUPONES’

It is important to understand what exactly is meant by caupones, as the edict of a bygone era develops a new dimension of complexity when applied to modern circumstances. In *Hamilton-Smythe v Grand National Hotel (Pty) Ltd*

1949 (4) SA 464 (W) at 465 reference is made to the English law, which draws a somewhat confusing distinction between a boarding-house keeper, a lodging-house keeper and an innkeeper. This case provides a somewhat confusing description in its classification of a lodging-house keeper in that it includes a hotel-keeper who provides lodgings, but then suggests that a lodging-house keeper is not an innkeeper as envisaged by the edict (at 465) unless the house is kept for the accommodation of lodgers (at 468). However, some light is shed on the meaning of *caupones*, which extends to innkeepers, publicans or tavern-keepers, but excludes the ordinary boarding-house or lodging-house keeper. The latter distinction between parties becomes important as the application of the edict and its resultant strict liability could be excluded depending on the classification of such party. (The American decision of *Smith v Dorchester Hotel* 145 Wash 344, 259 P 1085 (1927) provides a useful comparison: the court held that the plaintiff qualified as a lodger and not as a guest, as his stay was for a transient duration of four months and he had no other place of abode. See further Jay M Zitter 'Liability of hotel or motel for guest's loss of money from room by theft or robbery committed by person other than defendant's servant' (2005) 28 ALR 4th 120 § b.) Negligence would then have to be proved, or a contract of deposit relied upon, in order to hold liable persons excluded from the ambit of the edict, such as a boarding-house keeper, hotel-keeper or lodging-house keeper who is not an innkeeper (*Hamilton-Smythe* (supra); *Stocks & Stocks* (supra) at 761; *Connell v Kluge* 1921 CPD 596; *Sunny-Hoek Private Residential Hotel v Shields* 1953 1 SA 494 (T); and see further the electronic version of the *LAWSA Annual Cumulative Supplement* (2004) part 2, vol 28, para 42).

Legislation has also attempted to develop the meaning of these terms. Section 112(5) of the Liquor Act 30 of 1928, which was subsequently amended by s 6 of Act 39 of 1937, broadened the meaning of a lodging-house keeper to include a hotel-keeper who provides lodgings. This distinction becomes important especially in the case of *Hamilton-Smythe* (supra), where a number of the plaintiff's belongings were stolen from his room while he was asleep at the defendant hotel. The plaintiff sought to hold the innkeeper liable in terms of the edict, and thus had to prove that his property had been received by the defendant and that it had been stolen from his room (see at 467). The defendant relied on s 112 as a defence, alleging that the establishment was a lodging-house in order to avoid falling within the ambit of the edict and to escape being held strictly liable for the plaintiff's loss (see at 466–7).

It is interesting to note that the Tourism Act 72 of 1993 as amended, being an example of modern legislation regulating hotels and B & B establishments, makes no mention of an inn, boarding-house or lodging-house but refers merely to an 'accommodation establishment', which is defined as being 'any place in or upon which the business of providing accommodation with or without meals is conducted for gain'. This modern definition of accommodation thus draws no distinction between establishments. The relevance of

the praetorian edict may therefore be questioned if the distinctions determining whether strict liability should be imposed are not sufficiently clear.

STRICT LIABILITY OR NEGLIGENCE WITHIN MODERN LAW?

Some early guidelines on the application of the praetorian edict as a form of strict liability can be found in the leading case of *Davis v Lockstone* (supra). Lockstone sued the hotel proprietor for goods allegedly stolen from the hotel where he stayed as a guest. The court confirmed that the rule of Roman law imposing strict liability on mariners, innkeepers or stable-keepers except in the case of *vis major* or *damnum fatale* had been incorporated into the Roman-Dutch law in force in South Africa (at 156).

The construction placed on the edict is such that the innkeeper will be strictly liable for all loss or damage, including that caused by theft, unless one of the exceptions excluding the liability of the innkeeper applies (*Tregidga & Co* (supra) at 76). As mentioned earlier, the defence of *damnum fatale* was extended by Voet to incorporate robbery, but the innkeeper will remain liable in instances where the loss is facilitated by his own negligence (Voet 9.4.2; *Davis v Lockstone* (supra) at 158 and 161). In *Davis v Lockstone* the innkeeper argued that because the room had been opened from the outside the theft of the property fell within the exception of *damnum fatale*, thus requiring proof of negligence. Juta JA dismissed this defence and stated in this regard (at 166, emphasis original):

‘But the opening of an unlocked door is not the *breaking open* by thieves referred to by Voet and is in no sense a *damnum fatale*.’

The exceptions include heterogenous causes, some of which fall within the range of human control and some which do not, such as natural phenomena. These causes are essentially unexpected or irresistible events which are not foreseeable and which cannot be guarded against, such as unavoidable accident or burglary with violence (*First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) at 197C; *Gabriel* (supra) at 599; Voet 9.4.2).

The test for negligence is based on reasonable foreseeability and reasonable preventability of damage (J Neethling, J M Potgieter & P J Visser *Law of Delict* 5 ed (2006) at 126–33, *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E–F; *Mkhatswa v Minister of Defence* 2000 (1) SA 1004 (SCA) at 1111–14; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA); *Mukheiber v Raath* 1999 (3) SA 1065 (SCA); Voet 9.4.2). It therefore becomes clear that negligence indirectly plays a role in the defences that can be raised to refute liability. The inference that can possibly be drawn is that one is strictly liable (no negligence need be proved) unless one proves a defence of no negligence! One might then question the purpose of the edict, as its very character is surely undermined by the innkeeper’s defence that there was no accompanying negligence on his part. Such a view would fail to take into account that not all circumstances are covered by the

defences, however. The fact remains that theft would inevitably be the most frequent occurrence necessitating reliance upon the edict.

Negligence plays a further role in cases where the innkeeper can escape liability if the loss of the goods is attributable to the traveller's own negligence. (This would also accord with one of the defences available in a general delictual action based on strict liability where the fault on the part of the harmed person can possibly be raised to avoid liability. See Neethling, Potgieter & Visser op cit 331; *Sinclair v Grand National Hotel Ltd* 1944 TPD 397 at 401 and 404; *Glover v Finch* 1921 CPD 358; *Koenig v Godbold* 1923 CPD 526.) Contributory negligence would appear to play no role in cases where the innkeeper's liability stems from the praetor's edict. Aside from liability being stricti iuris, the actio de recepto was granted at a time when Roman lawyers did not recognize an apportionment of damages. An all-or-nothing approach to the principle of fault was usually adopted: see Zimmermann op cit 515 and 1010; *Stern and Ekermans* (supra) at 529C–E. Where ordinary contractual or delictual action is instituted, Watermeyer J confirms (at 530) that s 1 of the Apportionment of Damages Act 34 of 1956 is applicable to delictual claims but not to contractual claims. In the more recent case of *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA), Nienaber JA, Marais JA, Farlam JA and Brand AJA confirm that the principle of contributory negligence is designed to address specific needs identified in the law of delict and not in the law of contract (at 591A–D, 597E–F and 604G–H). A delict consists of a number of elements, including wrongfulness, fault and causation, which should also be clearly distinguished (*S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 (4) SA 1019 (SCA) at 1024 E–G; Neethling, Potgieter & Visser op cit 186–7). The limits of the innkeeper's liability would be determined with regard to the separate delictual requirement of legal causation (*Thandani v Minister of Law and Order* 1991 (4) SA 862 (A)).

In the case of *Gabriel* (supra) the plaintiffs booked accommodation at the defendant's establishment in Sea Point. While the plaintiffs were asleep a number of their belongings were stolen from the room they occupied. Access to the room could be gained via an external spiral staircase leading up to a deck outside the room (see at 598). There were no burglar bars on the windows although there was a 'Trellidoor' which (the court accepted) had been locked on the night of the burglary. The defendant attempted to avoid the strict liability of the edict by relying on the defences of *damnum fatale* and sole negligence on the part of the plaintiffs. The court concluded on the facts that the plaintiffs had not been negligent, and the defence of *damnum fatale*, on the basis that the loss was unforeseeable, also failed. The court held that if anyone should be held negligent it had to be the defendant, for being aware of the high crime rate in the area and failing to secure all the windows with burglar proofing (at 605). The court did confirm, however, that the principles imposing strict liability as set out in *Davis v Lockstone* (supra) are still applicable and have not been replaced by a test for negligence on the part of an innkeeper (at 599F–G).

THE ROLE OF EXCLUSION CLAUSES IN LIMITING OR EXCLUDING STRICT LIABILITY

Exclusion clauses play an important role in excluding liability under the edict. Such clauses can be utilized by contractual parties to restrict both contractual and delictual liability (Zimmermann op cit 520). The efficacy of a disclaimer notice was in issue in *Davis v Lockstone* (supra). Such a notice had been posted in the main hotel stating that the proprietor would not be held responsible for the theft of any valuables unless such goods were placed in his charge for safekeeping (see at 163). It was held that a notice limiting a hotel-keeper's liability was insufficient, as the consent of the guest is required with regard to that particular limitation (see further the earlier decision of *Glenburn Hotels (Pvt) Ltd v England* 1972 (2) SA 660 (RA)). In *Gabriel* (supra) a notice was also posted at the premises stating that '[t]he owner and the staff will not be held liable for any loss or damage sustained by whatsoever cause' (see at 600). It was held that the plaintiffs could not be bound by it as they were unaware of the notice and thus had not assented to its terms.

The question raised in such a case is whether the test is objective, i.e. whether it may be regarded as reasonably sufficient to take steps to draw the other party's attention to the notice or whether the other party must have appreciated and accepted the clause (A J Kerr *The Principles of the Law of Contract* 6 ed (2002) at 437). It would appear that it is enough for the innkeeper to take reasonable steps to draw the guest's attention to the disclaimer notice in order to avoid liability (Kerr op cit 439; Voet 4.9.7; *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) All SA 411 (A) at 414–17; *ABSA Bank Ltd v Fouché* 2003 (1) SA 176 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *FNB v Rosenblum* (supra); *Stocks & Stocks* (supra). Some American cases have held that a notice is insufficient unless a guest clearly agrees to its terms. (See *Baxter v Shanley-Furness Co* 193 Cal 558, 226 P 391 (1924); *Epp v Bowman-Biltmore Hotels Corp* 171 Misc 338, 12 NYS 2d 384 (Mun Ct 1939); *Buck v Hankin* 217 Pa Super 262, 269 A.2d 344 (1970). See also Zitter op cit § 3(a)).

Depending on the interpretation of an exclusion clause in a contract limiting or excluding the liability of an innkeeper, the exclusion may be applicable only to contractual liability. A person committing breach of contract could then still perhaps be held delictually liable (Neethling, Visser & Potgieter op cit 242n79).

PRACTICAL GUIDELINES

In regulating the liability of innkeepers there are a number of factors that should be taken into account. First, strict liability is irreconcilable with the fault principle which is the traditional basis for delictual liability (Konrad Zweigert & Hein Kötz (trans Tony Weir) *An Introduction to Comparative Law* 3 ed (1998) 647–9; Neethling, Visser & Potgieter op cit 329). However, policy reasons are often used as justification for the imposition of strict liability. Various competing considerations are weighed up against each

other. These competing considerations include the extent of the possible harm being caused to the guest if such measures are not present, the victim's need for protection, a high risk of damage, the degree or extent of the risk created by the actor's conduct, the degree of control which a defendant may exercise over his enterprise, the cost of preventing or minimizing the risk of foreseeable harm and that in certain cases, fault is difficult to prove (Zweigert & Kötz op cit 649 and 671–2; Neethling, Potgieter & Visser op cit 329–30; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at 1199D–F). Examples of some reasonable measures that could be taken by the innkeeper to prevent foreseeable harm are the installation of alarms or burglar-proofing, the provision of safety deposit boxes for valuables, and obtaining insurance. The premiums paid by the innkeeper for such insurance cover could possibly be recouped by charging a higher rate to guests.

In Roman times guests were at a greater risk of harm and disadvantage as they had to deliver their property into the custody of the innkeeper, a situation that lent itself to abuse owing to the prevalence of collusion with thieves and the difficulties of proving fault (Zimmerman op cit 516 and 561; *Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd* 1995 (3) SA 42 (A) at 44C–E). The risk principle may be relevant when considering whether the innkeeper can be held liable based on an increased risk of harm to the community. The vicarious liability of an employer is an example of where the risk principle is applied (Neethling, Visser & Potgieter op cit 339). Modern-day vicarious liability overlaps with the action that can be instituted delictually in terms of the edict for the loss caused by the unscrupulous or negligent actions of the innkeeper or his employees, thus rendering the edict somewhat unnecessary in this respect.

If the edict is not abolished, an innkeeper could still immunize himself against liability by contractually limiting or excluding such common-law liability. Conspicuous notices could be displayed, or a register with clear disclaimer terms could be signed (*Glenburn Hotels v England* (supra); *Durban's Water Wonderland* (supra) at 414–17; *ABSA Bank v Fouché* (supra); *Afrox Healthcare v Strydom* (supra); *FNB v Rosenblum* (supra)). Hotel-keepers have been exempted from liability in the cases of *Purvis v Coleman & Stetson* (1860) 21 NY 111; *Griffis v Buckofzer* 25 Ga App 531, 103 SE 800 (1920); *Hart v Mills Hotel Trust* 144 Misc 121, 258 NYS 417 (Mun Ct 1932); *Emmerson v Super 8 Motel-Stamford*, 59 Conn App 462, 757 A.2d 651 (2000).

A second factor to consider is that if the edict were abolished, the common law could be developed through legislative measures or the courts to regulate the liability of innkeepers, and a test of negligence could be provided for. Van der Walt and Midgley discuss the influence of the Constitution of the Republic of South Africa, 2006 as providing an objective value system against which the common law must be developed (J C van der Walt & J R Midgley *Principles of Delict* 3 ed (2005) 20). A number of jurisdictions in the USA, including Nebraska, Ohio, New York and Washington, have enacted statutes providing for exceptions to strict liability for the loss of or damage to guests' property. Examples are that an innkeeper

must provide a safe place for the deposit of valuables and that notices must be posted to inform guests of this fact (See Zitter *op cit* § (b)). The amount of liability for which an innkeeper can be liable is also restricted in some jurisdictions to avoid extensive liability (see generally Anne E Melley 'Liability for loss of or damage to property' (2005) 40A *Am Jur* 2d § 162). A classic example of the development of the common law through legislation to provide for a test for negligence is the liability of a collecting banker. It has become trite law that a collecting banker can be held liable to the true owner of a cheque, but negligence must be proved in order to found Aquilian liability (F R Malan & J T Pretorius *Malan on Bills of Exchange, Cheques and Promissory Notes in South African Law* 4 ed (2002) 440 (hereafter Malan); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797A–B; J T Pretorius 'More guidelines on the negligence of the collecting bank' (2000) 12 *SA Merc LJ* 359; *Van Hulsteyns Attorneys v Government of the Republic of South Africa* 2002 (2) SA 295 (SCA)).

Lastly, a third potential factor for consideration is the possibility of adopting an alternative common-law approach. Liability under the edict has traditionally arisen *ex contractu* for the return of the goods where the goods are received on the premises of the innkeeper. Liability arises *ex delicto* where the innkeeper or his servants directly cause the loss of the goods (*Davis v Lockstone* (supra) 154). In *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 448 (A) at 496 Grosskopf AJA stated that:

'In modern South African law we are of course no longer bound by the formal *actiones* of Roman law, but our law also acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu*, and allows the Plaintiff to choose which he wishes to pursue.'

The instituting of action under ordinary delictual or contractual principles would be in line with the position followed for boarding-houses or lodgings currently excluded from the ambit of the edict. It would also preclude the need to draw a somewhat confusing distinction between the various types of accommodation which are similar in nature. One would need to distinguish carefully between the principles applicable to an action based on contract and an action founded upon delict. There is recognition of the concurrence of a contractual and delictual action (See *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA); *Holtzhausen v ABSA Bank Ltd* (SCA) unreported case no 280/03 of 17 September 2004). However, the onus of proof differs in respect of delictual and contractual claims. In the case of a breach of contract the onus would fall on the defendant to show that he was not negligent. (One should bear in mind, however, that the relevance of fault in relation to contractual liability also depends on the type of breach of contract in question. See *Thoroughbred Breeders' Association* (supra) at 588D–F and 589A–C.) In a delictual action the onus rests on the plaintiff to prove that the defendant is negligent (Neethling, Potgieter & Visser *op cit* 242).

The liability for the loss of goods could also be based on a contract of depositum. This is a gratuitous transaction in terms of which the depositor hands over to a depositary objects to be kept in safe custody and which may not be used by the depositary (see Zimmermann *op cit* 205 and 215).

Innkeepers would not be capable of being held liable for losses suffered by their guests unless the latter had delivered their property to them for safekeeping. Liability could then possibly be based on the principle that the property was not returned (*Swart v Shaw* (supra) at 208; W J Hosten 'Die aanspreeklikheid van die depositarius en die vervoeder ingevolge die gemene reg' 1964 *Acta Juridica* 124).

In the case of a delictual action liability would demand that all the elements of delictual liability be met, leading to a more equitable outcome. In actions arising quasi ex delicto under the edict where the loss of the goods is attributable to the innkeeper or his employees, such cases would still possibly be covered under the ordinary principles of vicarious liability. Contributory negligence could also play a role in potentially reducing the liability of the innkeeper.

CONCLUSION

There would appear to be little similarity between the ignoble innkeeper of Roman times and the owner of modern-day B & B establishments or hotels (*Swart v Shaw* (supra) at 205D–F and 206E–F). While crooked innkeepers may still lurk about, they can perhaps be regarded as the exception rather than the norm. If the original intention of the edict is borne in mind it becomes doubtful whether it can be meaningfully applied within a modern context as the reasons for the use of the edict have largely fallen away.

A number of factors will bear on the question whether there is a place for the praetorian edict in modern law. A policy decision will undoubtedly have to be taken based on specific considerations of reasonableness and fairness, economic considerations, the relevance of the edict within a modern context, considerations pertaining to the principle of risk and difficulties of proving fault. It is difficult to justify the onerous burden placed on innkeepers by this edict irrespective of fault save in the instances of *vis major*, *casus fortuitus* or *damnum fatale*. Ought liability to be restricted on the basis of logic, fairness and convenience (see *Swart v Shaw* (supra) at 206F), or should a different approach perhaps be followed? It seems that it would not be inappropriate for the legislature or judiciary to intervene, and where the edict provides that *caupones* are liable absolutely without any proof of *culpa*, to declare such provisions obsolete.

Cessante ratione legis cessat lex ipsa? Only time will tell.