

Insurance in Roman law: Martialis *Epigrammaton* III 52

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1 Introduction

The *communis opinio* among specialists of insurance law holds that the origins of the insurance contract are found in Italy during the later Middle Ages. From this unquestionable fact, these experts draw the conclusion that the Romans did not know insurance on a profit basis or premium insurance.¹ The Anglo-American version gives prominence to the merchants in Lombard street, the great fire of London in 1666 and mariners and merchants passing the time in the coffeehouse of Edward Lloyd.² Thus, both legal families adhere to the belief that the insurance business and, more particularly, fire insurance and marine insurance had been beyond the imagination and/or expertise of Roman entrepreneurs and lawyers. This view is difficult to accept. In consequence, this article analyses the essential elements of private insurance for profit and argues that insurance can be achieved by means of other contracts. As a result the hypothesis is proposed that the *stipulatio*, the all-purpose contract of Roman law, was well suited to effect insurance transactions.

2 What is insurance?

To discover the essence of insurance the definitions of the earliest “insurance lawyers” may be useful. Santerna in *De Assecurationibus*³ defines the insurance contract as an agreement whereby one party takes upon himself the misfortune of the other party. Straccha⁴ also views the taking over of the risk of another’s goods to be transported over sea or land against a certain agreed price as the *essentialia* of the insurance contract. Van Niekerk shows that Santerna’s definition was widely taken over and expanded upon.⁵ For example, Grotius defines insurance as an agreement in terms of which one party assumes the *periculum* of another, who in turn is liable

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¹ Van der Keessel *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam ad* 3 24 pr; Van Niekerk *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* (1998) 3; Wessels *The Law of Contract in South Africa* (1937) 228 ff. This article will deal with private insurance for profit and consequently both public insurance as well as insurance on a mutual basis remain outside the discussion. For the meaning of mutual insurance and insurance for profit see Reinecke and Van der Merwe *General Principles of Insurance* (1989) 3 ff. For public insurance see Gordon and Getz *The South African Law of Insurance* (1993) 489 ff.

² Jenkins and Yoneyama *The History of Insurance* (2000) xix ff, xxviii ff; Longaker “History of insurance law” 1962 *Insurance Law Journal* 653 ff.

³ Santerna *Tractatus Perutilis et Quotidianus de Assecurationibus et Sponsionibus Mercatorum* (Venetiis 1552) I 2: “conventio, qua unus infortunium alterius in se suscepit pretio convento”.

⁴ *Tractatus de Assecurationibus* (1569) Intro 46: “assecratio est alienarum rerum sive mari, sive terra exportandarum periculi susceptio certo constituto pretio”.

⁵ Van Niekerk (n 1) 190 ff where further definitions are found.

to pay a premium.⁶ According to these definitions⁷ the essence of insurance is situated in the assumption of another person's risk against payment. Thus insurance is nothing more than a device to shift the risk of destruction, loss or damage onto another person.⁸ Such risk shifting takes place by way of agreement and in due course a special contract became recognised with its own requirements, characteristics and default clauses. However, recognition of the nominate insurance contract is not the Siamese twin of insurance. This is validated by Van Niekerk's description how during the late medieval renaissance of trade and commerce insurance was clothed in other cloaks, such as *fenus nauticum*, *do ut des*, or *emptio et venditio* in order to avoid and evade legal prohibitions against gambling and usury.⁹ These stratagems show that insurance has been and can be practised without the so-called insurance contract. Once the hurdles of gaming, wagering¹⁰ and usury¹¹ had been overcome the insurance contract developed and quickly became one of the most important contracts within commerce. Both Van Bynkershoek¹² and Van der Keessel¹³ attest to this and the rather lame explanation by the first on the absence of insurance in Roman law amazes.¹⁴

3 Risk and transfer of risk

In view of the fact that the assumption of another's risk is the essence of insurance, the primary question is whether Roman law had identified and developed the concept risk and, if so, what rules applied in this respect.

⁶ *Inleidinge tot de Hollandsche Rechts-geleerdheid* 3 24 1: "Verzekering is een overkoming, waer door iemand op hem neemt het onzeker gevaer dat een ander had te verwachten: den welke wederom hem daer voor gehouden is loon te geven." See Van Niekerk (n 1) 191 for comment and criticism on this definition.

⁷ For more definitions see Van der Keessel (n 1) *ad* 3 24 1 "Verzeekering".

⁸ Longnaker (n 2) 642; See also Krückmann "Versicherungshaftung im römischen Recht" 1943 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (ZSS)* 1 ff.

⁹ Vermeersch *sv* "usury" *The Catholic Encyclopedia* (1912) 235 ff. Although the fathers of the church condemned interest, originally the prohibition on interest was limited to clerics; *Decretum Gratiani* C XIV q 3 and 4. However, inspired by Alexander III the Council of Tours (1163), the third and fourth of the Lateran Councils (1179 and 1215), not only strongly condemn demanding interest by lay persons and order the profit so obtained to be restored, but introduce sanctions – *Decretales Gregor IX V 19 De usuris* 2, 5, 7, 9, 10 and 13. The second Council of Lyon (1274) firmed up the sanctions – *Liber sextus* V 5 1 and 2. The Council of Vienne (1311) punished local leaders of communities allowing usury with excommunication and declared that tenacious moneylenders should be punished as heretics – *Clementinae* V 5 un. See also Piron "Le devoir de gratitude. Emergence et vogue de la notion d'*antidora* au XIIIe siècle" in Quaglioni, Todeschini and Varanini (eds) *Credito e Usura fra Teologia, Diritto e Amministrazione. Linguaggi a Confronto (sec XII-XVI) – Convegno internazionale di Trento 3-5 settembre 2001* (2005) 73-101; Van Niekerk (n 1) 11 ff; *contra* Maloney "Early conciliar legislation on usury" 1972 *Recherches de Théologie Ancienne et Médiévale* 145-157 who holds that as early as 306 AD the Council of Elvira prohibited interest for both clerics and laymen.

¹⁰ Van Niekerk (n 1) 120 ff.

¹¹ Vermeersch (n 9) 235 ff.

¹² *Quaestiones Iuris Publici* I 21.

¹³ *ad* 3 24: "Apud nos adeo frequens est, ut praeter emptionem et locationem vix aliud occurrat negotium magis usitatum."

¹⁴ *Cf* I 21 where the learned judge explains that in Roman times commerce was not as widespread, the Roman navy had eliminated pirates, the size of the Roman empire had done away with fear of enemies and that the dangers of the sea were less awesome, since the Romans sailed along the coast and not in winter.

It is indisputable that the Roman jurists understood risk and developed a technical legal term, *periculum*, in this respect.¹⁵ The legal meaning of risk expresses the possible financial loss suffered as a result of damage to or destruction of a thing or its disappearance,¹⁶ or the loss of a claim for payment.¹⁷

In respect of the *periculum rei* the applicable principle was formulated in the adage “*casum sentit dominus*” or “*res perit domino*”.¹⁸ However, in a number of cases Roman law shifts the loss upon another person; this person usually has himself to blame for such transfer, since it is either based on *dolus* and/or *culpa*,¹⁹ unauthorised use,²⁰ or *mora*.²¹ It is only in the case of *periculum est emptoris* that an apparent explanation is lacking.²²

Furthermore, the parties to a contract had the freedom to alter the *ex lege* degree of liability of their specific contract,²³ thus a deposittee and a mandatee could agree to bear all risk;²⁴ a borrower could assume the full risk in respect of the borrowed object;²⁵ a tenant could agree in the lease to carry all risk;²⁶ the broker assumed the risk in the case of *aestimatum*;²⁷ a craftsman could assume full risk.²⁸

It is thus beyond doubt that Roman law identified the concept risk and recognised and allowed risk-shifting devices.²⁹

¹⁵ MacCormack “Periculum” 1979 ZSS 129-172, provides the sources and an excellent analysis of the meaning of this multi-faceted and ambiguous term. Kaser I *Das römische Privatrecht* (1971) 512; *contra*: Pernice “Parerga” 1898 ZSS 135: “Das dieser Ausdruck (*periculum*) keine technische Bedeutung hat, dass er vor allem nicht durchgängig und notwendig die Haftung für Zufall bezeichnet, ist schon längst hervorgehoben worden.” It must be granted that the ordinary use of *periculum*, namely danger, is also encountered in the texts: for example *Gai* 2 181; *Inst* 2 16 3; *Inst* 3 3 4; *Inst* 4 3 2; *D* 5 3 40 *pr*; *D* 16 3 1 3; *D* 17 2 29 1; *D* 19 2 27 1; *D* 39 2 38 1; *C* 1 55 6; *C* 2 4 13 *pr*; *C* 6 35 12 *pr*; *C* 8 17 12 5; *C* 8 55 10 *pr*; *C* 12 21 6.

¹⁶ the so-called *periculum rei*. For example *Inst* 3 23 3 and 3a.

¹⁷ *D* 17 1 26 6; *D* 19 2 15 2; *D* 19 2 38 *pr*; *D* 19 2 62; Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* (1990) 281 ff, 369 ff, 384 ff, 401 ff.

¹⁸ *Cf* *Inst* 3 24 5; *D* 6 1 15 3; *D* 20 1 21 2; *D* 24 1 28 *pr*; *D* 50 17 23 *in fine* and *C* 4 24 9. Wacke “*Casum sentit dominus*: Liability for accidental damages in Roman and modern German law of property and obligation” 1987 *TSAR* 318-331; Joubert “*Casum sentit dominus*: Liability for accidental damages in Roman-Dutch and modern South African law” 1987 *TSAR* 332-335.

¹⁹ either in contract or in delict; for example *D* 6 1 16 1; *D* 9 2 52 4; *D* 13 6 5.

²⁰ *eg* *D* 13 6 5 7; *D* 13 6 18 *pr*; *D* 44 7 1 4.

²¹ *D* 6 1 15 3; *D* 30 47 6; *D* 13 1 20; Zimmermann (n 17) 790 ff; Buckland *A Textbook of Roman Law from Augustus to Justinian* (1963) 550.

²² *D* 18 6 *De periculo et commodo rei venditae*; Seckel and Levy “Die Gefahrtragung beim Kauf im klassischen römischen Recht” 1927 ZSS 117-263; Zimmermann (n 17) 281 ff. [*Cf*, however, *D* 18 6 3 ed.]

²³ *Cf* *D* 50 17 23: “sed haec ita, nisi si quid nominatim convenit (legem enim contractus dedit)”; *C* 4 23 1.

²⁴ *D* 2 14 7 15: “item si quis pactus sit, ut ex causa depositi omne periculum praestet, Pomponius ait pactionem valere nec quasi contra iuris formam factam non esse servandam”; *D* 13 6 5 2: “[a]ut si hoc ab initio convenit, ut et culpam et periculum praestet is penes quem deponitur”; *D* 17 1 39: “Et Aristoni et Celso patri placuit posses rem hac condicione deponi mandatum suscipi, ut res periculo eius sit qui depositum vel mandatum suscepit: quod et mihi verum esse videtur.”

²⁵ *D* 13 6 5 3: “[e]t, si forte res aestimata data sit, omne periculum praestandum ab eo, qui aestimationem se praestaturum recepit”; *C* 4 23 1; Zimmermann (n 17) 197.

²⁶ *D* 19 2 9 2: “Iulianus libro quinto decimo digestorum dicit, si quis fundum locaverit, ut etiam si quid vi maiori accidisset, hoc ei praestaretur, pacto standum esse”; *cf* also *D* 19 2 30 4.

²⁷ *D* 19 3 1 1: “Aestimatio autem periculum facit eius qui suscepit.”

²⁸ *D* 19 2 13 5: “huic sententiae addendum et, nisi periculum quoque in se artifex receperat: tunc enim etsi vitio materiae id evenit, erit ex locato actio.”

²⁹ also Krückmann (n 8) 1 ff.

4 Risk-shifting devices in Roman law – insurance and speculation

In spite of Van Bynkershoek's observation to the contrary,³⁰ sea voyages in antiquity were dangerous:³¹ the ships were small, weather forecasts unknown, both coast and sea were only rudimentarily charted,³² while pirates remained a constant threat. In consequence, owners of vessels and merchandise insured against these dangers. They availed themselves of their freedom of contract to shift the risks of shipwreck and piracy onto another person and such arrangements came at a price. The origin of maritime insurance is found in *fenus nauticum*,³³ a loan of money to a merchant involved in transmarine trade to finance his merchandise. The merchant used the money to buy goods for export and/or to equip the ship; overseas he would buy other goods for import with the proceeds. The loan and the high interest were to be repaid only on the safe return of ship and cargo.³⁴ Many variations were possible,³⁵ but the taking over of the risks of shipwreck and piracy against payment of higher interest were the essential characteristics of this type of loan for consumption. Consequently it is generally held to represent a form of marine insurance.

The traditional argument is represented by Zimmermann,³⁶ who takes as a premise that the merchant lacked capital; the identical rationale is found in Van Niekerk,³⁷ which leads to the inevitable conclusion that insurance was a byproduct. However, a situation in which neither ship owner nor merchant are in need of money should also be brought within the equation. In this scenario the premise is that the ship owner and/or the merchant decide(s) to take out insurance against the dangers of the sea, and that loan was the byproduct. The entrepreneurs thus combined the golden rule of business, namely to work with and risk other people's money, with insuring their property.

Horace³⁸ refers to the moneylender Fufidius pursuing potential clients, and it is not hard to imagine "underwriters" trying to interest merchants to buy insur-

³⁰ Cf n 14.

³¹ Purpura "Il naufragio nel diritto romano: problemi giuridici e testimonianze archeologiche" in Purpura *Studi Romanistici in Tema di Diritto Commerciale Marittimo* (1996) 465-476.

³² Cf D 47 9 10.

³³ Biscardi "La struttura classica del *fenus nauticum*" in Ciapessoni (ed) *Studi Albertoni* (1936) 345 ff; *Actio Pecuniae Traiecticiae. Contributo alla Clausole Penali* (1947); "Pecunia traiectica e stipulatio poenae" 1978 *Labeo* 276 ff; Purpura "Ricerche in tema di prestito marittimo" in (n 31) 189 ff; Zimmermann (n 17) 181 ff for the Greek origins and the Roman practical adaptation.

³⁴ Cf D 45 1 122 1.

³⁵ Ship and cargo could be insured, or only ship or only cargo. See also D 22 2 4. The creditor could take the risk upon himself for the whole voyage or until a certain day or the fulfilment of a specific condition.

³⁶ (n 17) 182.

³⁷ 21 ff. Also Reinecke and Van der Merwe (n 1) 4.

³⁸ (n 1) Horace I *Sermones* – *Satyra* 2 12-18. "Fufidius vappae famam timet ac nebulones (dives agris, dives positus in fenore nummis):

quinas hic capiti mercedes exsecat atque
quanto perditior quisque est, tanto acrius urget;
nomina sectatur modo sumpta veste virili
sub patribus duris tironum.

'maxime' quis non 'Juppiter' exclamat simul atque audivit."

"Fufidius, who is rich in estates, rich in money invested at interest, is afraid of getting the reputation of being worthless and a scoundrel.

He makes a five-fold return on the sum that he lends, and the more desperate someone is, the more relentlessly he harasses him. He tries to make young men, who have only recently donned the toga of manhood, who are still in the paternal power of their hard fathers, his debtors. Who does not call out: 'Almighty Jupiter!' when he hears this?"

ance coverage for hazardous sea voyages. Since fire regularly destroyed sections of Rome, the same scenario could apply to the marketing of fire insurance.

Another high-risk enterprise is farming. Success is not only dependent on the weather: plagues, pests, labour problems, civil strife and war are never absent from this enterprise. In consequence, the farmer should be a willing candidate for risk shifting and this is indeed found in the Roman *emptio spei*.³⁹ In this case the attention has primarily been directed at the speculative element of the transaction, as recognition of the *emptio spei* not only made it possible to buy next year's crop from a farmer at a discount lump sum, but also allowed the buying of futures⁴⁰ on products like wheat, wine and meat, in Roman law.⁴¹ In consequence, both Pomponius⁴² and Zimmermann⁴³ concentrate on the speculative element of the transaction, thereby ignoring the fact that the other party to the transaction, namely the farmer, insured himself against drought, mad cow disease, rust on maize, diseased vines and other agricultural calamities.

The traditional argument is again represented by Zimmermann,⁴⁴ who takes as a premise that the farmer urgently needs money and therefore concludes an *emptio spei*; the fact that the farmer in actual fact took out insurance passes virtually unnoticed and at best would lead to the conclusion that this was a byproduct. However, the situation in which the farmer is not in need of money cannot be ignored and merits consideration. In such instance the entrepreneur lurking within the rustic decided to take out insurance against locusts, bad weather and the market.

5 Premium – the price of risk

The second essential element distilled from the earliest definitions of an insurance contract is the premium. The term premium came into general use during the 17th century,⁴⁵ but many authors explained the concept as the price of the risk, the *pretium periculi*.⁴⁶ It is little known that the origin of this term is found in *D 22 2 5*.⁴⁷ In this text Scaevola raises the question whether in general it may be agreed

³⁹ *D 18 1 8 1* (Pomp 9 *ad Sab*) 1: "Aliquando tamen et sine re venditio intellegitur, veluti cum quasi alea emitur. quod fit, cum captum piscium vel avium vel missilium emitur: emptio enim contrahitur etiam si nihil incidit, quia spei emptio est"; *D 18 4 11* (Ulp 32 *ad Ed*) "Nam hoc modo admittitur esse venditionem 'si qua sit hereditas, est tibi empta', et quasi spes hereditatis: ipsum enim incertum rei veneat, ut in retibus." Buckland (n 21) 483; Kaser (n 15) 549 n 35; Zimmermann (n 17) 245 ff.

⁴⁰ A future is an agreement to buy and sell a given quantity of a particular asset, at a specified future date, at a pre-agreed price. <http://www.liffe.com/liffeinvestor/introduction/how/futures/index.htm> (2-09-2008).

⁴¹ Cf Daube "Certainty of price" in Daube (ed) *Studies in the Roman Law of Sale in Memory of Francis de Zulueta* (1959) 12: "[W]e must also think, say, of a firm of victuallers at Rome undertaking to pay certain fishermen at Pessinus a fixed sum for their catches of cod during the season."

⁴² *D 18 1 8 1* (Pomp 9 *ad Sab*) 1: "Aliquando tamen et sine re venditio intellegitur, veluti cum quasi alea emitur."

⁴³ (n 17) 247. What we are dealing with, under these circumstances, is not a normal business transaction – it contains a strong element of gambling.

⁴⁴ (n 17) 247.

⁴⁵ Van Niekerk II *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* (1998) 718.

⁴⁶ Cf Voet *Commentarius ad Pandectas* 22 2 3: "[p]raemium assecurationis seu periculi pretium". Van Niekerk (n 45) 718.

⁴⁷ (Scaev 6 Respons): "Periculi pretium est et si condicione quamvis poenali non existente recepturus sis quod dederis et insuper aliquid praeter pecuniam, si modo in aleae speciem non cadat; veluti ea, ex quibus conditiones nasci solent, ut 'si non manumittas', 'si non illud facias', 'si non convaluero' et cetera. Nec dubitabis, si piscatori erogaturo in apparatus plurimum pecuniae dederim, ut, si cepisset, redderet, et athletae, unde se exhiberet exerceretque, ut, si vicisset, redderet. In his autem omnibus et pactum sine stipulatione ad augendam obligationem prodest."

that one of the contracting parties will carry the other's risk against payment. The Roman jurist identified the additional money⁴⁸ not as interest, but as the price for the risk undertaken by the creditor.⁴⁹ He argued that there is no doubt concerning the enforceability of a loan to a fisherman for the purchase of equipment, including the condition that the loan plus the premium for the risk will be repayable, if he has made a catch. The same applies to a loan made to an athlete for his living and training expenses, repayable with the additional premium for the risk, if he wins. Scaevola mentions that in these cases a *stipulatio* is not even required: mere agreement suffices.

6 *Obstacles to recognition of insurance – gambling*

Scaevola was, however, fully aware that the *periculi pretium* can also be used as a euphemism for gains and losses at the gaming table. His qualification “*si modo in aleae speciem non cadat*” therefore attempts to introduce a distinction between gambling and a more responsible assumption of risk. Arguing by analogy he refers to *stipulationes* in terms of which money will be owed subject to conditions such as “if you do or do not manumit,” or “if I do not recover.” It was generally accepted that such stipulations were valid and actionable and he extends his argument to the loan to the fisherman or athlete, where both the money owed as well as the premium promised on account of the risk can be claimed with the *condictio*. Thus, Scaevola skillfully demonstrates that speculative *stipulationes* are actionable and that the additional amount claimed is the price for the risk undertaken by the creditor. The statutory limit of interest remains unmentioned, since the cases under discussion are not dealing with interest.

The subprime crisis of 2007-2008 clearly demonstrates that it is and has always been difficult to draw the line between speculation and gambling.⁵⁰ *D* 11 5⁵¹ and *C* 3 43⁵² deal with gamblers. A *senatus consultum* forbade playing for money, but allowed bets on sporting competitions.⁵³ Thus it would appear that Roman law distinguished between betting on pure games of chance⁵⁴ and the more considered betting on the outcome of sporting events, presumably open to both participants and third parties. Marcian explains that the sporting type of bet took place by way of

⁴⁸ “quod dederis et insuper aliquid praeter pecuniam”. This translation differs from the Watson version in the interpretation of *praeter* as “more than” rather than “besides”.

⁴⁹ Another example of the price for risk is found in *I* 3 23 3. See also *D* 18 6 7 (Paul 5 *ad* Sab).

⁵⁰ During January 2007 it became apparent that Kerviel, a trader at Société Générale, lost his employer more than \$7 billion when the markets in his European stock-index futures turned against him. At the time it was not clear that Kerviel was nothing but the swallow announcing the imminent collapse of the international financial system, but the events of 2008 speak for themselves.

⁵¹ *De aleatoribus*.

⁵² *De aleae lusu et aleatoribus*.

⁵³ *D* 11 5 2 1. Carnelly and Schrage “Gambling regulation – a comparison between the Roman and South African gambling laws” in Hoctor and Schwikkard (eds) *The Exemplary Scholar. Essays in Honour of John Milton* (2008) 252-271; Kaser (n 15) 539 n 6 refers to Siber *Römisches Privatrecht* (1928) 179 ff for *stipulationes* concerning gaming and gambling. Also Voet (n 46) XI 5 and Lenel *Das Edictum Perpetuum* (1927) 175 ff.

⁵⁴ Carnelly and Schrage (n 53) 254: The common core of this type of Roman gambling consisted of three characteristics: firstly, the throwing of the dice; secondly, playing for money; and, thirdly, that it was a game of chance. Voet (n 46) XI 5 1 and 2.

sponsio,⁵⁵ and that the criterion according to which a bet was allowed or not was to be found in *virtus*, meaning manliness, excellence and bravery.

Consequently, Scaevola argued that contracts containing conditions⁵⁶ – that is, contracts depending on future, uncertain events – are valid as long as they did not qualify as pure gambling.⁵⁷

Nevertheless, the line between gambling and speculation has always been a fine one, and it is interesting to note how the early 18th century romanist and proto-capitalist Noodt elaborates on Scaevola's distinction. Noodt⁵⁸ believes that gambling is prohibited by statutes,⁵⁹ because it delivers no advantage to human life, but is no more than the desire for profit on the basis of chance.⁶⁰ He adds that not every agreement containing an element of chance is forbidden by the statutes and refers to the *emptio spei*⁶¹ and the uncertainty of its outcome and the comparison with the loan to the fisherman is drawn.⁶² Noodt argues that although this can be construed as gambling, it is not void, because the credit provider at his own risk assists the need and diligence of the fisherman, which is useful to the public.⁶³ Such transaction is considered to be reasonable.⁶⁴ Therefore, if the fisherman makes a catch and the credit provider receives his money plus whatever additional amount had been agreed upon, this is the price of risk.⁶⁵ The case of lending money to an athlete for living and training expenses,⁶⁶ on condition that he repays if he wins, is similar. Noodt concludes that financial assistance to the praiseworthy undertaking of a poor man lacking the necessary means to attain a worthy goal, at the risk of the credit provider, cannot reasonably be censured.⁶⁷

As a result of this lofty argument he has to dig deep to justify the profit-driven sponsorship of the athlete. He argues that the agreement in terms of which an athlete receives money to support himself and to train is valid, even though on a purely rational basis such enterprise would be considered foolish and empty.⁶⁸ Nevertheless, the Greeks viewed athletics as having a worthy purpose and *D 9 2 7 4* and *D 3 2 4* indicate that the Romans conformed to this view. In spite of the speculative element of the transaction Noodt never wavers from his line of reasoning that these cases represent nothing other than higher interest.

⁵⁵ *D 11 5 3* (Marcianus libro quinto regularum): “in quibus rebus ex lege Titia et Publicia et Cornelia etiam sponsonem facere licet: sed ex aliis, ubi pro virtute certamen non fit, non licet.” Wessels (n 1) 191.

⁵⁶ Zimmermann (n 17) 722.

⁵⁷ as described in n 47.

⁵⁸ *I De Foenore et Usuris Libri Tres* in *1 Opera Omnia* (1735) 218 f.

⁵⁹ For the prohibitions in his time see Van der Keessel (n 1) *ad* 3 3 49. Van Niekerk (n 1) 101-106.

⁶⁰ 218 ff: “[v]erba & prohibita quae nullam humanis usibus praestet utilitatem; sed tantum fortuna rogatur sine civili ratione. tum enim probanda non est conventio: quia legibus prohibetur.”

⁶¹ *D 18 1 8 1* (Pom 9 *ad* Sab): “Alquando tamen et sine re venditio intellegitur, veluti cum quasi alea emitur. quod fit, cum captum piscium vel avium vel missilium emitur: emptio enim contrahitur etiam si nihil inciderit, quia spei emptio est”; *D 18 4 7* (Paul 14 *ad* Plaut).

⁶² See Zimmermann (n 17) 247 n 85 for the dispute related by Plutarch *Vitae* Solon 4 1 ff concerning the catch of a golden tripod.

⁶³ 219: “quia meo periculo adjuvo piscatoris & inopiam, & industriam publice utilem.”

⁶⁴ *ibid*: “quod ratio patitur”.

⁶⁵ *ibid*: “& pecuniam recipiam, & quod praeterea convenit, quasi periculi pretium”.

⁶⁶ Noodt cites Quintilianus *Institutio Oratoria* 12 10: “Sicut athletarum corpora etiamsi validiora fiant exercitatione, & lege quadam ciborum.” (In the same way as the bodies of athletes become stronger by exercise and with a certain regular diet.)

⁶⁷ 219: “[s]i meo periculo juvem laudabile propositum hominis pauperis, & ideo non sufficientis sumptibus, necessariis ad virtutis exercitationem: nihil est quod cum ratione reprehendatur.”

⁶⁸ He refers to Anacharsis in *De Gymnasiis* of Lucianus.

7 Application of stipulatio

It is generally accepted that the contract of *stipulatio* was the cornerstone of the Roman contractual system on account of the immense scope of this contract. This means that the *stipulatio* could be used to accommodate everything not illegal or immoral.⁶⁹

In view of the fact that Roman law identified and recognised the transfer of risk against payment, in combination with the unlimited scope of the *stipulatio*,⁷⁰ the hypothesis is suggested that insurance in Roman law was not unknown and effected by way of one or two contracts of *stipulatio*. *D 22 2 5*⁷¹ supports this view when Scaevola combines *si modo in alee speciem non cadat* with *veluti ea, ex quibus conditiones nasci solent, ut "si non manumittas", "si non illud facias", "si non convaluero" et cetera*, thereby clearly indicating that he is arguing for the enforceability of conditional speculative *stipulationes*, in the context of assuming the risk of another against payment.

8 Insurance in Rome

Corroboration for the hypothesis that insurance was practised in Rome can be found in Livy *Ab urbe condita* XXIII 48 and 49 as well as XXV 3. The first fragments deal with the aftermath of the battle of Cannae. During the following year Publius and Gnaeus Scipio reported to the senate on their successful campaign in Spain, but added that the army needed money, material and food.⁷² The senate instructed the *praetor* to call a meeting of the popular assembly and propose a state–business partnership for the supply of the army in Spain.⁷³ Three partnerships offered to provide the supplies on credit, but on condition that the state would insure their cargoes against the dangers of the sea and enemy action.⁷⁴

The last text relates to insurance fraud perpetrated by Marcus Postumius and Titus Pomponius Veientanus a few years later. Since the state insured cargo destined for the army, these entrepreneurs sent battered old ships with a small cargo of little value to Spain. When the ships sank at the arranged place, as appears from the fact that the sailors were picked up in little boats, the owners put in an inflated claim. Al-

⁶⁹ Buckland (n 21) 434 ff; Kaser (n 15) 538 ff; Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 200 ff; Zimmermann (n 17) 68 ff.

⁷⁰ *Cf D 45 1 5 pr*: "conventionales sunt, quae ex conventionione reorum fiunt, quarum totidem genera sunt, quot paene dixerim rerum contrahendarum: nam et ob ipsam verborum obligationem fiunt et pendent ex negotio contracto."

⁷¹ *Cf n 47*.

⁷² XXIII 48: "Exitu aestatis eius qua haec gesta perscripsimus litterae a P et Cn Scipionibus venerunt quantas quamque prosperas in Hispania res gessissent; sed pecuniam in stipendium vestimentaue et frumentum exercitui et sociis navalibus omnia deesse. Quod ad stipendium attineat, si aerarium inops sit, se aliquam rationem inituros quomodo ab Hispanis sumatur; cetera utique ab Roma mittenda esse, nec aliter aut exercitum aut provinciam teneri posse."

⁷³ XXIII 48: "Prodeundum in contionem Fulvio praetori esse, indicandas populo publicas necessitates cohortandosque qui redempturis auxissent patrimonia, ut rei publicae, ex qua crevissent, tempus commodarent, conducereque ea lege praebenda quae ad exercitum Hispaniensem opus essent, ut, cum pecunia in aerario esset, iis primis solveretur. Haec praetor in contione; [diemque] edixit quo vestimenta frumentum Hispaniensi exercitui praebenda quaeque alia opus essent navalibus sociis esset locaturus."

⁷⁴ XXIII 49: "Ubi ea dies venit, ad conducendum tres societates aderant hominum undeviginti, quorum duo postulata fuere, unum ut militia vacarent dum in eo publico essent, alterum ut quae in naves imposuissent ab hostium tempestatisque vi publico periculo essent." A similar case is mentioned by Suetonius in his *Divus Claudius* 18: "Nam et negotiantibus certa lucra proposuit suscepto in se damno, si cui quid per tempestates accidisset."

though the senate had ignored the report by the *praetor*, two *tribuni plebis* proposed a fine of 200 000 *asses* in the popular assembly.⁷⁵

The above texts deal with the assumption of risk by the state in a military emergency; it can be argued that this was not even public insurance as no premium was mentioned. However, the texts show that the concept of insurance was present and the facts reflect a bilateral transaction. The case of insurance fraud supports this contention, since the existence of insurance is a prerequisite for insurance fraud.

This argument is validated by the sarcastic comment from the pen of Martial at the address of Tongilian, when the author quips in *Epigrams* III 52:

“Empta domus fuerat tibi, Tongiliane, ducentis:
abstulit hanc nimium casus in urbe frequens.
Conlatum est deciens. Rogo, non potes ipse uideri
incendisse tuam, Tongiliane, domum?”⁷⁶

One occurrence is an accident; repeat occurrences create a structure. In order to be understood the epigrams have to deal with repeat occurrences, in this instance arson to defraud the insurer, which requires the existence of fire insurance.

9 Conclusion

Simply stated, a person taking out insurance pays an amount of money in exchange for the undertaking that, if he suffers a certain loss, the insurer will pay for it. As a result of the fact that the legal sources show no trace of the nominate insurance contract, the conclusion has been accepted that insurance as such was virtually unknown in Rome. However, the socio-economic matrix of the Roman merchant, Rome’s dominance in economic, maritime and commercial matters, and the versatility of Roman legal development all provide a structure to support existence of insurance.

In consequence this article proposes the hypothesis that the closed system of the Roman law of contract in combination with the fact that precious little archival material relating to Roman contracts has been recovered, lies at the origin of this belief. It is argued that the *stipulatio* as the all-purpose contract of Roman law was eminently suited to effect insurance transactions, but has been overlooked in this respect. Although it is technically correct to state that no specific, nominate insurance contract was developed in Roman law, insurance against fire or shipwreck could have been and actually was transacted in the same way between parties as generic sales, building contracts⁷⁷ or other important business transactions in Roman law.

⁷⁵ XXV 3: “publicanus erat Postumius, qui multis annis parem fraude avaritiaque neminem in civitate habuerat praeter T Pomponium Veientanum, quem populantem temere agros in Lucanis ductu Hannonis priore anno ceperant Carthaginienses. hi, quia publicum periculum erat a vi tempestatis in iis quae portarentur ad exercitus et ementiti erant falsa naufragia et ea ipsa quae vera renuntiauerant fraude ipsorum facta erant, non casu. in veteres quassasque naves paucis et parvi pretii rebus impositis, cum mersissent eas in alto exceptis in praeparatas scaphas nautis, multiplices fuisse merces ementiebantur. ea fraus indicata M Aemilio praetori priore anno fuerat ac per eum ad senatum delata nec tamen ullo senatus consulto notata, quia patres ordinem publicanorum in tali tempore offensum nolebant. populus severior vindex fraudis erat; excitatique tandem duo tribuni plebis, Sp et L Caruilii, cum rem invisam infamemque cernerent, ducentum milium aeris multam M Postumio dixerunt.”

⁷⁶ *Epigrammaton* III 52: “Tongilianus, you bought your house for 200 000 sesterces. An accident, very common in the city, destroyed it. You collected 1 000 000 sesterces. Now I ask you, doesn’t it seem possible that you set fire to your own house, Tongilianus?”

⁷⁷ Cf D 45 1 84; D 45 1 95; D 45 1 124; D 45 1 137 3.

Thus insurance was known and practised in Roman law, albeit not in the form of a separate nominate contract, but in various forms, presumably in most instances by way of *stipulatio*. The fact that Roman law did not develop so-called insurance law is no more than an indication of the absence of statutory regulation; the medieval development of the nominate insurance contract may be explained as the practical consequence of the evaporation of the *stipulatio* during the second life of Roman law and made possible by the recognition of *pacta sunt servanda*, which facilitated the introduction of new contracts.

SAMEVATTING

VERSEKERING IN DIE ROMEINSE REG: MARTIALIS *EPIGRAMMATON* III 52

Die outeur ondersoek in hierdie bydrae of die Romeinse reg die begrippe “risiko” en “oordrag van risiko” aanvaar het. In die latere Romeinse reg was die versekeringspremie ook bekend as die prys van die risiko. Dié oorsprong van die begrip word gevind in *D 22 2 5*. Daardie teks verduidelik dat *stipulationes* wat onderhewig was aan die al dan nie plaasvind van onsekere toekomstige gebeurtenisse, wél in die Romeinse reg afdwingbaar was mits dit nie as ’n kansspel kwalifiseer het nie. Die outeur doen as hipotese aan die hand dat die Romeine en dus die Romeinse reg wél premieversekering geken het en dat so ’n transaksie aan die hand van die *stipulatio* as kontraksvorm gerealiseer is. Verskeie tekste van Livius asook die bogenoemde teks van Martialis handel oor versekeringsbedrog, wat slegs moontlik sou wees indien versekering toe reeds ’n algemene verskynsel was.