

The Misbehaving Doctor in Roman Law

CAMWS 2016, Williamsburg, VA

Molly Jones-Lewis, University of Maryland, Baltimore County (UMBC)

1a. Text of the *Lex Aquilia*'s first chapter, plebiscite, 3rd c. BCE. D.9.2.2 (via Gaius *fl.* 130-180 CE).

Lege Aquilia capite primo cavetur: "ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto." ... Et infra deinde cavetur, ut adversus infitiantem in duplum actio esset.

The first chapter of the *lex Aquilia* advises, "If anyone kills someone else's male or female slave or a four-footed animal or livestock unlawfully, let him be condemned to pay the owner the maximum amount that the property was worth in the preceding year:" and later it also decrees against the defendant who denies guilt the fine should be doubled.

1b. Text of the *Lex Aquilia*'s third chapter. D. 9.2.27.5-6 (via Ulpian *fl.* 211-222 CE)

Huius legis secundum quidem capitulum in desuetudinem abiit. Tertio autem capite ait eadem lex Aquilia: "ceterarum rerum praeter hominem et pecudem occisos si quis alteri damnum faxit, quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes domino dare damnas esto".

The second chapter of this law has fallen into disuse. In its third chapter, the *lex Aquilia* says: "In the case of all other things apart from a human or cattle that have been killed, if anyone has inflicted damages on another by unlawfully burning, breaking, or spoiling his property, let him be condemned to pay to the owner whatever the damaged item would have been worth in the next thirty days if it had not been damaged."

2. Defining "killing" under the *Lex Aquilia*, D.9.2.7.6 (Ulpian quoting Celsus, 67-130 CE).

Celsus autem multum interesse dicit, occiderit an mortis causam praestiterit, ut qui mortis causam praestitit, non Aquilia, sed in factum actione teneatur. unde adfert eum qui venenum pro medicamento dedit et ait causam mortis praestitisse, quemadmodum eum qui furenti gladium porrexit: nam nec hunc lege Aquilia teneri, sed in factum.

Celsus says it matters a great deal whether one kills directly or provides the cause of death, because a person who provides an indirect cause of death is not liable for an Aquilian action, but for an equivalent action. For this reason he refers to the case of a man who administered poison instead of medicine, and he says that the man in that case had provided a cause of death, similar to one who provides a sword to a madman; and such a man is not liable under the *lex Aquilia*, but is liable to an equivalent action.

3. Poisoning and the *Lex Aquilia*. D.9.2.9.pr-1 (Labeo, Augustan, d. 10/11 CE).

Item si obstetrix medicamentum dederit et inde mulier perierit, Labeo distinguit, ut, si quidem suis manibus supposuit, videatur occidisse: sin vero dedit, ut sibi mulier offerret, in factum actionem dandam, quae sententia vera est: magis enim causam mortis praestitit quam occidit. Si quis per vim vel suasum medicamentum alicui infundit vel ore vel clystere vel si eum unxit malo veneno, lege Aquilia eum teneri, quemadmodum obstetrix supponens tenetur.

Labeo likewise makes a distinction if an *obstetrix* has given a drug from which the woman subsequently died: If she had administered it with her own hands, it would appear that she has killed: but if she gave it to the woman for the patient to take herself, an equivalent action must be granted. This opinion is correct; for she provided a cause of death rather than killed outright. If someone administers a drug to anyone by force or persuasion, either by mouth or by enema or by using a poisonous ointment, he is liable under the *Lex Aquilia* in the same way as the *obstetrix* administering poison is liable.

4. Poisoning and the Sullan *lex Cornelia de sicariis et veneficis*, enacted 81 BCE.

D.48.8.3.pr-3 (via Marcian, fl. 200-222CE).

Eiusdem legis Corneliae de sicariis et veneficis capite quinto, qui venenum necandi hominis causa fecerit vel vendiderit vel habuerit, plectitur. Eiusdem legis poena adficitur, qui in publicum mala medicamenta vendiderit vel hominis necandi causa habuerit. Adiectio autem ista " veneni mali" ostendit esse quaedam et non mala venena. ergo nomen medium est et tam id, quod ad sanandum, quam id, quod ad occidendum paratum est, continet, sed et id quod amatorium appellatur: sed hoc solum notatur in ea lege, quod hominis necandi causa habet.

Under chapter five of the same *lex Cornelia* on murderers and poisoners, one who makes, or sells, or possesses poison for the purpose of homicide is held liable. Also liable under the law is the person who sells toxic medications to the public or possesses them for the purpose of homicide. Furthermore, the addition of the phrase "toxic drugs" indicates that there are certain drugs which are not toxic. The term is therefore neutral, covering as much a drug prepared for the purpose of healing as one for the purpose of killing, and also covering the class of drugs called "aphrodisiac." That said, only the kind of drug made for the purpose of killing a person is named in that law.

sed ex senatus consulto relegari iussa est ea, quae non quidem malo animo, sed malo exemplo medicamentum ad conceptionem dedit, ex quo ea quae acceperat decesserit. Alio senatus consulto effectum est, ut pigmentarii, si cui temere cicutam salamandram aconitum pituocampas aut bubrostim mandragoram et id, quod lustramenti causa dederit cantharidas, poena teneantur huius legis.

It is, however, ordered by a decree of the senate that a woman who, not admittedly maliciously but inadvisedly, has administered a fertility drug from which the recipient dies shall be sent into temporary exile. It is laid down by another decree of the senate that dealers in cosmetics are liable to the penalty of this law if they recklessly hand over to anyone hemlock (*cicuta*), salamander, aconite, pine-worms (Processional pine caterpillar?), or a venomous beetle (buprestis, suggested by Rives n.22), mandragora, or, except for the purpose of purification, cantharis beetles.

5a. Please don't rediscover the legend.



(c) Azarius

6. Pliny the Elder on a case of aphrodisiac poisoning, *N.H.* 25.25

sed quis fuit venia monstrandi qua mentes solverentur, partus eliderentur, multaque similia? ego nec abortiva dico ac ne amatoria quidem, memor Lucillum imperatorem clarissimum amatorio perisse, nec alia magica portenta, nisi ubi cavenda sunt aut coarguenda, in primis fide eorum damnata. satis operae fuerit abundeque praestatum vitae salutaris dixisse, < . . . >

But what pardon is there for showing ways in which minds can be undone, the unborn can be done away with, and many similar things? I do not include abortifacients in my account, and not even love potions, remembering that Lucullus, the most famous general, perished from such a potion, nor do I include other magical portents, unless to warn against them or debunk them, firstly because their veracity has been utterly destroyed. It should be enough for this work to have mentioned in abundance that which is principally for the health of life...

7. Galen *On Antecedent Causes* 14.183-4, survives only in Latin translation (Galen and Hankinson 1998)

Concede autem michi et secundum enarrare iudicium, quod oportuit dicere prius. Accusatus est medicus quia dedit farmacum deliterium. Sed qui emit id famulus / erat mulieris quae indigebat eo. Illa vero, postquam obtinuit farmacum, adolescentem monens eorum qui famulabantur suo privigno dare ei bibere, per illud puberem interfecit. Omnes igitur consimiliter novercae condempnati sunt: qui dedit farmacum, et qui emit, et medicus qui tradidit. Si igitur haberent hii advocatum ab Erasistrato eruditum, diceret utique: 'Quoniam mortuus est quidem puber, nullus contradicit. Non tamen a famulo qui dedit ei potum mortuus est sed a farmaco.

Allow me to discuss a second verdict, which I should have mentioned earlier. A doctor was put on trial because he gave a harmful drug. But he who bought it was a household slave of the woman who had need of it. But she, after she got hold of the drug, she gave it to him to drink by ordering the family slave who was in service to her stepson, and killed the young man by that means. Everyone, therefore, was condemned along with the stepmother: he who gave the drug, and he who bought it, and the doctor who supplied it. If indeed those people had had an advocate educated by Erasistratus, he would have said that: 'Nobody denies that the young man is dead. But he was killed not by the household slave who gave him the drink, but by the drug.'

8. Another test case: Cossinus vs. Cantharis in Pliny the Elder *N.H.* 29.93

Cossinum equitem Romanum amicitia Neronis principis nostrum, cum is lichene correptus esset, vocatus ex Aegypto medicus ob hanc valetudinem eius a Caesare, cum cantharidum potu praeparare voluisset, interemit. verum inlitas prodesse non dubium est cum suco taminiae uvae et sebo ovis vel caprae.

It (cantharis beetle) killed Cossinus, a Roman Eques and friend of our Emperor Nero, when he was seized by an attack of lichen and a doctor had been called from Egypt by Caesar because of his health. When (the doctor) ordered him to prepare cantharis in a drink, the drug finished him off. But there is no doubt that as a topical preparation with the juice of a Taminian grape and the suet of a sheep or nanny goat it is quite useful.

9. Digest 48.19.38.5 (Julius Paulus Prudentissimus, 3rd century CE, praetorian prefect ca. 228-35 CE).

Qui abortionis aut amatorium poculum dant, etsi dolo non faciant, tamen quia mali exempli res est, humiliores in metallum, honestiores in insulam amissa parte bonorum relegantur. quod si eo mulier aut homo perierit, summo supplicio adficiuntur.

Those who administer an abortifacient or aphrodisiac drink, even if they do not do so with guilty intention, are still condemned, because the deed sets a bad example. Defendants of lower rank should be condemned to the mines, and those of higher status should be temporarily exiled to an island with the forfeiture of part of their property. But if for that reason a man or woman dies, the defendant should suffer the death penalty.

10. Abuse of Patronage, Digest 38.1.26 (via Alfenus Verus, 1st century BCE).

Medicus libertus, quod putaret, si liberti sui medicinam non facerent, multo plures imperantes sibi habiturum, postulabat, ut sequerentur se neque opus facerent: id ius est nec ne? respondit ius esse, dummodo liberas operas ab eis exigeret, hoc est ut adquiescere eos meridiano tempore et valetudinis et honestatis suae rationem habere sineret.

A freedman who was a doctor, because he thought he would have far more patients calling for his services if his own freedmen were not practicing medicine, demanded that they accompanied him on house calls but did no work. Does he have a right to do so or not? Alfenus responded that it was legal, provided that he [the doctor] was demanding work appropriate to free men; that is, he must let them rest at noon and allow them time to pay attention to their health and hygiene.

11. Medical Extortion, Digest 50.13.3 (via Ulpian, fl. 211-222 CE).

Si medicus, cui curandos suos oculos qui eis laborabat commiserat, periculum amittendorum eorum per adversa medicamenta inferendo compulit, ut ei possessiones suas contra fidem bonam aeger venderet: incivile factum praeses provinciae coerceat remque restitui iubeat.

If someone who was suffering from bad eyes entrusted their treatment to a doctor who, in violation of trust/good faith, increased the danger of that man losing his sight by using the wrong medication, thus forcing the sick patient to sell his possessions: the governor of the province is to stop the un-neighborly (Watson uses “malicious”) practice and order the doctor to make restitution.

Bibliography:

Below, Karl Heinz. 1953. *Der Arzt im römischen Recht*. München: Beck.

Dioscorides Pedanius, and Lily Y. Beck. 2005. *De materia medica*. Hildesheim; New York: Olms-Weidmann.

Frier, Bruce W. 1989. *A Casebook on the Roman Law of Delict*. Atlanta, Ga.: Scholars Press.

Galen, and R. J. Hankinson. 1998. *Galen on Antecedent Causes*. Cambridge; New York: Cambridge University Press.

Mommsen, Theodor Krueger Paul Watson Alan. 1985. *The Digest of Justinian*. Philadelphia, Pa.: University of Pennsylvania Press.

Rives, James B. 2006. “Magic, Religion, and Law: The Case of the Lex Cornelia de Sicariis et Veneficiis.” In *Religion and Law in Classical and Christian Rome*, edited by Clifford Ando and Jörg Röpke, 47–67. Stuttgart: Franz Steiner.

Zimmermann, Reinhard. 1996. *The Law of Obligations : Roman Foundations of the Civilian Tradition*. Oxford: Clarendon Pr.