Essays

At the Origins of Medical Liability in the West: The Roman Legal Experience between the First Century BCE and the First Century CE

Domenico Dursi*

ABSTRACT: The essay examines the earliest considerations concerning physicians' liability in ancient Rome, as elaborated by jurists active between the first century BC and the first century CE, a development that significantly coincides with the consolidation of medical practice in Rome. The texts of the classical jurists preserved in the Digest reveal that particular emphasis was placed on cases in which physicians caused harm to slaves, thereby producing an economic loss for their owners, a loss that was actionable and compensable under the Lex Aquilia. Equally noteworthy is the jurists' treatment of the concept of fault (*culpa*), which was articulated primarily in terms of lack of professional skill (*imperitia*). The paper thus contributes to the understanding of the conceptual origins of professional liability in Western legal thought.

KEYWORDS: Roman law; medical liability; Roman jurist; Justinian's Digest; Lex Aquilia

1. Introduction

The theme of medical liability has, for quite some time, attracted considerable attention in both the medical and legal domains. It may be regarded as one of the major issues of our time, one that immediately revealed the need for a multidisciplinary approach. Indeed, in addition to developments in forensic medicine, numerous contributions over the years have addressed the topic from both a dogmatic standpoint and in light of case-law developments, particularly within civil and criminal law. The purpose of these pages is therefore not to add further arguments to those already established in positive law, but rather to analyze the terms of the question where it all began: in ancient Rome which, to paraphrase the title of a celebrated volume, invented law in the West.[1]

To the best of my knowledge, from this perspective the subject seems to lack substantial treatments expressly devoted to it.[2] What follows is therefore a journey into legal history, in full awareness of the historicity of law, which does not permit bold parallels or claims of continuity with current problems of medical liability—problems that are, obviously, shaped by forms of knowledge and techniques unknown

* *Full Professor of Roman Law, Department of Law, Sapienza University of Rome. Mail: Domenico.dursi@uniroma1.it.* *This article was subject to a double-blind peer review process.*

[1] A. SCHIAVONE, *Ius. L'invenzione del diritto in Occidente*, Torino 2017.

[2] Among the limited studies on the matter, see F. RICO-PEREZ, *La responsabilidad civil del medico en Roma*, in *Estudios en omenaje al Profesor Juan Iglesias*, III, Madrid 1988, 1603 ff.

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to the Romans.[3] Moreover, the consequences for a physician who harmed a patient were closely connected to the patient's *status personae* since, as is well known, the Roman world recognized slavery and it suffices to recall that slaves were regarded as things belonging to the *dominus*. As obvious, in other words, the elements of discontinuity with the present overwhelmingly outweigh the few elements of continuity, which are not entirely absent. Accordingly, I shall examine the texts of Roman jurists preserved in the Digest who, so far as we know, were the first to address physicians' liability, with the aim of conducting a preliminary exploration of some of their reflections on the subject by employing the historical-exegetical method.

Before proceeding to a strictly legal analysis, a few brief remarks are necessary regarding the spread of the medical art and its practice at Rome.

According to Pliny the Elder,[4] the first physician to arrive in Rome was a certain Archagathus, a native of the Peloponnese, in 219 BCE; yet rudimentary forms of medical practice in Rome are thought to have existed even prior to the arrival of physicians. This assertion, on closer inspection, is corroborated by the fact that the earliest attestations of the lexeme *medicus*, as has been noted,[5] are found in several comedies by Plautus (one of which, the *Menaechmi*, assigns physicians a prominent role) who, in 219 BCE, was at the height of his activity. Nor can it be assumed that the spread of medical knowledge in Rome predates this on the basis of what is read in Justinian's Institutes with regard to the *Lex Aquilia*: in paragraphs 6 - 7 of Book IV[6] it is affirmed that a surgeon could be held liable for damage where he had performed an operation on a slave with an unfavorable outcome determined by his neglect of the patient after the operation. The imperial manual comments that in such a case there was clearly fault; likewise, continues the introductory work, the physician would be liable for a poorly executed operation or for having administered the wrong medicine: again, cases of *culpa*.

Since it is not possible here to examine exhaustively the content of those passages, some clarification of the chronological issues under consideration is in order. The *Lex Aquilia* is now almost unanimously dated to around 286 BCE,[7] and thus one might infer that by that time there were already clear references to medical liability. On closer inspection, however, such a deduction lacks foundation, for we know only two *capita* of the plebiscite in question: the first concerning the killing of a slave or of *pecudes*, and the

[3] For these problems, see R. ORESTANO, *Introduzione allo studio del diritto romano*, Bologna, 1987; see also A. SCHIAVONE, *La storia spezzata. Roma antica e Occidente moderno*, Torino 2020.

[4] Nat. Hist. 29.12: […] venisse Romam Peloponneso Archagathum Lysiae filium L. Aemilio M. Licinio cons. aano urbis DXXXV. Natural History 29.12: […] that Archagathus, son of Lysias, had arrived in Rome from the Peloponnese during the consulship of Lucius Aemilius and Marcus Licinius, in the year 535 from the founding of the City.

[5] C. DE FILIPPIS CAPPAI, *Medici e Medicina nell'Antica Roma*, Cavallermaggiore, 1992, 53 ff. See also, with respect to the bibliographical references, C. PENNACCHIO, *Medicus amicus. Etica professionale nel mondo antico*, in G. LIMONE (a cura di), *Persona*, I, Capua, 2016, 259 ff. For a general survey of medicine at Rome M. VEGETTI, P. MANULI, *La medicina e l'igiene*, in A. MOMIGLIANO – A. SCHIAVONE (directed by), *Storia di Roma*, IV, Torino, 1989, 389 ff.

[6] Inst. 4.3.6 – 7: *Praeterea si medicus, qui servum tuum secuit, dereliquerit curationem atque ob id mortuus fuerit servus, culpae reus est. 7. Imperitia quoque culpae adnumeratur, veluti si medicus ideo servum tuum occiderit, quod eum male secuerit aut perperam ei medicamentum dederit.* Institutes 4.6-7: 6 Again, if a surgeon operates on your slave, and then neglects altogether to attend to his cure, so that the slave dies in consequence, he is liable for his carelessness. 7. Sometimes, too, unskilfulness is undistinguishable from carelessness—as where a surgeon kills your slave by operating upon him unskilfully, or by giving him wrong medicines.

[7] The bibliography on this point is vast; I confine myself here to referring to M. F. CURSI, *Danno e responsabilità extracontrattuale nella storia del diritto privato*, Napoli, 2010.

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third concerning the wounding, breaking, or burning of slaves and animals. So far as we know, there is no reference to the activity of physicians, which was, in all likelihood, brought within the scope of the *Lex Aquilia* by the interpretive activity of later jurists, especially once they began to reflect on the subjective element in assessing liability and on its extension to fault, precisely the element referenced in the passages just mentioned.

What is certain is that by the first century BCE the figure of the physician was fully established,[8] such that the earliest reflections by jurists on the problems of medical liability date from this period, as well as the first 'scientific' reflections on the medical art, given that right at the turn between the first century BCE and the first century CE Aulus Cornelius Celsus's treatise *de Medicina* appeared.[9]

2. Materials and Methods

The materials studied consist of the writings of the ancient Roman *iuris periti* preserved in Justinian's Digest, which allow us to trace a progressive emergence of the problem of physicians' liability starting, not by chance, in the first century BCE, when, as noted, the figure of the physician had become entirely familiar within Roman society.

The method of analysis employed is, as indicated, the historical-exegetical one, aimed at understanding the extent of the ancient jurists' statements in the context in which they operated—in short, attempting to reconstruct the 'Roman law of the Romans'.[10]

The text from which it is useful to take our point of departure is:

> Alf. 2 *dig*. 9.2.52.*pr*.: *Si ex plagis servus mortuus esset neque id medici inscentia aut domini neglegentia occidisset, recte de iniuria occiso eo agitur.*[11]

This passage, collected in the Justinianic anthology, was excerpted from a work, also entitled Digesta, by Alfenus Varus, a jurist and member of Rome's ruling class (he was consul suffectus in 39 BCE) in the first century BCE. He was one of the auditores of Servius Sulpicius Rufus, among the foremost exponents of Roman legal science of the age, whose thought he often reports, although in the present case it is impossible to establish whether we are in the presence of Servius's views.[12] What is certain is that the passage sets forth a casuistic rule concerning the following factual situation: a slave was wounded by a third party and, after an interval of time, died as a result of those injuries.[13] The question put to the jurist was whether the person who had caused the injuries should be liable ex lege Aquilia under the first caput, that is, for the killing of the slave, or simply for the injuries, sanctioned under the third caput, *vis-à-vis* the dominus of the slave who, it bears repeating, was, from a strictly legal point of view, a piece of

[8] C. DE FILIPPIS CAPPAI, *op. cit*., 69.

[9] For the features of ancient medical literature, see I. MAZZINI, *La medicina dei greci e dei romani*, I, Roma 1997, 97 ff.

[10] This expression goes back to ORESTANO, *op. cit*., 457 ff.

[11] ALFENUS, Digest book 2 D. 9.2.52 pr.: Where a slave dies from the effect of blows, and this is not the result of the ignorance of a physician or of the neglect of the owner, an action for injury can be brought for his death.

[12] About this issue see M. MIGLIETTA, *«Servius Respondit». Studi intorno a metodo e interpretazione nella scuola giuridica serviana – Prolegomena I*, Trento, 2010, part. 21 nt. 15.

[13] In this sense, see also S. SCHIPANI, *Responsabilità «ex lege Aquilia» criteri di imputazione e problema della «culpa»*, Torino, 1969, 177 ff.

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property belonging to his dominus. Alfenus states that in such a case the third party is required to compensate the owner for the death of the slave only if, in the interval, no further factor has intervened to interrupt the causal nexus, such as, for example, the physician's lack of expertise or the *dominus*'s negligence.[14]

Leaving aside the many aspects of interest in the passage, what is relevant for our purposes is the reference to the *inscientia medici* that is the physician's lack of expertise, which would give rise either to contractual liability or, at least in the present case, to Aquilian liability under the first *caput*, inasmuch as there would be a nexus between the physician's *inscientia* and the death.[15] The lexeme *inscientia* is in fact infrequent in the jurists' vocabulary and refers essentially to a state of unawareness incompatible with the performance of technical tasks and, in any case, it indicates nonconformity with a model of conduct to which the physician should have adhered.[16] We are therefore fully within the ambit of *culpa*, so that we may note how, for Alfenus Varus, a physician would be civilly liable if he caused the death of a slave through *culpa*.

In the same period, a reference to physicians' liability appears in a passage from Cicero's *de natura deorum*:

> Cic. *de nat. deo* 3.78: *Sic, si homines rationem bono consilio a dis immortalibus datam in fraudem malitiamque convertunt, non dari illam quam dari humano generi melius fuit. Ut si medicus sciat eum aegrotum, qui iussus sit vinum sumere, meracius sumpturum statimque periturum, magna sit in culpa, sic vestra ista providentia reprendenda, quae rationem dederit is, quos scierit ea perverse et inprobe ussuros* […].[17]

This passage is drawn from a philosophical work by the Arpinate in which the author inquires into the nature of the gods. Here the reference to the physician serves as a *similitudo* intended to illustrate the gods' fault, consisting in their having bestowed reason upon human beings while knowing that they would misuse it. We read, indeed, that the gods would be blameworthy just as a physician would be who had prescribed wine for therapeutic purposes to a patient even knowing that the latter would drink it undiluted and thus risk a rapid death. In the passage under examination Cicero locates the physician's fault in his awareness that the prescribed therapy, in the specific case, would produce adverse effects due to the patient's improper use of the particular 'drug.' It would seem, therefore, that the physician had also to make a prognostic assessment regarding the patient's correct adherence to the prescribed therapy. In other words, the physician's liability would arise not only when he had prescribed an incorrect medicine, but also where he ought to have foreseen the patient's improper use of it, an aspect that, to a certain extent, it falls outside the physician's sphere of control.

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[14] For a detailed exegesis, see S. GALEOTTI, *Ricerche sulla nozione di damnum. II. I criteri d'imputazione del danno tra lex e interpretario prudentium*, Napoli, 2016, 184 ff.

[15] C.A. CANNATA, *Sul problema della responsabilità nel diritto privato romano. Materiali per un corso di diritto romano*, Catania, 1996, 113 s.

[16] SCHIPANI, *op. cit*., 179.

[17] CICERO, *On the nature of gods* 3.78: A physician would be greatly to blame if he knew that the sick man, whom he had ordered to take wine, would take it too little diluted, and that the result would be immediate death, and in the same way this providence of yours must be censured for having given reason to those of whom it knew that they would make a wrong and wicked use of it.

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Indeed, this represents a considerable expansion of the physician's professional liability which, so far as I am aware, finds no support among the jurists. Considering this, it cannot be ruled out that the Arpinate is not referring to legal fault in the strict sense, but rather to a broader, so to speak, philosophical concept.

Further traces of medical liability are found in a text by Ulpian who, although writing in the second century CE, reports an opinion of Labeo, active between the first century BCE and the first century CE:

> Ulp. 18 *ad ed.* D. 9.2.9pr.: *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.*[18]

The passage refers to the case of a midwife who had administered a medicament to a woman who, following its intake, died. Faced with such a situation, Labeo drew a distinction depending on whether the midwife had applied the drug directly, with her own hands, or whether she had handed it to the woman and suggested that she take it. In the former case, according to the Augustan jurist, the midwife was to be considered responsible for the woman's death; if, however, she had merely supplied the drug and suggested its intake, she would be liable not under the direct Aquilian action but by means of an *actio in factum*, since the situation lacked the requisites for proceeding under the *actio ex lege Aquilia*. Indeed, Ulpian, alongside his citation of Labeo, glosses that in the second hypothesis it would not have been so much the act of killing, but rather the act of procuring death.

A few clarifications are in order. First, for the Roman jurists the midwife did exercise the ars medica, as Ulpian clearly affirms.[19] Furthermore, although the passage refers to a woman without specifying her *status libertatis*, it appears evident that she was a slave.[20] Had she been a free woman, there would have been no discussion of the *Lex Aquilia*, which concerned damage to things and was therefore applicable to slaves, who, as noted, were regarded as *res* from a strictly legal standpoint. At most, the discussion would have concerned the applicative profiles of the *Lex de sicariis et veneficiis*, concerning homicide perpetrated by means of weapons or poisons, a hypothesis that might encompass the administration of a *venenum*, a term which, according to its etymological roots and as consistently noted by jurists, denoted both a medicinal substance and a poison.[21] In the present case, however, proof of *dolus* would

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[18] ULPIANUS, *On the Edict*, Book 18 D.9.2.9pr.: Moreover, where a midwife administers a drug to a woman and she dies in consequence, Labeo makes a distinction, namely: that if she administered it with her own hands she is held to have killed the woman, but if she gave it to the latter in order that she might take it, an action in factum should be granted, and this opinion is correct; for she rather provided the cause of death, than actually killed the woman.

[19] ULPIANUS, 8 de omn. trib. D. 50.13.1.2: Sed et obstetricem audiant, quae utique medicinam exhibere videtur. ULPIANUS, On All Tribunals, Book 8: Governors hear midwives, who are also considered to practice medicine.

[20] See M. GENOVESE, *Responsabilità aquiliana nell'occidere tramite medicamentum dare dell'ostetrica e/o di altri: notazioni critico-propositive su D. 9.2.9 pr.-1 (Ulp. 18 ad ed.)*, in *Scritti per A. Corbino*, III, Tricase (Le), 311.

[21] Gai 4 ad leg. XII Tab. D. 50.16.236pr.: *Qui "venenum" dicit, adicere debet, utrum alum an bonum: nam et medicamenta venena sunt, quia eo nomine omne continetur, quod adhibitum naturam eius, cui adhibitum esset, mutat. cum id quod nos venenum appellamus, Graeci φάρμακον dicunt, apud illos quoque tam medicamenta quam quae nocent, hoc nomine continentur: unde adiectione alterius nomine distinctio fit. admonet nos summus apud eos poetarum Homerus: nam sic ait: φάρμακα, πολλὰ μὲν ἐσθλὰ μεμιγμένα, πολλὰ δὲ λυγρά.* GAIUS, *On the Law of the Twelve Tables*, book 4 D. 50.16.236pr: Those who speak of poison, should add whether it is good or bad, for medicines are poisons, and they are so called because they change the natural disposition of those to whom they are

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have been necessary, at least until the promulgation of two *senatus consulta*, cited by Marcianus,[22] of uncertain chronology, presumably not earlier than the emperor Claudius.[23] In light of this, it seems possible to hold that criminal liability on the part of a physician who had administered a medicine that proved lethal would arise only in the presence of *dolus*, at least until those above mentioned *senatus consulta.*

As to the damage, it must then be considered that it derived either from an error in the choice of the drug or in the dosage indicated, thus we are dealing with lack of professional skill, a species of *culpa.*[24] Finally, where intake of the substance had been merely suggested, the *dominus* of the slave could not proceed against the midwife by means of the direct Aquilian action, since, according to some, the jurist considered lacking the contact between the thing damaged – the slave – and the wrongdoer – the midwife; that is, the circumstance that the *damnum* was not *corpore corpori datum*[25] or, as has also been suggested, that there was no *occidere* in the sense attributed by Labeo to the term, used by the jurist to mean an act of violence, even minimal, performed 'manually' by the agent upon the victim.[26] These are, in truth, two largely overlapping perspectives, so that, in order to proceed with the direct Aquilian ac-

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administered. What we call poison the Greeks style *farmakon*; and among them noxious drugs as well as medicinal remedies are included under this term, for which reason they distinguish them by another name. Homer, the most distinguished of their poets, informs us of this, for he says: "There are many kinds of poisons, some of which are good, and some of which are bad." On this passage, see M. FIORENTINI, *I giuristi romani leggono Omero. Sull'uso della letteratura colta nella giurisprudenza classica,* in *BIDR,* 107, 2013, 186 ff.; more recently C. PENNACCHIO, *Farmaco, veleni, medicamenti. Breve storia di un ossimoro*, in *Studia et documenta historiae iuris*, 80, 2014, 117 ff.; N. PAPAKONSTANTINOU, *Roman declamation, Roman Law and Ancient Legal Medicine*, in *Rivista di diritto romano*, 23, 2023, 37 ff.

[22] Marc. 14 inst. D. 48.8.3.2.-3: 2: *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. 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. 3. 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.* MARCIANUS, *Institutes*, book 4 D. 48.8.3.2.-3: 2: The expression "injurious poisons" shows that there are certain poisons which are not injurious. Therefore, the term is an ambiguous one and includes what can be used for curing disease as well as for causing death. There also are preparations called love philtres. These, however, are only forbidden by this law where they are designed to kill people. A woman was ordered by a decree of the Senate to be banished, who, not with malicious intent, but offering a bad example, administered for the purpose of producing conception a drug which, having been taken, caused death. 3. It is provided by another Decree of the Senate that dealers in ointments who rashly sell hemlock, salamander, aconite, pinecones, bu-prestis, mandragora, and give cantharides as a purgative, were liable to the penalty of this law. On the senatus consulta referred to in the Marcian passage, see E. HOBENREICH, *Due senatocosnulti in tema di veneficio (Marcian. 14 inst. D. 48.8.3.2-3)*, in *Archivio Giuridico*, 208.4, 1988, 75 ff.

[23] HOBENREICHT, *op. cit*., 94 ff.; P. BUONGIORNO, *'Senatus consulta Claudianus temporibus facta'. Una palingenesi delle deliberazioni senatorie dell'età di Claudio (41-54 d.C.)*, Napoli, 2010, 412 ff.

[24] GENOVESE, *op. cit*., 317.

[25] *Ex variis* G. VALDITARA, *Sulle origini del concetto di damnum iniuria datum*, Torino, 1998, 14; *contra* see A. CORBINO, *Il danno qualificato e la Lex Aquilia*, Padova, 2008, 127 ff.; more recently, see S. GALEOTTI, *Ricerche sulla nozione di damnum. I. Il danno nel diritto romano tra semantica e interpretazione*, Napoli, 2015, 217 ff., for which reliance ought not to be placed on the actio in factum, but instead on the direct action, since no definitive proof exists as to the certain attribution of the damage to the author.

[26] GENOVESE, *op. cit*., 322 ff.

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tion, some physical contact between the agent and the victim was, in any event, required. Moreover, the absence of contact with the victim meant that the midwife's suggestion to take the drug, amounted to an indirect cause of death. Dieter Nörr, for his part, noted that the phrase *causa mortis* found in the fragment would have originated from the *verba legis* of the *Lex Cornelia de sicariis et veneficiis* re-employed in rhetorical contexts, and used by Labeo and by the jurists of his time to indicate the indirect causality of the *occidere.*[27]

Finally, it should be noted that Labeo's approach was adopted almost *verbatim* by another jurist, Juventius Celsus, head of the Proculian *secta* who, not by chance, tended to recognize themselves precisely in Labeo's *magisterium*. In particular, again thanks to Ulpian,[28] we learn that this Hadrianic jurist, though not explicitly referring to a physician or a midwife, emphasized how different it is to kill from to cause death; in the latter case, he underscored, the *actio ex lege Aquilia* would not have been due, but rather an *actio ad exemplum* modeled on the facts. And to clarify what it means to 'cause death,' he adduced the example of one who had given poison in place of a medicine – precisely the case discussed by Labeo – whom he considered analogous to a person who had handed a sword to a man not in possession of his senses.

What is certain is that with Labeo a line of interpretation was established which, consolidated by Celsus, was then adopted by Ulpian. The latter not only makes it his own but also records the stages in the formation of this approach: on the other hand, it is not unusual, in the history of Roman legal thought, to identify interpretive trajectories linking Ulpian to Labeo, often mediated by the Proculians.[29]

Ulpian, finally, preserves a testimony of Proculus, founder and eponym of the Proculian sect:

> Ulp. 18 *ad ed.* D. 9.2.7.8: *Proculus ait, si medicus servum imperite secuerit, vel ex locato vel ex lege Aquilia competere actionem.*[30]

With a lapidary statement, Proculus asserts that a physician who has performed a surgical intervention unskillfully upon a slave may be proceeded against either on the basis of the contract of letting (*actio ex locato*) or under the *Lex Aquilia* for extra-contractual liability. The importance of this excerpt is evident. First, it emerges that medical art could be the object of a contract of lease.[31] Second, albeit indirectly, the requisite skill with which the physician must perform the intervention comes to the fore, and thus,

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[27] D. NÖRR, *Causa mortis. Auf den Spuren einer Redewendung*, München, 1986, 160 ff.; 210 ff.

[28] Ulp. 18 ad ed. D. 9.2.7.6: *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.* ULPIANUS, on the edict book 18 D.9.7.2.6: Celsus says that it makes a great deal of difference whether the party actually kills, or provides the cause of death, as he who provides the cause of death is not liable under the Lex Aquilia, but is to an action in factum. With reference to this, he cites the case of a party who administered poison as medicine, and who he says provided the cause of death; just as one who places a sword in the hands of an insane person, for the latter would not be liable under the Lex Aquilia, but would be to an action in factum. On the passage see D. NÖRR, *Causa mortis. Auf den Spuren einer Redewendung*, cit., 169 ff.

[29] Ulpian refers to Labeo on no fewer than 350 occasions, which makes him the jurist most frequently cited after Julian. The enumeration in T. HONORÉ, *Ulpian*, Oxford, 1982, 211 ff.

[30] ULPIANUS, on the edict book 18 D.9.7.2.8: Proculus holds that if a physician should operate upon a slave unskillfully, an action will lie either on the contract, or under the Lex Aquilia.

[31] G. COPPOLA, *Cultura e potere. Il lavoro intellettuale nel mondo roman*o, Milano, 1994, 168.

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once again, the element of fault in the assessment of the physician's liability,[32] to be understood specifically as *imperitia*, that is, a deficiency of the technical competence, skill, or experience necessary to perform specific tasks. Indeed, Celsus, Proculus's follower and near contemporary, explained, with reference to the contract of letting, also recalled in the passage at issue, that lack of skill falls within fault and is relevant whenever a contract is concluded with a person in view of his technical expertise.[33] The physician, as a bearer of technical expertise, was therefore not bound merely to ordinary diligence in providing his services, but rather to true professional diligence.[34]

It has, in fact, been observed[35] that *imperitia* constitutes a requirement additional to the causal *nexus*, in the sense that both the act of killing and the lack of skill are necessary; conversely, the physician's conduct, although it may have caused the death, would not, in itself, amount to the typical conduct of killing, unless it were characterized by lack of skill.

The continuation of the passage makes it clear that a physician who has intervened surgically with lack of skill is to be held liable either under the *actio locati* or under the action based on the *Lex Aquilia*. In other words, Proculus specifies that the physician's liability may be contractual or extra-contractual, but in both cases, it is grounded in *imperitia*.

The task, then, is to understand in which case one might proceed *ex locato* and in which under the *Lex Aquilia*. It has been argued that the two actions were available to the *dominus* in elective concurrence, since the physician's liability would arise not only in the contractual sphere but also in the extra-contractual one. In particular, it has been argued that the justification for intervening on the body of the slave would lie in the specific professional competence attributed to the physician: the *imperite* conduct in the concrete case would exclude the ground of justification, thereby restoring to the physician's act the character of *iniuria* which the contract would otherwise have precluded.[36]

It appears to me, that another interpretation may also be plausible. One might suppose that the jurist, in his statement, was referring to two distinct hypotheses: first, that in which the *dominus* turned to a physician and concluded with him a *locatio operis*; and second, that in which the slave, of his own accord, in the presence of some ailment, turned autonomously to a physician, in which latter case lack of skill would give rise to Aquilian liability. That slaves would resort on their own to a physician must in fact have been a frequent hypothesis; otherwise, it would be difficult to explain why almost all the texts concerning medical liability are commentaries on the *Lex Aquilia*.

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[32] In this sense, see also RICO-PEREZ, *op. cit.*, 1609.

[33] Ulp. 32 ad ed. D. 19.2.9.5: *Celsus etiam imperitiam culpae adnumerandam libro octavo digestorum scripsit: si quis vitulos pascendos vel sarciendum quid poliendumve conduxit, culpam eum praestare debere et quod imperitia peccavit, culpam esse: quippe ut artifex, inquit, conduxit.* ULPIANUS on the edict book 32 D. 19.2.9.5: Celsus also states in the Eighth Book of the Digest that want of skill should be classed with negligence. Where a party rents calves to be fed, or cloth to be repaired, or an article to be polished, he must be responsible for negligence, and whatever fault he commits through want of skill is negligence, because he rents the property in the character of an artisan. On the meaning of artifex and on the legal aspects connected with this figure, see most recently P. MARRA, *Artifex. Profili giuridici dei lavori specialistici nell'antica Roma*, Soveria Mannelli, 2025.

[34] In a similar sense, see S. GALEOTTI, *Ricerche sulla nozione di damnum. II. I criteri d'imputazione del danno tra lex e interpretario prudentium*, cit., 191.

[35] SCHIPANI, *op. cit*., 325.

[36] In these terms, see COPPOLA, *op. cit*., 172; most recently, S. GALEOTTI, *Ricerche sulla nozione di damnum. II. I criteri d'imputazione del danno tra lex e interpretario prudentium*, cit., 192 f.

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3. Conclusions

An examination of the ancient texts shows that the *ars medica*, largely of Greek origin, had already reached Rome by the early first century BCE, and was later systematically codified, nearly a century afterwards, in Celsus' Latin treatise *De Medicina.* Around this phenomenon the Romans undertook a *cogitatio iuridica*, the genuine and autochthonous fruit of their genius. Indeed, it is to the period between the first century B.C. and the first century A.D. that we may ascribe the earliest *testimonia* of some of the most illustrious jurists of the age – Alfenus Varus, Labeo, Proculus – concerning hypothesis of medical liability. In truth, the casuistry centers on harm inflicted upon slaves in the context of activities performed by physicians, cases which, in view of the peculiar legal regime of slavery, were examined from the standpoint of the patrimonial damage suffered by the *dominus* of the slave. What primarily comes into play are cases that fall within the scope of the *Lex Aquilia* and are thus treated as extra-contractual liability. In my view, this depended on the fact that, in most cases, no contractual relationship existed between *dominus* and *medicus* concerning the care of the *servus*; more likely it was the latter who, in the presence of some 'sickness', presented himself directly to the physician. From the analysis of the texts there also emerges the subjective element of lack of skill, one of the possible articulations of fault, an indication that were taking shape rules of conduct to which the physician, as the practitioner of an *ars*, was required to adhere: in essence, one might say, technical competence was required for the performance of the *ars* and, consequently, a qualified form of diligence.

It should also be noted that in certain statements attributable to Proculus reference is made to the possibility for the *dominus* to proceed on the basis of the *actio locati*, a sign that a *locatio operis* may have been concluded between *dominus* and *medicus* with the care of the slave as its object. In such a case the criteria proper to contractual liability would apply.

The sources, for the period under consideration, do not preserve any record of cases where the physician caused physical harm in the practice of his art to a free man. Wholly conjecturally, one might imagine the existence of some form of contractual liability, perhaps along the lines of the *actio locati*, but on this point it seems more prudent to adopt a *non liquet*. If, instead, the application of a *medicamentum* by a physician to a free person resulted in death, the *Lex Cornelia de sicariis et veneficiis* would most likely have applied, provided the physician's intent had been proven; finally, it seems reasonable to conjecture that where the death of a free patient occurred during or following a surgical intervention, the same law would have applied if the physician's lack of skill emerged as, properly speaking, we read in jurists of the second century CE, and, *a fortiori*, in the presence of *dolus*.

In conclusion, the examination of ancient sources highlights how, at the dawn of the spread of the medical art in Rome, jurists addressed, as far as the evidence allows us to ascertain, essentially issues concerning the physician's liability, outlining a set of rules and orientations which, at least in their core elements, can be traced with remarkable continuity throughout the European legal tradition. This, as is well known, a matter distinct from those typically pertaining to social medicine; nevertheless, one may already discern, albeit faintly, the theme of the relationship between physician, patient, and society, which undoubtedly constitutes one of the central pillars of modern social medicine. Moreover, through the jurists' reflections— though in filigree—we can apprehend some of the juridical frameworks within which the medical art was then practiced, among which, as we have seen, was the *locatio operis*: this

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bears witness to the fact that even in ancient Rome medical practice was inscribed within an horizon not only technical, but also normative and social.

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