10.55019/plr.2020.1.99-119
Pázmány Law Review
VII. 2019–2020. • 99–119

# "CASUS MEDIUS" IN ROMAN LAW?

## *Problems of the limits of "custodia"-liability*[*]

Iván Siklósi[**]
Associate Professor, Eötvös Loránd University

## I. Introduction

*a)* It is well-known that the responsibility for *custodia*[1], which is mostly (but even

---

[*] The term "casus medius" used in my book treating the *custodia*–liability published in 2009 had been based upon the idea of Professor András Földi for describing events which do not belong to either lesser accidents or "acts of God". I would like to thank here Professor Földi for his genuine idea. It also deserves a special mention here that I have discovered the complicated problem of "casus medius", first and foremost, on the basis of the research of Professor Földi who devoted numerous works to the topic of the responsibility including *custodia*–liability.

[*] Dr. hab. Iván Siklósi, PhD, associate professor, ELTE Eötvös Loránd University, Budapest, Hungary, Faculty of Law, Department of Roman Law and Comparative Legal History. E–mail: ivan.siklosi@ajk.elte.hu

[1] The literature on the *custodia*–liability is virtually boundless today. Famous scholars devoted autonomous monographies to this topic (see Jean Paris: *Responsabilité de la « custodia » en droit romain*. Paris, Sirey, 1926.; Giuseppe Ignazio Luzzatto: *Caso fortuito e forza maggiore come limite alla responsabilità contrattuale I. La responsabilità per 'custodia'*. Milano, Giuffrè, 1938.; Antonino Metro: *L'obbligazione di 'custodire' nel diritto romano*. Milano, Giuffrè, 1966.; René Robaye: *L'obligation de garde. Essai sur la responsabilité contractuelle en droit romain*. Bruxelles, Publications des Facultés universitaires Saint-Louis, 1987.; recently Martín Serrano-Vicente: *'Custodiam praestare.' La prestación de 'custodia' en el derecho romano*. Madrid, Tébar, 2006.). – In addition, numerous studies were dedicated to the topic of *custodia* (see e.g. Jan Vážný: 'Custodia'. *AUPA* 12 [1929], 101–159.; Paul Krückmann: „Custodia", *SZ* 64 [1944], 1–56.; Geoffrey MacCormack: "Custodia" and "culpa". *SZ* 89 [1972], 149–219.; Idem: "Dolus", "culpa", "custodia", and "diligentia": Criteria of liability or content of obligation. *Index* 22 [1994], 189–209.; Govaert Carolus Joannes Joseph van den Bergh: 'Custodiam praestare': 'custodia'–liability or liability for failing 'custodia'?. *TR* 43 [1975], 59–72.; Alejando Guzmán Brito: La responsabilidad objetiva por 'custodia' en el derecho romano y en el derecho moderno, con una referencia especial a la regla 'periculum est emptoris'. *Revista Chilena de Derecho* 24 [1997], 179–199.; for the questions on *actio furti* of the *custodiens* see e.g. Fritz Schulz: Die Aktivlegitimation zur „actio furti" im klassischen römischen Recht. *SZ* 32 [1911], 23–99.; Joachim Rosenthal: „Custodia" und Aktivlegitimation zur

in the modern literature not exclusively[2]) considered as an "objective contractual

„actio furti". *SZ* 68 [1951], 217–265.; Max Kaser: Die „actio furti" des Verkäufers. *SZ* 96 [1979], 89–128.; Hans Ankum: Justinien C.6.2.22.pr. – 3a de 530 après J.–C., et la légitimation active de l'« actio furti » en cas de vol d'une chose prêtée dans le droit romain classique. *RIDA* 47 (2000), 463–479.; for the relationship of *pignus* and *custodia* see e.g. César Rascón: *'Pignus' y 'custodia' en el derecho romano clásico*. Oviedo, Universidad de Oviedo, 1976.; Hans Ankum: „Furtum pignoris" und „furtum fiduciae" im klassischen römischen Recht I. *RIDA* 26 [1979], 127–161 and *II*., RIDA 27 [1980], 95–143.; Max Kaser: „Furtum pignoris" und „furtum fiduciae". *SZ* 99 [1982], 249–277.; on the *custodia*–liability of usufructuary see Gunter Wesener: 'Custodia'–Haftung des Ususfruktuars. In: Antonio Guarino – Luigi Labruna (ed.): *Synteleia Vincenzo Arangio-Ruiz I*. Napoli, Jovene, 1964. 191–197.; for the relationship of *stipulatio* and *custodia* see Ingo Reichard: Stipulation und Custodiahaftung. *SZ* 107 [1990], 46–79.; on the *custodia*–liability of tenant see Wolfgang Hoffmann-Riem: Die „Custodia"–Haftung des Sachmieters untersucht an Alf./Paul. D. 19, 2, 30, 2. *SZ* 86 [1969], 394–403.; on the *custodia*–liability of *horrearius* see e.g. Joseph Anthony Charles Thomas: "Custodia" and "horrea". *RIDA* 6 [1959], 371 ff.; Felix Wubbe: Zur Haftung des „Horrearius". *SZ* 76 [1959], 508 ff.; Roberta Marini: La custodia di merci dell''horrearius': a proposito di CIL VI 33747. *SZ* 132 [2015], 154 ff.; Attila Pókecz Kovács: The economic analysis of document TPSulp. 45. In: Földi András – Sándor István – Siklósi Iván (ed.): *Studia Gábor Hamza*. Budapest, ELTE Eötvös Kiadó, 2015. 267 ff.). In the great monographies, in which the whole system of contractual liability of classical and Justinianic law has been treated, the questions of *custodia*–liability has been analysed in detail, too (see e.g. Vincenzo Arangio-Ruiz: *Responsabilità contrattuale in diritto romano*. Napoli, Jovene, 1933[2].; Carlo Augusto Cannata: *Ricerche sulla responsabilità contrattuale nel diritto romano*. Milano, Giuffrè, 1966.; Idem: *Sul problema della responsabilità nel diritto privato romano*. Catania, Libreria Editrice Torre, 1996.; Francesco Maria De Robertis: *La responsabilità contrattuale nel sistema della grande compilazione*. I–II. Bari, Cacucci, 1982–1983.; Riccardo Cardilli: *L'obbligazione di 'praestare' e la responsabilità contrattuale in diritto romano*. Milano, Giuffrè, 1995.). From the Hungarian bibliography on *custodia*–liability (in which the objective approach of *custodia*–liability can be considered as prevailing) see e.g. Géza Marton: *Felelősség custodiáért* [Liability for "custodia"], Budapest, 1924.; Idem: *Les fondements de la responsabilité civile*. Paris, Sirey, 1938. passim; Idem: Un essai de reconstruction du développement probable du système classique romain de responsabilité civile. *RIDA* 3 (1949), 177 ff.; Idem: Rinascita della dottrina classica della responsabilità per custodia. *Iura* 7 (1956), 124 ff.; Károly Visky: La responsabilité dans le droit romain à la fin de la République. *RIDA* 3 (1949), 437 ff.; Balásfalvi Kiss Barnabás: *A „veszély" kérdése az adásvételnél a római jogban I. Custodia–felelősség.* [The question of "risk" in the contract of sale in Roman law I. Liability for "custodia"], Kecskemét, Első Kecskeméti Hírlapkiadó- és Nyomda-Részvénytársaság, 1940.; Imre Molnár: Verantwortung und Gefahrtragung bei der „locatio conductio" zur Zeit des Prinzipats. *ANRW* II/14, 1982. 583 ff., passim; Idem: *Die Haftungsordnung des römischen Privatrechts*. Szeged, Diligens, 1998., passim; András Földi: *Sulla responsabilità per fatto altrui in diritto romano*. Publicationes Universitatis Miskolciensis, sectio juridica et politica 3 (1988), 137 ff.; Idem: Anmerkungen zum Zusammenhang zwischen der Haftung „ex recepto nautarum cauponum stabulariorum" und der Haftung für „custodia". *RIDA* 40 (1993), 263–291.; Idem: *Kereskedelmi jogintézmények a római jogban* [Commercial legal institutions in Roman law]. Budapest, Akadémiai Kiadó, 1997. 103 ff.; Idem: *A másért való felelősség a római jogban* [Vicarious liability in Roman law]. Budapest, Rejtjel Kiadó, 2004. passim; Iván Siklósi: *A custodia–felelősség néhány kérdése a római jogban* [Some questions of custodia–liability in Roman law]. Budapest, Publicationes Instituti Iuris Romani Budapestinensis, 2009.; Idem: Quelques remarques sur la responsabilité de la « custodia » en droit privé romain classique. *RIDROM* 15 (2015), 223–248.

[2] With regard to the subjective interpretation of *custodia*–liability, first and foremost, the much–disputed book of Robaye deserves mentioning (Robaye op. cit.). According to Robaye, "la *custodia* est un critère de responsabilité subjective" (Robaye op. cit. 46.). The distinguished Italian Romanist, Voci also interpreted the liability for *custodia* in context of *diligentia* and *culpa* (i.e. from a subjective

liability" (i.e. *custodia*-liability did not presuppose fault[3]) in the literature of Roman law, meant a liability for so-called "lesser accidents" in classical Roman law.[4] However, Roman jurists did not create the Latin term "casus minor"; it is applied by modern scholars only, to identify the accidents within the range of the *custodia*-liability. It also deserves mentioning that a *custodiens* was not liable for all accidents out of the scope of acts of God; he was liable for theft and for other typical "lesser accidents", casuistically specified in the sources of Roman law.[5]

*b)* As for the other "traditional" type of accidents, the term "vis maior" (see, in addition, the expressions "vis magna" [Gai. D. 18, 6, 2, 1], "vis naturalis" [Iav. D. 19, 2, 59], "vis extraria" [Alf.–Paul. eod. 30, 4], "fatale damnum" [Gai. D. 18, 6, 2, 1; Ulp. D. 4, 9, 3, 1; Ulp. D. 17, 2, 52, 3], "casus maior" [Gai. D. 44, 7, 1, 4; Inst. 3, 14, 2],"casus fortuitus" [Alf.–Paul. D. 19, 2, 30, 4; Ulp. D. 16, 3, 1, 35; Inst. 3, 14, 2; eod. 4], "casus improvisus" [C. 4, 35, 13], "theou bia" [Gai. D. 19, 2, 25, 6],[6] and "vis divina" [Ulp. D. 39, 2, 24, 4]) in contrast to "casus minor", appears in the Roman sources, too. Even a *custodiens* is not liable, of course, for "superior force" ("act of

approach) in his excellent study treating the system of liability in Roman private law: Pasquale Voci: 'Diligentia', 'custodia', 'culpa': i dati fondamentali. In: Idem: *Ultimi studi di diritto romano*. Napoli, Jovene, 2008. 71 ff. (originally published: *SDHI* 56 [1990], 29 ff.). Regarding the subjective interpretation of *custodia*–liability see from the modern literature, in addition, Pietro Cerami: Il comodato. In: Francisco Javier Paricio Serrano (coord.): *Derecho romano de obligaciones. Homenaje J. L. Murga Gener.* Madrid, Editorial Centro de Estudios Ramón Areces, 1994. 330.; Idem: Ricerche romanistiche e prospettive storico–comparatistiche. *AUPA* 43 (1995), 321. Contrary to these interpretations see e.g. Hans Ankum: Prêt de couverts d'argent pour un déjeuner en droit romain classique. In: Jean-François Gerkens (éd.): *Mélanges F. Sturm I.* Liège, Éditions juridiques de l'Université de Liège, 1999. 21.

3 Cf. Reinhard Zimmermann: *The law of obligations. Roman foundations of the civilian tradition.* Oxford, Oxford University Press, 1996[3]. 195.

4 Cf. e.g. Fritz Schulz: *Classical Roman law.* Oxford, Clarendon Press, 1951. 515.: "liability for *custodia* implied a liability for lesser accidents *(casus minor)*".

5 Based on the research by András Földi (see e.g. Földi *Sulla responsabilità* [op. cit.], 137 ff. and Idem *Anmerkungen* [op. cit.], 263 ff., especially 272–274) who strongly refers to the "case law approach" of the classical jurists in this respect. In Földi's plausible view, *custodia*–liability cannot be defined as a liability for all accidents excepting *vis maior*. Consequently, the *custodiens* may not only refer to an inevitable accident, but also to other casuistically specified events in order to get an exception against the action of the plaintiff. Liability of the *custodiens* for theft only can be considered as unambiguous in classical Roman law. Key issue is, according to Földi, whether the circumstances of the accident can be proven or not. Since theft always creates a suspicious situation, in case of *furtum* the exculpation is impossible. The debtor is obviously not responsible for *vis maior*. However, in other cases, especially in the case of *damnum ab alio datum* when the thing is still there, the exculpation is conceivable. In Földi's view, from the fact that the *custodia*–liability did not extend to *vis maior*, an extension of *custodia*–liability to all accidents which *humana infirmitas resistere potest* did not follow. Apart from the simple and obvious cases, the liability for *custodia* was casuistically established; and the *damnum ab alio datum* was mostly out of the scope of the *custodia*. Földi emphasizes, as a result, that the responsibility for *custodia* was a liability for *culpa levis*, *furtum*, and for certain casuistically specified events. Cf., in addition, Zimmermann, op. cit. 193 who, in a summarized form, also refers to the "casuistical" (i.e. "case law") approach ("liable… for certain typical accidents"; "casuistical way").

6 This is the only fragment in which the Greek expression "theou bia" ("force of God") appears.

God"), i.e. for such an inevitable accident, "which human weakness cannot provide against".[7]

*c)* In our opinion, the usual and "traditional" distinction between *casus minor* and *casus maior* does not imply all cases of accidents. There are events for which a *custodiens* is not objectively liable, but which cannot be considered as "acts of God" either since these accidents can be avoided by human effort. In this regard, based on our research, certain cases of robbery *(rapina)*, the wrongful damage committed by a third person *(damnum ab alio datum)*, and certain cases of flight of slaves *(fuga servorum)* can be mentioned. In order to classify these accidents, in our opinion, the introduction and application of a third dogmatic category, the concept of "casus medius" seems to be reasonable (and necessary).

(It is to be noted here that the elaboration of a new concept of "casus medius" has been dogmatically, as well as terminologically inspired by the scientific results linked to András Földi.[8])

## II. On the concept of "casus minor" in a nutshell

The concept of *casus minor* does not appear in Roman law sources of; it was created by the outstanding scholar of the German Pandectist legal science ("Pandektenwissenschaft"), Julius Baron[9] in order to classify the accidents which are, in theory, avoidable by properly watching and guarding, but which may also occur in case of "normal" diligence.

While the concept of *vis maior* seems to have been crystallized in the sources of Roman law more or less, it has never been clear which accidents *custodia*-liability involved exactly. The responsibility for *custodia* cannot be considered as an unproblematic legal construction;[10] furthermore, in Zimmermann's words,

---

[7] See Gai. D. 44, 7, 1, 4: *"cui humana infirmitas resistere non potest"* (in the English translation edited by Alan Watson [*The Digest of Justinian.* Philadelphia, University of Pennsylvania Press, 1985]: "which human weakness cannot prevent"). Furthermore, see Gai. D. 13, 6, 18 *pr.: "ita ut tantum eos casus non praestet, quibus resisti non possit"*; Ulp. D. 19, 2, 15, 2: *"vim, cui resisti non potest"*; and C. 4, 65, 28: *"cui resisti non potest"*. As for the modern literature on *vis maior,* see e.g. Andreas Doll: *Von der vis maior zur höheren Gewalt. Geschichte und Dogmatik eines haftungsentlastenden Begriffs.* Frankfurt am Main–Bern–New York–Paris, Peter Lang Verlag, 1989; Wolfgang Ernst: Wandlungen des „vis maior"–Begriffes in der Entwicklung der römischen Rechtswissenschaft. *Index 22* (1994), 293 ff.

[8] See the above–cited works of the author.

[9] Cf. Julius Baron: Die Haftung bis zur höheren Gewalt. *AcP* 78 (1892), 284 ff. (It is also well–known that the debates on the interpretation of the legal nature of *custodia*–liability began with Baron. See: „Diligentia exactissima", „diligentissimus paterfamilias" oder die Haftung für „custodia". *Archiv für die civilistische Praxis* 52 [1869], 44–95.)

[10] We mention here only one example: the *custodia*–liability for immovable is much–disputed in the literature of Roman law. According to distinguished Romanists, the responsibility for *custodia* did not extend to real estate (cf. Cannata *Ricerche* [op. cit.], 119 f.; R. Knütel: Die Haftung für Hilfspersonen im römischen Recht. *SZ* 100 [1983], 348.; Guzmán Brito op. cit. 181.). In our opinion,

the *custodia*-liability "cannot… adequately be cast into an abstract formula".[11] In addition, the word "custodia" itself, was not used in the sources as an unequivocal technical term of law.[12] The scope of "lesser accidents", which is much-disputed in modern literature, developed slowly and laboriously from the preclassical age[13] of Roman law. It is unquestionable that the *custodia*-liability included first the responsibility of the *custodiens* for theft[14] based on the rich casuistry.[15] Regarding the other cases of the lesser accidents, however, we know relatively few texts from the Roman law sources.[16]

The lack of interest in conceptual abstractions of Roman jurists was probably the main reason why Roman jurists did not create the concept of *casus minor*, which, however, cannot be considered as an anachronistic or illogical one.

Applying this term, as we have seen, the Romanists usually distinguish between two types of accidents: 1. those, which are avoidable and, therefore, serve as grounds

---

however, the extension of the *custodia*–liability to an immovable cannot be denied based on several sources (regarding the sale of a tenement [*insula*] which has been destroyed by fire, see Alf. D. 18, 6, 12; considering the liability of the lessee of woodland, based on a lease clause [*lex locationis*], see Alf. D. 19, 2, 29; for the liability of the tenant farmer [*colonus*] of a farmhouse [*villa*], see Alf.–Paul. eod. 30, 4; on the relationship of the *custodia*–liability and *cautio damni infecti*, see Paul. D. 19, 1, 36, Paul. D. 39, 2, 18, 9, and Paul. eod. 38 *pr.*; on these three fragments see e.g. Geoffrey MacCormack: The "cautio damni infecti": buyer and seller. *SZ* 88 [1971], 300–321). We cannot go deeper into this complicated problem here.

11 Zimmermann op. cit. 193. Cf., in addition, Schulz *Classical Roman law* (op. cit.) 515.

12 Cf. Zimmermann op. cit. 194. For the different meanings of the word "custodia" see e.g. Paris op. cit. 3 ff.; Metro op. cit. 1 ff.; van den Bergh *Custodiam praestare* (op. cit.) 63 ff.; Robaye op. cit. 14 ff.; Serrano-Vicente *Custodiam praestare* (op. cit.) 35 ff.

13 Since the *custodia*–liability, in our opinion, was already known among the earlier jurists *(veteres)* in the cases of *commodatum* (cf. Ulp. D. 13, 6, 5, 6 and eod. 5, 9) and *emptio venditio* (cf. Paul. D. 18, 6, 15, 1). Cf. Visky *La responsabilité* (op. cit.) 482. There are, however, completely different approaches regarding the formation of *custodia*–liability. According to Cannata, the *custodia*–liability (in a technical sense) had not been known among the *veteres*, and it was only elaborated in Hadrian's time (see Cannata *Ricerche* [op. cit.] 119 ff.; cf. Knütel op. cit. 348). We cannot go deeper into this question here.

14 Cf. e.g. Theo Mayer-Maly: *Locatio conductio. Eine Untersuchung zum klassischen römischen Recht.* Wien–München, Verlag Herold, 1956. 203.; Földi *Vicarious liability* (op. cit.) 231.

15 See e.g. Lab.–Iav. D. 19, 2, 60, 2; Gai. 3, 203; Paul. D. 47, 2, 83 (82), 1 (= PS 2, 31, 30); Ulp. D. 13, 6, 10, 1; Ulp. D. 47, 2, 14, 17; Ulp. eod. 48, 4. – On the extension of the active legitimation of *actio furti* to the *custodiens* see e.g. Schulz *Die Aktivlegitimation* (op. cit.) 23 ff.; Rosenthal op. cit. 217 ff.; Kaser *Die actio furti.* (op. cit.) 89 ff.; Ankum *Justinien C.6.2.22.pr.–3a* (op. cit.) 463 ff.; Jan Ulrich Wacke: *„Actiones suas praestare debet"*. Berlin, Duncker & Humblot 2010. 169 ff. Cf., in addition, Martín Serrano-Vicente: Enfoques jurisprudenciales en torno a la legitimación activa a la 'actio furti': Gayo, Papiniano, Ulpiano y Paulo. *Seminarios Complutenses de Derecho Romano* 28 (2015), 1041 ff.

16 Cf. e.g. Ulp. D. 19, 2, 13, 6 (on the responsibility of a fuller who takes in clothes for cleaning and mice then gnaw at them; cf. e.g. Paris op. cit. 62 f.; Arangio-Ruiz op. cit. 85 f.; Mayer-Maly *Locatio conductio* (op. cit.) 207 f.; van den Bergh *Custodiam praestare* (op. cit.) 69.; Robaye op. cit. 184 f.; Voci op. cit. 124.; Serrano-Vicente *Custodiam praestare* [op. cit.] 154 f.); Paul. D. 9, 1, 2 *pr.* (regarding the extension of the active legitimation of the *actio de pauperie* to a *custodiens*).

for *custodia*-liability *(casus minor)*; 2. those, which cannot be averted because of human infirmity *(vis maior).*

As mentioned above, the main problem of this dichotomy is that there are accidents which are not allowed to be regarded either as lesser accidents or as "acts of God".

Our question is the following: how to treat those accidents, which do not belong to either lesser accidents or "acts of God"?

## III. The cases of "casus medius"

The cases where we cannot apply either the term "casus minor" or the category of *casus maior* are, in our opinion, the following: the "simple" case of robbery *(rapina)*,[17] the wrongful damage committed by a third person *(damnum ab alio datum)*, and certain cases of the *fuga servorum*. These events are not allowed to be considered as "acts of God" since, in principle, these are preventable by proper precaution. Nevertheless, a *custodiens* is not liable objectively for these accidents; consequently, these events cannot be regarded as lesser accidents, either. The relevant cases in this respect are to be classified in a new dogmatic category i.e. of "casus medius" (cf. the trichotomy of *capitis deminutio minima–media–maxima*). In our view, the usual dichotomy (i.e. of *casus minor* and *casus maior*) is therefore to be replaced by the trichotomy of *casus minor*, *casus medius*, and *casus maior*, through the introduction of the new category of "casus medius".

As mentioned before, the term "casus minor" was not formulated by the Roman lawyers. This concept, however, cannot be regarded as an anachronistic one; the same is true for the concept of "casus medius".

Let us see the relevant cases from the sources of classical Roman law.

### 1. Rapina

*a)* In contrast with the responsibility of the *custodiens* for theft, we know relatively few Roman law sources related to the questions on the liability of a debtor for robbery.

As a starting premise, we emphasize the main difference between these two delicts, i.e. theft and robbery: the existence of violence.[18] As we will see, violence can be considered as the limitation of objective liability of the *custodiens*. While a *custodiens* is always liable for theft, he is not objectively liable for robbery.

Naturally, *custodia*-liability does not extend to cases of robbery belonging to "acts of God". The case of *latronum incursus* is an inevitable accident which human weakness cannot prevent; this event is mentioned together with *hostium incursus*,

---

[17] The other cases of robbery belong to the scope of acts of God (see below).

[18] See e.g. Gai. 3, 209; Inst. 4, 2 *("Vi bonorum raptorum")*; D. 47, 8 *("Vi bonorum raptorum et de turba").* On the problems of *actio vi bonorum raptorum* see e.g. Letizia Vacca, *Ricerche in tema di 'actio vi bonorum raptorum'*, Milano, Giuffrè, 1972. For the legal character of *actio vi bonorum raptorum* see e.g. Hans Ankum: Actions by which we claim a thing ("res") and a penalty ("poena") in classical Roman law. *BIDR* 85 (1982), 30 f. (= in: Idem: *Nueva antología romanística.* Madrid, Marcial Pons Ediciones Jurídicas y Sociales, 2014. 126 f.).

*tumultus*, *naufragio*, *incendium*, *ruina*, *aquae magnitudo*, *animalium mors*, *servorum mors*, and *piratarum insidiae* by the Roman jurists. These events cannot be averted because of human infirmity.[19]

Nevertheless, there are cases of robbery that do not fall under either "acts of God" or lesser accidents. In the "simple" case of robbery violence is, in principle, avoidable. But would it be righteous to make the debtor responsible for such an event, too?

*b)* The most relevant text of this topic is a much-disputed fragment of Neratius.[20] Based on this text, it is clear that the vendor, who is liable for *custodia,*[21] is not responsible for *rapina*.

Neratius examines the following case in this complicated text. A thing, for which the vendor should be held responsible because of a contract of sale, is taken from the vendor by force.[22] The vendor should guard the thing. This means that he is required to be responsible for its safe-keeping; in other words, he is objectively liable for it.[23] However, it is more proper[24] that there is no further consequence than his being liable for the transfer of actions for recovering the thing to the purchaser because, as the jurist says, custody is of little advantage where violence is employed ("quia custodia adversus vim parum proficit"; cf. the translation edited by Watson: "for its safekeeping is of slight avail against force"). According to the argumentation by Neratius, the vendor shall have to provide the buyer with these actions to use not only at the judgement *(arbitrio)* of the buyer[25], but also at his risk, so that all profit and expense fall to the buyer.

---

19 See, *inter alia*, Gai. D. 13, 6, 18 *pr.*; Gai. D. 44, 7, 1, 4; Ulp. D. 4, 9, 3, 1; Ulp. D. 50, 17, 23.

20 *"Si ea res, quam ex empto praestare debebam, vi mihi adempta fuerit: quamvis eam custodire debuerim, tamen propius est, ut nihil amplius quam actiones persequendae eius praestari a me emptori oporteat, quia custodia adversus vim parum proficit. Actiones autem eas non solum arbitrio, sed etiam periculo tuo tibi praestare debebo, ut omne lucrum ac dispendium te sequatur."* (Ner. D. 19, 1, 31 *pr.*). On this fragment see e.g. Paris op. cit. 231 ff.; Arangio-Ruiz op. cit. 157 and 163; Metro op. cit. 100 and 120.; MacCormack *Custodia* (op. cit.) 188.; van den Bergh *Custodiam praestare* (op. cit.) 68.; Kaser *Die actio furti* (op. cit.) 125.; Robaye op. cit. 375.; Voci op. cit. 107 ff.; Martin Pennitz: *Das „periculum rei venditae". Ein Beitrag zum „aktionenrechtlichen Denken" im römischen Privatrecht*. Wien–Köln–Weimar, Böhlau, 2000. 388 ff.; Serrano-Vicente *Custodiam praestare* (op. cit.) passim, especially 298 ff.

21 On the *custodia*–liability of the vendor see e.g. Kaser *Die actio furti* (op. cit.) 105 ff.; Martin Bauer: *„Periculum emptoris." Eine dogmengeschichtliche Untersuchung zur Gefahrtragung beim Kauf.* Berlin, Duncker & Humblot, 1998. 59 ff.; Pennitz op. cit. 380 ff.; Serrano-Vicente *Custodiam praestare* (op. cit.) 263 ff.; Edson Kiyoshi Nacata Júnior: *A responsabilidade por custodia no direito romano: análise do problema na compra e venda* [PhD dissertation]. São Paulo, 2012.

22 The phrase "vi mihi adempta fuerit" does not refer to the *vis maior*, cf. Pennitz op. cit. 388[86]. Thus, this robbery cannot be considered as a robbery in the sense of *vis maior.*

23 The phrase "quamvis eam custodire debuerim" refers not only to the "custody" as an activity, but also to the (objective) liability for *custodia* of the vendor (cf. e.g. Pennitz op. cit. 388) which, however, does not include an objective liability for robbery.

24 Due to the expression "propius", it is unmistakeable that this decision was disputed in classical Roman law; see e.g. Pennitz op. cit. 389.

25 Therefore, the purchaser is in position to decide which action he would like to bring.

This text cannot be cut out of its wider context. For its correct interpretation, in our view, the following text[26] needs to be taken into consideration. Based on Ner. D. 19, 1, 31, 1, when the thing (i.e. a slave) has been not delivered (*mora* [*tradendi*]), the vendor should be held liable not only for what the vendor acquired through him, but also for what the purchaser would have acquired if the slave had already been delivered to him (i.e. the vendor has to pay the whole *lucrum cessans* of the purchaser). Based on this text, it will be clear that the object of the sale mentioned in the passage D. 19, 1, 31 *pr.* was probably a slave, notably a *servus custodiendus*. During the analysis of the topic of *fuga servorum,* we will see that *custodia*-liability was extremely problematic in those cases when a slave was the object of the custody. More exactly, the objective *custodia*-liability was applied only in case of a *servus custodiendus*. As a result, we can presume that the object of the sale in D. 19, 1, 31 *pr.* was probably a *servus custodiendus*.

In our view, the phrase in the *principium* of the passage "quamvis eam custodire debuerim" refers probably to the objective *custodia*-liability of the vendor for a *servus custodiendus*. If the slave had been a *servus non custodiendus*, this phrase would be senseless since the vendor would not be liable for *custodia* in case of such a slave.

As a result, although the vendor is liable for *custodia*, he is not liable for robbery. In other words, the vendor is not liable for the violence, which is an essential element of robbery (as opposed to theft). Robbery is, therefore, the risk of the purchaser for whom the vendor should transfer his (reipersecutory) actions.

The decision of Neratius in D. 19, 1, 31 *pr.* has numerous interpretations in the literature of Roman law. Especially the phrase "quamvis eam custodire debuerim"[27] was controversial in the literature of interpolation criticism.

In our view, however, the most problematic part of the text is the reference to the transfer of the actions for the purchaser. What kind of actions are these exactly?[28] Only (due to the using of the expression "actiones persequendae eius") the *actiones rei persecutoriae* (*rei vindicatio* and *condictio*)? And what will be with the *actio vi bonorum raptorum* (which is a penal action)? The phrase "tamen propius est" refers to the debate among the classical Roman lawyers in this respect.[29] Neratius, however, decided only to assign the reipersecutory actions to the purchaser.

It would not be illogical if the vendor, since he is not liable for robbery, were obliged to transfer even the *actio vi bonorum raptorum* to the buyer (cf. the "principle of utility").[30]

---

[26] *"Et non solum quod ipse per eum adquisii praestare debeo, sed et id, quod emptor iam tunc sibi tradito servo adquisiturus fuisset."* (Ner. D. 19, 1, 31, 1).

[27] For the interpretation of this phrase see from the modern bibliography Serrano-Vicente *Custodiam praestare* (op. cit.) 299 ff.

[28] On this question see Paris op. cit. 232 f.

[29] Cf. Pennitz op. cit. 389.

[30] Since the "principle of utility" (in German terminology: "Utilitätsprinzip" [Kübler] or "Utilitätsgedanke") was well–known among the classical Roman jurists. On this principle see e.g. Dieter Nörr: Die Entwicklung des Utilitätsgedankens im römischen Haftungsrecht. *SZ* 73 (1956), 68.; Jacques-Henri Michel: *Gratuité en droit romain*. Bruxelles, Institut de Sociologie de l'Université

The interpretation of Paris[31] on the historical development of the transfer of actions can be considered remarkable. According to the French scholar, in classical Roman law the vendor was obliged to assign the reipersecutory actions to the purchaser, but in the Justinianic law the term "actiones persequendae" implied the penal actions (*actio furti* and *actio vi bonorum raptorum*), too.

From modern literature, the interpretation by Pennitz deserves special mention.[32] In his view, Neratius (contrary to the standpoint of other classical jurists) wanted to assign only the reipersecutory actions to the purchaser only with reference to the legal principle (which can be deduced from the rule "periculum emptoris")[33] that all the profit and loss have to fall to the purchaser after the conclusion of the contract of sale. Therefore, Neratius could not have come to the conclusion that the purchaser should be entitled to bring penal actions (*actio furti* and *actio vi bonorum raptorum*), too. According to the interpretation of Pennitz, the decision can be regarded as an original classical one.

The essence of this fragment, regarding the topic of our study, will be summarized as follows. We can lay down that Neratius excludes the liability for *rapina* of the vendor.[34] Although the vendor is responsible for *custodia* in the classical era, he is not liable for the robbery the essence of which is violence.[35] Based on the contract of sale, the purchaser cannot bring an action for damages against the vendor to make him liable, but the vendor is obliged to assign the reipersecutory actions to the purchaser due to the principle "periculum est emptoris".

*c)* Due to violence, it would be unjust to make the *custodiens* responsible even for a simple robbery. No doubt, a robbery would be extremely difficult to avoid, foresee, or prevent. Consequently, the *custodia*-liability of classical Roman law did not extend to the simple robbery, which should not be regarded as a *casus minor*. In other words, the basis of liability for a violent tort is not *custodia*. Violence can be regarded as the limit of liability for *custodia*.[36] It is clear that nobody is responsible for violence, which cannot be averted due to human weakness; yet a "simple" robbery cannot be

---

Libre de Bruxelles, 1962. 325 ff.; de Robertis op. cit. I, 64 ff.; Zimmermann op. cit. 198 ff.; Bauer op. cit. 86 ff.; Max Kaser – Rolf Knütel – Sebastian Lohsse: *Römisches Privatrecht.* München, C. H. Beck, 2017[21]. 224.

31 Paris op. cit. 232 f.

32 Pennitz op. cit. 390.

33 Cf. Paul. D. 18, 6, 8 *pr.*: *"Necessario sciendum est, quando perfecta sit emptio: tunc enim sciemus, cuius periculum sit: nam perfecta emptione periculum ad emptorem respiciet."* On the principle "periculum est emptoris", which problem cannot be analysed here, see e.g. Wolfgang Ernst: „Periculum est emptoris". *SZ* 99 (1982), 216 ff.; Bauer op. cit. passim; Éva Jakab: *Risikomanagement beim Weinkauf.* München, C. H. Beck, 2009.

34 Cf. e.g. Paris op. cit. 232.; Metro op. cit. 120.

35 In contrast to the theft. *Furtum* can be regarded as a lot more evitable event than the *rapina*. The vendor, as a *custodiens*, would be liable for theft. However, the vendor is not liable for the robbery, which is a violent tort.

36 Cf. van den Bergh: *Custodiam praestare* (op. cit.) 68.

considered as an inevitable accident, either. As a conclusion, the "simple" robbery can only be considered as a "casus medius" since it is neither a *casus minor* nor a *casus maior* and it is the purchaser to bear the risk.

## 2. Damnum ab alio datum

*a)* One of the most difficult and most disputed questions of the contractual liability in classical law is the relationship of *custodia*-liability and *damnum ab alio datum*, more exactly the content and the basis of the liability of a debtor for this accident. Regarding the wrongful damage caused by a third person, we do not have a rich casuistry, in contrast with the liability of the *custodiens* for theft.

Two fragments are relevant in this topic. Iul. D. 13, 6, 19 and Ulp. D. 19, 2, 41[37] report on the view of Salvius Iulianus and on its corrections, made by Marcellus and Ulpianus in D. 19, 2, 41.[38]

*b)* According to Iulianus,[39] with reference to *locatio conductio* and *commodatum*, it is out of question that parties who agree to keep something safe, or receive it to be used[40] (i.e. a *conductor operis* or a *commodatarius*) should bear loss inflicted wrongfully by a third party. This means that they are not liable for wrongful damage committed by another; for how can we keep someone from doing us wrongful damage by either proper care or diligence?[41]

In order to exclude liability for *damnum ab alio datum*, the text refers to "cura aut diligentia". These words seem to have been used in a subjective sense; therefore the argumentation of Iulianus seems to be contrary to the objective theory of *custodia*. In our opinion, however, presuming interpolation would lead us astray. Iulianus may have decided the question of liability for *damnum ab alio datum* from a different view than that of objective *custodia*-liability. This text, which does not mention the word "custodia", can be cited as an example for subjective liability, in our view. According to distinguished Romanists, the text is considered to have been interpolated.[42] Indeed, the expression "cura aut diligentia" is perhaps not an

---

[37] For the various interpretations of Iul. D. 13, 6, 19 and Ulp. D. 19, 2, 41, see e.g. Vážný *op. cit.* 107 ff.; Arangio-Ruiz op. cit. 165 ff.; Krückmann op. cit. 52.; Cannata *Ricerche* (op. cit.) 61 ff.; Idem *Sul problema* (op. cit.) 28 ff.; Metro, op. cit. 99 ff.; MacCormack *Custodia* (op. cit.) 171 f.; Rascón *op. cit.* 95 ff.; Knütel *op. cit.* 410 ff.; Földi *Sulla responsabilità* (op. cit.) 137 ff.; Robaye op. cit. 198 ff. and 289 ff.; Voci op. cit. 117. ff.; Serrano-Vicente *Custodiam praestare* (op. cit.) 223 ff.

[38] Cf. Serrano-Vicente *Custodiam praestare* (op. cit.) 224.

[39] *"Ad eos, qui servandum aliquid conducunt aut utendum accipiunt, damnum iniuria ab alio datum non pertinere procul dubio est: qua enim cura aut diligentia consequi possumus, ne aliquis damnum nobis iniuria det?"* (Iul. D. 13, 6, 19).

[40] Cf. the translation edited by Watson: "who contract for looking after something or borrow something for use".

[41] Cf. the translation edited by Watson: "for what degree of care and attention will secure us against commission of wrongful loss by other people?" Regarding the style of this question, see Cannata *Sul problema* (op. cit.) 30: "in forma di domanda retorica".

[42] For references to the bibliography see e.g. Robaye op. cit. 290 ff.

original, a classical one, regarding the expression "custodia" mentioned in Ulp. D. 19, 2, 41.[43] Nevertheless, Iulianus may have decided considering responsibility for the *culpa*. The interpolation, though theoretically possible, might only be considered as a formal, stylistic and not as a substantial, dogmatic modification when compared to the presumably original text.

*c)* As cited by Ulpianus, Marcellus comes to a different conclusion regarding the liability for *damnum ab alio datum* at first sight.[44] Ulpianus refers to the above-mentioned standpoint by Iulianus, who said that an action cannot be brought against the guard for a wrongful damage committed by another; for, by what kind of custody[45] can he prevent an unlawful damage being caused by someone else? Marcellus, however, says that this can sometimes *(interdum)* be done when the party could have taken such care of the thing that it could not have been damaged, or where the guard himself caused the damage ("ipse custos damnum dedit"). According to Ulpianus, Marcellus's view deserves approval.[46]

We have to refer to the remarkable stylistic difference between Iulianus's and Ulpianus's texts. Instead of the expression "cura aut diligentia" mentioned in D. 13, 6, 19, Ulpianus uses the term "custodia" in passage D. 19, 2, 41. Due to the use of the term "custodia" it does not seem to be easy to decide whether *custodia* or *culpa (in eligendo)* was based liability for *damnum ab alio datum*. Moreover, we do not know whether Ulpianus really cites Iulianus's genuine words. It would be theoretically conceivable that Ulpianus, contrary to Iulianus, who had not referred to *custodia,* judged from the aspect of objective liability for *custodia.* Consequently, according to Ulpianus, the guard would be sometimes objectively responsible for *damnum ab alio datum*, too.

This argumentation and conclusion do not seem to be correct, however. Ulpianus may have cited Iulianus's standpoint word by word. Furthermore, the originality of the word "custodia" is more sustainable than that of the phrase "cura aut diligentia", the occurrence of which is highly probable to be postclassical.

---

[43] Cf. Arangio-Ruiz op. cit. 165. who mentioned a "usual interpolation" in case of the expression "cura aut diligentia". According to Cannata (*Sul problema* [op. cit.] 29), "cura aut diligentia", which appears instead of "custodia" in the text, is a result of interpolation, too.

[44] *"Sed de damno ab alio dato agi cum eo non posse Iulianus ait: qua enim custodia consequi potuit, ne damnum iniuria ab alio dari possit? Sed Marcellus interdum esse posse ait, sive custodiri potuit, ne damnum daretur, sive ipse custos damnum dedit: quae sententia Marcelli probanda est."* (Ulp. D. 19, 2, 41).

[45] In our opinion, the term "custodia" mentioned in this fragment does not refer to the objective *custodia*–liability. This expression seems to be used in a subjective sense here: "what degree of care" can prevent a *damnum ab alio datum*?

[46] Cf. the translation edited by Watson: "But Julian says that there can be no action against him over damage done by the third party: for by what kind of safekeeping could he make certain that wrongful damage cannot be done by a third party? But Marcellus says that this can sometimes occur if he could have guarded against the damage being done or if the guard himself does the damage. Marcellus's view deserves approval."

There are two possible interpretations for the term "custodia" to be original in this context: 1. the expression "cura aut diligentia" in Iul. D. 13, 6, 19 is a result of interpolation, and the liability of the *custodiens* for *damnum ab alio datum* is totally excluded, specifically regarding objective *custodia*-liability; 2. Iulianus used the word "custodia" in a subjective approach, "custodia" meaning the same as the expression "cura aut diligentia". For us, the second interpretation seems to be more correct. In our opinion, presuming the first variant to be correct would only result from superficially reading the text. The word "custodia" in passage D. 19, 2, 41 seems to have been used in a subjective sense. In other words: only the superficial reading of this text raises the suspicion of the "substantial" (dogmatic) interpolation in the text of D. 13, 6, 19.

As for the standpoint of Marcellus, the debtor is sometimes liable for *damnum ab alio datum*, specifically, when the party could have taken such care of the thing that it would not have been injured. The terms "custodiri" as well as "custos" in Ulp. D. 19, 2, 41 could refer to the objective *custodia*-liability, too. It is more likely, however, that Marcellus decided the question of liability from a subjective approach. Instead of the expressions "custodiam praestare" (cf. e.g. Ulp. D. 13, 6, 5, 9), "custodia praestetur" (cf. eod. 5, 6), or "custodiae nomine tenentur" (cf. Gai. D. 4, 9, 5 *pr.*), which refer to objective *custodia*-liability in classical Roman law sources, the expression "custodiri potuit", which seems to be of a subjective nature, appears in this text. Cannata has a similar standpoint; according to the distinguished Italian Romanist, this case does not fit the traditional scheme of liability for *custodia*.[47]

Of course, an action can also be brought against the guard when he himself caused the damage. The phrase "ipse custos damnum dedit" also refers to subjective liability: the guard is obviously liable for his own fault *(culpa)* if he committed the damage himself. The variant "ipse custos damnum dedit" is regarded by Cannata as "a typical case of the liability for *culpa*".[48] We agree with the view of the Italian Romanist.

*d)* Without any doubt, a wrongful damage caused by a third person would be extremely difficult avoid, foresee, or prevent for the debtor. One of the motives for the rejection of the objective *custodia*-liability for *damnum ab alio datum* could also be, however, that the jurists did not want to extend the active legitimation of the *actio legis Aquiliae*[49] to the interested debtor. Iulianus, who, as we have seen, excluded completely the responsibility of the interested debtor for *damnum ab alio datum,* refused to extend the active legitimation of the *actio legis Aquiliae* to the *commodatarius*. According to Iulianus as cited by Ulpianus, a person to whom clothes have been lent, cannot proceed under *lex Aquilia*; this action is available to

47 Cannata: *Sul problema*. 29.

48 Ibid.29.

49 Contrary to the extension of the active legitimation of *actio furti* to the *custodiens*, if the *custodiens* were also objectively liable for *damnum ab alio datum*, it would be logical that he could bring the action based on *lex Aquilia*, too.

the owner.[50] This rule can be considered as a main one even in the time of Ulpianus; according to the late classical jurists, the action on the *lex Aquilia* is available to the "erus", that is the owner.[51] However, it was recognized that in certain situations not only the owner is entitled to bring the *actio legis Aquiliae*.[52] This many-fold problem would be impossible to discuss properly here. Even in the late classical period of Roman law, active legitimation of *actio legis Aquiliae* was only casuistically and *utiliter* extended to other persons than the owner, in contrast with *actio furti,* which the *custodiens,* being objectively responsible for theft, was always entitled to bring.[53]

*e)* As for the literature concerning the problems of liability for *damnum ab alio datum*, certain modern scholars lay down that the liability of the debtor for *damnum ab alio datum* was disputed in classical Roman law, and the debtor was only liable for certain "types" of wrongful damage done by a third person.[54]

Other Romanists, however, expressly recognize the extension of the objective *custodia*-liability to the *damnum iniuria datum* in the time of Marcellus. According to Knütel, the liability for *culpa* ("Verschuldenshaftung") did not arise with regard to the standpoint of Marcellus.[55]

The above-cited two texts were much disputed, especially in the Romanist scholarship of interpolation criticism (cf. "interpolation hunting"), due to textual critical considerations.

According to Vážný, the *custodiens* was liable for *damnum ab alio datum*, and both Ulp. D. 19, 2, 41 and Iul. D. 13, 6, 19 are to be considered as results of interpolation.[56]

Upon analysing the argumentation by Marcellus, Arangio-Ruiz, distinguished between "danni evitabili" and "danni non evitabili". According to the Italian Romanist, in the first case an action based on the contract can be brought against the *custodiens*; in the second case, however, such an action (i.e. a "contractual action") cannot be brought against the guard.[57]

However, according to Krückmann, who interpreted *custodia*-liability from a subjective approach, the liability for *damnum ab alio datum* cannot be regarded

---

50 *"Eum, cui vestimenta commodata sunt, non posse… lege Aquilia agere Iulianus ait, sed domino eam competere."* (Ulp. D. 9, 2, 11, 9).

51 *"Legis autem Aquiliae actio ero competit, hoc est domino."* (Ulp. D. 9, 2, 11, 6). Cf. e.g. Vážný op. cit. 108.; Arangio-Ruiz op. cit. 167.; Voci op. cit. 120.

52 See e.g. Ulp. D. 9, 2, 11, 10 (*fructuarius* and *usuarius* [*utilis actio*]); Ulp. eod. 17 (*bonae fidei possessor* and *creditor pigneraticius* [*in factum actio*]); Ulp. D. 7, 1, 17, 3 and Paul. D. 9, 2, 12 (*usufructuarius* [*utilis actio*]).

53 See the above–cited sources and literature.

54 Cf. e.g. Kaser: *Die actio furti.* 99 f.

55 Knütel op. cit. 412.

56 Vážný op. cit. 107 ff.

57 Arangio-Ruiz op. cit. 167. For a contrary view see Robaye op. cit. 199., who interprets the construction of the *custodia*–liability as a subjective one ("responsabilité subjective") and disputes the standpoint of Arangio-Ruiz regarding the distinction between "danni evitabili" and "danni non evitabili".

as a liability for *casus minor* ("Zufallshaftung"), but a responsibility for *culpa* ("Verschuldenshaftung").[58]

According to Cannata's genuine interpretation, *custodia*-liability, mentioned in Ulp. D. 19, 2, 41, is not a liability for *culpa in custodiendo* yet. After Marcellus, however, a new era begins, when *custodia*-liability construed as a liability for *culpa in custodiendo*.[59]

MacCormack, while interpreting the classical *custodia*-liability by hitting subjective tones (more precisely: from a "mixed" perspective), accepts the classical origin of the relevant fragments. He emphasizes that *custodia*-obligation means here "an obligation to exercise a certain type of *diligentia*".[60]

In his much-disputed book on the contractual liability in Roman law, Robaye accepts the classical origin of our fragments, giving a completely subjective interpretation. He disputes, *inter alia*, Arangio-Ruiz's standpoint regarding the distinction between "danni evitabili" and "danni non evitabili". When considering liability for *damnum ab alio datum,* it is also worth mentioning that, according to Robaye, Marcellus wanted no more than to develop the main rule originally formulated by Iulianus.[61]

In Földi's plausible view,[62] the two sources complete each other. As a main rule, formulated by Iulianus, the *custodiens* was not liable for *damnum ab alio datum*, and this standpoint was recognized and amended by Marcellus, formulating the obvious exceptions from the main rule. According to Földi, the extension of the *custodia*-liability to wrongful damage caused by a third person was not self-evident at all; such a view could only be considered as a presumption, which needs to be supervised. In addition, Földi presumes that liability for the damage committed by another was rather based on *culpa in eligendo* in classical Roman law as well. Földi strongly refers to the "case law approach" regarding liability for accidents out of theft and "acts of God".[63] Key issue is, according to Földi, whether the circumstances of the accident can be proven or not. Since theft always creates a suspicious situation, in case of *furtum* the exculpation is impossible. In cases of *vis maior,* the debtor is obviously not liable. However, in other cases, especially in the case of *damnum ab alio datum,* when the thing is still there, exculpation is conceivable. Apart from the simple and obvious cases, in Földi's view, liability for *custodia* was only casuistically established; and *damnum ab alio datum* was mostly out of the scope of *custodia*.[64]

*f)* Returning to Ulp. D. 19, 2, 41, we would like to draw attention to the following circumstances. As we have seen, the extension of the objective *custodia*-liability to a wrongful damage done by a third party was completely rejected in the time of

---

58 Krückmann op. cit. 52.

59 Cannata *Sul problema* (op. cit.) 30.

60 MacCormack *Custodia.* (op. cit.) 171.

61 Cf. Robaye op. cit. 296.

62 See. e.g. Földi *Sulla responsabilità* (op. cit.) 137 ff.; Idem *Commercial legal institutions* (op. cit.) 107.

63 See e.g. Földi *Anmerkungen* (op. cit.) 272–274.

64 Cf. Földi *Anmerkungen* (op. cit.) 273.

Iulianus. According to Marcellus, however, "sometimes" an action can be brought against the debtor who is, consequently, liable for *damnum iniuria datum* in special and obvious cases. But only in case of his fault. Specifically, 1. when the party could have taken such care of the thing that it could not have been injured; 2. when the *custos* caused the damage. Therefore, we hold that the "discrepancy" between the standpoints of Iulianus and Marcellus is not a real one; it is about that the main rule, formulated by Iulianus, was developed and supplemented by Marcellus and Ulpianus.[65]

As for the interpretation of the texts Iul. D. 13, 6, 19 and Ulp. D. 19, 2, 41, in our view, those authors come to the right conclusion who interpret *custodia*-liability from a subjective or a "mixed" point of view (i.e. partly from an objective and partly from a subjective). In this regard, the interpretations of Krückmann, MacCormack, and Robaye seem to be correct. Földi comes to a similar conclusion in the Hungarian literature.

*g)* As mentioned above, one of the reasons why Roman jurists did not extend the objective *custodia*-liability to *damnum ab alio datum* could be rejection of the extension of active legitimation regarding *actio legis Aquiliae* to other persons than the owner. (In the time of Iulianus [i.e. originally], rejection was of an overall character. Later, in the time of Paulus and Ulpianus, it was partial.) It was presumably attributable to the protection of the owner, the legal nature of *actio legis Aquiliae*,[66] as well as traditionalism, or conservatism, furthermore, the "case law approach"[67] of Roman lawyers.

*h)* Unless our argumentation is incorrect, *damnum ab alio datum* cannot be considered as a *casus minor*. The originality of the expression "cura aut diligentia" does not

---

65 Cf. Robaye op. cit. 296.

66 The action based on *lex Aquilia* is obviously a *mixta actio* in the Justinianic law (see Inst. 4, 6, 19: *"legis Aquiliae actio de damno mixta est..."*); but, according to the prevailing view in the modern literature of Roman law, it is to be considered as a "mixed action" in the classical Roman law, too (cf. e.g. Heinrich Honsell – Theo Mayer-Maly – Walter Selb: *Römisches Recht*. Berlin–Heidelberg–New York–London–Paris–Tokyo, Springer–Verlag, 1987. 365.; Kaser–Knütel–Lohsse op. cit. 314.; see differently e.g. Ulrich von Lübtow: *Untersuchungen zur „lex Aquilia de damno iniuria dato"*. Berlin, Duncker & Humblot, 1971. 73.). According to the view of András Földi published in his book on the vicarious liability in 2004, the theory of cumulation is "strongly doubtful" (Földi *Vicarious liability* [op. cit.] 234). For the legal nature of *actio legis Aquiliae* see, in addition, e.g. Ankum *Actions* [op. cit.] 31 ff. (= Idem *Antología* [op. cit.] 127 ff.); in Ankum's view, the interpolations regarding *actio legis Aquiliae* are rather superficial, and the original penal character of this action is still clearly visible in many Digest–texts (Ankum *Actions* [op. cit.] 39 = Idem *Antología* [op. cit.] 135). The topic debating the legal characteristics of *actio legis Aquiliae* would require an autonomous study. Since it would be impossible to treat here appropriately the problem of the *concursus* of the *actio legis Aquiliae* with the reipersecutory actions, we cannot go deeper into this problem here.

67 On the "case law approach" regarding the scope of lesser accidents, see the above–cited works of András Földi. On the "aktionenrechtliches Denken" of Roman jurists see e.g. Max Kaser – Karl Hackl: *Das römische Zivilprozeßrecht.* München, C. H. Beck, 1996[2]. 235.; Wolfgang Kunkel – Martin Josef Schermaier: *Römische Rechtsgeschichte*. Köln–Weimar–Wien, Böhlau, 2001[13]. 117.

seem to be a crucial problem because "custodia" and "cura aut diligentia" mean the same in this regard. The possible interpolation seems to have been a stylistic, rather than a substantial one.

Consequently, the responsibility for *damnum ab alio datum* is considered to have been as a subjective (i.e. liability for *culpa*) and not as an objective liability (i.e. liability for *custodia*) in classical Roman law.

As a conclusion, let us emphasize that *damnum ab alio datum* does not belong to the class of lesser accidents, serving as basis for *custodia*-liability. Since *damnum ab alio datum* cannot be considered, as a *vis maior* either, the wrongful damage caused by a third person is to be regarded as a "casus medius", similar to "simple" robbery.

In Földi's opinion, as we have seen, the *damnum ab alio datum* was mostly out of the scope of *custodia*. However, wrongful damage committed by another was always out of the scope of the events for which a *custodiens* was objectively liable, which phenomenon we attribute to the subjective interpretation of the above-cited fragments. Based on this consideration, *damnum ab alio datum* can be regarded as a "casus medius".

### 3. Fuga servi (servorum)

*a)* The complicated problem of the flight of the slave would require an autonomous monograph. In our study, this topic can only be treated in a nutshell.

In the sources of classical and Justinianic Roman law we can discover a distinction between slaves "qui custodiri solent" and slaves "qui custodiri non solent".[68] As Ulpianus notes in a probably interpolated fragment,[69] nobody is liable for the "flights of slaves who are not habitually under guard" (in the translation edited by Watson). Although *fuga servi* can be regarded as an evitable accident (i.e. it is not a *vis maior*), based on this fragment it is evident that nobody is responsible for the flight of the slave whom it is not customary to guard. In this famous and much-disputed fragment, the flight of such a slave is mentioned together with typical cases of *vis maior*.[70]

In another much-disputed text (D. 13, 6, 18 *pr.*), which may also have been interpolated by the compilers, Gaius, *inter alia*, excludes the liability of the *commodatarius* for the flights of the slaves "not usually confined" (in the translation edited by Watson).[71]

---

[68] Cf. e.g. Metro op. cit. 153.

[69] See Ulp. D. 50, 17, 23: *"Fugae servorum qui custodiri non solent… a nullo praestantur"*. On this much–disputed fragment see e.g. Paris op. cit. 203 ff.; Arangio-Ruiz op. cit. 94 f.; de Robertis op. cit. I, 33 ff.; Robaye op. cit. passim; MacCormack *Dolus* (op. cit.) 198 f.; Cardilli op. cit. passim; Serrano-Vicente *Custodiam praestare* (op. cit.) 256 ff.

[70] *"[...] fugae servorum qui custodiri non solent, rapinae, tumultus, incendia, aquarum magnitudines, impetus praedonum a nullo praestantur."*

[71] *"In rebus commodatis talis diligentia praestanda est, qualem quisque diligentissimus pater familias suis rebus adhibet, ita ut tantum eos casus non praestet, quibus resisti non possit, veluti… fugas servorum qui custodiri non solent."* See e.g. Paris op. cit. 118 ff.; Arangio-Ruiz op. cit. 169.; Luzzatto op. cit. 132 ff.; MacCormack *Custodia* (op. cit.) 208 f.; Robaye op. cit. passim, especially

In certain cases the debtor, as a *custodiens*, is objectively liable for the *fuga servi*; there are, however, situations, when the debtor is not responsible for the flight of the slave. In this regard Kaser points out that the distinction between *servi custodiendi* and *non custodiendi* was quite uncertain, and the liability for *fuga servi* was judged from case to case.[72]

*b)* Based on Ulp. D. 13, 6, 5, 6[73], it seems to be obvious that in case of the *commodatum* of a slave, *custodia*-liability was doubted even in time of the *veteres*. According to Ulpianus, among the earlier jurists it was a question whether there was a liability for the safe-keeping of Ulpianus, among the earlier jurists it was a question whether there was a liability for the safe-keeping of a borrowed slave. Sometimes the *commodatarius* is liable for the safe-keeping even of a slave lent in chains or of an age to demand safe-keeping. "If the intention was that the one who sought to borrow" (as of the translation edited by Watson) should be liable for safe-keeping, then it should be held that the *commodatarius* must be liable for it (i.e. for *custodia*, in an objective sense). In the present study it would be impossible to treat this text appropriately. We would like to lay down only that Ulpianus refers back here to the preclassical antecedents of the development leading to the formation of the clear distinction between "servi custodiendi" and "servi non custodiendi" in the classical era.

In the passage D. 6, 1, 21,[74] which is out of the topic of *custodia*-liability, Paulus analyses a case the starting point of which was the flight of a slave from a possessor in good faith *(bonae fidei possessor)*. The essence of this text is summarized as follows (N.B. without giving a comprehensive interpretation on this fragment here). Where a slave runs away from a *bonae fidei possessor*, we may ask, Paulus says, whether the slave was one that ought to have been guarded. For, if he seemed to have been of "good (unblemished) reputation", so that he ought not to have been kept in custody, the *possessor* must be released from liability. If, however, the slave ought to have been guarded *(culpa)*, the defendant should be condemned, i.e. the possessor will be liable for the flight of the slave). Paulus describes a clear distinction between slaves of "good reputation" who, therefore, ought not to have been guarded, and slaves who ought to have been guarded. In the first case, the *possessor* (i.e. the defendant of the

284.; Cardilli op. cit. 496 ff.; Ankum *Prêt de couverts* (op. cit.) 17 ff.; Serrano-Vicente *Custodiam praestare* (op. cit.) 245 ff.

72 Kaser *Die actio furti* (op. cit.) 110.

73 *"Sed an etiam hominis commodati custodia praestetur, apud veteres dubitatum est. Nam interdum et hominis custodia praestanda est, si vinctus commodatus est, vel eius aetatis, ut custodia indigeret. Certe si hoc actum est, ut custodiam is qui rogavit praestet, dicendum erit praestare."* On this much–disputed fragment see e.g. Cardilli op. cit. 173 ff.; Serrano-Vicente *Custodiam praestare* (op. cit.) 250 ff.

74 *"Si a bonae fidei possessore fugerit servus, requiremus, an talis fuerit, ut et custodiri debuerit. Nam si integrae opinionis videbatur, ut non debuerit custodiri, absolvendus est possessor... Si vero custodiendus fuit, etiam ipsius nomine damnari debebit..."* On this text see e.g. Cannata *Ricerche* (op. cit.) 46 ff.; Serrano-Vicente *Custodiam praestare* (op. cit.) 253.; Emanuele Stolfi: *Studi sui 'Libri ad edictum' di Pomponio II.* Milano, Edizioni Universitarie di Lettere Economia Diritto, 2001. 331 ff.; Wacke op. cit. 73 ff.

*rei vindicatio*) of the slave has to be released from liability; yet in the second case, the defendant of the *rei vindicatio* is liable for the flight of the slave.

In the much-disputed D. 47, 2, 81 (80) *pr.*[75], Papinianus analyses the following case. Somebody has sold, yet not delivered a slave, probably a *servus non custodiendus*[76], i.e. a slave who ought not to have been guarded, and the slave is stolen. It is without the fault of the vendor; the better opinion (N.B. the expression "magis est" apparently refers to the controversy among the jurists in this question) is that the vendor will be entitled to the action for theft. The vendor is regarded to be interested either because the property was in his hands, i.e. he was the owner of the slave, or because he will be obliged to assign his actions, i.e. the reipersecutory actions (*rei vindicatio* or *condictio furtiva*)[77] because *actio furti* can be brought by the vendor. On this text we cannot give a full interpretation here. We merely intend to state that this text is out of the topic of *custodia*-liability; the vendor in the present case is not liable for *custodia,* notwithstanding he has *actio furti*. In case of a *servus custodiendus*, the vendor would be objectively liable for *custodia*.

*c)* As a conclusion of this brief analysis, we can lay down that in case of the flight of a *servus custodiendus,* the debtor is liable for *custodia*; and the flight of such a slave falls under the scope of lesser accidents. However, in case of a *servus non custodiendus,* the debtor is not liable for *custodia*. The flight of a slave cannot be considered as a superior force since this accident is avoidable even in the case of a *servus non custodiendus*. Therefore, in this second case *fuga servi* can be regarded as a "casus medius".

In the cases of the flight of a slave we can discover a "border area" of the *casus minor* and *casus medius*.

## IV. Conclusions

*a)* Summarising the analysis of the above-cited texts, let us emphasize again that the "traditional" classification of the accidents (*casus minor* and *casus maior*) does not include all cases of the accidents. Inspired by the results of the research by András Földi,[78] it seems to be obvious that there are events between "lesser accidents" (for which a *custodiens* is liable) and "acts of God" (which cannot be avoided by human efforts). The case of the simple robbery (not in the sense of *vis maior*), the wrongful damage committed by a third person, and certain cases of the flight of slaves (when the slave should not have been guarded) were investigated in our study. These cases

---

[75] *"Si vendidero neque tradidero servum et is sine culpa mea subripiatur, magis est, ut mihi furti competat actio: et mea videtur interesse, quia dominium apud me fuit vel quoniam ad praestandas actiones teneor."* Cf. e.g. Paris op. cit. 268 ff.; Arangio-Ruiz op. cit. 155 f.; Robaye op. cit. 385 f.; Voci op. cit. 115 f.; Pennitz op. cit. 395 f.

[76] Cf. Pennitz op. cit. 395[117].

[77] Cf. Arangio-Ruiz op. cit. 155 f.

[78] See the above–cited works of the author.

are out of the scope of lesser accidents and "acts of God", too. In order to classify these events ("dogmatically"), the introduction and application of a third category, the concept of "casus medius", seems to be necessary.

A "casus medius" can be prevented, in principle, with proper (or extreme) precautions (it cannot be regarded as an inevitable accident), but it would be unjust to make the debtor (objectively) responsible for such an accident. Therefore, it is beyond *custodia*-liability. This is the main reason, in our opinion, why a third dogmatic category, i.e. "casus medius", needs to be applied regarding these cases.

Applying this new term, the usual dichotomy (*casus minor–casus maior*) can be changed to trichotomy: *casus minor*, *casus medius*, and *casus maior*.

The term "casus medius" does not appear in the sources of Roman law. But the same is also true for the term "casus minor". However, these concepts cannot be regarded to be anachronistic. Introducing and applying the term "casus medius" will perhaps generate criticism due to, *inter alia*, the conservatism of jurisprudence, yet we hope that the current classification of accidents can be supplemented with the new concept of "casus medius".

*b)* The following question arises: is there any coherence regarding "casus medius" cases?

Cases of *rapina* and *damnum ab alio datum* have a common core: violence (in the first case against a person and in the second case against a thing) which poses obviously a limit to objective liability for *custodia*.

In addition, a robbery or a wrongful damage committed by another would be hard to foresee or prevent and the same is true for the flight of a *servus non custodiendus*.

It is generally recognized that prevention is primary principle regarding legal responsibility.[79] In our opinion, the preventive function of responsibility could not be fulfilled if a *custodiens* were liable for *rapina*, *damnum ab alio datum*, or for the flight of a *servus non custodiendus*. Without any doubt, these events would be extremely difficult to avoid, foresee, or prevent. This may have been be the main reason for a *custodiens* not being liable for these events which, however, cannot be considered as irresistible and, therefore, as "acts of God". Consequently, there is a need to introduce a third dogmatic category i.e. of "casus medius" for such events.

The responsibility for *custodia*, in our view, has to be analysed from a "mixed" approach, i.e. from an objective and a subjective approach as well.[80] Liability for *custodia* cannot be interpreted exclusively from an objective perspective. Prevention of a *casus minor* also requires an improved diligence from the *custodiens*. However, prevention of events falling under the scope of "casus medius" (simple robbery; wrongful damage done by a third person; flight of a *servus non custodiendus*) would require such extreme diligence which should not be deemed as expected even from a *custodiens*.

---

[79] Cf., first and foremost, Marton *Les fondements* (op. cit.) 344 ff. ("premier principe de la responsabilité civile").

[80] Cf. the above–cited works of Cannata and MacCormack.

*c)* According to Földi,[81] as we have seen, it is only liability for theft of the *custodiens* that can be regarded as unambiguous in classical Roman law; apart from the simple and obvious cases, liability for *custodia* was only casuistically established. Földi emphasizes that it is not the possibility of human resistance that is of great importance in this regard; the key issue is whether the circumstances of the accident can or cannot be proven. This argumentation is very conceivable, yet we also have to draw attention to the importance of the aspect whether a debtor is able to foresee, avoid, and prevent the damage. In the cases of "casus medius", the prevention of the damage would require excessive efforts from the debtor especially in the case of robbery, which includes violence against a person.

We agree with Földi's view that responsibility for *custodia* included primarily liability for theft, and that *custodia*-liability cannot be considered as a responsibility for all accidents out of the scope of "acts of God". Practical aspects of the probability could also play a role considering the decision of the question whether or not a debtor was liable for a particular accident. In this regard, it is undoubtedly important to distinguish whether the thing is still there or not. One of the bases of *custodia*-liability for theft may be that the thing has disappeared in suspicious circumstances from the custody of the debtor. However, in case of *damnum ab alio datum* the thing is still there, consequently, the exculpation for such damage seems to be more conceivable.

*d)* A few words on the question of the above-mentioned "casuistic method" i.e. "case law approach". We think that there are guiding principles, which play a significant role with regard to the cases of "casus medius".

Violence seems to be the limit of *custodia*-liability. If our argumentation is correct, there is no objective *custodia*-liability for robbery or for wrongful damage caused by a third person. Violence is the linchpin between these two accidents. These events, moreover, are much less predictable and preventable than theft.

As for the flight of the *servus non custodiendus*, the debtor was not obliged to foresee this event. Therefore, his liability for such damage would be contrary to the preventive nature of legal responsibility. As we have seen, there is a clear distinction between *servi custodiendi* and *servi non custodiendi* in the sources of Roman law, which seems to be a very conscious dichotomy.

The element of violence in cases of *rapina* and *damnum ab alio datum* as well as the differentiation between the two types of the slaves refer to guiding principles in spite of the "case law approach".

*e)* Last but not least, let us see the "three-stage scale" of the accidents investigated (or mentioned at least) in our study – in a summarized form:

- *Casus minor*: not an original Roman law term (it has been created by Baron in the 19th century) for accidents which can be avoided by human efforts and for which a *custodiens* is objectively liable (i.e. independently of his fault).
- *Casus medius*: a new dogmatic category for accidents which can be avoided

[81] See the above–cited works of the author.

by human efforts but for which a *custodiens* is not (objectively) liable. It includes (in the light of our research) *a)* the "simple" robbery; *b)* the wrongful damage committed by another; *c)* and the flight of a *servus non custodiendus*. It would be extremely difficult for the debtor to foresee, to prevent, or to avoid these accidents. Therefore, the objective liability for *custodia* did not extend to these events.

– *Casus maior*: an original Roman law term for accidents which human weakness cannot prevent.

This would be a "three-stage scale" of the accidents with the brand new term "casus medius".