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“Casus medius” in Roman Law? (A Brief Summary)

The following paper – which is a short contribution to the topic of the limits of *custodia*-liability in Roman law – is an edited version of the English-language part of the author’s habilitation lecture entitled “*Casus medius*” a római jogban? (“*Casus medius*” in Roman law?), held on September 28, 2020 at the ELTE Faculty of Law. It summarises the most important thoughts of the author’s habilitation thesis, which will be published in book form in 2021 [*A custodia-felelősség problémái a római jogban* (*Problems of custodia-liability in Roman law*), ELTE Eötvös Kiadó, Budapest, 2021, with a summary in French].

1.

It is well known that the responsibility for *custodia* is mostly (but even in the modern literature not exclusively) considered an “objective contractual liability” in the literature of Roman law. It did not presuppose fault, being a liability for so-called “lesser accidents” in classical Roman law (cf. e.g. Schulz: “liability for *custodia* implied a liability for lesser accidents”), according to the objective theory of *custodia*-liability (which can be considered to prevail, even nowadays).

However, there are different interpretations regarding the nature of *custodia*-liability. With regard to the subjective interpretation of *custodia*-liability, first and foremost the much-disputed book by Robaye deserves mentioning from the modern bibliography. According to Robaye, “la *custodia* est un critère de responsabilité subjective”. The distinguished Italian Romanist Voci also interpreted the liability for *custodia* in the context of *diligentia* and *culpa* (i.e. from a subjective approach), in his study of the system of liability in Roman private law.

The legal construction of 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). It cannot be interpreted exclusively from an objective or a subjective perspective. With regard to the mixed approach of *custodia*-liability, we can refer, for instance, to the works of Cannata and MacCormack. According to Cannata, the term “*custodiam praestare*” “non esprime un criterio di responsabilità, ma un’obbligazione contrattuale”, and *custodia* “rappresenta l’oggetto di un specifico dovere di diligenza”. MacCormack emphasised – with regard to Ulp. D. 19, 2, 41 – that *custodia*-obligation means an obligation to exercise a certain type of *diligentia*. He also stressed that the term “*custodiam praestare*” does not express a liability independent of fault.

2.

As for “casus minor”, this Latin term was not created by the Roman jurists; it is only applied by modern scholars to identify the accidents for which a *custodiens* is objectively liable. The term “casus minor” (*niederer Zufall*) was created by *Julius Baron*, in the 19th century, for describing accidents which can be avoided by human efforts and for which a *custodiens* is (objectively) liable (i.e. independently of his fault).

It deserves a special mention that a *custodiens* was not liable for all accidents out of the scope of acts of God. Therefore, *custodia*-liability cannot be defined as a liability for all accidents excepting *vis maior*. The *custodiens* was liable for theft (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; cod. 48, 4) and for other typical lesser accidents, casuistically specified in the sources of Roman law. In this regard, we have to refer to the research by *András Földi*, who strongly emphasises the “case law approach” of the classical jurists in this respect. (Földi devoted numerous works to the topic of responsibility, including *custodia*-liability, as well.) Zimmermann, in a summarised form, also refers to the “casuistical” (i.e. “case law”) approach in this regard.

3.

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. D. 19, 2, 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; Inst. 3, 14, 4], “casus improvisus” [C. 4, 35, 13], “theou bia” [Gai. D. 19, 2, 25, 6], and “vis divina” [Ulp. D. 39, 2, 24, 4]) – in contrast to *casus minor* – appears in the Roman sources. Even a *custodiens* is not liable, of course, for “superior force” (“act of God”), i.e. for such an (inevitable) accident which human weakness cannot provide against.

4.

In our opinion, the usual and “traditional” distinction between *casus minor* and *casus maior* does not imply all possible 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 efforts. In this regard – on the basis of our research – certain cases of robbery (*rapina*), the wrongful damage committed by a third person (*damnum ab alio datum*), and certain cases of the flight of slaves (*fuga servorum*) can be mentioned. In order to classify these accidents (“dogmatically”), in our opinion, the introduction and application of a third dogmatic category, the concept of “casus medius”, seems to be reasonable.

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

5.

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, "casus medius" covers accidents which can be avoided by human efforts on the one hand but for which a *custodiens* is not (objectively) liable on the other hand. It includes, in the light of our research, "simple" robbery (other cases of robbery belong to the scope of acts of God), wrongful damage committed by another, and the flight of a *servus non custodiendus* (when the slave should not have been guarded; this case is out of the scope of lesser accidents; the flight of a *servus custodiendus* can be considered as *casus minor* since such a slave should have been guarded).

As for *rapina*, for example, it is the risk of the purchaser. According to Neratius, when a thing is taken from the vendor by force, although he should guard it (he is liable for *custodia*), there is no further consequence than he is liable for the transfer of his reipersecutory actions to the purchaser, because custody is of little advantage where violence is employed (cf. the translation edited by Watson: "for its safekeeping is of slight avail against force"). The robbery is, therefore, the risk of the purchaser for whom the vendor should transfer his reipersecutory actions, due to the (consequently applied) principle "periculum est emptoris". In a summarised form: the vendor is not liable for the robbery, and the purchaser cannot bring an action for damages – based on contractual liability – against him but the vendor is obliged to assign his reipersecutory actions to the purchaser, in accordance with the rule of "periculum est emptoris". (Cf. Ner. D. 19, 1, 31 pr.)

6.

Prevention can be considered as the primary principle of legal responsibility (in this regard we have to refer, first and foremost, to Marton's view). Without any doubt, a *rapina*, a *damnum ab alio datum*, or a flight of a *servus non custodiendus* would be extremely difficult to be avoided, foreseen, or prevented. This may be, probably, the main reason for a *custodiens* not being liable for these accidents which, however, cannot be considered as irresistible and, therefore, as "acts of God". Consequently, in our opinion, a new dogmatic category, of "casus medius", needs to be used in regard of these events. The prevention of a *casus minor* requires, naturally, an improved diligence from the *custodiens*. However, the prevention of the events belonging to the scope of "casus medius" would require such an extreme diligence which would not be expectable even from a *custodiens*.

7.

We think that there are guiding principles which play a significant role with regard to the cases of “*casus medius*”. The element of violence in the cases of *rapina* and *damnum ab alio datum*, as well as the above-mentioned differentiation between the two types of the slaves, refer to guiding principles, in spite of the “case law approach”.

Violence seems to be the limit of the *custodia*-liability. If our argumentation is correct, there is no objective *custodia*-liability for robbery or for wrongful damage caused by a third person. The violence is the lynchpin between these two accidents.

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.

8.

In summarised form, *casus minor* is a term for accidents which can be avoided by human efforts and for which a *custodiens* is objectively liable. *Casus medius* would be a new dogmatic category for accidents which can be avoided by human efforts on the one hand but for which a *custodiens* is not objectively liable on the other. Finally, *casus maior* is an original Roman law term for accidents which human weakness cannot prevent. This would be a “three-stage scale” of the accidents (instead of the dichotomy of *casus minor* and *casus maior*), with the brand-new term of “*casus medius*”.