RIDA

REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ

65 2018

Presses Universitaires de Liège

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Éditorial

Jean-François Gerkens

Dans l'éditorial de la *RIDA* 64, nous déplorions la disparition de Joseph Mélèze-Modrzejewski, membre de notre comité de rédaction. Avec le décès de Hans Ankum, c'est un nouveau membre de notre comité de rédaction qui est venu à manquer. Il y était entré pour le numéro 36 (1989), il y a donc environ 30 ans, en même temps que Giovanni Pugliese.

Hans Ankum a fait l'objet d'une commémoration lors de l'assemblée générale de la SIHDA d'Édimbourg, ainsi que lors d'une rencontre du « Forum romanum », société savante qu'il avait fondée au sein de son Université d'Amsterdam. Lors de cette réunion du 18 octobre 2019, Eric Pool a évoqué « le maître et ami Hans Ankum », Laurens Winkel « le romaniste », Edgar du Perron le « professeur de l'Université d'Amsterdam » et l'auteur de ces mots, « Hans Ankum et la SIHDA ». La *RIDA* commémorera Hans Ankum dans son prochain numéro.

Au demeurant, le présent numéro commémore, comme annoncé, Joseph Mélèze-Modrzejewski sous la plume de Jakub Urbanik. Il rend également hommage à Berthold Kupisch à l'initiative de Jeroen Chorus.

Enfin, le premier article du présent numéro constitue l'élaboration du texte de la conférence introductive à la session internationale de la SIHDA de Bologne. Pascal Pichonnaz l'avait prononcée le 12 septembre 2017,en ouverture de la session internationale dont la chronique est parue dans le numéro précédent de la *RIDA*. Le présent numéro contient quant à lui, la chronique de la SIHDA de Cracovie de 2018.

Au titre des nouveautés éditoriales, la rédaction de la *RIDA* a décidé de publier — dans le futur et en plus de la revue — des monographies sous forme de « Hors-série la *RIDA* ». Nous espérons que l'initiative trouvera également son lectorat.

Excellente lecture à toutes et tous !

Chaudfontaine, le 11 novembre 2019.
Jean-François Gerkens

Fullness of Κουστωδία/Φυλακή (*Custodia*) in Early Byzantine Law

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1. Introduction

In the contract of partnership (*societas*) the partner is liable for *dolus* (fraud) or *culpa* (fault), but not for certain typical accidents. But there is one text in title *pro socio*, namely D. 17.2.52.3, in which also *custodia*-liability is imposed on the partner (*socius*)[1]. If cattle is entrusted to him and this cattle is valuated, he must answer for their guard (*custodiam praestare debuit*). It is the valuation by *aestimatio* which makes that his liability is extended with *custodia*[2], i.e. responsibility for loss by theft[3]. The sixth-century Byzantine jurist Stephanos refers to this *custodia* as a specific form of *custodia*[4]:

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1. Cf. for example M. Kaser, *Das römische Privatrecht* I[2] [*RPR* I], Munich, 1971, p. 576: "*Die Gesellschafter haften einander für* dolus*, außerdem schon in klassischer Zeit, wenn ein* socius *gemeinsames Gut beschädigt hat, für* culpa*, ferner, wenn er Gesellschaftssachen zur Bearbeitung übernimmt, für* custodia." Kaser refers for the latter to D. 17.2.52.3, but he generalises the point, since the text mentions, valuated cattle only. The text presents problems if considered from the point of view of classical Roman law (*imprudentibus* vs *damna fatalia* and several emendations have been suggested. However here its Justinianic version is point of departure.

2. For the increase in liability, see H. de Jong, "Increase in Liability by Aestimatio/Διατίμησις (Valuation). A Survey from Classical Roman Law to Byzantine Law", *ZSS RA* (2018), p. 364–394.

3. In the case of the fuller (D. 47.2.12*pr* and D. 19.2.13.6) *custodia* comprised also the loss or damage caused by mice, thus loss in general which could have been prevented by absolute guard. This wide liability of *custodia* is not present here, as D. 17.2.52.3 makes clear. See R. Zimmermann, *The law of obligations: Roman foundations of the civilian tradition*, Oxford, 1996, p. 399.

4. For Stephanos, see H. de Jong, *Stephanus en zijn Digestenonderwijs*, Den Haag, 2008.

D. 17.2.52.3 (*Ulpianus libro trigensimo primo ad edictum*):

Damna quae imprudentibus accidunt, hoc est damna fatalia, socii non cogentur praestare: ideoque si pecus aestimatum datum sit et id latrocinio aut incendio perierit, commune damnum est, si nihil dolo aut culpa acciderit eius, qui aestimatum pecus acceperit: quod si a furibus subreptum sit, proprium eius detrimentum est, quia custodiam praestare debuit, qui aestimatum accepit. Haec vera sunt, et pro socio erit actio, si modo societatis contrahendae causa pascenda data sunt quamvis aestimata.

"Partners cannot be compelled to assume liability for losses which they could not have anticipated, that is, unavoidable losses. Therefore, if animals subjected to prior valuation have been entrusted to a partner and are lost through brigandage or fire, the loss is shared, provided that there was no *dolus* (fraud) or *culpa* (fault) on the part of the partner who received the animals so valuated. If, on the other hand, the animals were stolen by thieves, the loss is borne by the man who received the valuated animals, because he should have provided for their *custodia* (guard). This is all true, and the *actio pro socio* will be available, provided that the cattle although valuated were handed over to be pastured on account of a contract of *societas* (partnership)[5]."

Sch. Ca 12 ad B.12.1.50.3 = D. 17.2.52.3 (BS.481/18–28 [Stephanos]):

Στεφάνου. Σημείωσαι, ὅτι ἡ μὲν τῶν λῃστῶν ἔφοδος τυχηρὰ εἶναι δοκεῖ περίστασις, ἡ δὲ κλοπὴ οὐκ ἔστι τυχηρὰ περίστασις, κουστωδίᾳ δέ, τουτέστιν φυλακῇ καθυποβαλλέτω· διὸ τῷ κουστωδίαν χρεωστοῦντι ἐκ περιστάσεως καὶ ἡ κλοπὴ κινδυνεύεται, ἐν ᾧ μὴ κουστωδίαν περὶ τὸ κλαπὲν ἐνεδείξατο. Κουστωδίαν δὲ νόησον ἐνταῦθα, ἣν ἀεὶ λέγει πλέμαμ (πλέναμ *HdJ*) κουστωδίαν, τουτέστι τὴν ἐπιμελῆ κουστωδίαν, ὥστε καὶ κλοπῆς περιγίνεσθαι· (…)

"By Stephanos. Notice that the attack of robbers appears to be an accidental situation, but the theft is not an accidental situation, and to *custodia*, that is the guard, he must subject; therefore, because he has been objected to *custodia* in this situation he takes the risk too, in case it has pointed out there was no *custodia* for the stolen thing. Consider *custodia* here, which he always mentions *plenam custodiam*, that is to say, the careful *custodia*, that also theft is part of it; (…)[6]."

Stephanos starts with the difference between an attack by robbers and theft: they are not comparable. An attack by robbers has to be interpreted as an accidental situation, but theft is not an accidental situation; apparently theft was to be reckoned with constantly. That is a reasonable explanation of the text. The surprise, however, follows: Stephanos specifies the form of *custodia* or φυλακή meant in D. 17.2.52.3, as *plena custodia*. According to him this *plena custodia* means careful *custodia*. By paraphrasing it in this way Stephanos implicitly suggest that there is more than one form of *custodia*, that is when the *custodia* is not *plena*. Apparently

5. Translations from the Digest are based on A. Watson, *The Digest of Justinian*, Philadelphia, 1985.

6. The Greek fragments are as literally as possible translated by the author.

the Byzantine jurist makes use of a specific system of different levels of *custodia* each with its own specification. In interpreting D. 17.2.52.3 Stephanos may have D. 18.6.2.1 in mind which reads *plena custodia*:

> D. 18.6.2.1 (*Gaius libro secundo cottidianrum rerum*):
>
> *Custodiam autem ante admetiendi diem qualem praestare venditorem oporteat, utrum plenam, ut et diligentiam praestet, an vero dolum dumtaxat, videamus. Et puto eam diligentiam venditorem exhibere debere, ut fatale damnum vel vis magna sit excusatum.*
>
> "Let us now consider the extent of the vendor's liability for *custodia* until the time of measuring out; is it *plena*, so that he has to show diligence, or is he liable only for *dolus*? I take the view that he has to display *diligentia*, but that unavoidable accident (*damnum*) or great violence (*vis magna*) will excuse him."

The suggestion is based on the circumstance that these (the scholion and the Digest fragment)[7] are the only texts which mention *plena custodia*. Hence it is likely if not of necessity that the liability in these fragments must be interpreted in the same way in early Byzantine law: as careful *custodia*.

In the Romanist literature *custodia* has been exhaustively examined[8], but fullness of *custodia* was never the main topic in these researches. What is meant by the fullness of *custodia* or φυλακή? What is the content of this obligation? We shall basically deal with early Byzantine law, because the doctrine of the fullness of *custodia* or φυλακή is only found in the teachings of the sixth-century Byzantine jurist Stephanos. Dieter Nörr said that the "*Scholiasten*" had developed this doctrine, "*am deutlichsten*" in the scholia by Stephanos[9]. The graduation in *custodia* is according to Nörr an invention by the "*Scholiasten*". The question is: is this true? Is there a difference concerning the fullness of *custodia* or φυλακή between Justinianic law and early Byzantine law[10]? In (2) I shall give a brief overview of the — more or less elaborate — Roman and Byzantine law literature on *custodia* in D. 17.2.52.3 and *plena custodia* in D. 18.6.2.1. What interpretations of *custodia* in these fragments do exist? However, not all authors deal with both fragments.

7. D. 16.3.1.12 has not this expression, but suggests a connection, see below.

8. For the meaning of *custodia*, see among others G. MacCormack, "*Custodia* and *Culpa*", *ZRG RA* 89 (1972), p. 149–219; G.C.J.J. van den Bergh, "*Custodiam Praestare*: *Custodia*-Liability or Liability for Failing *Custodia*?", *Tijdschrift voor Rechtsgeschiedenis* 43 (1975), p. 59–72; G.C.J.J. van den Bergh, "*Custodia* and *Furtum Pignoris*", in *Studi in onore in Cesare Sanfilippo* I, Milan, 1982, p. 603–614.

9. D. Nörr, *Die Fahrlässigkeit im byzantinischen Vertragsrecht*, Munich, 1960, p. 62.

10. For the terms early (and later) Byzantine law see H. de Jong, "Using the Basilica", *ZRG RA* 133 (2016), p. 286–321. In this article I will not deal — or sporadic in the footnotes — with later Byzantine law, because in the later Byzantine period the fullness of φυλακή (*custodia*) is never mentioned as such. This is not so striking, because the fullness refers directly to the Latin word *plena* in *plena custodia*. This *plena* is never translated in a proper way in Greek. See *infra*, n. 42.

In (3) I shall examine the Justinianic law on *plena custodia*[11]. The reason for this is to illustrate that the Byzantine law is of indispensable benefit to understand Justinianic law. In the Digest only one fragment next to D. 18.6.2.1 appears to refer to a form of *plenus* in combination with *custodia*, viz D. 16.3.1.12. Furthermore, I shall try to deduce from the Corpus iuris text the different meanings of *custodia* concerning the fragments dealt with. The relation in abstract meaning between *culpa*, *custodia* and *diligentia* becomes also clear. In (4) the early Byzantine law will be the central point of discussion. There appears to be two explicit different interpretations of the technical meaning of *custodia* or φυλακή, a general and a specific. This will be followed by concluding remarks (5).

2. Literature on D. 17.2.52.3 and D. 18.6.2.1

2.1. Roman law literature: MacCormack and Van den Bergh

In 1972 Geoffrey MacCormack distinguished for the liability for failure to furnish *custodia* three groups where liability other than the obligation to keep the object safe is present[12]. D. 17.2.52.3 is an example of texts of the first group which state or strongly imply that a person — here the partner — required to furnish *custodia* is liable if the object entrusted to him is stolen without his fault. For his argument MacCormack refers to the context in which a contrast is drawn between a case where there is no liability unless fault and a case where is liability irrespective of fault. In this specific fragment the decisive element is according to him the acceptance by the partner of cattle at a valuation which imposes a liability to return. MacCormack interpreted the partner's liability thus as a strict liability, i.e. an objective liability[13].

D. 18.6.2.1 is according to MacCormack an example of texts of the third group in which the obligation to furnish *custodia* is qualified as an obligation to exercise a certain type of *diligentia*, i.e. keeping an object safe. In this fragment there is a contrast between an obligation to refrain from *dolus* and an obligation to show

11. For the classical *custodia*, see literature *supra*, n. 8.

12. MacCormack, *Custodia* and *Culpa* (*supra*, n. 8), p. 159ff., especially p. 167–168, p. 159: "The texts may be considered in three groups: (i) those which appear on the surface to make a person required to furnish *custodia* strictly liable for certain types of loss, (ii) those which imply that there was no such strict liability, and (iii) those which define *custodia* in terms of *diligentia* and so make liability depend upon some lack of *diligentia*."

13. Cf. Kaser, *RPR* II (*supra*, n. 25), p. 325: "*Justinian dagegen führt im Anschluß an die oströmische Schuldoktrin wieder genaue Abstufungen ein. Dabei setzt sich unter philosophischen, rhetorischen und (von der Philosophie vorbereiteten) christlichen Einflüssen der Leitgedanke durch, alle Schadenshaftung auf das Verschulden des Schädigers zurückzuführen. Die Fälle einer 'objektiven' oder einer typisierten Haftung ohne Ansehen des individuellen Schuldvorwurfs, wie sie das klassische Recht vor allem in der* custodia-*Haftung gekannt hat, werden jetzt (im allgemeinen) in die Kategorien der Verschuldenshaftung eingeordnet*."

diligentia[14]. The vendor's liability is subjective. In conclusion, MacCormack did not connect D. 17.2.52.3 and D. 18.6.2.1 with each other. The fragments belong to other groups of *custodia*.

In his studies Govaert van den Bergh did not explicitly examine the *custodia* in D. 17.2.52.3, but he paid attention to *custodia* in D. 18.2.6.2. He noticed in his study of 1982 the degrees of *custodia* in D. 18.2.6.1[15]. In contrast with many other scholars who believed that the text was interpolated, Van den Bergh accepted these degrees of *custodia* as dependent on the status and skill of the debtor, the nature of the object, or the conditions of the contract. An exhaustive explanation is missing.

2.2. Byzantine law literature: Pflüger and Nörr

Heinrich Hackfeld Pflüger briefly refers in *Zur Lehre von der Haftung des Schuldners nach römischem Recht* (1947) to the above mentioned scholion by Stephanos at D. 17.2.52.3. Referring to various fragments from the Corpus iuris, among which D. 18.2.6.2, he interprets this *custodia* or φυλακή as the classical *diligentia*[16]. He notices that the difference only lies in the expression used: "*Verschieden ist nur die Art sich auszudrücken, der Klassiker und der Nachklassiker. Die Klassiker lassen den Entleiher* custodiam praestare*, die Nachklassiker* custodiam plenam *oder* diligentam*; sie lieben die Superlative*[17]." With this interpretation and explanation Pflüger ignores the possibility of different specimina of *custodia*, although Stephanos' scholion gives at the end an unmistakable hint at this. He does not explain why the *custodia* is called *plena* and how it would correspond with *diligens custodia*.

Dieter Nörr's discussion about the Byzantine *custodia* in D. 17.2.52.3 in *Die Fahrlässigkeit im byzantinischen Vertragsrecht* (1960) is quite elaborate. However, the above mentioned scholion by Stephanos is never presented[18]. Nörr does not refer within the scope of D. 17.2.52.3 to D. 18.2.6.2. In his distinction of an untechnical meaning of *custodia* ("*Bewachung*") and a technical meaning of *custodia* (πλένα κουστωδία), Nörr extracts from Stephanos' scholion a third meaning (γενικὴ κουστωδία)[19]. This third meaning is according to Nörr a new

14. MacCormack, *Custodia* and *Culpa* (*supra*, n. 8), p. 177.

15. Van den Bergh, *Custodia* and *Furtum Pignoris* (*supra*, n. 8), p. 609–610.

16. *Inst.* 3.14.2; D. 18.6.2.1; D. 13.6.5.5; D. 13.6.18*pr*; D. 44.7.1.4. H.H. Pflüger, "Zur Lehre von der Haftung des Schuldners nach römischem Recht", *ZRG RA* 65 (1947), p. 121–218, p. 132–133.

17. Pflüger, *Zur Lehre von der Haftung* (*supra*, n. 16), p. 133.

18. D. Nörr, *Die Fahrlässigkeit* (*supra*, n. 9), p. 61–69.

19. Nörr, *Die Fahrlässigkeit* (*supra*, n. 9), p. 62: "*Bekanntlich tritt* custodia *häufig im untechnischen Sinne auf, bedeutet einfach 'Bewachung'. Ihr steht die* custodia *im technischen Sinne gegenüber. Zwischen diese beiden Begriffe schieben die Scholiasten einen dritten ein, der Züge der beider an sich trägt. Er findet sich schon in 18.6.3.4 angedeutet, wird aber erst durch die Scholiasten voll entwickelt, am deutlichsten bei Steph. in den Scholien* Σημείωσαι *zu 17.2.52.3–12.1.50 (I 752) und* Σημείωσαι *zu 13.6.5.2–13.1.5 (II 7).*"

intermediate notion, which equates with *dolus* and therefore reminds of *diligentia quam in suis*. He also refers in this context to BS.1011/3–1012/10 at B.16.9.1.4 (D. 7.9.1.4)[20], discussed below. Notwithstanding the fact that Nörr tries to elaborate Stephanos' suggestion of different species of *custodia*[21], his explanation of the two *custodiae* is unsatisfactory and he does not place the *plena custodia* clearly in the general context of *custodia*.

3. Justinianic law

3.1. *Plena custodia* in the Digest: D. 18.6.2.1 and D. 16.3.1.12

There are only two fragments which comprise of a form of *plenus* in combination with *custodia*. The first one is from Gaius in D. 18.6 (*de periculo et commodo rei venditae*) on which Stephanos in his remark, as already mentioned in the introduction, may have based his doctrine of *custodia*[22]. For convenience's sake the fragment is repeated:

> D. 18.6.2.1 (*Gaius libro secundo cottidianrum rerum*):
>
> *Custodiam autem ante admetiendi diem qualem praestare venditorem oporteat, utrum plenam, ut et diligentiam praestet, an vero dolum dumtaxat, videamus. Et puto eam diligentiam venditorem exhibere debere, ut fatale damnum vel vis magna sit excusatum.*
>
> "Let us now consider the extent of the vendor's liability for *custodia* until the time of measuring out; is it *plena*, so that he has to show diligence, or is he liable only for *dolus*? I take the view that he has to display *diligentia*, but that unavoidable accident (*damnum*) or great violence (*vis magna*) will excuse him."

Gaius indirectly refers with *custodiam… qualem* to the various terms and specifications of *custodia*. From this fragment it can be derived that the *plena custodia* involves especially *diligentia* too. The word *et* from the phrase *ut et diligentiam praestet* is decisive for this. Apparently the guard has to be careful. The next question arises: what does *custodia* without this *diligentia* exactly mean? What does the *custodia* mean when it is not *plena*? Gaius specifies in the fragment the counterpart (*an vero*) of this *plena custodia* too. The other option is namely,

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20. See *infra*, 4c.

21. Nörr, *Die Fahrlässigkeit* (*supra*, n. 9), p. 63: "*Abgesehen von der Subjektivierung durch Anlehnung an die* diligentia *zeigt sich in den Worten:* κουστωδίαν ἐνταῦθα νόησον τὴν φυλακήν, τὴν ἀσφάλειαν *(BS.481/18–28 [Stephanos]* HdJ*) eine Auflösung in Richtung auf eine bloße Sorge- und Sicherungspflicht, bei der die Haftung für Diebstahl nicht nur in der theoretischen Formulierung, sondern auch im praktischen Ergebnis verloren zu gehen droht.*"

22. Cf. D. 39.2.38*pr.* This fragment has the same content as in D. 18.6.2.1, namely the liability of the vendor before delivery of possession. The vendor is liable for (*omnis*) *diligentia*, the subjective *diligentia* and the objective *diligentia*, just as the answer is in D. 18.6.2.1, only formulated in another way around. The *custodia* can be delivered to the purchaser by a stipulation. In this case the vendor loses *omnis culpa*.

that *custodia* is interpreted as *dolus*[23]. The word *dumtaxat* (only) explicitly refers to a form of *custodia* which is not *plena*. The non *plena custodia* corresponds with *dolus*.

In the next Digest fragment, following D. 18.2.6.2, Paul interprets the *plena custodia* with *diligentia* as a greater care than one might show in one's own affairs. That means that this *diligentia* must not be interpreted as merely *diligentia quam in suis*:

> D. 18.6.3 (*Paulus libro quinto ad Sabinum*):
>
> *Custodiam autem venditor talem praestare debet, quam praestant hi quibus res commodata est, ut diligentiam praestet exactiorem, quam in suis rebus adhiberet.*
>
> "The vendor has to observe the same degree of *custodia* as does a person who borrows for use and return; thus, he has to display greater *diligentia* than he might show in his own affairs."

Since the compilers placed this fragment straight after Gaius, we may assume that it was for them the explanation of Gaius' text. It appears therefore that the *diligentia* in *plena custodia* is not interpreted as the concrete, subjective standard of *diligentia*, which is the *diligentia quam in suis*, but as the abstract standard of *diligentia*[24]. I therefore make in the following a distinction as is made in literature between these two forms of *diligentia*, namely between the subjective *diligentia* (concrete, subjective standard of *diligentia*) and the objective *diligentia* (abstract standard of *diligentia*)[25]. The subjective *diligentia* refers to the carefulness as shown in one's own affairs (*diligentia quam in suis*), it refers to the subject of the *custodia*. The objective *diligentia* follows the *diligentia* by taking an abstract standard like the standard care which any very careful head of family will keep to in relation to his own affairs (*diligens paterfamilias*)[26]. Another objective standard is the superlative of *diligentia* (*exactissima diligentia*)[27]. Furthermore, in the Digest fragment Paul

23. Cf. D. 16.3.32 Celsus *libro undecimo digestorum*: "*Quod Nerva diceret latiorem culpam dolum esse, Proculo displicebat, mihi verissimum videtur. Nam et si quis non ad eum modum quem hominum natura desiderat diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem is quam suis rebus diligentiam praestabit.*" See Zimmermann, *The Law of Obligations* (*supra*, n. 3), p. 462–464; Van den Bergh, *Custodiam Praestare* (*supra*, n. 8), p. 66–67.

24. Cf. *Inst.* 3.14.2; *Inst.* 3.14.4; *Inst.* 3.24.5; D. 13.6.18*pr*; D. 44.7.1.4. In these fragments the content of *custodia* with the objective *diligentia* is explained in various ways.

25. Cf. for example W. Kunkel, "*Diligentia*", *ZRG RA* 45 (1925), p. 301ff.; Pflüger, *Zur Lehre von der Haftung* (*supra*, n. 16), p. 159–160; M. Kaser, *Das römische Privatrecht* II[2] [*RPR* II], Munich, 1975, p. 354–355; Nörr, *Die Fahrlässigkeit* (*supra*, n. 9), p. 46–49; Zimmermann, *The Law of Obligations* (*supra*, n. 3), p. 210ff.

26. Kaser, *RPR* II (*supra*, n. 25), p. 351: "*Dieser Maßstab des sorgsamen Hausvaters stammt aus der griechischen Sozialethik. Er war den Klassikern nicht schlechthin fremd, wird aber offenbar von den oströmischen Rechtslehrern bevorzugt, vielleicht unter dem Einfluß der christlichen Sittenlehre.*"

27. *Inst.* 3.27.1. Cf. also Theoph.3.27.1.

compares the *plena custodia* with the *custodia* required in the contract of loan for use (*commodatum*), that means this full *custodia* includes the same objective *diligentia*. In title *Commodati vel contra* (D. 13.6) Ulpian explicitly states what Paul is pointing at:

> D. 13.6.5.5 (*Ulpianus libro vicensimo octavo ad edictum*):
>
> *Custodiam plane commodatae rei etiam diligentem debet praestare.*
>
> "He must clearly answer even for the careful *custodia* of the borrowed thing[28]."

In this fragment the word *etiam*, positioned before *diligentem*, is important. It gives a gradation to the word *custodia*: the careful *custodia* is meant. It indirectly refers to the non-careful *custodia*, thus to various terms and forms of *custodia*. Here too, *custodia* includes the careful *diligentia*, which is, as can be derived from D. 18.6.3, the objective *diligentia*.

The second fragment from title *depositi vel contra* with the comparative of *plenus* and *custodia* reads as follows:

> D. 16.3.1.12 (*Ulpianus libro trigensimo ad edictum*)
>
> *Quod si rem tibi dedi, ut, si Titius rem non recepisset, tu custodires, nec eam recepit, videndum est, utrum depositi tantum an et mandati actio sit. et Pomponius dubitat: puto tamen mandati esse actionem, quia plenius fuit mandatum habens et custodiae legem.*
>
> "Where I gave a thing to you on the condition that if Titius did not accept it, you would look after it, and he did not accept it, it must be considered whether there is only an *actio depositi* or also an *actio mandati*. Pomponius is unsure, but I think that there is an *actio mandati* because mandate was of greater (*plenius*) scope with a mode of *custodia* too."

In this fragment Ulpian assumes to the existence of a *mandatum*, although the opinions differ on this matter. Since the condition is fulfilled, the *tu* has to keep (*custodire*) the thing. According to Ulpian this full fledged (*plenius*) *mandatum* includes also liability for *custodia*, as is explicitly expressed by *custodire*. What the specific content of this *custodia* is, remains unclear. From the context it can be derived it must be the *plena custodia*, so the objective *diligentia* is to be expected. Again the fullness of *custodia* liability is on the table, although in another construction. The comparative form of *plenus* makes clear that the contract of *depositum* lacks this specific *custodia* liability and is therefore less *plenus*.

From the Digest fragments it follows that *plena custodia* comprises the objective *diligentia* in the case of the contracts of *venditio*, *commodatum*, *mandatum* and in that of *societas* with an *aestimatio*. The question now is: what exactly is the standard

28. In the next fragment (D. 13.6.5.6) a question is asked whether this custody applies to slaves too. A condition is that the slave is lent in chains. Indirectly D. 11.4.1.7 is referring to this *diligens custodia*: *Ulpianus libro primo ad edictum*: "*Diligens custodia etiam vincire permittit*."

liability in the contract of *venditio*, *commodatum*, *mandatum* and *societas*? And: where does *plena custodia* figure in all this?

3.2. Standard liability of *venditio, commodatum* and *mandatum*

What do we find in the Corpus iuris concerning the liability for *custodia*? In D. 50.17.23 the liability for the contracts *venditio*, *commodatum*, *mandatum* and *societas* is defined[29]:

> D. 50.17.23 (*Ulpianus libro vicensimo nono ad Sabinum*):
>
> *Contractus quidam dolum malum dumtaxat recipiunt, quidam et dolum et culpam. Dolum tantum: depositum et precarium. Dolum et culpam mandatum, commodatum, venditum, pignori acceptum, locatum, item dotis datio, tutelae, negotia gesta: in his quidem et diligentiam. Societas et rerum communio et dolum et culpam recipit.* (…)
>
> "Some contracts only involve *dolus malus*, some *dolus* and *culpa*. Only *dolus*: deposit and *precarium*. *Dolus* and *culpa*: mandate, loan for use, sale, acceptance of pledge, hire, likewise grant of a dowry, tutelage, unauthorized administration; and indeed, among these we include *diligentia*. Partnership and a sharing of things involve *dolus* and *culpa*. (…)"

The purchaser, mandatory and the borrower are liable for *dolus*, *culpa* and *diligentia*, the partner only for *dolus* and *culpa*. It is striking that the term *custodia* in case of *venditio*, *commodatum* and *mandatum*, as we have read in D. 18.6.2.1–3 and D. 16.3.1.12, is not explicitly mentioned, although *diligentia* is. *Diligentia* is here apparently the careful *custodia* giving its name[30]. There are two fragments in the Corpus iuris, one in the Codex title *De pignoribus* and one in the Digest title *De pigneraticia actione vel contra*, which confirm this meaning of *diligentia* as careful *custodia*[31]:

> C. 8.13.19:
>
> *Sicut vim maiorem pignorum creditor praestare necesse non habet, ita dolum et culpam, sed et custodiam exhibere cogitur* [293].
>
> "Just as a creditor in possession of pledged property is not responsible for any acts of God, so he is responsible for *dolus* and *culpa*, but also for *custodia*[32]."

29. Cf. D. 13.6.5.2 in which is exposed how the liability in various contract can be explained. that is whether one of the parties (or both) profits from the contract. This effects the liability.

30. See Kaser, *RPR* I (*supra*, n. 1), p. 507: "(…) *Im Corp. Iur. ist die* custodia *häufig, aber nicht immer, von der* diligentia *verdrängt.*"

31. Cf. also C. 4.65.28: "*In iudicio tam locati quam conducti dolum et custodiam, non etiam casum, cui resisti non potest, venire constat* [294]."

32. Translations from the Code are based on B.W. Frier *et al.* (eds.), *The Codex of Justinian: a new annotated translation, with parallel Latin and Greek text based on a translation by Justice Fred H. Blume*, Cambridge, 2016.

D. 13.7.13.1 (*Ulpianus libro trigensimo octavo*):

Venit autem in hac actione et dolus et culpa, ut in commodato: venit et custodia: vis maior non venit.

"As in the case of loan for use, both *dolus* and *culpa* are taken into account in this action. So also liability for *custodia*. Not, however, acts of God."

Where in D. 50.17.23 pledge and *commodatum* make liable to *diligentia* next to *dolus* and *culpa*, here they make additionally liable for *custodia*. Apparently *diligentia* and *custodia* are the same notions in these contexts. This will be discussed in (3d). In case of the *venditio* and the *commodatum* the *custodia* includes the objective *diligentia*, as we already found in D. 18.6.2.1. The same apply to *mandatum*, as was presented in D. 16.3.1.12.

There is one Digest fragment concerning the contract of loan for use (*commodatum*) which combines all different designations of liability together[33]:

D. 13.6.5.15 (*Ulpianus libro vicensimo octavo ad edictum*):

(…) *verum in vehiculo commodato vel locato pro parte quidem effectu me usum habere, quia non omnia loca vehiculi teneam. Sed esse verius ait et dolum et culpam et diligentiam et custodiam in totum me praestare debere*: (…)

"(…) nevertheless, in the case of a hired or borrowed vehicle I have in effect a share of its use, because I cannot be everywhere the vehicle goes. Yet the more correct view is, he says, that I must be liable for the whole amount in respect of (*et*) *dolus* and (*et*) *culpa* and (*et*) *diligentia* and (*et*) *custodia* (…)"

3.3. Standard liability of *societas*

It followed from D. 50.17.23 that a partner is liable only for *dolus* and *culpa*. In literature it is stated that *custodia* has not only to do with *diligentia*, but also with the notion of *culpa*[34]. D. 17.2.72 makes clear what this standard *culpa* for *societas* means, as we also can learn from D. 17.2.52.3 and D. 50.17.23:

D. 17.2.72 (*Gaius libro secundo cottidianarum rerum*):

Socius socio etiam culpae nomine tenetur, id est desidiae atque neglegentiae. Culpa autem non ad exactissimam diligentiam dirigenda est: sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet, quia qui parum diligentem sibi socium adquirit, de se queri debet[35].

"A partner is responsible to his co-partner even on the score of *culpa* (fault), that is, *desidia* (laziness) and *neglegentia* (negligence). But *culpa* (fault) should

33. For the relation between *culpa*, *custodia* and *diligentia* see *infra*, 3d.

34. Kaser, *RPR* II (*supra*, n. 25), p. 346ff., p. 347: "*Dabei deckt die* culpa *auch die Fälle der klassischen* custodia-*Haftung* (…)". Cf. Zimmermann, *The Law of Obligations* (*supra*, n. 3), p. 203, where is stated that *custodia* has been transformed into and superseded by *culpa*-liability in post-classical Roman law. See the literature mentioned *supra*, n. 8.

35. Cf. *Inst.* 3.25.9.

> not be assessed on the basis of a comparison with *exactissima diligentia* (the most stringent standards of diligence). It is enough that a partner show *diligentia* (diligence) in the affairs of the partnership commensurate with that which he is accustomed to exhibit in his own affairs. A partner who acquires as co-partner a man of inadequate *diligentia* (diligence) has only himself to blame."

The partner is liable for *dolus* and *culpa*, consisting of *desidia* (laziness), *neglegentia* (negligence) and the subjective *diligentia*[36]. The objective *diligentia* is not part of the liability of the partner. The partner becomes only liable for this objective *diligentia* when the object is valuated by *aestimatio*, as we saw in D. 17.2.52.3.

3.4. *Culpa* (liability), *custodia* (obligation) and *diligentia* (responsibility)

We do not find in the Digest an elaborate system of the meaning of the various terms for and levels of *custodia* and its relation with *culpa* and *diligentia*[37]. This is not so striking, when we consider the casuistic structure of the Digest. Kaser states that in Justinianic law the liability for *culpa* was extended to all contractual and quasi-contractual liabilities. It also applies to obligations *stricti iuris*[38]. In classical times *custodia* is always mentioned together with *culpa*, whereas in post-classical times *diligentia* and *culpa* are found in the texts next to each other. *Custodia* appears to be pushed away[39]. But what abstract relation can we discover between these notions of *culpa*, *custodia* and *diligentia*? In his article MacCormack makes a distinction between the notions of obligation and liability. Referring to the person's obligation the word *custodia* is used, whereas the word *culpa* is reserved for his

36. Cf. C. 4.35.13: "*A procuratore dolum et omnem culpam, non etiam improvisum casum praestandum esse iuris auctoritate manifeste declaratur*." In C. 4.35.13 the liability for a *procurator*, that is a mandatary, in case of the contract of mandate is presented as *omnis culpa* (all fault), which must — as derived from D. 50.17.23 — comprise of *dolus*, *culpa* and *diligentia* as part of *custodia*. It must be *culpa* included with the subjective and objective *diligentia*. And it is clear that *custodia* is part of it, but again the term *custodia* is not mentioned.

37. See for example A. Berger, *Encyclopedic dictionary of Roman law*, Philadelphia, 1953, p. 422–423: "It belongs to those not precisely defined and oscillating expressions concerning contractual responsibility, which through manipulations of the compilers of the Digest became nebulous. Moreover, the *custodia* itself is sometimes accompanied by adjectives, such as *diligens*, *plena*, which seem to presuppose a gradation thereof. (…) Since on the one hand *custodia* is linked with *culpa*, *neglegentia*, or *diligentia*, on the other hand it is opposed to *vis maior*, it has been assumed that *custodia* entailed a higher degree of responsibility than for *culpa* only; in particular, it involved the duty of a more careful custody, and consequently, liability for a simple, lesser accident (not for *vis maior*), such as theft which through a more attentive guarding by the debtor could be prevented. Another theory does not consider *custodia* a specific degree of responsibility between *culpa* and *vis maior*, but a diligent care for things belonging to another. (…) *Custodia* is not to be separated from *diligentia*, for there is no *custodia* without *diligentia*."

38. Kaser, *RPR* II (*supra*, n. 25), p. 351–352.

39. Kaser, *RPR* II (*supra*, n. 25), p. 352–353.

liability[40]. Van den Bergh interprets *diligentia* as a general category of responsibility[41]. These abstract concepts of liability, obligation and responsibility can organize the relation between the notions. It appears from the texts dealt with that a person can be liable for *culpa*, which means that he is obliged to *custodia* expressed as a responsibility for *diligentia*. The condition for *custodia* is that another person's property is entrusted to him. This has as consequence that the liability for *culpa* is now a wider term and includes more than mere *custodia*.

4. Early Byzantine law

4.1. Two remarks at D. 17.2.52.3 (B.12.1.50.3): *plena custodia*

In only two scholia the sixth-century Byzantine jurist Stephanos explictly refers to *plena custodia*, a concept which can be traced back, as we saw, to D. 18.6.2.1. This Digest fragment has been handed down in the Basilica, reconstructed on the basis of the Florilegium Ambrosianum[42]. Unfortunately, no scholia at this title are handed down. The reason for this is probably the poor tradition of the Basilica. In the introduction the first scholion by Stephanos was partly reproduced in order to illuminate our research question, here it is reproduced completely:

> Sch. Ca 12 ad B.12.1.50.3 = D. 17.2.52.3 (BS.481/18–28 [Stephanos]):
>
> Στεφάνου. Σημείωσαι, ὅτι ἡ μὲν τῶν λῃστῶν ἔφοδος τυχηρὰ εἶναι δοκεῖ περίστασις, ἡ δὲ κλοπὴ οὐκ ἔστι τυχηρὰ περίστασις, κουστωδίᾳ δέ, τουτέστιν φυλακῇ καθυποβαλλέτω· διὸ τῷ κουστωδίαν χρεωστοῦντι ἐκ περιστάσεως καὶ ἡ κλοπὴ κινδυνεύεται, ἐν ᾧ μὴ κουστωδίαν περὶ τὸ κλαπὲν ἐνεδείξατο. Κουστωδίαν δὲ νόησον ἐνταῦθα, ἣν ἀεὶ λέγει πλέμαμ (πλέναμ *HdJ*) κουστωδίαν, τουτέστι τὴν ἐπιμελῆ κουστωδίαν, ὥστε καὶ κλοπῆς περιγίνεσθαι· καὶ μὴ τὴν γενικὴν λεγομένην κουστωδίαν, τουτέστι τὴν τῷ δόλῳ προσεοικυῖαν· καὶ ἁπλῶς εἰπεῖν κουστωδίαν ἐνταῦθα νόησον τὴν φυλακήν, τὴν ἀσφάλειαν. Μέμνησο τῶν παραδεδομένων σοι παρ' ἐμοῦ ἐν τῷ ε′. διγ. τῆς κομμοδάτι τοῦ

40. MacCormack, *Custodia* and *Culpa* (*supra*, n. 8), p. 179ff. Cf. Zimmermann, *The Law of Obligations* (*supra*, n. 3), p. 193ff.

41. Van den Bergh, *Custodiam Praestare* (*supra*, n. 8), p. 67.

42. B.53.7.2.1 = D. 18.6.2.1: Χρεωστεῖ δὲ φυλακὴν ἀκριβεστάτην ἕως οὗ μετρήσηται ⟦ἐὰν μετὰ ταῦτα⟧· πρὸ γὰρ τῆς μετρήσεως σχεδὸν οὐ πέπραται, εἰ μὴ ἄρα χωρὶς μετρήσεως ἐπράθη, τυχὸν ἀγγεῖα ἢ πίθοι, ἐφ' ὧν καὶ πρὸ τῆς μετρήσεως ἐλευθεροῦται τοῦ κινδύνου ὁ πράτης. It is striking that in later Byzantine law the Latin term *custodia* never occurs, only the term φυλακή is used. When the *plena custodia* is meant, almost always the combination of φυλακή and the superlative ἀκριβεστάτη is used, as also in B.53.7.7 (D. 18.6.3) (Χρεωστεῖ δὲ φυλακὴν ἀκριβεστάτην, οἵαν ὁ κατὰ χρῆσίν τι λαβών, τουτέστιν ἐπιμέλειαν μεγίστην ἥπερ ἐν τοῖς ἰδίοις πράγμασιν). Cf. Accursius, glosse *Utrum plenam* ad D. 18.6.2.1: "*ut* diligentiam φυλακὴν ἀκριβεστάτην *aiunt Greci. Vide scripta ad eundem tit.* C. & βασιλικ. *lib. 35 tit. 7 Cuiac*". It is striking that in various Byzantine lexicons *custodia* is translated as φυλακή ἀκριβεστάτη, see for example L. Burgmann, "Das Lexikon αὐσηθ", in *Fontes minores* VIII (1990), K98 (p. 314). Sometimes μεγάλη ἐπιμέλεια is used for φυλακή (BS.3500/33–3501/13).

παρόντος συντάγματος, καὶ σημείωσαι, ὅτι ἡ κλοπὴ οὐχ ὑπερβαίνει τὴν ἐξάκταν διλιγεντίαν, εἰ μὴ κατὰ δόλον ἢ ῥᾳθυμίαν ἡ τυχηρὰ γέγονεν αὕτη περίστασις.

"By Stephanos. Notice that the attack of robbers appears to be an accidental situation, but the theft is not an accidental situation, and to *custodia*, that is the guard, he must subject; therefore, because he has been subjected to *custodia* in this situation he takes the risk too, in case it has pointed out there was no *custodia* for the stolen thing. Consider *custodia* here, which he always calls *plenam custodiam*, that is to say, the careful *custodia*, that also theft is part of it; and not the so-called general *custodia*, that is to say, the one which resembles *dolus*; and to say it simply consider *custodia* here as guard, the carefulness (*diligentia*). Remember the things which were taught you by me in fragment 5. of *de commodati* of this *pars* and notice, that theft does not exceed *exactam diligentiam*, unless the accidental situation itself was caused by *dolus* or by fault."

At the beginning of the scholion Stephanos makes clear that theft is not an accidentcal situation. In other word, one is liable for this when it occurs. Then, he makes a distinction between the careful *custodia* as *plena custodia* and the general *custodia* which resembles *dolus*. The careful *custodia* apparently includes the objective *diligentia*[43], as follows from the end of the remark. Concerning the content, the degrees of *custodia* completely correspond with D. 18.2.6.2[44]. At the end Stephanos says that excercising the objective *diligentia* is sufficient to protect the object against theft. In D. 17.2.52.3 the *plena custodia* has further to be considered simply guard, in the sense of security. At the end of his remark Stephanos refers to his teachings at title *de commodati* (D. 13.6), which will be discussed below.

In Stephanos' second remark at D. 17.2.52.3 the focus lies on the διατίμησις (valuation) of the cattle, which causes the increase in liability:

Sch. Ca 13 ad B.12.1.50.3 = D. 17.2.52.3 (BS.481/29–34 [Stephanos]):

Στεφάνου. Τοῦτο, ἐπειδὴ κατὰ διατίμησιν ἔλαβε τὰ θρέμματα. Σημείωσαι δὲ ἐξ αὐτοῦ δύο κάλλιστα, ὅτι καὶ κατὰ φύσιν ἡ πρὸ σόκιο, τουτέστι μὴ γενομένης διατιμήσεως, τοιαύτην κουστωδίαν οὐκ ἀπαιτεῖ, καὶ ὅτι διατιμήσεως γενομένης εἰσάγεται κουστωδία, πλέναμ δηλονότι, ὥστε καὶ κλοπὴν ὑπερβαίνειν. Ὁ μὲν τυχηρὸς κίνδυνος <…>. Καίτοι ἐπὶ κομοδάτου ἡ διατίμησις εἰσάγει τὰ τυχηρά.

"By Stephanos. This applies too, because he received the creatures at a valuation. Notice two very nice rules, that the *actio pro socio* too on the basis of nature, namely because there was no valuation, such a *custodia* is not claimed and that when there was a valuation *custodia* leads in, namely *plena*, to cover theft too. The incidental risk <…>. Yet in *commodatum* the valuation leads in the contingencies."

In this fragment the liability increases because of the διατίμησις (valuation). The valuation causes an increase in liability[45]. The liability for theft is included in the

43. See also BS.610/7–9 [Cyrillos] at D. 13.6.5.5.

44. Cf. also BS.607/24–608/4; BS.667/5–7; BS.760/20–25 [Anonymos].

45. De Jong, *Increasing Liability* (*supra*, n. 2), p. 303–305.

liability for *custodia*, resulting in *plena custodia*. Is there no διατίμησις (valuation) such a *plena custodia* does not exist. What *custodia* or full *custodia* next to guard against theft comprises is not made clear. It may have been obvious for Stephanos.

In these two scholia it becomes clear that there are various terms and levels of *custodia*, the careful *custodia* and the general *custodia*, which can also be found — although hidden and not explained — in the Digest. Therefore Stephanos' division does not seem to be new. And it cannot be considered as his idea.

We may find more information about these degrees of *custodia* in the teachings to which Stephanos mentioned.

4.2. Remarks at D. 13.6.5 (B.13.1.5): the careful *custodia*

In his remark at D. 17.2.52.3 Stephanos refers to his teaching at D. 13.6.5. These teachings can be found in the Basilica. It is also unsure whether Stephanos has meant his *monobiblion* about *culpa* by this, to which he refers in a remarkt at D. 13.6.5[46]. The next remark at D. 13.6.5.2 concerns the liability which is divided on the basis of profit from various contracts[47]:

> Sch. Ca 11 ad B.13.1.5.2 = D. 13.6.5.2 (BS.608/7–609/3):
>
> Σημείωσαι, ὅτι ἐφ' ὧν ἐκ τοῦ αὐτοῦ συναλλάγματος ἑκάτερος ὠφελεῖται τῶν συναλλαξάντων, ὡς ἐπὶ τῆς πράσεως καὶ μισθώσεως, καὶ ὡς ἐπὶ διατιμητῆς δηλονότι, ὡς ἐπὶ προικός, καὶ ὡς ἐπὶ ἐνεχύρου καὶ κοινωνίας, τότε οὐ μόνον ἀπὸ δόλου, ἀλλὰ καὶ ἀπὸ κούλπας ἤτοι κουστωδίας ὁ ῥέος κατέχεται. Ὁ χρησάμενος οὖν, ὅτε μὲν ἐκ τοῦ χρησθέντος πράγματος ἑκάτερος ὠφελεῖται ὅ τε χρήσας καὶ ὁ χρησάμενος, τότε ἀπὸ δόλου καὶ ἀπὸ κούλπας ἤτοι κουστωδίας μόνης κατέχεται. Ἔνθα δὲ μόνος ὁ χρησάμενος ὠφελεῖται, τότε οὐ μόνον δόλον, ἀλλὰ καὶ κούλπαν ἤτοι κουστωδίαν καὶ διλιγεντίαν ἀπαιτεῖται. Διλιγεντίαν δὲ οὐχ ἣν αὐτὸς περὶ τὰ οἰκεῖα τίθεται πράγματα, ἀλλ' ἣν ὁ ἐπιμελέστατος ἀνὴρ ἐπὶ τοῖς οἰκείοις τίθεται πράγμασιν. Οὕτως ὁ Γάϊος ἐν τῷ μδ′. τῶν Διγ. βιβ. (D. 44.7.1[4]) φησίν[48]. Τὴν δὲ τοιαύτην διλιγεντίαν καλῶς ἄν τις καὶ κουστωδίαν, οὐχ ἁπλῆν,

46. BS.607/24–608/4 (Stephanos?). See De Jong, *Stephanus* (*supra*, n. 4), p. 37–38. Cf. D. Nörr, "Die Entwicklung des Utilitätsgedankens im römischen Haftungsrecht", *ZRG RA* 73 (1956), p. 68–119, p. 107–113.

47. D. 13.6.5.2: *Ulpianus libro vicensimo octavo ad edictum*: *Nunc videndum est, quid veniat in commodati actione, utrum dolus an et culpa an vero et omne periculum. Et quidem in contractibus interdum dolum solum, interdum et culpam praestamus: dolum in deposito: nam quia nulla utilitas eius versatur apud quem deponitur, merito dolus praestatur solus: nisi forte et merces accessit (tunc enim, ut est et constitutum, etiam culpa exhibetur) aut si hoc ab initio convenit, ut et culpam et periculum praestet is penes quem deponitur. Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in pignore, ut in societate, et dolus et culpa praestatur.*

48. D. 44.7.1.4 *Gaius libro secundo aureorum*: *Et ille quidem qui mutuum accepit, si quolibet casu quod accepit amiserit, nihilo minus obligatus permanet: is vero qui utendum accepit, si maiore casu, cui humana infirmitas resistere non potest, veluti incendio ruina naufragio, rem quam accepit amiserit, securus est. Alias tamen exactissimam diligentiam custodiendae rei praestare compellitur, nec sufficit ei eandem diligentiam adhibere, quam suis rebus adhibet, si alius diligentior custodire poterit.* (…)

οὐδὲ τὴν καθόλου[49], ἀλλ᾽ ἐπιμελεστάτην ἀποκαλέσῃ. Καὶ κουστωδίαν γὰρ ὁ χρησάμενος ἐπιμελεστάτην, ἐν ᾧ πρὸς ὠφέλειαν αὐτοῦ μόνου ὁρᾷ τὸ χρησθέν, ἐπὶ τῷ πράγματι χρεωστεῖ, ὡς ὁνομικὸς ἐν τῷ παρόντι διγ., δι᾽ ὧν ἐπιφέρει λέγων αὐτὸν κουστωδίαν, οὐ τὴν τυχοῦσαν, οὐδὲ τὴν καθόλου, ἀλλ᾽ ἐπιμελεστάτην ὀφείλειν ἐπὶ τῷ πράγματι παρασχεῖν. Συνελόντα τοίνυν εἰπεῖν ὁ χρησάμενος, εἰ μὲν καὶ αὐτὸς καὶὁ χρήσας ἐκ τοῦ πράγματος ὠφελεῖται, δόλον καὶ κούλπαν ἤτοι κουστωδίαν ἐπὶ τῷ πράγματι μόνον χρεωστεῖ· εἰ δὲ μόνος ὠφελεῖται, τότε χρεωστεῖ δόλον καὶ κούλπαν καὶ διλιγεντίαν ἤτοι κουστωδίαν ἐπιμελεστάτην. Εἰ δὲ μόνος ὁ χρήσας ὠφελεῖται ⟦τότε χρεωστεῖ δόλον καὶ κούλπαν καὶ διλιγεντίαν ἤτοι κουστωδίαν ἐπιμελεστάτην· εἰ δὲ μόνος ὁ χρήσας ὠφελεῖται⟧ τότε δόλον ἀπαιτεῖται καὶ μόνον ὁ χρησάμενος, ὡς ἐπὶ τῶν σκηνικῶν, οἷς ὁ ἄρχων ἐπιτελῶν θέαν ἔχρησέ τινα, φαιδροτέραν δεῖξαι τοῖς συνιοῦσι τὴν θέαν βουλόμενος. Δυνατὸν δέ ἐστιν αὐτόν, τὸν χρησάμενον λέγω, ὑποκεῖσθαι καὶ τοῖς τυχηροῖς, ἐὰν τοιοῦτον γένηται σύμφωνον, ὡς ἀνήνεκται βιβ. δ′. τοῦ Κωδ. τιτ. κδ′. διατ. α′. (…)

"Notice that among them from the same contract each of the parties derives profit, as in sale and hire, and of course by valuation, as in dowry, and as in pledge and partnership, then the accused is not only liable for *dolus*, but also for *culpa*,namely *custodia*. The borrower for use thus, when each, the lender and the borrower, derives profit from the thing given in loan, he is liable for *dolus* and *culpa* namely *custodia* alone. Here the borrower alone derives profit, than he is not only for *dolus*, but also for *culpa* namely *custodia* and *diligentia* be claimed. *Diligentia* does not mean, that he takes care for his own things, but that a most careful man takes care for his own things. Like this Gaius says in book 44 of the Digest. Such a *diligentia* someone should have called correctly as *custodia*, not simply, not even general, but most careful. For the borrower is for the most careful *custodia*, in a case he gains for himself alone advantage of the thing given in loan, with regard to the thing in debt, as the jurist in the next fragment, by which he in his words argues, that he is obliged with regard to the thing to provide not the accidental, not the general, but the most careful [*diligentia*]. And that he said briefly, the borrower, when not only himself but also the lender derives profit from the thing, he is in debt only for *dolus* and *culpa* namely *custodia* with regard to the thing; if he alone derives profit, than he is in debt for *dolus* and *culpa* and *diligentia* namely the most careful *custodia*. If the lender alone derives profit, [than he is in debt for *dolus* and *culpa* and *diligentia* namely the most careful *custodia*; if the lender alone derives profit] then the borrower is alone for *dolus* to be claimed, as by the actors, whom the magistrate gave in loan some theatre, because he wanted to demonstrate the quit bright theatre to the assembled people. It is possible to say, that he, I mean the borrower, is also responsible for contingencies, if there was such an agreement, as is described in book 4 of the Codex, title 24 (23), constitution 1. (…)"

49. Kunkel, *Diligentia* (*supra*, n. 25), p. 302: "*Kyrill nennt die* diligentia quam suis κούλπα μετρία *(sch.* Κυρίλλου *zu D. 10.2.25.26: Heimb IV 267), und in ähnlicher Weise heißt sie bei den späteren Scholiasten* μέση ἐπιμέλεια. *lhr gegenüber wird immer wieder die Strenge der diligentia diligentis betont, innerhalb der justinianischen Sammlung namentlich in den verfälschten Gajustexten.*"

In this remark the same distinction — although in a superlativum and not in a comparativum — is made as the distinction in the remark at D. 17.2.52.3 (BS.481/18–28 [Stephanos]): the careful (or most careful) *custodia* including *diligentia* and the general *custodia* without this specific *diligentia*[50]. The choice for the form of *custodia* depends on the profit the party has. In above-mentioned remark it becomes clear that *culpa* includes the general *custodia*, as will be discussed further. This general *custodia* means *diligentia quam in suis*.

In the next remark at D. 13.6.5.13 Stephanos explains again the liability of *custodia*, comprising of the objective *diligentia*[51]. In one case this objective *diligentia* apparently does not exist:

> Sch. Ca 39 ad B.13.1.5.13 = D. 13.6.5.13 (BS.612/8–14 [Stephanos])[52]:
>
> Στεφάνου. Ἐπειδὴ ὁ δίσκος ἐν χρήσει δεδόσθαι δοκεῖ, διὰ τοῦτο κούλπαν ὀφείλει καὶ ἐπὶ τῷ δίσκῳ· κούλπαν δὲ λέγω τὴν ἐξάκτον διλιγεντίαν, ἣν ἀπαιτεῖται ὁ χρησάμενος, ἔνθα πρὸς κέρδος αὐτοῦ καὶ μόνου τὸ κομμοδάτον ὁρᾷ, ὡς ὁ Γάϊος ἐν τῷ η′. (18) διγ. τοῦ παρόντος τιτ. φησίν. Ἐπὶ μέντοι τῇ φυγῇ τοῦ οἰκέτου κουστωδίαν ἤτοι διλιγεντίαν οὐκ ἀπαιτεῖται, εἰ μὴ ἄρα τοιοῦτος ἦν οἰκέτης, ὃν ἔδει φυλάττειν, δεδεμένον τυχὸν ἢ καὶ μικρὸν τὴν ἡλικίαν, ὡς εἶπεν ἀνωτέρω.
>
> "By Stephanos. Because the dish seems to be given in loan, he is therefore in debt for *culpa* for this dish; I mean *culpa* as *exacta diligentia*, which the borrower has to be claimed, where he is to consider alone to derive profit from it, as Gaios says in fragment 8 (18) of this title. Yet in case of the flight of the slave there is no *custodia* namely *diligentia* be claimed, unless such a slave, who must be guarded, was chained or was young in his age, as I said above[53]."

In this remark *culpa* is equated with the objective *diligentia*, actually the *plena custodia*. From this remark it can be derived — or better, it confirmes — that *culpa* including the objective *diligentia* corresponds with the *plena custodia*[54]. How are *custodia* and *culpa* related to each other in Byzantine law?

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50. Nörr says that the two grades of *custodia* correspond with the two grades of *diligentia* (Nörr, *Die Fahrlässigkeit* [*supra*, n. 9], p. 66: "[…] *so ergibt sich, daß die beiden Grade der* custodia *den beiden Graden der* diligentia *entsprechen, während die an sich in der Luft liegende Entsprechung mit den Graden der* culpa *nicht erscheint*").

51. D. 13.6.5.13 *Ulpianus libro vicensimo octavo ad edictum*: *Si me rogaveris, ut servum tibi cum lance commodarem et servus lancem perdiderit, Cartilius ait periculum ad te respicere, nam et lancem videri commodatam: quare culpam in eam quoque praestandam. Plane si servus cum ea fugerit, eum qui commodatum accepit non teneri, nisi fugae praestitit culpam.*

52. Cf. BS.616/10–14 [Kyrillos].

53. This remark is probably BS.609/29–610/6. Cf. BS.610/7–9 [Cyrillos]. See D. 11.4.1.7 (*diligens custodia*) (B.60.7.1.7 [ἀσφαλὴς φυλακὴ]) and BS.859/6–7 [Anonymos] (ἀσφαλὴς φυλακὴ) with a referenc to this fragment.

54. Kaser, *RPR* II (*supra*, n. 25), p. 356: "*Die Haftungslehre der oströmischen Schule, die mit mancherlei Unklarheiten und unaufgelösten Widersprüchen ins Corpus iuris eingegangen ist, läßt sich zwar, wie sich gezeigt hat, im allgemeinen noch von den elastischen, durch die Kasuistik bestimmten Gedankengängen der klassischen Juristen leiten. Dabei werden freilich die*

4.3. Remarks at D. 7.9.1 (B.16.9.1): the relation between *culpa*, *custodia* and *diligentia*

Remarks made at the title of usufruct give us an insight how we have to interpret the relation between *custodia* and *culpa* in early Byzantine law, although it is not in the abstract way of obligation and liability. At D. 7.9.1, also covering D. 7.9.2, an anonymous author links *custodia* and *culpa*. Since D. 7.9.2 starts with *nam*, the previous phrase is mentioned[55]:

D. 7.9.1.7 (*Ulpianus libro septuagensimo nono ad edictum*):

(…) *omnem enim rei curam suscipit*.

"(…) for he undertakes every care over the thing."

D. 7.9.2 (*Paulus libro septuagensimo quinto ad edictum*):

Nam fructuarius custodiam praestare debet.

"Because the usufructuary is obliged to accept responsibility for custody [of the thing]."

Sch. Π 6 ad B.16.9.1.4 = D. 7.9.1.4 (BS.1011/3–1012/10):

(…) Ὁ γὰρ οὐσουφρουκτουάριος πᾶσαν τοῦ πράγματος ἀναδέχεται τὴν φροντίδα. Καὶ κουστωδίαν γὰρ ἐπὶ τῷ πράγματι παρέχειν ὀφείλει. Δῆλον δέ, ὅτι διὰ τῆς κουστωδίας τὴν κυρίως κούλπαν δηλοῖ, τουτέστι σπουδὴν ἣν αὐτὸς ὁ οὐσουφρουκτουάριος ἐπὶ τοῖς οἰκείοις τίθεται πράγμασι. Τοῦτο γὰρ ἔγνως καὶ ἐν τῷ προλαβόντι διγέστῳ.

"(…) For the usufructuary undertakes every care over the thing. For he is obliged to show *custodia* for the thing too. It is clear that because of the *custodia* the proper *culpa* becomes clear, namely the care that the usufructuary has for his own things. For this you have learnt in the previous fragment."

Here *custodia* is linked to the proper *culpa* (κυρίως κούλπα)[56]. The author refers to D. 7.9.1.3 in which is said that the usufructuary will act as he would do in regard to his own affairs. This is the subjective standard of care, that is the *diligentia quam in suis*, formulated as *omnis cura* in D. 7.9.1.7.

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differenzierenden Lösungen der Klassiker vielfach durch Schematisierungen vergröbert, wenn auch vereinfacht und dadurch leichter zugänglich gemacht."

55. The original fragment previous to D. 7.9.2 has not been handed down and cannot be constructed, see O. Lenel, *Palingenesia iuris civilis*, I, Leipzig, 1889, repr. Graz, 1960, Fr. 813. For a full discussion of the text and the literature, see G. Wesener, Custodia-Haftung des Usufruktuars, in: V. Arangio-Ruiz, *Synteleia*, Vol. 1, Naples, 1964, p. 191–197, especially p. 191. In this article three opinions by various scholars are stated, i.e. the (non)-existence of the *custodia*-liability at the moment an *ususfructus* arises and the *custodia*-liability as a limited liability, namely a *cautio usufructuaria*.

56. See also Nörr, *Die Fahrlässigkeit* (*supra*, n. 9), p. 63.

At this fragment another scholion — which both Nörr and Wesener ignore —, as the anonymous author of the scholion refers to, is placed in which the content of the proper *culpa* is compared with the *culpa* including *diligentia* in D. 7.1.65*pr*[57]:

> Sch. Π 6 ad B.16.9.1.3 = D. 7.9.1.3 (BS.1010/13–1010/25):
>
> [Τοσαύ]την ὁ οὐσ[ουφρουκτουάριος] ἀπαιτεῖται σπουδήν, ὅσην αὐτὸς ἐπὶ τοῖς οἰκείοις τίθεται πράγμασιν. Σημείωσαι διὰ τὸ κείμενον πρὸς τῷ τέλει τοῦ παρόντος διγ. καὶ ἐν τῷ β′. διγ. Σημείωσαι, ὡς εἶπον, ὅτι κούλπαν καὶ μόνην ὁ οὐσουφρουκτουάριος ἀπαιτεῖται, τουτέστι μὴ ῥᾳθυμεῖν. Καὶ μὴ συναρπαγῇς ἐκ τῶν εἰρημένων τῷ Πομπωνίῳ ἐν τῷ ξε′. διγ. τοῦ α′. τιτ., καὶ νομίσῃς διλιγεντίαν ἤτοι ἐπιμέλειαν καθόλου τὸν οὐσουφρουκτουάριον ἀπαιτεῖσθαι δι᾽ ὧν ἐκεῖσέ φησιν. Ἐκεῖνα γάρ φησιν, ὅσον ἦκε πρὸς αὐτὸν καὶ τοὺς αὐτῷ διαφέροντας· οὕτω γὰρ ἄρχεται τὸ αὐτὸ διγ.· διλιγεντίαν οὐ χρεωστεῖ παρασχεῖν ὁ οὐσουφρουκτουάριος, εἰ μὴ πρὸς τὰ οἰκεῖα καὶ τοὺς αὐτῷ διαφέροντας· ὅπερ εἰς κούλπαν ἀναλύεται. Ἔστι γὰρ τῆς ἄγαν ῥᾳθυμίας τὸ μήτε τῶν οἰκείων κρατεῖν. Οὕτως εἰπέ, καὶ οὐ διαμάχῃ τῷ ἐνταῦθα ῥητῷ σαφῶς ἔχοντι, ὅτι ὁ οὐσουφρουκτουάριος τὴν κυρίως κούλπαν ἀπαιτεῖται, τουτέστι σπουδήν, ἣν αὐτὸς ἐπὶ τοῖς οἰκείοις τίθεται πράγμασιν.
>
> "The usufructary is obliged to such a care, as he has for his own things. Notice that what is stated at the end of this fragment (D. 7.9.1.7) and in the second fragment (D. 7.9.2). Notice, as I said, that the usufructary is obliged to only *culpa*, that is not neglecting. And do not pin together what is said by Pomponios in fragment 65 of title 1, and consider that the usufructary in general is obliged to *diligentia* namely care in cases which he mentions there. For he says there, as for it is caused by himself or his family; for in this way started this fragment; the usufructary is not obliged to provide *diligentia*, unless by its own affairs and those of his family; what reduces it to *culpa*. For not being strong for your own affairs is very much carelessness. In this way he spoke, and he does not fight against this Latin text here, which clearly has, that the usufructary is obliged to proper *culpa*, namely the care that he has for his own things."

A distinction is made between D. 7.9.2 and D. 7.1.65*pr*[58]. The student has to be aware that they are not similar cases. The anonymous author seems to explain that the *custodia* in D. 7.9.2 has to be interpreted as the general *custodia*, that is the

57. For the same comparison see D. 17.2.72 and D. 17.2.52.3. In D. 17.2.72 it is stated that partnership has nothing to do with (objective) *exactissima diligentia*. In the remarks at this fragment Cyrillos (BS.524/14) and Stephanos (BS.524/15–20) speak therefore of σπουδή in the meaning of ([subjective] *diligentia quam suis rebus*). At the end of his remark Stephanos refers to his teachings at D. 17.2.52.3. See for this De Jong, *Increasing Liability by* Aestimatio/ Διατίμησις *(Valuation)* (*supra*, n. 2), p.; Cf. Van den Bergh, *Custodiam Praestare* (*supra*, n. 8). P. 66–67.

58. D. 7.1.65*pr Pomponius libro quadragensimo septimo ad edictum*: *Sed cum fructuarius debeat quod suo suorumque facto deterius factum sit reficere, non est absolvendus, licet usum fructum derelinquere paratus sit: debet enim omne, quod diligens pater familias in sua domo facit, et ipse facere.*

cura without the objective *diligentia*[59], as also the word σπουδή refers to[60]. It only encompasses the subjective *diligentia*. This *custodia* does not refer to the *plena custodia*, which included the liability for loss resulting from theft, quite irrespective of whether the debtor himself could be blamed for the incident or not. By contrast, in D. 7.1.65*pr* it has to do with the objective *diligentia*[61].

In conclusion, *custodia* has to be interpreted as the proper *culpa* (κυρίως κούλπα), which corresponds with the *diligentia quam in suis*. The terms are linked to each other without refering to the various abstract meaning of it.

5. Conclusion

In a remark at D. 17.2.52.3, in which the liability of the partner in the contract of partnership is increased by *aestimatio* to *custodia*, the sixth-century Byzantine jurist Stephanos refers to this *custodia* as a specific form of *custodia*, namely *plena custodia*. It deals with the careful *custodia*. Stephanos probably based his interpretation on D. 18.6.2.1 which reads *plena custodia*. In Roman law literature these two fragments (D. 17.2.52.3 and D. 18.6.2.1) are not connected to each other. MacCormack interpreted the liability in D. 17.2.52.3 as a strict liability, i.e. an objective liability, whereas he understood the liability in D. 18.6.2.1 as a subjective liability. By contrast, Van den Bergh interpreted without further explanation the degrees of *custodia* as dependent on the status and skill of the debtor, the nature of the object, or the conditions of the contract. In the Byzantine law literature Pflüger refers to Stephanos' remark at D. 17.2.52.3 and the Digest fragment, D. 18.2.6.2. He points out the different expressions without paying attention to the various degrees of *custodia*. Nörr only interprets Stephanos' remark and leaves out the connection with D. 18.2.6.2. The third meaning of *custodia*, γενικὴ κουστωδία, is according to Nörr a new intermediate notion.

In Justinianic law only in D. 18.6.2.1 the *plena custodia* in a case of *venditio* with a reference to *commodatum* is explicitly found, and more or less implicitly in D. 16.3.1.12 in a case of *mandatum*. These three contracts (*venditio*, *commodatum* and *mandatum*) have the same standard liability, i.e. *plena custodia*. This *plena custodia* refers to the abstract standard of *diligentia*, namely the standard care which any very careful head of family will keep to in relation to his own affairs (*diligens paterfamilias*) or the superlative of *diligentia* (*exactissima diligentia*). By contrast, the standard liability in *societas* for *custodia* which is non *plena* corresponds with

59. D. 13.6.19.

60. Kunkel, *Diligentia* (*supra*, n. 25), p. 341: "*Im Griechischen wird* diligentia *in erster Linie durch* ἐπιμέλεια *wiedergegeben, das als Gegensatz von* ἀμέλεια *ganz die entsprechende Stellung einnimmt. Mehr dem lateinischen* cura *oder* studium *entspricht der andere griechische Begriff* σπουδή." Cf. D. 23.3.17*pr* (*diligentia quam in suis rebus*) with BS.2003/27–2004/13 [Stephanos] (σπουδὴ ἐπὶ τοῖς οἰκείοις πράγμασιν).

61. See also BS.954/29–955/15 at B.16.1.64 (D. 7.1.64). In this scholion the anonymous author probably refers to D. 7.9.1 and the index with the paragrafai.

the concrete, subjective standard of *diligentia*, comprising of the care for one's his own affairs. In the Digest this specific form of *custodia* is because of the casuistic structure of the compilation not further explained, although there are various evidences indicating an underlying system of different degrees of *custodia*. It can be deduced from the Corpus iuris that in these fragments a person can be liable for *culpa*, which means that he is obliged to *custodia* expressed as a responsibility to *diligentia*. *Culpa* refers to liability, *custodia* to the content of the obligation and *diligentia* to a general category of responsibility.

In early Byzantine law Stephanos refers in his teachings to two different kinds of the technical meaning of *custodia*, namely the general *custodia* (γενικὴ κουστωδία) and the careful *custodia* (πλέμα [πλένα *HdJ*] κουστωδία). The general *custodia* corresponds with *culpa* comprising of the subjective *diligentia.* The careful *custodia* refers to *plena custodia*. This *plena custodia* corresponds with the objective *diligentia*, which encompasses the careful *custodia*. Stephanos probably had D. 18.6.2.1 in mind which explicitly reads *plena custodia*. In combining these two fragments, it follows that Stephanos interprets D. 17.2.52.3 as imposing subjective liability and not, as MacCormack did, as objective liability. In scholia at B.16.9.1 (D. 7.9.1) the *custodia* as the general *custodia* is interpreted as proper *culpa* (κυρίως κούλπα), that means comprising of subjective *diligentia*. *Custodia* is therefore *culpa*, comprising of the subjective *diligentia* in its proper form, that is in its non full form. In its full form of *custodia* is the careful *diligentia*.

In Justinianic and early Byzantine law the same doctrine of *custodia* is used. In his teachings the Byzantine jurist Stephanos has explicitly categorised the different terms of *custodia* which can help the students comprehend the complex doctrine. This categorisation is also present in Justinianic law, although, because of its character of the texts, implicitly. It is obvious that to understand Justinianic law properly one needs to take cognizance of views of early Byzantine scholars.

RIDA

65 2018

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PRESSES UNIVERSITAIRES DE LIÈGE

ISBN : 978-2-87562-230-3