

Diligentia Quam In Suis: A Standard of Contractual Liability from Ancient Roman to Modern Soviet Law

Herbert Hausmaninger

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>



Part of the [Law Commons](#)

Recommended Citation

Hausmaninger, Herbert (1985) "Diligentia Quam In Suis: A Standard of Contractual Liability from Ancient Roman to Modern Soviet Law," *Cornell International Law Journal*: Vol. 18: Iss. 2, Article 2.

Available at: <http://scholarship.law.cornell.edu/cilj/vol18/iss2/2>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CORNELL INTERNATIONAL LAW JOURNAL

Volume 18

Summer 1985

Number 2

ARTICLES

DILIGENTIA QUAM IN SUIS: A STANDARD OF CONTRACTUAL LIABILITY FROM ANCIENT ROMAN TO MODERN SOVIET LAW

Herbert Hausmaninger[†]

INTRODUCTION

The legal systems of continental Europe and of other areas of the world, inspired by the civil law tradition, have, for over two thousand years, incorporated many legal institutions and principles created and refined by ancient Roman jurists. In most instances, Roman legal thought has been retained or revived in modern codes because of its manifest reasonableness and usefulness even in contemporary circumstances. There are, however, instances that illustrate a different aspect to the survival of Roman (or any) law: legal notions, once adopted,

[†] Professor of Law, University of Vienna, Austria; Visiting Professor, Cornell Law School (1984-85).

sometimes stubbornly outlast their usefulness, and this may continue for centuries.

Diligentia quam in suis (d.q.s.)—contractual liability only for the amount of care that the obligor customarily exhibits in his *own* affairs, rather than the care that may be expected from a reasonable man—is one of these notions. It will be argued here that although the notion of *d.q.s.* was initially useful, it should have been abandoned long ago. Its reception into modern civil codes during the European codification movements of the 18th and 19th centuries was quite unjustified. It is especially surprising, given the general technical and ideological context of modern Soviet contract law, that *d.q.s.* made a sudden appearance in the Soviet civil codes of 1963/64. Obviously, Communist morality requires a high standard of care in *all* legal relationships, and there is no good reason why an exceptional lowering of this standard should have been introduced in 1964. The adoption of *d.q.s.* into the Soviet Code suggests that, despite official disclaimers, Soviet law still seems to be much indebted to its Roman and civil law heritage.

I BACKGROUND

Most civil law codes today contain a general principle of contractual liability that an obligor is responsible for the level of care ordinarily exhibited by a prudent and conscientious man. This standard of liability is derived from the Roman law concept of *bonus pater familias*,¹ "the good housefather." This concept still appears in literal translation in the French Civil Code (article 1137 "bon père de famille") and its derivatives,² such as the Spanish *Código civil* and the Portuguese *Código civil* of 1966. The German codifiers, on the other hand, found it awkward to inquire whether a ballet dancer performed her obligations like a good housefather³ and chose the more neutral

1. For the term *bonus pater familias*, see the following texts from the books of classical Roman jurists (1st and 2nd centuries A.D.) in DIGEST OF JUSTINIAN (*Eng. trans. in* S.P. SCOTT, *THE CIVIL LAW* (1932)) [hereinafter cited as DIG. JUST.]; DIG. JUST. 40.4.22 (Africanus); DIG. JUST. 18.1.35.4 (Gaius); DIG. JUST. 7.1.9.2 (Ulpianus); DIG. JUST. 7.8.15.1 (Paulus). The sources frequently use the more precise formula *diligens pater familias* (diligent housefather). Cf. DIG. JUST. 35.1.111 (Pomponius); DIG. JUST. 45.1.137.2 (Venuleius); DIG. JUST. 13.7.22.4 (Ulpianus); DIG. JUST. 10.2.25.16 (Paulus). See also the combinations *prudens et diligens pater familias* (prudent and diligent housefather) in DIG. JUST. 19.1.54.pr. (Paulus), and *vir bonus et diligens pater familias* (good man and diligent housefather) in DIG. JUST. 38.1.20.1 (Paulus).

2. See, e.g., the Spanish *CÓDIGO CIVIL* art. 1104 ("buen padre de familia"), and the Portuguese *CÓDIGO CIVIL* art. 487 ("bom pai de família").

3. See Zusammenstellung der gutachtlichen Ausserungen zu dem Entwurf des Bürgerlichen Gesetzbuchs I 207 (1890).

formulation of "diligence required in intercourse."⁴

In exceptional cases, however, the obligor is not held to this standard of ordinary prudence but is granted—again according to Roman law—a special kind of leniency. The standard is lowered to the concrete level of care apparent from the obligor's *personal* behavior pattern. That is, the obligor is liable only for the level of care that he usually exercises in the administration of his own affairs: *diligentia quam in suis rebus adhibere solet*.⁵ In other words, the obligor is liable for *culpa in concreto* (negligence by deviation from a personal standard) as opposed to *culpa in abstracto* (negligence by deviation from the "good housefather" standard).

This personal standard of care appears in a number of modern civil law codes, e.g., the German,⁶ the French,⁷ the Swiss,⁸ the Japanese⁹ and several Central and South American Codes.¹⁰ We also find it in the Louisiana Civil Code¹¹ and most recently in the civil codes enacted by the Soviet Union Republics in 1963/64.¹² Most of these

4. This is the literal translation of Bürgerliches Gesetzbuch [BGB] art. 276 (W. Ger.), "die im Verkehr erforderliche Sorgfalt." Cf. E.J. SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW 151 (1907). THE CIVIL CODE OF THE GERMAN EMPIRE (W. Loewy trans. 1909) has "care required in trade," while more modern English translations use the term "ordinary care." Cf. THE GERMAN CIVIL CODE (C.J. Wang trans. 1907) and THE GERMAN CIVIL CODE (I.S. Forrester, S.L. Goren, H.M. Ilgen trans. 1975) [hereinafter cited as Forrester].

5. For a detailed discussion of the development of this standard in classical and post-classical Roman law, see Hausmaninger, *Diligentia quam in suis*, FESTSCHRIFT MAX KASER 265 (1976).

6. See *infra* Part III.

7. CODE CIVIL [C. CIV.] art. 1927 ("The bailee must observe, in the keeping of the thing bailed, the same care that he observes in the keeping of things which belong to him."), translated in J.H. CRABB, THE FRENCH CIVIL CODE (1977).

8. SCHWEIZERISCHES OBLIGATIONENRECHT art. 538 ("Each member shall be required to bring to bear in respect of the business of the partnership the diligence and care he normally devotes to his own affairs."), translated in B. BECCHIO, A.D.M. PHILLIPS, U. WEHINGER, SWISS COMPANY LAW 68 (1984).

9. The Civil Code of Japan (translated by the Liaison Section of the Attorney General's Office, Tokyo 1952) MINPŌ art. 659 ("A gratuitous bailee must use the same care in the custody of the thing bailed as he uses in respect of his own property."); art. 827 ("A person who exercises parental power must exercise his or her right of management with the same care as he or she uses when acting on his or her behalf.").

10. See, e.g., the civil codes of Argentina (CODIGO CIVIL art. 2202 (1869)), Brazil (CODIGO CIVIL art. 1266 (1916)), Costa Rica (CODIGO CIVIL art. 1349 (1888)); Peru (CODIGO CIVIL art. 1609 (1936)), Venezuela (CODIGO CIVIL art. 1756 (1942)). In a number of these civil codes, *diligentia quam in suis*, originally adopted from the French CODE CIVIL, has subsequently been eliminated in later revisions. For a European example of this development, see the Italian CODICE CIVILE art. 1768 (1942), which substitutes "diligenza del buon padre di famiglia" for the original *d.g.s.* in art. 1843 of the 1865 code. For a North American example, see the CIVIL CODE OF LOWER CANADA (later CIVIL CODE OF QUEBEC) art. 1802 (1866) ("The depositary is bound to apply in the keeping of the thing deposited the care of a prudent administrator.").

11. LA. CIV. CODE ANN. art. 2937 (West 1952).

12. See, e.g., CIVIL CODE OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC [RSFSR] art. 425 (Eng. trans. in W. GRAY, SOVIET CIVIL LEGISLATION (1965)).

codes apply this lower standard of care in only one case: the gratuitous depositary (a bailee who keeps the thing for the sole benefit of the bailor) is not liable for negligence with respect to goods he received for safekeeping, if he is equally negligent with respect to his own property.

The German Civil Code (BGB) goes considerably further, adding four more cases: liability in partnerships (article 708), obligations of spouses arising from their marital relationship (article 1359), obligations of parents toward their children (article 1664), and liability of an immediate or provisional heir toward a subsequent or reversionary heir (article 2131). However, according to BGB article 277, someone who is liable only for the amount of care he usually exercises in his own affairs will not be excused from *gross* negligence.¹³ Modern German *diligentia quam in suis* thus excludes liability only for slight or ordinary negligence when the defendant is equally negligent in his own affairs.

Contemporary German courts and scholars feel ill at ease with this particular manifestation of their Roman heritage. Although they find some sympathy for a personal standard of care in special circumstances, most critical observers consider two features of this rule so disturbing that they seek to restrict the rule or advocate its total abolition. First, the defendant will be excused if he is careless in his own affairs, but will be liable if he is generally careful in his own affairs, yet happens to have acted carelessly in the case at hand. This amounts to rewarding carelessness. Second, such a rule places an awkward burden both on the defendant who is called upon to prove that he is generally careless, and on the judge who must ascertain the facts.¹⁴

An inquiry into the Roman origins of *diligentia quam in suis* provides a valuable perspective on the contemporary debate over its continued use as a personal standard of liability in German, Anglo-American, and Soviet law. These three modern legal systems have been singled out for more detailed study here for different reasons. My main focus will be on Germany, because its legal system contains the largest number of situations in which *d.q.s.* is still applied today, and at the same time, demonstrates the most conscientious jurisprudential efforts to limit its application. The Anglo-American tradition will be considered because it initially borrowed *d.q.s.* from Roman law, subsequently thought better of it, and yet continues to make reference to it in isolated English and American court decisions. Also, Louisiana's civil law jurisdiction is interesting for the bluntness with

13. "Whoever is obliged to exercise only such care as he is accustomed to exercise in his own affairs is not relieved from responsibility for gross negligence." BGB article 277, translated in Forrester, *supra* note 4.

14. See *infra* notes 69-70 and accompanying text.

which it ignores the express *d.q.s.* language of its Code, replacing it with the common law standard of the "prudent man." The sudden appearance of *d.q.s.* in the Soviet legal system in 1964, and the ensuing embarrassment of Soviet scholars with this revival of the past, is perhaps the most fascinating episode in the modern history of *d.q.s.* Aside from shedding light on substantive issues of legal policy, this study of *d.q.s.* and its restrictions displays a wide variety of jurisprudential techniques in several civil law jurisdictions and reveals characteristic features of these different legal cultures.

II ROMAN LAW

A. THE RISE OF *DILIGENTIA QUAM IN SUIS* IN THE CLASSICAL PERIOD:¹⁵ CELSUS AND GAIUS

The first source making reference to *d.q.s.* is a well-known Celsus¹⁶ text in Justinian's Digest. In it, the jurist discussed two types of fault, *dolus* and *culpa*, to define the liability of an obligor in the contract of *depositum*. Celsus, in the eleventh book of his digest, wrote:

Nerva's observation, that greater *culpa* amounts to *dolus*, was rejected by Proculus, but I myself would strongly approve. For even if someone generally fails to be as diligent as human nature demands, he is not free from fraud unless he exhibits at least his own standard of care towards the deposited goods: for he violates *fides* if he applies less care than in his own affairs.¹⁷

This passage has been widely misinterpreted by modern scholars. The most common error has invariably been to project the precision of

15. Classical Roman law, the law of the first two and one-half centuries A.D., was fundamentally jurists' law. Cases were heard by Roman noblemen who had little or no background in the law. Jurists from the same noble social class advised the judges. The social and professional authority of the learned jurists gave their advisory opinions at least *de facto* force of law. Judicial decisions were not considered binding precedents and thus were not recorded. The legal writings of the jurists, however, were authoritative works. They recorded leading and dissenting opinions and provided persuasive arguments for future legal disputes. There existed no equivalent of the common law doctrine of *stare decisis*, yet jurists had great respect for the authority of older opinions and would not deviate from them without good reason.

16. Celsus became *praetor* in 107 A.D. and *consul* for the second time in 129 A.D. He also served as *legatus* in Thrace and *proconsul* of Asia and as a member of Emperor Hadrian's *consilium*. Together with Neratius, he led the Proculian law school. His main work is the 39-volume digest, a colorful mixture of treatises, opinions, and letters.

17. DIG. JUST. 16.3.32. Of the jurists named in this text, Nerva headed the so-called Proculian law school and died in 33 A.D. Proculus was his immediate successor; Celsus led the establishment some 100 years later. We are thus dealing with a controversy within the Proculian school, and the pointed way in which Celsus contradicted his venerable predecessor was a characteristic of his polemical style. On Celsus, see Hausmaninger, *Publius Iuventius Celsus: Persönlichkeit und juristische Argumentation*, in H. TEMPORINI, 15 AUFGSTIEG UND NIEDERGANG DER RÖMISCHEN WELT, II 382-407 (1976). On Roman law schools, see Stein, *The Two Schools of Jurists in the Early Roman Principate*, 31 CAMBRIDGE L.J. 8 (1972).

modern legal concepts into an as yet nontechnical terminology of a text written in the second century A.D.

Scholars also paid insufficient attention to the fact that the term *dolus* had different meanings in the Roman law of contracts and in the law of delicts. In the law of delicts, *dolus* and *culpa*, respectively, signified "willful" and "negligent" misconduct and represented different degrees of fault. In Roman contract law, on the other hand, *dolus* was perceived as the opposite of *bona fides* (good faith); in other words, as a breach of faith. The concept of *dolus* as a breach of faith manifested itself in the third century B.C., when the Roman *praetor* (a magistrate responsible for proposing legal remedies in his edict) created forms of action expressly subjecting performance to the standard of *bona fides* (good faith) in consensual contracts such as contracts for purchase, hire, partnership or mandate,¹⁸ as well as in deposit, guardianship, and several other obligations.

The concept of *culpa* (negligence) made its first appearance not in contract, but in delict, when Republican Roman jurists in the first century B.C. introduced liability for negligence into their interpretation of the *lex Aquilia*.¹⁹ The introduction of *culpa* as a standard of liability into the law of contracts did not occur until centuries later, mainly because of the rigidity of existing forms of action. On the one hand, it would seem that especially in the realm of *bonae fidei* actions, a more subtle interpretation of good faith would have demanded that the obligor be held liable not only for willful deceit (*dolus*), but also for negligent misconduct. On the other hand, a judgment stating breach of faith in contracts such as deposit, mandate, and partnership resulted in personal infamy,²⁰ and we must assume that the sensitivity of Romans in matters of honor and social reputation constituted a serious barrier against liberal interpretation of *bona fides* in existing contract actions.²¹

18. Mandate (*mandatum*) is a consensual contract by which a party assumes the obligation to perform a gratuitous service. B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 187 (1962).

19. See F.H. LAWSON & B.S. MARKESINIS, 1 TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 19 (1982).

20. *Infamia*, the state of infamy in a legal sense, resulted from the exercise of certain dishonest professions or from condemnatory judgments in legal relations that represented a special trust, the betrayal of which was considered especially contemptible. Legal consequences of infamy were, *inter alia*, exclusion from guardianship, exclusion from appearance in court as advocate or accuser, and exclusion from public office. See A. BERGER, ENCYCLOPEDIA DICTIONARY OF ROMAN LAW (1953).

21. The formula of the *diligentia* action on deposit, as reconstructed by O. LENEL, EDICTUM PERPETUUM (3d ed. 1927) reads as follows:

"Quod A. Agerius apud N. Negidium mensam argentam deposuit, qua de re agitur, quidquid ob eam rem N. Negidium A. Agerio dare facere oportet ex fide bona, eius iudex N. Negidium A. Agerio condemnato, . . ." ("If it appears that the plaintiff deposited the pay-desk which is the object of the proceedings, with the

We can assume that one and the same leading case was discussed by the three jurists Nerva, Proculus, and Celsus, and that the facts were eliminated from D 16.3.32 by Justinian's compilers of the Digest, who were only interested in the legal rule as such.²²

Nerva seems to have recognized a case of recklessness on the part of the deposittee as *dolus* in the sense of breach of faith. Other jurists of his time may have done the same. The temptation to develop *culpa*-liability in the law of contracts must have begun around that time. It could not, however, succeed immediately for reasons already indicated, i.e., the infamy connected with a judgment against the defendant in several *bonae fidei iudicia*. Nerva attempted to include at least gross negligence in the existing concept of *dolus*. Proculus protested by saying a deposittee would not be guilty of a breach of faith if he was generally a careless man. Celsus, however, agreed with Nerva: even a habitually careless man committed a breach of faith, if he treated someone else's property more carelessly than his own.

The three jurists emphasized three different aspects of the case. Nerva disapproved of the objectively serious misconduct of the deposittee, for which he should be held accountable. Proculus considered the habitual carelessness of the deposittee towards his *own* things and thus did not find any breach of faith. Celsus established a quantitative relationship between the two elements and thereby invented the concept of relative *dolus*.

But we had to wait for Gaius²³ to see this concept of relative *dolus* develop into a technical standard of contractual liability. Gaius, who worked approximately one generation after Celsus in the middle of the second century A.D., adopted the notion of *diligentia* (diligence), which is first documented in the sources as a positive duty of Roman officials and of guardians of minors,²⁴ and used it to expand the contractual *dolus*-liability to *culpa*. Gaius stated:

defendant, the judge shall condemn the defendant to the plaintiff in whatever the defendant ought on that account to give to and to do in good faith for the plaintiff. . . .") M. KASER, ROMAN PRIVATE LAW 413 (R. Dannenbring trans. 4th ed. (1984)).

22. See generally, Honoré & Rodger, *How the Digest Commissioners Worked*, 87 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, ROMANISTISCHE ABTEILUNG [ZSS] 246 (1970); T. HONORÉ, TRIBONIAN 139 (1978).

23. Gaius, whose full name and origin remain obscure, was a law teacher without the right to deliver legal opinions on imperial authority (*ius respondendi*). His works, comprising approximately 20 titles published between 150-180 A.D., served primarily didactic purposes. His INSTITUTES, a systematic textbook of Roman law for beginners, exerted a great influence on European legal instruction and civil law codification. On the personality and style of this Roman jurist, see A.M. HONORÉ, GAIUS (1962) and LIEBS, *Gaius und Pomponius*, reprinted in GAIO NEL SUO TEMPO 70 (1966).

24. Cf. GAIUS INSTITUTES 1,200 "[N]either are tutors appointed by will obliged to give security, their trustworthiness and diligence having been approved by the testator himself. . . ." 1 THE INSTITUTES OF GAIUS 63 (F. De Zulueta trans. 1946).

One is liable towards his partner not only for *dolus* but also for *culpa*, i.e., for laziness and carelessness. But *culpa* is not to imply extreme diligence. It shall be sufficient to exhibit the same diligence towards common property, which one usually applies to one's own, because he who acquires a less than careful partner must blame himself and bear the consequences.²⁵

We encounter the same juxtaposition of *exactissima diligentia* and *d.q.s.*—of extreme care and the care one usually exhibits towards one's own things—in another Gaius text concerning *commodatum* (gratuitous loan for use).²⁶ A third text concerning *negotiorum gestio* (quasi-contractual management of another's affairs), which also rejects *d.q.s.* in favor of *exactissima diligentia* (extreme care), also probably derived from Gaius.²⁷

We may speculate that Gaius probably adopted the idea of *d.q.s.* from Celsus and went on to develop it into a special standard of liability. Gaius, like Celsus, considered *d.q.s.* a means of expanding *dolus*-liability, but he no longer offered it merely as relative *dolus*. Rather, Gaius promoted *d.q.s.* to an independent standard of liability, contrasting it with *exactissima diligentia*. *Culpa*-liability in partnership contracts was still considered controversial among the late classical jurists Paul and Ulpian,²⁸ more than a generation after Gaius. Gaius seems to have contributed to its introduction by devising an appealing distinction and not holding partners responsible for *exactissima diligentia* in the first place, but rather suggesting a smaller step beyond *dolus*, viz. *d.q.s.*

B. THE SUBVERSION OF *DILIGENTIA QUAM IN SUIS* IN POST-CLASSICAL TIMES

The late classical jurists do not appear to have favored this distinction between *exactissima diligentia* and *d.q.s.* The few references to *d.q.s.* in their work invariably bear the marks of subsequent interpolation. Ulpian and Paul imposed an abstract "reasonable man" standard of diligence on legal relations such as guardianship, administration of a wife's dowry by her husband, and administration of common property, situations in which liability had previously been

25. DIG. JUST. 17.2.72.

26. "[H]e is, on the other hand, compelled to answer for extreme care in safekeeping the object, and it does not suffice for him to apply the same care that he applies to his own affairs, if another could have safeguarded them more diligently." DIG. JUST. 44.7.1.4.

27. "And in such case he has to account on the basis of the highest standard of diligence: it is not enough that he showed the degree of care that he would in his own affairs, if indeed another, being more diligent, would have handled matters more advantageously." INST. JUST. 3.27.1, translated in J.A.C. THOMAS, THE INSTITUTES OF JUSTINIAN 250 (1975).

28. Paul seems to reject implicitly a *culpa*-standard for partnership in DIG. JUST. 10.2.25.16. Ulpian writes in DIG. JUST. 17.2.52.2 that this was an unsettled question, citing Celsus for an affirmative view in favor of *culpa*-liability.

restricted to *dolus*. Ulpian and Paul felt no need to use the intermediary solution of *d.q.s.*, and we might say that by the late classical period, *d.q.s.* had fulfilled its "historical mission" of easing the transition from *dolus* to *culpa*-liability.

Suddenly, however, a post-classical school of jurisprudence²⁹ decided to revive the old concept of a personal standard for a different function: to *mitigate culpa*-liability that had become too burdensome. We do not know why they did not content themselves with the distinction between *culpa lata* and *culpa levis* (gross and slight negligence) that was developed at the same time. The reasons given in the texts for the return to the Gaius doctrine of *d.q.s.* are not conclusive.

In the case of joint ownership, the decision turned upon the difference between administration in the common interest and administration exclusively for someone else's benefit, for which liability should be stricter.³⁰ In the case of dowry, the same idea seems to have prevailed: the husband administers the wife's property together with his own and partly in his own interest.³¹ In the case of guardianship, no express motivation was revealed.³² In addition to the aspect of joint administration of property, the notion of guardianship as an involuntarily assumed burden may have led to mitigation of liability.

Justinian does not appear to have interfered with classical and later controversies in this field of liability. The state of affairs reflected in his compilation can be summarized as follows: Celsus first suggested that *d.q.s.* should be observed in a case of deposit. There was no second case of deposit in which his rule was applied. Gaius, on the other hand, expressly excluded any *culpa*-liability of the deposittee in D 47.7.1.5 and Ulpian proceeded likewise.³³ Justinian's Institutes adopted the position of Gaius.³⁴ It is surprising that Gaius should have dropped the idea of Celsus in the very place in which he found it. Perhaps the sanction of infamy still proved too strong an obstacle to be overcome, whereas the problems of administration in partnership made an extension of liability more pressing and acceptable in that area.

Partnership was the only legal relationship Gaius subjected to *d.q.s.*, but his repeated juxtaposition of *d.q.s.* and *exactissima diligentia*

29. The so-called classical period of Roman jurisprudence ends with Ulpian's pupil Modestinus. The great commentaries of the late classical jurists were subsequently re-edited with textual additions and alterations by lesser jurists who remained anonymous. The pioneering work on the character of this post-classical jurisprudence is F. WIEACKER, *TEXTSTUFEN KLASSISCHER JURISTEN* (1960).

30. DIG. JUST. 10.2.25.16.

31. DIG. JUST. 23.3.17.pr.

32. DIG. JUST. 27.3.1.pr.

33. DIG. JUST. 16.3.1.8; DIG. JUST. 16.3.1.6.

34. INST. JUST. 3.14.3.

created a technical distinction which was, interestingly, the first technical elaboration of degrees of negligence in legal history. Both Celsus and Gaius used *d.q.s.* to expand liability for *dolus*.

Anonymous post-classical editors of the works of Paul and Ulpian added guardianship, dowry, and joint ownership to the category of situations in which liability was measured by the care that one exhibits toward one's own property. Their purpose was to reduce the previous requirement of "ordinary care" (for various reasons). The Roman sources thus produce no single underlying principle governing *d.q.s.*, and this situation has not changed in any way in modern civil law.

III GERMAN LEGAL DEVELOPMENT

When the German Civil Code was drafted toward the end of the 19th century,³⁵ the First Commission established liability of the obligor for *slight* negligence as the basic rule. In some instances, however, the rule was to be reduced to liability only for *gross* negligence or for *d.q.s.* The draft used such exceptions sparingly, recognizing only five cases of reduced liability. It reduced liability to gross negligence in favor of the donor, the gratuitous lender, and the administrator of someone else's affairs without authorization—*negotiorum gestor*. It required only *d.q.s.* in partnership and in certain relationships among spouses.³⁶

The Commission was unfortunately most reticent in registering its motivations for decreeing *d.q.s.* We read in the record of deliberation:

Particularly *partnership* . . . is excellently suited for the enactment of this peculiar modification of liability. In general this is in accordance with existing law.³⁷

And concerning liability of spouses, we read:

35. The First Commission consisted of eight practitioners and three law professors. Windscheid was apparently the most influential of its members. The Commission began its work in 1881 and submitted the First Draft in 1887. A Second Commission was created in 1890 to examine more than 600 critical memoranda submitted by professors, judges, and various interest groups. The Commission consisted of ten permanent members (eight legal practitioners and two professors) and twelve non-permanent members (mostly leading businessmen). It published the Second Draft in 1895. The Code (BGB) was enacted in 1896 and became operative in 1900. For a brief history of the German codification process, see E. FREUND, 1 CONTINENTAL LEGAL HISTORY SERIES 446-451 (1912); see also Riegert, *The West German Civil Code, Its Origin and Its Contract Provisions*, 45 TUL. L. REV. 48, 52 (1970).

36. 2 B. MUGDAN, DIE GESAMMTEN MATERIALIEN ZUM BÜRGERLICHEN GESETZBUCH 15 (1899).

37. *Id.* at 336 with reference to the Commercial Code (HGB), the Prussian Code (ALR), the Saxonian Civil Code and the Swiss Code of Obligations (emphasis added).

The provisions of the section . . . are justified by the special nature of the matrimonial relationship and of the property relations among spouses based upon the latter.³⁸

There followed a citation to the dominant view in the theory and previous legislation of German states.

The Commission was not much more enlightening in those cases in which it rejected the Romanist *d.q.s.* doctrine it found in the existing German common law. Concerning common ownership, the Commission acknowledged generally that modern legislation overwhelmingly adopted the standard of *d.q.s.*, but stated simply that there was no sufficient reason to deviate from the good-housefather standard.³⁹ The record reveals slightly more information concerning the liability of the guardian: the Commission weighed the reasons for and against limiting liability, and decided in favor of protecting the ward.⁴⁰

The first draft of the German Civil Code adopted only two of the four cases of *d.q.s.* contained in the Roman law theory and practice of 19th century Germany. The First Commission showed a restrictive tendency by not acknowledging any general principle of reduced liability, by permitting only a few exceptions, and by imposing liability for gross negligence in all cases, even in the application of the *d.q.s.* rule. The Commission also recognized the difficulty of proving *d.q.s.*,⁴¹ but could not bring itself to eliminate it altogether.

When the Second Commission revised the draft Code, however, it added three more cases of *d.q.s.* to the Code: those of the deposit, the parents, and the immediate heir, each for a different reason.

The first draft demanded a high level of care from the deposit, regardless of whether or not he received any compensation, stressing the right of the depositor to expect reasonable diligence on the part of the deposit.⁴² The Second Commission argued otherwise: "[A]ccording to experience and equity the gratuitous deposit should be liable only for the degree of care he usually exhibits in his own affairs."⁴³ The difficulty of drawing a line between deposit, and mandate—a contract to conduct someone's affairs without compensation and which prescribed a higher degree of care—was generously brushed aside in the record. The mandate, we read in the record, contains a direct duty to become active, whereas deposit requires only safekeeping.

38. 4 B. MUGDAN, *supra* note 36, at 67.

39. 2 B. MUGDAN, *supra* note 36, at 491.

40. 4 B. MUGDAN, *supra* note 36, at 623.

41. *Id.* at 68.

42. 2 B. MUGDAN, *supra* note 36, at 319-320.

43. *Id.* at 968.

The liability of parents toward their children was not reduced in the first draft, because the Commission saw no reason to require less care from parents than from guardians.⁴⁴ The Second Commission introduced *d.q.s.* in favor of the parents,⁴⁵ probably considering the family relationship to be a mitigating circumstance.

The reduced liability of the immediate heir was decided by a vote of 8:8 with the chairman breaking the tie. The immediate heir, as the owner of the estate, should not be liable for more than *d.q.s.*⁴⁶

The qualitative loss inflicted on the principles of the first draft by this uncritical relapse into the Roman law tradition should be obvious. Rather than pushing forward to reach a uniformly high standard of liability in all legal relationships, the Second Commission increased the number of unprincipled exceptions that had been uncritically maintained in the existing law. One is reminded of Franz Wieacker's fitting description of the gentlemen in the Second Commission: "These conscientious practitioners were neither bold nor arrogant enough to emancipate themselves from their apprenticeship in a similar way as the legislators of the [preceding] century of Enlightenment."⁴⁷

The attitude of the Second Commission can perhaps best be illustrated by reporting their reaction to a sensible proposal for increased liability in partnership. This proposal argued that modern partnership was no longer characterized by a bond of brotherhood, that voluntary assumption of duties required diligent performance, and that everyone administering someone else's affairs should bear the same amount of liability. The Commission refused to yield. It explained in a highly platitudinous style that the liability of partners for *d.q.s.* was deeply rooted in popular consciousness. Since one had to deal with a traditional rule that had proven itself in practical application and had not given rise to any doubt or objection, and since the question whether partners should be liable for *d.q.s.* or slight negligence was of minor importance anyway, there was no reason to deviate from existing law. Moreover, the Commission insisted that there was a psychological element in favor of limiting the liability of partners inherent in the nature of the contract of partnership: it must be assumed that parties intending to form a partnership wish to take each other as they actually are.⁴⁸

I would admit that there is some continuing fascination with the thought of making the concrete individual man the measure of legal

44. 4 B. MUGDAN, *supra* note 36, at 396.

45. *Id.* at 984.

46. 5 B. MUGDAN, *supra* note 36, at 587.

47. F. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 473 (2d ed. 1967).

48. 2 B. MUGDAN, *supra* note 36, at 985.

expectations. But it appears to be a fallacy to believe that people want to take each other as they are. We do not really count on substandard care when entering into contracts of deposit, partnership, and perhaps least of all, matrimony. For it still seems the exception rather than the rule that we are (or should be) quite familiar at this point with the amount of care the obligor usually exercises in his or her own comparable affairs.

In weakening the principles of personal responsibility and reliance on a high standard of care (especially in partnership), and by failing to safeguard special interests in need of legal protection (in particular, those of minors), the BGB took a step backward to a less demanding level of ethical conduct. German scholars criticized this deficiency, but it was not until 1966 that the German Federal Supreme Court took the first step toward restricting the scope of *d.q.s.* by eliminating it as a standard of liability in traffic accidents.

The initial case involved a partnership under BGB article 708.⁴⁹ Four men had agreed to rent a car for a trip to another city. The costs were to be shared, and one of them was to drive. The inexperienced driver caused an accident in which all three of his companions were injured. One of them carried social insurance. The social insurance agency brought a subrogation claim against the driver.⁵⁰

The defendant argued that if his behavior constituted fault, it amounted to no more than slight negligence, which would have been the same had he been alone in the car. The two lower courts accepted this reasoning and dismissed the suit.⁵¹ The Supreme Court explicitly rejected its own previous line of decisions and argued that

the standard of liability in BGB article 708 is generally unsuitable for the legal regulation of automobile traffic. In view of the history and purpose of the law it cannot have been intended to apply in this area, in which there exists no reason for a reduced standard of liability. Merely because they have entered a partnership, the passengers are not to suffer in the absence of express contractual terms to the contrary, that their lives and health be treated by the driver with less diligence than would be required under the general objective standard. This would entirely contradict the persistent legislative endeavor to counteract the dangers of automobile traffic by insisting on a high level of liability. In adopting the rule into the Civil Code, the legislator cannot have intended its extension to an area then largely unexplored, which by its very

49. Decision of the German Supreme Court in Civil Cases (Bundesgerichtshof in Zivilsachen [BGHZ] of Dec. 20, 1966, 46 BGHZ 313 (1966). The decision is also reported at 1967 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 558 (1967); 22 JURISTEN ZEITUNG [JZ] 255 (1967). BGB article 708 reads: "A partner, in the fulfillment of the duties imposed upon him, is responsible only for such care as he is accustomed to exercise in his own affairs." Forrester, *supra* note 4. For a detailed survey of legislative history, court practice, and academic discussion, see G. SCHLICK-WILLNER, DIE FRAGWÜRDIGKEIT DER HAFTUNG FÜR *diligentia quam in suis* (BGB article 708) (Dissertation, Freiburg 1977).

50. 46 BGHZ 313-315 (1966).

51. *Id.* at 315.

nature allows no room for individual carelessness. . . .⁵²

The Supreme Court cited scholarly opinion to support its view,⁵³ and most commentators approved the result, but criticized its reasoning.

The result has been widely accepted in the scholarly community, either for the special reason that the innocent accident victim should not be denied compensation by the driver's liability insurance company, because the driver himself was not liable for slight negligence,⁵⁴ or for the more general reason that *d.q.s.* was an unjustifiable personal standard of care that should, as far as possible, be restricted or eliminated altogether.⁵⁵

The Court's historical argument that the legislators of 1896 could not have intended the application of article 708 to then unforeseeable automobile traffic seems to be of little value. Legislative materials give no indication how the legislators might have decided had they correctly foreseen future development in this area.⁵⁶

The stronger argument is no doubt that rules of traffic law fostering a high standard of care on the part of all car drivers protect the life and health of participants, and should not be displaced by a rule of lower liability for partnerships. The *d.q.s.* standard should only apply to the violation of mere property interests.

German legal theory refers to this technique of statutory construction as "Restriktion" or "teleologische Reduktion."⁵⁷ It is applied when the language of the statute is perceived to be too broad in view of the sense and purpose of the enactment and must, therefore, be "reduced" to its "Sinn und Zweck"—its sense and purpose.

The Court partially contradicts its "life and health protection" theory by declaring the standard of *d.q.s.* generally unsuitable for application in automobile traffic matters, for traffic matters include property interests. This broader thrust of the Court's reasoning is evidenced also in the formulation that automobile driving "by its very nature allows no room for individual carelessness."⁵⁸ Thus the Court's main argument appears to be based on an "increased danger to the public" theory, under which *d.q.s.* has no place in automobile

52. *Id.* at 317-18.

53. E. Böhmer, 11 VERSICHERUNGSRECHT [Vers.R.] 943 (1960) and 15 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 21 (1961); H. STOLL, DAS HANDELN AUF EIGENE GEFAHR 27 (1961); W. ROTHER, HAFTUNGSBESCHRÄNKUNG IM SCHADENSRECHT 191 (1965).

54. See Deutsch, *Abschied von der culpa in concreto?*, 1967 JURISTISCHE SCHULUNG 496, 498 (1967); Hoffmann, *Die Fragwürdigkeit der Haftung für diligentia quam in suis*, 20 NJW 1207 (1967).

55. See Hoffmann, *supra* note 54, at 1209; Larenz, *Zum Haftungsprivileg des § 708 BGB*, Festschrift für Harry Westermann 299 (1974).

56. See Larenz, *supra* note 55, at 301.

57. K. LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 377 (3d ed. 1975).

58. 46 BGHZ 313, 318 (1966).

traffic because driving is not merely one's "own affair."⁵⁹

This is indeed the direction of subsequent Supreme Court decisions. In 1970, the German Federal Supreme Court extended its restrictive reading of article 708 to alter the effect of article 1359. The Court held that the personal standard of liability governing property relations among spouses was inapplicable when one spouse caused damage to the health or property of the other while violating a traffic rule.⁶⁰

In that case, a wife who had filed for divorce drove her husband's new car too fast on an icy road. The car went into a ditch and was totally destroyed. The husband recovered damages in the Supreme Court. The Court repeated its arguments from the partnership case of 1966, emphasizing the protective function of a high standard of care in view of the extent and danger of automobile traffic.⁶¹ In addition, the Court expressly addressed and approved the argument that an insurance company should not be allowed to reject a claim by relying on a spouse's lower duty of care under article 1359.⁶² At the same time, the Court generally drew a line between liability claims of spouses arising from personal injury or property damage in the domestic and in the extra-domestic spheres, and limited the application of article 1359 to the former.⁶³

In 1974, the Supreme Court reaffirmed its position when a wife who had been riding in a car driven by her husband was injured through his slight negligence.⁶⁴ Again, the result reached by the Court was widely accepted by the scholarly community. The reasoning supporting the decision, as well as its potential and desirable extension to other property relations among spouses, is still disputed today.⁶⁵

Commentators have also discussed the analogous judicial restriction of the lower standard of care of parents toward their children (article 1664),⁶⁶ but have paid little attention to the provisional heir

59. Larenz, *supra* note 55, at 307.

60. 53 BGHZ 352 (1970); 23 NJW 1271 (1970); 17 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FAMRZ] 386 (1970). BGB article 1359 reads: "The spouses are answerable to each other in the discharge of the obligations arising out of the marital relationship only for such care as they are accustomed to exercise in their own affairs." Forrester, *supra* note 4, at 211.

61. 53 BGHZ at 355-56.

62. *Id.* at 354.

63. *Id.*

64. 61 BGHZ 101, 104-05 (1973).

65. See Wacke in 5 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 148-155 (1978) [hereinafter cited as MÜNCHENER KOMMENTAR].

66. The reduced standard of liability is not to be applied in traffic accidents nor generally in violations of the duty of parental supervision. See Hinz in 5 MÜNCHENER KOMMENTAR, 1445 (1978); O. PALANDT, BÜRGERLICHES GESETZBUCH 1614 (43d ed. 1984). BGB article 1664(1) reads: "The parents, in the exercise of parental authority over the

(article 2131)⁶⁷ or to the case in which *d.q.s.* originally appeared in Roman law, namely, the gratuitous depositary (article 690).⁶⁸ There thus remains, under each of the five Code articles, a considerable area of human behavior to which the personal standard of *d.q.s.* remains applicable today.

In all these cases, an investigation into the private habits of the obligor still has to be conducted with the awkward consequence that the obligor must try to prove that he is generally a most careless man. Some courts, in desperation, have taken recourse to fictions and presumptions in order to substitute a standard of ordinary care⁶⁹ for the *d.q.s.* standard which is so difficult to apply, and rewards the lazy and the careless. It was precisely for these two reasons that Franz von Zeiller, the father of the Austrian Civil Code of 1811, eliminated *d.q.s.* which, as he said, "is practically inscrutable to the judge, and which would affect the ordinary prudent citizen worse than the careless."⁷⁰ Zeiller's Kantian ethic demanded ordinary care and diligence in *all* legal relationships. German scholarship today still seems divided over the issue of degrees of liability,⁷¹ but the majority want the legislature to abolish *d.q.s.* and replace it with the general abstract standard of liability for slight negligence. Some scholars propose reduced liability for exceptional cases, but advocate a standard of gross negligence for these cases rather than *d.q.s.*

IV

ANGLO-AMERICAN LAW

In the Anglo-American common law, the history of *d.q.s.* begins

child, shall be responsible only for such care as they customarily apply to their own affairs." Forrester, *supra* note 4, at 256.

67. See Grunsky in 3 MÜNCHENER KOMMENTAR 915 (1980); PALANDT, *supra* note 66, at 1917. BGB article 2131 reads: "The provisional heir shall be responsible to the reversionary heir in respect of his management only for the same care as he is accustomed to exercise in his own affairs." Forrester, *supra* note 4, at 336.

68. See Haase in 4 MÜNCHENER KOMMENTAR 187 (1980); PALANDT, *supra* note 66, at 725. BGB article 690 reads: "If the custody is undertaken gratuitously, the depositary shall be responsible only for such care as he is accustomed to exercise in his own affairs." Forrester, *supra* note 4, at 113.

69. Some authors have deliberately misconstrued *d.q.s.* as referring not to care usually applied by the obligor, but to the care he could and should have applied. See Wacke, *supra* note 65, at 150.

70. F. VON ZEILLER, 3 KOMMENTAR ÜBER DAS ALLGEMEINE BÜRGERLICHE GESETZBUCH FÜR ÖSTERREICH [ABGB] 711 (1912).

71. The strongest argument offered by defenders of *d.q.s.* arises in connection with the liability of spouses (art. 1359). Defenders of *d.q.s.* argue that matrimony constitutes a community for better or worse, and that both the moral nature of marriage and distributive justice demand that one accept one's partner despite the partner's weaknesses. Thus they argue that a subjective standard of liability should apply in marital relationships. See O. TATZEL, *DIE diligentia quam in suis* IM EHELICHEN VERHÄLTNIS (Dissertation Tübingen) 88, 107 (1970).

in 1601 with the reasoning of Lord Coke in *Southcote's Case*.⁷² According to Coke, a bailee was absolutely liable for goods received in safekeeping. Only under an express agreement, he reasoned, could the bailee's liability be lowered to the standard of *d.q.s.* Lord Coke specifically recommended such an agreement: "It is good policy for him who takes any goods to keep, to take them in a special manner, *scil.* to keep them as he keeps his own goods."⁷³

More than one hundred years later, Chief Justice Holt, in *Coggs v. Bernard*,⁷⁴ abandoned the strict liability standard for the deposittee, considering it too exacting, and replaced it with fault liability. If the deposittee received compensation, he should be liable for reasonable care, but if he acted gratuitously, he should answer merely for gross neglect. Whether or not gross neglect would be imputed to the deposittee would depend upon the care the latter took of his own property. Lord Holt cited Bracton, who wrote on this point: "[B]ut he is not liable for negligence . . . for he who gave goods to a negligent friend for safekeeping, must impute this to himself and his own folly."⁷⁵

This language corresponds almost verbatim to Justinian's Institutes 3.14.3 and dates back to Gaius in Digest 44.7.1.5. Moreover, Lord Holt, like Celsus before him in Digest 16.3.32, viewed gross neglect as a breach of faith (fraud), as an extension of *dolus*-liability, when he formulated "the keeping them as he keeps his own, is an argument of his honesty."⁷⁶

In the course of further development in the English law of bailment, the concept of gross negligence was transformed from a presumption of *dolus* to a degree of *culpa*. Degrees of negligence analogous to those in Roman law have been suggested repeatedly by learned judges, but have had little success.⁷⁷ English courts today hold the gratuitous bailee to the prudent man standard of liability.⁷⁸

72. 76 Eng. Rep. 1061 (1601).

73. *Id.* at 1063.

74. 92 Eng. Rep. 107 (1703).

75. *Id.* at 110; "Culpa autem nomine non tenetur . . . quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriae fatuitati hoc debet imputare."

76. *Supra* note 74, at 110.

77. See J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS 57 (8th ed. 1870).

78. See, e.g., *China Pacific v. Food Corp.*, 1982 A.C. 939, 969, in which Diplock, L.J., stated that the gratuitous bailee, "under the ordinary principles of the law of bailment too well-known and too well-established to call for any citation of authority, owed a duty of care . . . to take such measures . . . as a man of ordinary prudence would take for the preservation of his own property." An aberration in this line of "well-established" authority is the dictum of Lord Denning, M.R., in *Morris v. C.W. Martin & Sons Ltd.*, [1966] 1 Q.B. 716, 725, that a gratuitous bailee's duty is only to keep the deposited item "as his own." This language, in conjunction with Lord Denning's citation to *Coggs v. Bernard*, see *supra* note 74 and accompanying text, implies that Lord Denning favored revival of the *d.q.s.* standard for gratuitous bailees. This has not occurred. See *Palmer*, 134 N.L.J. 607,

The history of standards of care in the American law of bailment has followed a similar pattern. In 1821, the Supreme Court of Massachusetts, in *Foster v. Essex Bank*,⁷⁹ adopted the argument of Lord Holt in stating: "[T]he bailee will be answerable only for gross negligence, which is equivalent to a breach of faith. . . . [T]he degree of care, which is necessary to avoid imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind."⁸⁰ Again, one is reminded of Celsus, but also of Gaius when the Court continued: "[T]he depositor has no reason to expect a change of character, in favor of his particular interests, and it is his own folly to trust one, who is not able, or willing, to superintend with diligence his own concerns."⁸¹

The courts of Massachusetts have maintained *d.q.s.* as a special standard of liability in favor of the gratuitous deposittee.⁸² Vermont adopted the same standard in 1882.⁸³ Outside these two jurisdictions, less than a handful of isolated decisions exist.⁸⁴ Most American courts have, in the past, adopted an abstract standard of gross negligence, and are increasingly moving toward a uniform standard of ordinary care of a reasonable or prudent man, regardless of the aspect of compensation or gratuitous nature of the deposit.⁸⁵ American courts have usually found this standard to be flexible enough to accommodate the special circumstances of individual bailment cases calling for a reduction of liability.

The civil law jurisdiction of Louisiana has been successfully coopted into this common law trend. Article 2937 of the Louisiana Civil Code (revised in 1870) copied article 1927 of the French Code Civil of 1804 and reads: "The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property." But the construction of the article differs pointedly from French doctrine and judicial practice, which determine the obligor's

608 (1984) ("It is submitted that Lord Denning's assertion that a gratuitous bailee need keep the bailed goods only 'as his own' . . . is [not] justifiable in principle under modern law."); Note, *The Port Authority as Bailee*, 95 L.Q. Rev. 335, 337-39 (1979) (asserting that the "prudent man" is the common law standard of care for gratuitous bailees).

79. 17 Mass. 479 (1821).

80. *Id.* at 498-99.

81. *Id.* at 499.

82. See *Smith v. First National Bank of Westfield*, 99 Mass. 605 (1868); *Rubin v. Huhn*, 229 Mass. 126 (1918); *Altman v. Aronson*, 231 Mass. 588 (1919).

83. See *Whitney v. The First National Bank of Brattleboro*, 55 Vt. 154 (1882); *Jobidon v. Lussier*, 124 Vt. 242 (1964).

84. *Knowles v. Atlantic & St. Lawrence Railroad Company*, 38 Me. 55 (1854); *Boyden v. Bank of Cape Fear*, 65 N.C. 13 (1871).

85. See BROWN, *PERSONAL PROPERTY* 266 (3d ed. 1975).

fault "in concreto," according to his own conduct.⁸⁶ Louisiana courts seem to ignore the clear language of their Code and replace it with the reasonable or prudent man standard. See, for example, the statement of the Louisiana Court of Appeals in *Lumbermen Mutual Casualty Company v. Wallace* in 1962:⁸⁷

[Civil Code] article 2937 does not contemplate that if the depositary be careless in preserving his own property that he may be careless, without liability, in preserving the deposit. The language of the article means nothing more or less than that the depositary must use ordinary care such as may be expected of a prudent man.⁸⁸

The boldness of this interpretation stands in striking contrast to the painstaking methods by which German jurists attempt to manipulate their outdated code provisions.

V SOVIET LAW

In 1963 and 1964 the Soviet Union Republics adopted new civil codes to reflect substantial progress towards a Communist society. In these codes, the contract of deposit, a subject not regulated in the previous code of 1922, was treated in a fashion strongly reminiscent of the German Civil Code, including the latter's *d.q.s.*-liability of the gratuitous deposittee. Article 425 of the RSFSR Code reads: "A deposittee under a gratuitous contract of deposit concluded between citizens is required to care for the property deposited with him as he cares for his own property."⁸⁹

Soviet textbook references to this exceptional standard of liability⁹⁰ usually confine themselves to a crisp one sentence paraphrase of

86. See the decision of the Cour d'appel de Lyon of Nov. 16, 1972, Rec. Dalloz 1973, somm. 78 with note. See also N. DEJEAN DE LA BATIE, APPRECIATION IN ABSTRACTO ET APPRECIATION IN CONCRETO EN DROIT CIVIL FRANCAIS 74 (1965).

87. *Lumbermen Mutual Casualty Co. v. Wallace*, 138 So. 2d 247 (La. Ct. App. 1962).

88. *Id.* at 250, citing *Fireman's Fund Indemnity Co. v. Sigard*, 129 So. 2d 258 (La. Ct. App. 1961). All subsequent Louisiana cases interpret art. 2937 as referring to a prudent man standard. See, e.g., *Aetna Life & Cas. v. O'Brien*, 440 So. 2d 966, 969 (La. Ct. App. 1983); *Mercer v. Columbia Equipment Co., Inc.*, 407 So. 2d 1285, 1287 (La. Ct. App. 1982); *Saunders Leasing System, Inc. v. Neidhardt*, 381 So. 2d 979, 981 (La. Ct. App. 1980); *Nynhier v. Frisch*, 367 So. 2d 47 (La. Ct. App. 1979); *Travelers Ins. Co. v. Coleman E. Adler, Inc.*, 285 So. 2d 381, 384 (La. Ct. App. 1973); *Braswell Motor Freight Lines, Inc. v. Hartford Acct. & Indem. Co.*, 239 So. 2d 692, 694 (La. Ct. App. 1970). See also Rubin, *Bailment and Deposit in Louisiana*, 35 TUL. L. REV. 825, 835 (1975).

89. SOVIET CIVIL LEGISLATION 112 (W. Gray ed. 1965).

90. The general standard of liability set out in art. 222 of the Civil Code includes *slight* negligence:

A person who has failed to perform an obligation or has performed it improperly is materially liable only where there has been fault (intention or negligence) except in cases laid down by law or contract. The burden of proof that he was not at fault rests on the person who violated his obligation.

The Civil Code and the Code of Civil Procedure of the RSFSR 1964, LAW IN EASTERN EUROPE 64 (A.K.R. Kiralfy trans. 1966). For another English translation of the RSFSR

the code article and fail to elaborate the reasoning behind it. The monograph on "The New Civil Codes of the Union Republics" published by Verdnikov and Kabalkin⁹¹ in 1965 links the Code provision to previous court practice dating back to the Soviet Supreme Court decision in *Kulebiashkina v. Trofimova*, a 1944 case concerning deposited property stolen from the depositor.⁹² The Supreme Court did not cite any authority for its decision.⁹³

The leading post-war Soviet textbook states the law without referring to the Supreme Court decision. It explains the limited liability of the depositor by stressing his good offices and the gratuitous nature of the contract: he should, therefore, be responsible only for the care he usually applies to his own goods of the same kind and value.⁹⁴ This explanation hardly lessens the surprise at finding the concept of *d.q.s.* elevated to the rank of legislative enactment at a time when Soviet law reformers were bent on demonstrating progress in the replacement of legal norms with high moral standards of behavior, mutual comradely assistance, and the like. The high standard of care and diligence that is generally required of Soviet citizens in their legal relationships,⁹⁵ independent of financial compensation, seems inexplicably lowered in this particular case.

Civil Code, see SOVIET CIVIL LEGISLATION (W. Gray ed. 1965). There are two exceptions in which the Code reduces liability to intent and *gross* negligence: art. 345 (a party delivering property for gratuitous use who fails to disclose defects in such property), and art. 427 para. 2 (the depositor's responsibility for loss or damage to property not collected in time by the depositor). Cf. Braginskii in S.N. BRATUS' & O.N. SADIKOV, KOMMENTARI K GRAZHDANSKOMU KODEKSU RSFSR 266 (3d ed. 1982).

91. V.G. VERDNIKOV & A. IU. KABALKIN, NOVYE GRAZHDANSKIE KODESKSY SOIUZNYKH RESPUBLIK 114 (1965). For an excellent discussion of the history of Soviet civil law theory and codification, see generally N. REICH, SOZIALISMUS UND ZIVILRECHT (1972).

92. IX Sudebnaia praktika Verkhovnogo Suda SSSR 1944, 28 (1945). The People's Court in Baku rejected Kulebiashkina's suit against Trofimova for the value of garments deposited but not returned to the plaintiff on the grounds that the defendant had received the goods under a neighborly relationship and not for safekeeping on a contractual basis. It became impossible to return the goods because they had been stolen from the defendant's apartment. The Collegium of the Supreme Court of the Azerbaijan Soviet Socialist Republic reversed the decision and sentenced the defendant to return the goods or their value to the plaintiff. The Collegium of the Supreme Court of the USSR reversed and remanded the case to the Supreme Court of the Azerbaijan Republic, emphasizing the contractual nature of the defendant's obligation and defining the latter as a duty to apply the same measure of care to the deposited goods, which the depositor usually applied toward similar property of his own in comparable circumstances.

93. The pre-World War II Soviet civil law textbook of 2 IA. F. MIKOLENKO & P.E. ORLOVSKII, GRAZHDANSKOE PRAVO 264 (1938), discusses the contract of deposit but does not suggest a lower standard of care for the gratuitous depositor. The pre-revolutionary textbook 3 K. POBEDONOSTSEV, KURS GRAZHDANSKAGO PRAVA 460 (1896) misconstrues the Roman concept of *d.q.s.* Although it expressly acknowledged that *d.q.s.* is a personal standard of care, *id.* at 142, the textbook recasts *d.q.s.* as an objective duty by assuming the depositor's diligence towards his own property.

94. 2 SOVETSKOE GRAZHDANSKOE PRAVO 164 (S.N. Bratus' ed. 1951).

95. See *supra* note 90.

Two prominent Soviet authors, E.A. Fleishits and A.L. Makovsky, have offered a noteworthy perspective on this development:

The 1963-64 codes clearly express the tendency to encourage the development of new moral principles in the life of Soviet society (as far as legal measures allow it). . . .

The norms on the liability of seller and lessor for defects in goods sold or leased, proceeding from the requirements of socialist morality, establish much more rigorous criteria of the good faith of a person taking part in socialist property transactions.

Fuller regulation of gratuitous property relations (gifts, gratuitous use of property, and gratuitous custody) than the previous legislation is characteristic of the present codes.

In establishing liability for breach of particular obligations under such contracts, the codes pay no attention to their being performed gratuitously. In other words, a person who assumes obligations toward another person must fulfill his obligations equally conscientiously, irrespective of whether or not he receives reward for it. . . .⁹⁶

The low standard of liability in deposit must have been an embarrassment to these authors, and they loftily substituted wishful thinking for the clear language of the Civil Code article 425. An attempt to explain away the difficulties raised by article 425 appears in the commentary to the Civil Code edited by Fleishits in 1966. Article 425, the commentary claims, presupposed a certain minimal care of the deposittee towards his own property. "Therefore," it continues,

an uneconomical attitude of the deposittee towards his own property does *not* free him from liability to the depositor for non-safekeeping by exhibiting a similar (non-economical) attitude towards the objects received in deposit. Yet in a gratuitous deposit there is not to be imposed on the deposittee the obligation to take *special measures* of protection . . . if he does not take these measures in respect of his own property (such as sprinkling furs with naphthalene).⁹⁷

In the latest edition of this leading commentary, co-editor and co-author O.N. Sadikov explains the clause as meaning:

the deposittee must take such safeguarding measures as he would apply to things belonging to himself. However, if the property received for deposit is lost as a result of malice or negligence on the part of the deposittee (art. 222), the latter must bear liability even in those cases where, together with property received in deposit, his own property was also lost (e.g., in case of theft of

96. E.A. FLEISHITS & A. MAKOVSKY, *THE CIVIL CODES OF THE SOVIET REPUBLICS* 22 (1976).

97. E.A. FLEISHITS, *NAUCHNO-PRAKTICHESKII KOMMENTARI K GK RSFSR 501* (1966). A.V. Dozortsev authored the comments on chapter 37 (deposit). The second edition, E.A. FLEISHITS & O.S. IOFFE, *KOMMENTARI K GK RSFSR 642* (1970), retains these comments without change. There is little additional argument or information to be gained from Soviet textbook literature. Cf. O.A. KRASAVCHIKOV, 2 *SOVETSKOE GRAZHDANSKOE PRAVO* 303 (2d ed. 1972) (illustrates art. 425 by pointing out that a deposittee who sprinkles his own clothes with naphthalene, must do the same with those deposited with him); O.S. IOFFE, *OBIASATEL'STVENNOE PRAVO* 502 (1975) (points out that a deposittee will not be liable for the theft of deposited property, if at the same time some of his own goods were also stolen). There is a short reference to, but no discussion, of art. 425 in Ioffe, *Soviet Law and Roman Law*, 62 B.U.L. REV. 703 (1982).

things from the unlocked apartment of the depositor).⁹⁸

A Yugoslav critic of the Soviet codification remarks that the drafters had been expressly commissioned to avoid Roman law concepts but had, on the contrary, introduced a good number of them, thus making the new codes more traditional than the old.⁹⁹ We may indeed observe that the new Soviet codes have adopted much more of the conceptual and systematic perfectionism of the Romanist German Code than the previous Russian Code of 1922.¹⁰⁰

The reception of *diligentia quam in suis* into the Russian Civil Code represents a particularly strange and inconsistent anachronism in Soviet legislative history. It was belatedly recognized as such by Soviet legal scholars who have subsequently strained to fit the code article into more progressive patterns of Communist morality.

CONCLUSION

The history of *d.q.s.* shows the development of a creative legal concept that quickly outran its usefulness. It was introduced by Celsus in the beginning of the second century A.D. as an extension of *dolus*-liability. It was further developed by Gaius in the second half of that century into a special personal standard of *culpa*-liability. Both jurists thus paved the way for the general introduction of higher levels of liability in the Roman law of contracts. Consequently, by the end of the second century A.D., *culpa* liability had become firmly established as an objective standard, requiring the diligence of a *bonus pater familias*—a reasonable, prudent man—in most contractual relationships. This standard included liability for slight negligence. An exceptional lowering of the degree of care required of an obligor to liability merely for gross negligence could be found in special circumstances, e.g., in the gratuitous contract of deposit.

The normative standards of *culpa levis* and *culpa lata* (slight and gross negligence) developed by the late classical jurists reflect a higher level of commercial ethics than the factual test of care usually exhibited in the obligor's own affairs. The subsequent re-introduction of *d.q.s.* by post-classical editors of classical legal literature to reduce liability in a variety of privileged relationships seems to have been technically superfluous and regressive. The objective *culpa lata* standard could have been used to achieve the same purpose with fewer

98. S.N. BRATUS' & O.N. SADIKOV, KOMMENTARI K GK RSFSR 503 (3d ed. 1982).

99. STANOJEVIĆ, *Arbeiten an der Kodifizierung des bürgerlichen Rechts in Jugoslawien*, 16 OSTEUROPA RECHT 197, 199 (1970).

100. See SCHROEDER, *Das neue Bürgerliche Gesetzbuch der Russischen Sowjetrepublik*, 9 RECHT IN OST UND WEST 49 (1965).

problems of awkward inquiry into and proof of personal behavior patterns.

D.q.s. also appears to be of highly questionable moral validity. Rather than basing gradations of liability on the presence or absence of economic reward, the legal system should, from a moral point of view, demand an equal level of care in the performance of all legal duties. Should a need for mitigation be perceived due to special circumstances, this could arguably be better achieved by drawing a line between legal and extralegal obligations (e.g., a gentlemen's agreement), by express contractual terms limiting liability, by non-enforcement of liability that has arisen (e.g., in family situations), or ultimately, through judicial flexibility in applying a more or less fact-specific prudent man standard.

From this perspective, the greater part of the history of *d.q.s.* reveals itself as the unreflective continuation of a legal fossil. *D.q.s.* had become an anachronism as early as the time of Justinian, but stubbornly survived sustained attacks for centuries.

This history shows, however, more than a mindless continuation of an obsolete legal doctrine within a legal system and from one legal system to another. It illustrates a variety of techniques employed, once a critical awakening has taken place, to restrict or eliminate a legal rule that has been recognized as undesirable.¹⁰¹

It is not surprising that legislative reform was not forthcoming in either Germany or Louisiana. Civil law legislatures have a history of being overburdened in public law areas, and thus of leaving a core area of "private" law implicitly to the courts for quiet, unspectacular adjustment. It may be somewhat surprising, though, that the Soviet Union, which most forcefully denies the lawmaking authority of its courts on theoretical grounds,¹⁰² and exhibits great legislative activism in practice, should share this attitude of legislative non-interference with *d.q.s.*

In the absence of legislative relief, the most pragmatic, untheoretical attitude is taken by the courts of Louisiana, which simply ignore the clear language of their Code without affording us any insight into what may be going on in their minds. There seems to be a measure of conflict between official pride in a civilian code tradition¹⁰³ and the economic, social, and legal realities of the surrounding common law.

101. On "case law" in civil law jurisdictions, see generally R. SCHLESINGER, *COMPARATIVE LAW* 592 (4th ed. 1980).

102. On court decisions and scholarly doctrine as "sources" of law in Soviet theory and practice, see W.E. BUTLER, *SOVIET LAW* 48 (1983).

103. See generally Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 *TUL. L. REV.* 4 (1971); Dainow, *Civil Law Translations and Treatises Sponsored in Louisiana*, 23 *AM. J. COMP. L.* 521 (1975).

There is also no visible influence of legal scholarship on this interpretation of *d.q.s.*

The Russian professors unintentionally allow us a glimpse of their embarrassment over the presence of the *d.q.s.* provision in their Code, but would not openly admit that their deliberate misreading of the Code provision is based on its incompatibility with high standards of Communist morality. Soviet scholars greatly influence their courts in both an oral advisory function and through their written commentary. This remains true even though courts do not cite scholarly literature. Since, conversely, such legal literature rarely cites court decisions, we may only assume that the courts follow scholarly commentary in this case as they do in others.

The Germans, on the other hand, strongly impress us as the most theory-minded jurists. Their Supreme Court relies on and extensively cites scholarly monographs and law review articles, and presents a variety of explicit and implicit policy considerations. The Court conducts a vivid dialogue with academic lawyers and openly acknowledges the importance of their contribution to judicial practice. In the exercise of judicial lawmaking,¹⁰⁴ the German Supreme Court not surprisingly exhibits more restraint than its Louisiana counterpart. But its respect for legislative enactment and its jurisprudential sophistication obviously have their price: *d.q.s.* is still alive and well in German law, and likely to remain that way for years to come.

104. On German judicial activism see J.P. DAWSON, *THE ORACLES OF THE LAW* 432-502 (1968); for the most recent evaluation of the ongoing German debate on "judge-made law," see Bydlinski, *Hauptpositionen zum Richterrecht*, 40 JZ 149 (1985).