

A Study of Co-principals of Negligence
--Based on the Phenomenon of Medical Negligence

過失犯の共同正犯について

一医療過失事件を契機として

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Abstract

Modern society has become a risk society in the sense that it has to accept the risks that arise for the sake of utilitarian effects. Modern healthcare is one of the many risky activities. It requires highly specialized techniques, and when it is performed, the work is always done by multiple medical professionals through division of labor and cooperation. When multiple healthcare professionals act carelessly with the life and health of a patient, they may face criminal charges. Whether those medical practitioners are criminally liable and, if so, whether they are liable as parallel principals of negligence or co-principals are controversial issues. Medical negligence is being decriminalized in Japan, and the author concurs with this trend. However, article 211 of the Japanese Penal Code provides for the crime of Causing Death or Injury through Negligence in the Pursuit of Social Activities, and medical negligence cases are still subject to criminal law assessment. Professional negligence crimes are enacted to demonstrate that, even in a risk-taking society, accidents that occur in business may not always be viewed as business risks. Essentially, it serves as a deterrent by informing professionals that professional risk cannot be used as a pretext for gross negligence resulting in significant damage to others. Thus, professional negligence is not regarded as an exceptional type of negligence. The requirements for a medical negligence crime must be rigorously narrowed to meet the expectation of limited negligence liability. Precedents demonstrate that some medical professionals have been held criminally liable for negligence under a very low threshold of care adopted by the court. For example, in the case of Inappropriate Cancer Surgery at Yamamoto Hospital, the doctor was found guilty of Causing Death through Negligence in the Pursuit of Social Activities due to a misdiagnosis and improper surgery that led to the patient's death.

The question remains as to what requirements must be met for multiple negligent actors to be considered joint offenders rather than concurrent perpetrators. The concept of negligent co-principalship has been recognized since the Methanol Case in 1953. In reality, defendants were held liable as co-principals in minority medical negligence cases. When the negligent actus reus of multiple medical personnel combined to cause a patient's severe injury or death, in the majority of cases, the medical professionals were held liable as parallel principals of negligence. The idea is that multiple actors violated their joint duty of care at the same time period, and their violations had a causal effect on the ultimate social harm; therefore, each of them is a principal offender, and they are parallel principals, although, negligent co-principalship is recognized in Japanese law. For example, in a case where the nurses, anesthesiologists, and

surgeons failed to verify the patient's identity, resulting in the patient being sent to the wrong operating room, receiving the wrong surgery, and being seriously injured (the incident of mistaken patients in Yokohama City University Hospital), the Supreme Court of Japan found each medical practitioner guilty of Causing Injury through Negligence in the Pursuit of Social Activities. In other words, those defendants were liable as parallel principals of negligence. The question is, could the defendants in those cases be held liable as negligent co-principals? Even though the form in which perpetrators can be held responsible, parallel principles of negligence or co-principals of negligence, may not have any bearing on the conviction and sentencing of the defendants, in academic terms, it is an issue to be addressed. Co-principals of negligence and parallel principals are two distinct concepts and are not interchangeable.

Two main questions were examined in the dissertation: whether medical negligence can result in criminal liability and whether the perpetrators assume the liable as co-principals of negligence or parallel principals of negligence. In order to answer the two questions, the paper analyzed the components of negligent principals and joint offences. As a finding, the doctrine of objective attribution is adopted to understand the co-principals of negligence and criminal medical negligence. According to the prevailing view, multiple actors co-violate a joint duty, resulting in a severe consequence, and a joint negligent crime is thereby established. In other words, a co-violation of a joint duty is the essential element of co-principals of negligence. Under Japanese criminal law, the duty of care requires the maintenance of “ordinary standards of care”, which can be found in statutes and regulations, as well as in written and unwritten codes of conduct. However, this low threshold has expanded negligence liability, one of its weaknesses. For instance, in the Laparoscopic Surgery and Procedural Errors at Jikei Medical University Aoto Hospital, the Supreme Court found the defendants guilty of Causing Death through Negligence in the Pursuit of Social Activities building on the fact that due to the surgeon's use of new technology without sufficient skill and experience, and consequently they failed to react appropriately to the hemorrhage during the procedure, resulting in the patient's death. This “co-violation of joint duty” criterion has the further disadvantage that those who divide and cooperate usually have different positions, undertake different tasks, and thus assume distinct risks and obligations, making it challenging to apply the concept of negligent joint crime under such standard. According to the objective attribution doctrine, a negligent joint crime is a case where a risk impermissible under criminal law is co-created, and this risk is realized in the ultimate social harm.

Specifically, when the idea of objective attribution is being used to analyze a negligent joint offence, three requirements need to be examined, and they are (1) the conduct created an

impermissible risk which is presupposed by the constituent elements of a substantive crime; and (2) the risk had realized in the ultimate social harm; and (3) the infringement of a legal interest falls within the scope of protection provided by this statute. The focus of this dissertation is on the first element. That is, under what circumstances the requirement of “multiple persons have jointly created a risk that is not permitted by the criminal law” is satisfied.

A commission of a negligent actus reus means the creation of a risk that is not permitted by the criminal law. The “violation of the duty of care” requirement is not eliminated but relegated to a sub-requirement in this dissertation. In other words, the analysis of whether an actor has violated the duty of care is an essential reference for determining whether an impermissible risk has been created. Unlike civil negligence, criminal negligence must be different from and more demanding than civil negligence. This suggests that the threshold for violating the duty of criminal negligence is much higher than for civil negligence. Accordingly, the author emphasized the importance of “the basic duty” and “a flagrant violation” of it. “Basic obligations” imply that the standards expected by criminal law are outside the range of medical or clinical standards discussion. The scope of professional negligence in healthcare in Japan currently is defined as “manifest negligence”. In clinical practice, manifest negligence is a violation of evident medical standards that all medical professionals are aware of (or should be aware of), such as those stipulated in textbooks as “must be done” or “must not be done”. With such an approach, the duty of care has been elevated from a reasonable person's standard of care to a reasonable medical practitioner's standard of care. The level of care imposed upon medical practitioners is more stringent than the performers in other social activities.

As a type of negligence crime, criminal medical negligence is unique only in the context where it occurs. Under the principle of equality, medical negligence is supposed to be assessed on the same standard as general negligence. As a result, the criminal law imposes obligations on medical personnel in respect of matters that are not related to their expertise. Alternatively, the duty that is imposed by criminal law pertains to matters that have no technical barriers. The medical decision-making errors in the Fukushima Ohno Hospital Incident (adhesive placental abruption surgery and the criminal liability of obstetricians) or the Case of Jikei Medical University Aoto Hospital (laparoscopic surgery and procedural errors), for example, fall outside the scope of criminal law evaluation. On the other hand, verifying the patient's identity, the drug's name, dosage, et cetera, fall within the scope of the obligations required by criminal law.

Criminal negligence has to be a gross deviation so flagrant that it is punishable as a crime. As

a general rule, a gross deviation standard is defined as a significant departure from the standard of care. It is the purpose of this paper to emphasize the flagrant nature of the violation. Hence, a gross deviation is more than just a significant departure from the standard outlined in the obligation; it involves an egregiousness that ordinary people would never have acted and tolerated the behavior of the actor as he/she did. In the Incident of Mistaken Patients at Yokohama City University Hospital, the anesthesiologist followed the hospital's routine procedure for identifying patients. At the time, the patient did not realize that the anesthesiologist was calling someone else's name, so the wrong procedure was performed on him. Despite the anesthesiologist's lack of thoughtfulness and thoroughness in the confirmation process, the hospital's routine procedures indicate there is a high likelihood that other hospital personnel would have followed the same procedure as the defendant anesthesiologist in the same situation. Thus, the anesthesiologist's violation did not meet the requirement of an egregious violation.

The restricted principal concept was adopted in this dissertation since it is a direct way to screen out the principal offender and narrow down the negligence liability. An accomplice and a principal offender are distinguished in a negligent offence. Complicity is defined as the participation in the actus reus committed by the principal that infringes on the legal interest in an indirect manner. The principal violates the prohibition against direct infringement of legal interests. Hence, it is required that the offender's violation has dominated the causal process of the criminal facts. Moreover, Japanese criminal law does not punish attempts and complicity in negligence, and all medical negligence, are result-based crimes, thus, the connection between the violation and the ultimate social harm must be considered along with the evaluation of the negligent act. Each participant does not have to dominate the entire criminal fact, but their unlawful actions must have created or increased the risk of infringement of the legal interest. In summary, a medical professional satisfies the elements of negligence when his/her violation of a fundamental duty reaches a flagrant level, and that violation has created or increased the risk of severe injury or death to the patient.

To constitute a joint crime, must multiple negligent participants have a mental connection? In this dissertation, the author argued that a negligent joint crime does not depend on a mental connection between the participants, although according to the Japanese co-perpetration theory, the mental connection is an indispensable element. The "mental connection" requirement is a result of the doctrine of causality-based co-perpetrators, and this doctrine is the rationale underlying co-perpetrators assumption of responsibility. Under this doctrine, each participant, regardless of a principal or an accomplice, is responsible for the entire crime committed by

other participants because each has psychological and physical causality towards the realization of the result. Furthermore, psychological causality requires a mental connection between the participants. From the above, it appears that mental connection is a folded-up element. While some scholars have attempted to eliminate this “mental connection” element by advocating the idea of jointness of conduct, it remains a hidden component as long as the doctrine of causality-based co-perpetrators is applied.

As an alternative to the doctrine of causality-based co-perpetrators, “domination of the causal process” as the ground of liability for principal offenders is suggested in this dissertation. In that case, a mental connection is no longer an essential element. Negligent joint crimes can be classified into two types, namely, agreement-based negligence and non-agreement negligence. Both types of negligence could lead to co-principal liability. Agreement-based negligence entails a joint relationship between the actors based on mutual consent and joint actus reus committed to fulfilling the agreement. In the case of non-agreement negligence, when each principal offender is causally related to the ultimate social harm, and they share the same duty not to cause the harm, they have established a joint relationship. A communication or agreement between them, or even a mental connection, is not required in this case. Medical team members have a contractual duty to avoid harmful outcomes for one patient and prevent other members' illegal acts from causing harm to that patient. This indicates that these medical professionals have a joint relationship. When team members have committed a grossly negligent actus reus that results in a patient's death or serious injury, they are liable as co-principals.

In summary, current law and doctrine indicate that medical negligence may result in criminal liability. Nevertheless, it is recommended that criminal medical negligence be reserved for extremely rare instances. Moreover, considering the extraordinary level of trust required in the medical profession, the prosecution against medical professionals should also be done with great caution to guard the peaceful working environment for medical practitioners. Medical practitioners may be subject to criminal prosecution if they violate the codes of conduct to an outrageous degree during their basic duties, thereby creating or increasing the risk of death or severe injury to the patient. This is because they present a risk prohibited by the criminal law. In terms of liability, when multiple medical personnel in furtherance of their agreement commit jointly a violation that results in a harmful outcome, they establish a joint relationship and can be liable as co-principals. For non-agreement negligence, the assumption that each actor qualifies as a principal offender entitles them to assume legal liability as co-principals if they share a legal responsibility to prevent the harmful outcome.