博士論文

# 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

# ―医療過失事件を契機として

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## Introduction

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.

Criminal trials involving medical negligence are declining in Japan.[1] The author concurs with this trend since it is doubtful whether convicting a medical practitioner through a criminal trial will resolve or reduce the problem of medical malpractice. Medical Accident Investigation Committee recommended that Medical Accident Investigation Committee should examine the causes of medical accidents and develop preventive measures, and it would not be effective in preventing medical malpractice by concentrating on penalizing individual doctors who have made mistakes.[2] It is doubtful whether convicting a medical practitioner through a criminal trial will resolve or reduce the problem of medical malpractice, 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

[1] STUDY GROUP ON MEDICAL PRACTICE AND CRIMINAL LIABILITY, *Medical Practice and Criminal Liability* (2019) at 7.

[2] YASUNORI FUNAYAMA, THE ROLE OF CRIMINAL LAW AND THE CRIMINAL NEGLIGENCE THEORY (2007) 153.

under a very stringent standard 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. Medical negligence crimes require a careful examination of the standard of duty of care.

Another 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: (1) whether medical negligence can result in criminal liability; and (2) 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. Chapter 1 described the main doctrines of negligent co-principalship and illustrated how they understand joint crimes differently. It is now generally understood that participants who co-violate the joint duty and cause a serious consequence are liable as co-principals. Nevertheless, there are differing opinions

regarding the components of the “co-violation of a joint duty” requirement. Besides, since the new theory of negligence has replaced the old one as the prevailing view, courts and majority academics have agreed that negligent perpetrators can constitute a joint crime. Still, there are scholars who advocate the jointness of crime doctrine and maintain a negative attitude that in order to establish a joint crime, perpetrators must have conspiracy. Against this negation the author argued that negligent perpetrators do not have the determination to commit a crime, yet criminal negligence is still a crime. In this way, negligent perpetrators can constitute a joint crime, even without the involvement of a conspiracy.

Chapter 2 discussed the criteria for assessing negligence offence under the old and new theories of negligence. According to the old negligence theory, negligence offences do not have a specified act. Negligence offences differ from intent crimes only in terms of negligent mental states and negligence liability. By the new theory of negligence, negligent actus reus is defined as a violation of the duty of care to distinguish it from intentional acts. While the drawback of the “violation of the duty of care” requirement is that the majority of negligence offences, of which all criminal medical negligence, are result crimes, and the violation of the duty of care as the requirement has failed to emphasize the connection between the actus reus of the participant and the ultimate social harm, that is that the violation of each principal offender must have contributed significantly to the ultimate social harm. The two deficiencies lead to an expansion of negligence liability. As a consequence, this chapter suggests adopting “objective attribution” doctrine to understand negligence crimes.

Chapter 3 discussed the reasons why Japanese law adopts “expanded principal concept” for determining negligence offences. Then it argued for “restricted principal concept” in order to limit negligence liability. It also explained the distinctions and connections between principal and accomplice in terms of codes of conduct and norms of sanction, based on which the “domination of the causal process” standard was introduced in this part. This means that among the negligence actors, it is the one who creates and increases the risk of legal interest infringement that is the principal offender. Furthermore, this chapter challenged attempts to define negligent crimes as triggering type offences and then narrow the scope of liability by utilizing the “retroactive prohibition” rule and “social adequacy” standard. Instead, it stressed the importance of the two criteria of the “basic duty” and the “flagrant violation of it” when determining the actus reus of negligence crimes.

Chapter 4 aimed to explore what is the difference between co-principals and parallel principals in the requirements for their establishment, and, in particular, what requirements are to be fulfilled to constitute a co-principalship of negligence. First, it presented the prevailing view on the "jointness" element. Then it proposed a different view that a mental connection between the perpetrators is not an essential component to establish a joint relationship for a negligence joint crime. It was further argued that under agreement-based negligence, the perpetrators form a mutual agreement and jointly commit the violation in furtherance of said agreement, and therefore they are in a joint relationship. In cases of non-agreement negligence, presupposing that multiple actors were liable as principals for the result, where they shared a common legal duty to avoid the ultimate social harm, they can be held liable as co-principals. Chapter 5 focused on the exclusionary rules that apply to the causation inquiry.

## Chapter 1 Doctrines of Negligent Joint Principals: An Overview

In regard to negligent co-principalship, two camps have formed, namely the positive and negative views. Negligent co-principalship doctrines have evolved through four phases during which the positive attitude (the doctrine of jointness of conduct) and the negative attitude (the doctrine of jointness of crime) oppose each other and alternately prevail. [3] Prior to and shortly after the Second World War, the debate focused on the validity of negligent co-principalship and formed a dichotomy. Unlike the doctrine of jointness of crime, which argues that a co-principalship of negligence is not valid conceptually, the doctrine of jointness of conduct demonstrates a positive attitude and affirms such a crime pattern.

Courts began to recognize negligent co-principalship in the 1970s. Furthermore, a new theory of negligence was introduced, which clarified that the actus reus of negligence is a breach of duty of care, and since then, not only the mental state, but also the conduct of negligence has been distinguished from intentional acts. As a result of the new theory of negligence, a joint negligence can be construed semantically as multiple perpetrators co-violating a duty of care. It is for this reason that some scholars who supported the "jointness of crime" doctrine and were previously in the negative camp have shifted to agreeing with the concept of negligence co-principles. The affirmation of negligence co-principalship (hereinafter "the positive doctrine") has become dominant since that time. As for the positive doctrine, there are different views. This chapter discussed the development of doctrines regarding negligent co-principals and detected the remaining questions.

### I. Negative Doctrines on Co-principalship of Negligence

#### A. Doctrine of Jointness of Crime

In the beginning, the doctrine of jointness of crime and the doctrine of jointness of conduct appear to be in contradiction, i.e., the doctrine of jointness of crime denied the existence of negligent co-principalship, whereas the doctrine of jointness of conduct affirmed it. The two sides disagreed with respect to the definition of "jointness", that is, on what basis offenders are considered to be in a joint relationship. In the doctrine of jointness of crime, a joint offence involves more than one person with the intent to commit a crime. As Takikawa Yukitoki, a representative of the jointness of crime doctrine, stated:

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[3] For details, see Otsuka Hiroshi, *Co-principals of Negligence*, No. 28 CRIM. LAW J. 11,17 (2011).

> The co-principalship reveals a distinctive feature from a subjective perspective. A co-principal is aware that he/she complements the actions of others and that their actions complement his/her own. A distinctive quality of joint principals is their determination to achieve one result through mutually complementary conduct. Only intentional conduct can produce such a mental state of mutual understanding. Despite the fact that negligent offenders are capable of producing a joint conduct, they lack the determination to commit a crime together. It is considered several independent offences of negligence multiple actors of negligence meet the essential elements of a substantive crime.[4]

According to the jointness of crime doctrine, the element of jointness required in a joint crime refers to the conspiracy between the perpetrators. Conspiracy constructs a criminally joint relationship. While the communication between the perpetrators of negligence is non-criminal in nature. Although the structure of negligent crimes and joint crimes is still under discussion, it is clear that criminal law punishes negligent perpetrators regardless of their mental state. Negligent offenders do not have the determination to commit a crime, yet criminal negligence is still a crime. In this context, joint negligence does not require a determination to commit a joint crime or conspiracy. As well, negligence is not a subordinate concept to intent, so we should not automatically apply the way we understand intent crimes to negligent crimes.

**B. Doctrine of Mind-merged Agent**

According to the doctrine of mind-merged agent, joint crimes are the crimes committed by two or more people with "one heart and mind" and at least one of them commits an actus reus that is required by the substantive crime.[5] A major advantage of this doctrine is that it provides an explanation for why conspirators are liable as principals even if they do not commit a substantive crime.[6] When multiple persons conspire to commit a crime, they become one agent with a common purpose. Participant actions are considered the acts of the agent, and co-conspirators are considered joint principals. This idea has also been criticized. The first problem with this doctrine is that it is based on the principle of group liability, which is contrary to the principle of individual

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[4] TAKIKAWA YUKITOKI, AN INTRODUCTION TO THE THEORY OF CRIME (Revised ed. 1947) 228-229.

[5] SAITO KINSAKU, PRECEDENTS AND LEGISLATION OF CO-OFFENDING (1959) 104.

[6] Japanese law considers a co-conspirator to be a co-principal.

liability set forth by modern criminal law.[7] Additionally, because this doctrine considers the participants to be converting into a super-individual entity, it should have been the super-individual entity that would be subject to liability; however, according to this doctrine, each participant is responsible.[8] As a result, it shows inconsistency and would result in a shift in responsibility and a violation of the liability principle. As for the doctrine's claims, its proponents contend that co-perpetrators must have conspiracy and deny the negligence co-principalship.

### C. Expanded Principal Concept

The expanded principal concept does not distinguish between the commission of a crime and the assistance in committing it. Participants who contributed to the crime are considered principals. The idea is that negligent crimes are fundamentally different from intentional crimes, and we should analyze them differently. There is no need to examine the evil mind or conduct of the perpetrator in negligent offences, as the focus is on the fact that every perpetrator triggered the harmful result.[9] In cases of negligence, we are concerned that a serious consequence was caused, which could have been avoided. Thus, any participant who triggers the consequence is a principal offender regardless of the form of participation.[10] Multiple actors caused a serious consequence as a result of gross negligence, and they represent several independent perpetrators.

One shortcoming of the doctrine is that intuitively it seems that it does not strictly limit negligence liability.[11] Each participant is elevated to an independent principal offender regardless of the actual weight of their contribution. In addition, the doctrine is unable to address cases of gross

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[7] SAEKI HITOSHI, THINKING AND ENJOYING CRIMINAL LAW (2013) 401.

[8] It is similar to the idea of treating a company as a legal entity, distinct from individuals, such as the director, employee, or shareholder of this company.

[9] MATSUMIYA TAKAAKI, CONTEMPORARY ISSUES IN THE THEORY OF NEGLIGENT CRIMES (2004) 46-47.

[10] In order to limit negligence liability, the negligence actus reus is restricted to the violation of the necessary inattention for social functioning. Adachi Kouji, *Development of the Doctrine of Objective Attribution and Its Challenges (2)*, No. 269 RITSUMEIKAN LAW REV. 265, 262 (2000).

[11] Although even with this doctrine, participants who were positioned as principals in the first round of examination can be decriminated by the other factual elements in the second round.

negligence where causation cannot be determined, such as the "Rolling Stones" case,[12] two men communicated and decided to throw two large stones down from the top of a slope so steep that the bottom could not be seen. One of the rocks killed a fisherman at the foot of the slope, but it was impossible to determine who threw the rock that killed that fisherman. According to the expanded principal concept, each participant is examined in accordance with the principal offender rules, and their causation will be analyzed separately. In the given case where the causation is uncertain, due to principle of presumption of innocence, neither defendant would be liable.

**D. No Utility**

Some scholars argue that multiple negligent actors can theoretically constitute a joint crime, but there is no practicality in recognizing negligence co-principalship. Multiple negligence can be regarded as concurrent perpetration, with parallel principals acting simultaneously. It is the responsibility of each participant to supervise other participants in order to avoid harmful results.[13] Supervision can be considered an individual responsibility.[14] In the event that a harmful result is achieved, each actor is responsible for violating their individual supervisory duty.[15] Therefore, it is unnecessary to find co-principalship in this instance and those perpetrators are independent multiple principals.

However, the decision of Setagaya Cable Incident demonstrates that the court affirmed the utility of the negligence co-principalship.[16] This case involved two workers melting lead tube covering the telephone cable without double checking that the torch had been extinguished, resulting in

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[12] Swiss Supreme Court ruled that the two defendants were jointly liable for negligence homicide as co-principals. Marc Thommen stated in his book that co-offending was strictly defined as an intent crime until that ruling. A joint crime is traditionally viewed as requiring a conspiracy. In this instance, however, the supreme court's decision was an attempt to overcome issues of evidence by relying on substantive criminal law tools. MARC THOMMEN, INTRODUCTION TO SWISS LAW (2018) 390.

[13] NISHIDA NORIYUKI, CRIMINAL LAW: THE GENERAL PART (REVISED BY HASHIZUME TAKASHI) (3rd ed. 2019) 415.

[14] MAEDA MASAHIDE, LECTURES ON CRIMINAL LAW: THE GENERAL PART (6th ed. 2015) 370.

[15] *Id*.

[16] Facts and the court's decision, see Setagaya Cable Incident, No. 1419 HANREIJIHO 133 (1992).

a fire which caused a public danger. Two defendants were found to be co-principals by the court. As their joint duty was to prevent the fire, they had a mutual duty to supervise each other and ensure that one another's torches were extinguished before leaving the workplace. However, they failed to fulfill this duty, thereby creating a public danger.

## II. Positive Doctrines on Co-principalship of Negligence

### A. Doctrine of Jointness of Conduct and Doctrine of Jointness of Crime

In the beginning, the doctrine of jointness of conduct and the doctrine of jointness of crime were completely incompatible, namely, the "jointness of crime" doctrine, which represents a negative attitude toward negligence co-principalship, and the "jointness of conduct" doctrine, which represents a positive attitude. In the 1970s, this dichotomy had faded away.[17] Some commentators who advocated the doctrine of "jointness of crime" have changed their attitudes and now accept the negligence co-principalship. Part of the reason for this change is that courts have begun to recognize negligent co-principalship as a factor in their decisions, and the new theory of negligence has also contributed to the change.

An old theory of negligence determined whether an offence was intentional or negligent based solely on the mental state of the perpetrator. While negligence refers to a lack of attention, intent refers to an acceptance of a harmful outcome by the actor. There is no difference between their conduct. It is in this context that the proponents of the "jointness of crime" doctrine assert that, subjectively, negligent perpetrators, unlike intentional perpetrators, have no intention to jointly commit a crime, and therefore cannot establish a co-principal relationship. Due to the new theory of negligence, it is now possible to distinguish between actus reus of negligent offences and actus reus of intentional offences. Negligent actus reus is defined as a violation of the duty of care. Negligent co-principalship has become possible from the perspective of both "jointness of crime" and "jointness of conduct". According to "jointness of crime" doctrine, when multiple actors co-violate their joint duties, they are committing a joint crime. The joint act theory holds that the key to joint criminality is that the perpetrators jointly commit the criminal act. Multiple perpetrators committing a violation of duty together constitute a joint crime because they are jointly committing a negligence actus reus.

[17] Kitagawa Yosuke, *Co-principalship of Negligence*, No. 13 HOGAKU KENKYU 72–73 (2011).

## B. Teleological Concept of Action

### 1. Kimura Kameji's Teleological Concept of Action

Japanese jurist Kimura Kameji created the Japanese version of the teleological concept of action, which was influenced by the teleological concept of action proposed by a German legal philosopher Hans Welzel to explain why negligent perpetrators could establish co-principals. In his view, conduct is a purposeful activity, which was a groundbreaking assertion. Previously, intent and negligence were considered to be a matter of mental state. The teleological concept of action indicates that intent is an integral part of the act. Specifically, it is the subjective side of the act, that is, the intent of the actor is the subjective element of the violation. An act can be divided into two parts: (1) the subjective aspect, i.e., the mental state (intent and negligence), and (2) the objective aspect, i.e., the causal relationship between the result and the body movement.[18] Negligence actus reus of negligence does not only have the objective aspect that it triggered the result. Subjectively, intent actus reus contains knowing purpose, while negligence actus reus contains an inattentive purpose.[19]

Kimura Kameji's teleological concept of action was inspired by the German teleological concept of action. In contrast, the German doctrine only applies to intentional crimes, that is, the teleological concept of action has not been used to argue for negligence joint offences. A joint crime can be committed by perpetrators with intent to commit a crime, but negligent co-principalship is usually not recognized. If there is more than one negligent party, those offenders are considered independent multiple perpetrators. According to Kimura Kameji, actus reus of negligence is also a form of purposeful conduct. Although the perpetrators did not know the criminal result, they were able to foresee and recognize other facts that were associated with the criminal result.[20] The act associated with the criminal result is the purposeful conduct. Negligent crimes are committed by perpetrators who failed to pay attention while performing the purposeful

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[18] KAMEJI KIMURA, CRIMINAL LAW: GENERAL PART (1973) 86-88.

[19] KAMEJI KIMURA, CRIMINAL LAW: GENERAL PART (ENLARGED AND REVISED BY ABE JUNJI) (1978) 382.

[20] Kimura Kameji, *Principal and Accomplice*, *in* CRIMINAL LAW COURSES (VOLUME 4): ATTEMPTS, ACCOMPLICE, MULTIPLE CRIMES FOR ONE ACT 81 (Criminal Law Society of Japan ed., 1963).

act.[21] Consequently, negligence actus reus is an inattentive act of purpose.[22] A negligent co-principalship occurs when multiple actors conduct a social activity, which is a purposeful act, and in the process, they jointly cause harm due to their lack of attention. In the "Rolling Stones" case, for example, both defendants knew they were pushing rocks off the top of the mountain, but the purpose was not to kill the fisherman at the foot of the mountain.

### 2. A Discussion of Kimura Kameji's Teleological Concept of Action

Kimura attempted to prove that there was an agreement between the negligent parties, although such a communication does not constitute a conspiracy. The offenders agreed to commit the act that unfortunately resulted in the harmful result. First, in order to clarify the criminal and non-criminal elements, it is not recommended to use "purpose" to describe negligence crimes. Purpose is a subjective element, and subjectively perpetrators of negligence reject causing harmful results, thus they do not have a purpose in the sense of criminal law. Additionally, this approach has the disadvantage of overlooking the possibility that the actus reus may be committed by omission and multiple persons, though, may not have reached an agreement on the omission. For example, the directors of a company failed to convene a board meeting promptly to discuss and withdraw a product that was claimed to be toxic to humans, resulting in bodily harm to a number of consumers. Kimura's doctrine implies that not recalling products was not an act of the directors following their communication and agreement, and that they did not form a joint relationship. If, however, the directors reached an agreement through a unanimous vote and decided not to recall the products since no toxic substance was identified, they may be considered co-offenders. The key facts of the former and latter cases are the same and moreover directors have a common duty to prevent the company's products causing social harms. Where actors share an obligation, it does not make sense that agreement brings about joint responsibility and non-agreement becomes individual liability.

## C. Co-violation of a Joint Duty

### 1. Uchida Fumiaki's View

Besides employing the teleological concept of action, Uchida Fumiaki also incorporated the doctrine of co-violation of a joint duty to explain negligent co-principalship. His understanding of the teleological concept of action in relation to negligent behavior is similar to that of Kimura

[21] *Id.*

[22] *Id.*

Kameji. Those who commit negligence perceive partial fact patterns, which is a hybrid mental state of awareness and non-awareness.[23] Since the performance of a social activity is a purposeful act, and participants are aware of this joint performance when they participate in it. While this social activity itself is not a crime, it is related to negligence actus reus and offers the possibility for a co-violation of a joint duty.[24] Thus, when evaluating a fact pattern, the social activity that provides the conditions of co-violation of a joint duty cannot be ignored, and it is part of the unlawful conduct. Essentially, co-principals of negligence are those who jointly engaged in a high-risk activity with others but whose inattentiveness jointly led to social harms.[25] Multiple individuals performing a high-risk activity suggests that they could anticipate the need to avoid unnecessary harm. As a result, the duty of care (attention) involves paying attention to both their own behavior and the behavior of their coworkers, since this is the way to ensure that joint work is carried out safely. Otherwise, if the participants violated their joint duty of care and caused the result, this process is interpreted as if they jointly committed a negligence crime.[26]

**2. Otsuka Hiroshi's View**

With the new theory of negligence becoming increasingly popular, it has been accepted that negligence co-principalship is feasible and that, when perpetrators co-violate a joint duty, they constitute co-principals. As a result, different formulations have been applied to analyze the negligence joint crimes and intent joint crimes. Otsuka Hiroshi opposes dualism and advocates the same standard of actus reus for both negligent and intentional crimes. Thereafter, the standard of "a violation of the duty to avert the harmful result" was suggested.[27] Accordingly, "co-violation of the duty of result avoidance" is the requirement for the negligence joint crime.[28] Multiple negligence actors can establish a joint relationship and taking responsibility as co-principals because their negligent acts are mutually reinforcing. The prevention of social harm is

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[23] Uchida Fumiaki, *Establishment of a Co-principalship of Negligence*, 8 No. 3, 4 HOKKAIDO LAW REV. 52–53 (1958).

[24] *Id*.

[25] Uchida Fumiaki, *The Recent Theory of Joint Principals of Negligence*, No. 542 KENSYU 92 (1993).

[26] *Id*.

[27] Otsuka Hiroshi, *Scope of Co-principals of Negligence: In the Wake of the Akashi Fireworks Festival Pedestrian Bridge Accident*, 62 No. 1 KOBE LAW J. 15 (2012).

[28] *Id,* at 18.

dependent on the cooperation of all participants; therefore, they have an interdependent relationship in fulfilling the duty to avoid social harms, and they must remind each other to uphold that duty throughout the process.[29] Communication or mental connection between the actors is not an essential element for a co-principalship of negligence.[30]

**D. Yamaguchi Atsushi's View**

Different criteria are used to analyze co-principals by action and co-principals by omission.[31] As participants in the same activity, they have a joint duty of care to avoid social harms, or, in other words, they have a joint duty to take action to avoid harmful consequences. If participants promoted each other's inattentive acts and failed to take measures to avoid social harms, that is, they failed to fulfill their joint duty to act, hence they constituted co-principals of negligence. [32] Due to these perpetrators' co-violation of a joint duty, they had formed a joint relationship, making them co-principals rather than parallel principals.[33]

As joint duty refers to the joint responsibility of participants to act, this requirement is only applicable when the offence has been committed by omission. On the other hand, a negligent offence can also be committed by positive actions. The requirement of "co-violation of a joint duty" is not applicable to positive actions since it would overextend the scope of co-principals of negligence[34] The idea of causality-based co-perpetrators is instead used to explain why those actors share a common relationship. That is, multiple participants jointly triggered the harmful result through providing their mental causality and physical causality to the consequence.[35]

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[29] *Id*.

[30] *Id,* at 20.

[31] KATSUNORI KAI, THE PRINCIPLE OF CULPABILITY AND THE THEORY OF CRIMINAL NEGLIGENCE (expanded ed. 2019) 191.

[32] Yamaguchi Atsushi, *Memorandum of Co-principals of Negligence*, *in* A COLLECTION OF ESSAYS CELEBRATING PROFESSOR NISHIHARA HARUO'S 70TH BIRTHDAY (VOLUME 2) 399 (the editorial committee of the collection of essays celebrating Professor Nishihara Haruo's 70th birthday ed., 1998).

[33] *Id*.

[34] *Id*.

[35] *Id,* at 401.

## E. The Area of Responsibility

### 1. Kaneko Hiroshi's View

If multiple persons share an area of responsibility, then they are in a joint relationship regardless of whether the offence is intentional or negligent and regardless of whether the participants have communicated and agreed upon their performance.[36] Furthermore, it is evaluated from the perspective of society as a third party whether the participants have the joint duty to prevent harmful results, and how the event led to the consequence.[37] In circumstances where society expects the participants to prevent an undesirable outcome, the participants must cooperate to reduce the risk, and if a social harm occurs due to the oversight of the participants, they are responsible for the consequences.[38] Kaneko Hiroshi used an innovative approach, i.e., the common area of the responsibility, to understand the joint relationship of the actors in a co-principalship. In previous doctrines, the requirement of jointness for a negligence joint crime was described as requiring a joint mental state and the violation of the joint duty. A major disadvantage of this approach is that, if the participants are to be expected to perform certain duties based on social expectations, the scope of the legal duties will be unclear, and it conflicts the principle of legality.[39]

## III. Summary

The concept of negligence co-principalship has been accepted by Japanese courts and most scholars. The negligence joint crime is understood and analyzed within the framework of the new theory of negligence. Alternatively, when each participant violates their joint duty, each of them is a co-principal of negligence, and they establish negligence co-principalship. Currently, the main issue is how to determine if the requirement of "co-violation of a joint duty" is satisfied. The idea of factual conduct requires both a subjective and an objective element for "jointness". As participants are aware that they are taking part in a social activity with others, they satisfy the subjective component of mental connection. The actors each breach their duty of care, indicating that they co-violate a joint duty of care, and this is the objective element for a joint relationship. As another view points out, the joint duty does not refer to the specific obligation for each actor;

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[36] Kaneko Hiroshi, *Co-principals of Negligence: A Focus on the Doctrine of Jointness*, No. 326 RITSUMEIKAN LAW REV. 168, 187 (2009).

[37] *Id,* at 166-167.

[38] *Id*.

[39] Otsuka Hiroshi, *supra* note 3, at 17.

rather, it refers to the duty of avoiding the result specified in a substantive crime. Consequently, it would be a joint crime if every participant failed to fulfil the duty of preventing social harms. "Inauthentic omission" viewpoint advocates a distinction between cases of action and cases of omission in the analysis of negligence offences. In the case of negligence by omission, the participants co-violate a joint duty and they constitute a joint crime. Additionally, in the case of negligence by action, if each actor contributes causally to the ultimate social harm, then they are co-principals. According to the "area of responsibility" view, actors are responsible based on social expectations, i.e., if society expects those participants to work together to prevent harmful outcomes, then they share the responsibility. A discussion of the Japanese theory of negligence will be presented in Chapter 2. Depending on the negligence theory used, the constituent elements of a negligence offence can differ and may even impact the establishment of a joint crime. Accordingly, the criteria for examining medical negligence cases are also affected.

## Chapter 2 Theories of Negligence

There have been three stages in the development of the negligence theory, namely, the old theory of negligence, the new theory of negligence, and the new-new theory of negligence[40]. Their understandings of criminal negligence differ, as do the essential elements required for establishing a negligence crime. The new theory of negligence is currently prevailing in Japan, according to which a negligent perpetrator is one who violates the duty of care and causes the social harm. Accordingly, co-principals of negligence are those who commit a co-violation of the joint duty and cause the ultimate social harm. However, 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. 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. This low threshold has expanded negligence liability. As a result of the following discussion, it is hoped to advance the essential elements of a negligence crime in this chapter.

### I. Old Theories of Negligence

#### A. Initial Old Theory of Negligence

In the old theory of negligence, negligence is merely a mental state and is linked to mens rea. It demonstrates the idea that (1) the unlawfulness of an offence shows in the consequence, and it means that if an act has caused a social harm, the conduct is considered unlawful;[41] and (2) a perpetrator's responsibility is determined by his/her subjective aspect. In other words, negligence results in negligence liability, which is typically less severe than intentional liability. Thus, the old theory of negligence does not distinguish between negligent act and intentional act. A problem with this theory is that an act is technically illegal if it produces a harmful result, even if it is

[40] New-new theory of negligence is also known as the doctrine of apprehensiveness. It indicates that the perpetrator's foreseeability of the ultimate social harm is not necessary to establish a negligence crime. In addition, when a participant feels a sense of apprehension that something harmful would occur, this person is obliged to take measures to eliminate that sense of apprehension. The actus reus of negligence, according to the new theory of negligence, refers to the perpetrator's failure to take steps to remove his/her sense of apprehension. Since this theory would expand negligence liability unnecessarily, very few scholars support it.

[41] IDA MAKOTO, LECTURES ON CRIMINAL LAW: GENERAL PART (2nd ed. 2018) 214.

legally permissible. For example, if another vehicle violated traffic rules and stroke *X*'s car, *X*'s car went off course and hit pedestrian *Y*, killing *Y*. As a result of the old theory of negligence, pedestrian *Y* died, and *X* as a driver of a vehicle was able to foresee the risks associated with modern traffic, therefore *X*'s behavior is unlawful. Although ultimately, *X* will not be held criminally responsible since *X* lacked mens rea. Additionally, during the era in which the old theory of negligence was the dominant view, academics generally adopted the doctrine of "jointness in crime" to understand joint crimes. Therefore, those who conspire to commit a crime are co-perpetrators to that crime and negligence actors cannot be co-principals.

**B. Revised Old Theory of Negligence**

The actus reus of a negligent offence is not only the conduct caused a harmful result; the conduct must also involve an impermissible risk.[42] In negligence crimes, the actus reus is not only the conduct that caused a social harm, but it must also involve an impermissible risk. Suppose a driver should have slowed down to 30 kph at an intersection but drove at 50 kph and injured a pedestrian. This is considered the actus reus of negligence because it poses a substantial risk of hitting pedestrians. It is considered an impermissible risk if ordinary people could predict that such an act would result in the consequences when they were committing it.[43] A significant improvement in the revised old theory was the limitation of negligence actus reus to conduct that creates impermissible risks. It served as a transition that led the negligence theory to the new theory of negligence.

**II. New Theory of Negligence**

**A. Typified Negligent Actus Reus**

Under the new theory of negligence, if a person complies with the code of conduct, even if their behavior causes harm to others, they are not considered negligent. An underlying rationale of such an approach is that negligence is a reflection of a person's mental state and behavior. Thus, the new idea is that the actus reus of negligence crimes can be typified. An act must violate a code of conduct in order to be considered an actus reus of negligence. Alternatively, it is a violation of duty in which a perpetrator fails to observe the necessary care in social life and fails to take appropriate measures to prevent the harm.[44] As compared with the old theory, the new theory

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[42] HIRANO RYUICHI, CRIMINAL LAW: THE GENERAL PART (1) (1972) 193.

[43] *Id,* at 194.

[44] FUJIKI HIDEO, LECTURES ON CRIMINAL LAW: GENERAL PART (1975) 239.

describes negligent crimes more concretely.

**B. Negligence Crimes and Omissions**

According to the new theory of negligence, a violation of the duty is the actus reus of negligence. The said duty includes the duty to foresee the consequence and the duty to avoid the consequence. An opinion is that the core criterion for evaluating the negligence crime is the duty of consequence avoidance. A negligence crime is established since the actor fails to take appropriate measures to prevent harm to society. [45] Unleashing a dog poses a risk of the dog biting a child, however, this danger-creating action does not constitute negligence.[46] Actors' failure to take appropriate action to prevent the danger generated by unleashing a dog is regarded as criminal negligence and blameworthy.[47] Therefore, the actus reus of negligence manifests itself in omissions. [48]

The above interpretation of negligence was creative, but a more conventional interpretation would be that a negligence actor caused significant harm by violating the duty of care to the extent that the negligence was so gross that the offender should be punished as a criminal. In a case where an actor who is not qualified to practice medicine performs surgery on a patient for pecuniary gain and causes the patient's death by failing to properly treat the hemorrhage during the surgery, what the law denies is not that the perpetrator fails to take proper means to stop the bleeding, but that the perpetrator lacks the qualifications to practice medicine but performs the surgery on persons.

**C. "Violation of the Duty", "Duty to Avoid Harmful Consequences" and "Duty to Act"**

Co-violation of a joint duty is the prevailing view regarding the requirements for establishing a negligence co-principalship. This means that if multiple actors have a joint duty and co-violate that duty, they may constitute co-principals.[49] In addition, Otsuka Hiroshi argued that a duty to act is not a type of duty of care.[50] The two concepts were developed for different purposes and

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[45] Inoue Masaji, *The Duty to Avoid Harmful Results: An Answer to Professor Hirano*, 34 No. 1 J. LAW POLIT. 41–42 (1967).

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] SAEKI HITOSHI, THINKING AND ENJOYING CRIMINAL LAW (2013) 427.

[50] Otsuka Hiroshi, *Co-principals of Negligence*, No. 28 CRIM. LAW J. 17 (2011).

should be distinguished from one another. This concept of "duty to act" is intended to clarify who is the guarantor, i.e., who controls the development of the fact pattern so that this person is obligated to take measures to prevent harmful consequences.[51] A co-violation of a joint duty of care is the same thing as a joint duty to avoid social harms, serving as the requirement for determining a joint crime, and this requirement can be accomplished by either action or omission, and can be accomplished with intent or negligence.[52] Co-violation of a joint duty is therefore the generic standard for joint crimes. The dissenting opinion argues that there can be no doubt that "duty to act" is inextricably linked to "duty to avoid social harms".[53] For co-principals who are negligent by omission, the duty to avoid harmful results refers to the duty to act.[54]

From interpretation, a joint duty of care sometimes could be a concept interchangeable with a duty to avoid consequences. A duty to act may be considered to be a form of a duty of care. In contrast, to clarify the functions of the elements of a crime and codes of conduct for actors, we can try to technically distinguish between these concepts. (1) "Duty to care" is for identifying guarantors. The concept implies that, with limited exceptions, there is no criminal law obligation to prevent harm to others, even if there is no danger to oneself or where the victim may lose his/her life if left alone. Besides, since negligence crimes target the conduct that violates the duty of care, there is a risk that omissions without the status of a guarantor may also be considered as a breach of the duty of care, if little attention is paid to detect whether the actor has the status of a guarantor or not. Non-guarantor omissions may be punished as negligence crimes and the negligence liability would be expanded. (2) This dissertation considers "duty to avoid social harms" as a condition for deciding whether the actors have a joint relationship. As presented in Chapter 4, it asserted that when actors share a joint duty to avoid consequences, they can be held liable as co-principals of negligence.

(3) The duty of care is the code of conduct for participants, and this dissertation intends to raise the threshold for the negligence crime by restricting the criteria for determining the violation of the duty of care. In addition, although it is generally accepted that a negligent co-principalship

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[51] *Id*.

[52] *Id*.

[53] Matsumiya Takaaki, *Theoretical Basis of Co-principals of Negligence: In Response to Professor Otsuka Hiroshi's View*, 339, 340 RITSUMEIKAN LAW REV. 503 (2011).

[54] *Id*.

requires participants' co-violation of the joint duty, in reality, the parties who divide and cooperate usually have different positions, undertake different tasks, and therefore assume distinct risks and obligations, making it difficult to apply the concept of co-violation of a joint duty and the concept of negligent joint crime for such a scenario. Negligence joint crimes imply that the participants have a common relationship and that they are all principals in the negligence offences. Whether a joint relationship has been formed between multiple actors can be examined separately from whether these actors satisfy the elements of negligence principal. We discuss "violation of the duty of care" in order to determine whether each participant is a principal offender, since Japanese law does not punish negligent accomplices.

## III. Rethinking "Violation of Duty of Care" as the Essential Element for Determining a Negligent Crime

### A. "Violation of Duty of Care" Requirement Contains Two Elements: "The Basic Duty" and "A Flagrant Violation"

A violation of the duty of care is considered to be the negligence actus reus under the prevailing view. It follows that, when multiple actors co-violate a joint duty, resulting in a severe consequence, they constitute a joint negligent crime. To put it another way, co-violation of a joint duty of care is the essence for determining a joint negligence crime. The duty of care in Japanese law requires the maintenance of "ordinary standards of care", which can be found in statutes, regulations, and unwritten codes of conduct. As a result of this standard, medical professionals can be implicated in criminal proceedings for any violation of medical protocols.[55] In the case of a violation of the duty to avoid unnecessary surgical procedures at Yamamoto Hospital[56], the

[55] Yet sometimes medical misconduct is not readily determinable as criminal or civil liability, even with the investigation findings of a Medical Accident Investigation Committee.

[56] For the facts and courts' decisions, see Ukai Makiko, *A Cancer Surgery with No Medical Justification: Yamamoto Hospital Incident*, *in* ONE HUNDRED MEDICAL LAW JUDICIAL PRECEDENTS (2) 132–133 (Kai Katsunori & Tejima Yutaka eds., 2nd ed. 2014) 132-133. Tanii Satoshi, *Criminal Cases Study: A Case Where a Patient Died After Undergoing an Unprofessional Hepatic Tumor Resection Surgery with Inadequate Staffing and the Surgeons' No Experience in Performing Such Surgery - Two Surgeons Were Found Guilty of Causing Death Thro*, 122 No.11, HOGAKU SHIMPO 132–133 (2016). Heisei22(Wa)42: Causing Death due to Negligence in the Pursuit of Social Activities.

hospital president *X*[57] was found of guilty of negligence. The reason is that the two doctors misdiagnosed patient's benign hepatic hemangioma as liver cancer and decided to perform the surgery despite having no adequate experience in the liver surgery. They were unable to cope with the emergency situation during the surgery and the patient died.

Another issue that cannot be overlooked in this case is that the hospital president *X* was convicted of fraud. It was alleged that he performed unnecessary medical treatment on many patients and fraudulently claimed medical assistance expenses in the welfare system.[58] The grounds for conviction in this case are debatable, i.e., whether the court held that the defendant doctor was guilty because he performed an unnecessary procedure on a patient for improper pecuniary gain or because he misdiagnosed and failed to provide the procedure due to substandard professionalism. If the defendant is guilty because of inexperienced misdiagnosis and surgical failure, this judgment has exemplified the shortcomings of relying on the violation of the duty of care as the essential element in determining negligence crimes, that is, the low threshold standard of breach of the duty of care has expanded the negligence liability.[59] Medical professionals would tend to use "defensive medicine" if all deaths that occurred during medical treatment were determined to have been caused by violation of duty of care. Therefore, they will refuse to perform surgeries and take additional steps to rescue patients for fear of criminal prosecution and liability.[60]

Since negligence is a crime, a commission of a negligent actus reus means the creation of a risk

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[57] Another suspect (doctor *Y*) died of a sudden illness while in custody.

[58] Ueda Masakazu, *Criminal Negligence for a Violation of the Duty to Avoid Unnecessary Surgical Procedures*, *in* ONE HUNDRED MEDICAL LAW JUDICIAL PRECEDENTS (3) 122–123 (2022).

[59] If the court took into consideration the fact that the defendant performed unnecessary surgery on the patient for illegal profit and then found that his misdiagnosis and surgical failure constituted a negligence crime, the author finds the conclusion arguable as well. Under the above circumstances, given the defendant's inexperience and the high risk associated with the surgery, the defendant may be considered to have accepted the risk of the patient dying or being severely injured as a result of the procedure. Thus, his mental state constitutes recklessness. Recklessness is an intentional crime in Japanese law, not negligence.

[60] George Mousourakis, *Causation, Criminal Omissions and Medical Negligence: Some Doctrinal and Policy Aspects of a Common Law Approach*, 54(2) HOSEI RIRONRON 38 (2021).

that is not permitted by the criminal law. 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. Therefore, the author splits "violation of the duty of care" requirement and proposes a more restricted criteria for assessing the "duty of care" and the "violation". That is, "violation of the duty of care" required in criminal negligence refers to "the basic duty" and "a flagrant violation" of it.

**B. The "Basic Duty" Element**

"Basic duties" imply that the standards expected by criminal law are not within the scope of the discussion of medical or clinical standards. Japanese law defines professional negligence as "manifest negligence". Manifest negligence in clinical practice refers to a violation of evident medical standards that all medical practitioners are aware of (or should be aware of), such as those specified in textbooks as "must do" or "must not do".[61] As a result of this approach, the standard of care has been elevated from that of a reasonable person to that of a reasonable medical practitioner. The level of care imposed upon medical practitioners thus is more stringent than the performers in other social activities. However, professional negligence is not supposed to be regarded as an exceptional type of negligence. 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. Moreover, the requirements for a medical negligence crime must be rigorously narrowed to meet the expectation of limited negligence liability.

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. The duty that is imposed by criminal law pertains to matters that have no technical barriers. Therefore, in the above-mentioned Yamamoto Hospital case, the doctor was not supposed to be prosecuted for misdiagnosis and surgical failure though it resulted in the patient's death. Likewise, the medical decision-making errors in the Fukushima Ohno Hospital Incident (adhesive placental abruption surgery and the

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[61] MINISTRY OF HEALTH LABOUR AND WELFARE, *Scope of Causing Death Through Negligence in the Pursuit of Social Activities in Healthcare* (2008) 1.

criminal liability of obstetricians)[62] and the Case of Jikei Medical University Aoto Hospital (laparoscopic surgery and procedural errors)[63], also fall outside the scope of criminal law evaluation.[64]

### C. The "Flagrant Violation" Element

Not only the "basic duty", but criminal negligence also 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,[65] the anesthesiologist followed the

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[62] Inoue Kiyonari, *Fukushima Ohno Hospital Incident: Adhesive Placental Abruption Surgery and the Criminal Liability of Obstetricians*, *in* ONE HUNDRED MEDICAL LAW JUDICIAL PRECEDENTS (2) 128–129 (2014). Quarterly Keiji-bengo, Heisei18(Wa)41: Causing Death due to Negligence in the Pursuit of Social Activities and Violation of the Medical Practitioners Act, 57, 185.

[63] Tadaki Makoto, *Laparoscopic Surgery and Surgical Malpractice: Aoto Hospital of Jikei Medicine University Case*, *in* ONE HUNDRED MEDICAL LAW JUDICIAL PRECEDENTS (2) 130–131 (Katsunori Kai & Tejima Yutaka eds., 2nd ed. 2014). Heisei18(U)2122: Causing Death due to Negligence in the Pursuit of Social Activities.

[64] 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.

[65] Summary of facts: Patient *X* with a heart disease and patient *Y* with a lung disease were scheduled for surgical procedures. On the day of operation, nurse *A* moved the two patients to the exchange hall and transferred them to the nurse B without introducing the two patients' name to B. B also failed to confirm the two patients' identity information. The patients were then sent to the operating rooms with their identities confused. Although the two patients were of similar age, their facial and other features were quite different. Their symptoms were different from the pre-operative examination results. Despite many indications that the doctors in both operating rooms raised doubts on the patients' identities, they did not stop the procedure to thoroughly verify the patients' identities. They proceeded and completed the surgeries on the wrong patients. ACCIDENT INVESTIGATION COMMITTEE FOR MEDICAL ACCIDENTS AT YOKOHAMA CITY UNIVERSITY

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.[66]

## III. Essential Elements of Negligent Co-principals Under the Doctrine of Objective Attribution

### A. Basic Concept of the Doctrine of Objective Attribution

This dissertation states that a commission of a negligent actus reus refers to a 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 considered an essential reference for determining whether an impermissible risk has been created. "Creation of a risk impermissible under criminal law" is the first component of the idea of the doctrine of objective attribution.[67] This idea

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HOSPITAL, *Accident Investigation Committee Report on Medical Accidents at Yokohama City University Hospital* (1999), https://www.yokohama-cu.ac.jp/kaikaku/bk2/bk21.html.

[66] On the other hand, Hiyama Emi pointed out that the court has commented that merely because a medical practitioner followed medical convention does not mean that he or she fulfilled his or her duty of care based on the standard of medical care required of a medical institution. Moreover, confirming that the patient is the target of surgery is directly related to the patient's life and health, and if the anesthesiologist did not receive a definite answer, the anesthesiologist was obliged to perform confirmation measures even if other doctors of higher rank disagreed. Hiyama Emi, *Patients Misidentification Case*, *in* ONE HUNDRED MEDICAL LAW JUDICIAL PRECEDENTS (3) 142–143 (2022).

[67] To determine that the defendant's conduct was the cause of the social harm specified in the definition of the offence, the approach of Japanese law is similar to that of the common law system, that is both the actual cause and the legal cause have to be proved. For a long time in Japan, the doctrine of adequate causation was the standard for analyzing legal cause. According to the doctrine of adequate causation, when the intervening event that occurred on the causal chain between the former actus reus and the ultimate social harm was abnormal, this intervening event

indicates that the essential elements of a negligent crime are meet when (1) a piece of conduct created an impermissible risk which was presupposed in the constituent elements of a crime; and (2) this risk has realized in the ultimate social harm; and (3) the harmful result realized, or the legal interest infringed falls within the protection scope for which this statute was enacted. To decide whether a piece of conduct satisfies the three requirements, in addition to determining the performance of the duty and the occurrence of the social harm, a series of exclusionary rules are to be examined. If the conduct satisfies any of the exclusionary, the ultimate social harm is not attributed to the actor, and the actor is acquitted in cases of negligence.

**1. Creating an Impermissible Risk**

A harmful result is not attribute to an actor if the actor's conduct did not create an impermissible risk. A piece of conduct is considered not to create an impermissible risk when (1) the conduct reduced the risk[68], such as pushing someone who was about to be hit in the head by a rock so that

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broke the causal chain. Then the former actus reus is not considered the adequate cause of the harmful result and the causation between the former actus reus and the consequence is to be denied. Otherwise, if the occurrence of the intervening event was ordinary or adequate, in other words, it was dependent event of the former actus reus, the causal chain sustained and the first actus reus is regarded as an adequate cause and a legal cause of the consequence.

However, the idea of what kind of violation is considered to be the cause of the criminal result has changed a bit. In recent discussions, the doctrine of realization of risk, serving as an approach to analyzing causation, has received increasing attention in Japan. In the judgment of the case Near Miss of Japan Airlines Jet 2010, the court has expressly adopted the "realization of risk" criterion (Keishu, Japan Airline Near Miss Incident, 64, No7 1019 (2010), https://www.courts.go.jp/app/files/hanrei_jp/801/080801_hanrei.pdf.). This view was derived from the doctrine of objective attribution (*Objektive Zurechnung*). Unlike the application of the doctrine of objective attribution in Japan, scholars who support this doctrine in Germany, represented by Claus Roxin, see this doctrine as a criterion used to analyze whether the essential elements are met, and not just a tool to prove the requirement of causation. See Chapter 5 for a more specific discussion of causation. The author of this dissertation adopts the doctrine of objective attribution with the aim of describing how this doctrine is used to analyze whether the constituent elements of co-principals are satisfied.

[68] CLAUS ROXIN, CRIMINAL LAW GENERAL PART: FUNDAMENTALS, THE STRUCTURE OF THE

the rock ended up hitting on that person's shoulder and injured the person; (2) the conduct did not created a risk[69], such as persuading a person to go for a walk in a thunderstorm, resulting in the victim killed by a lightning strike. Walking is a daily activity and thus persuading another person to perform a legally permissible daily activity is not a commission of actus reus; (3) the created risk was controlled to the extent permitted by law, i.e., the particular risk is a legally permissible one.[70] For example, the risk involved in driving a car on a road is legally permissible. A harmful result is not attributed to the actor when the accident occurred while the actor was obeying the traffic rules; (4) the hypothetical causal process does not prevent the satisfaction of the essential elements of a crime.[71] For instance, an actor who shot and killed a criminal about to be executed before the executioner could carry out the death penalty was still committing an act of murder.

**2. Realizing an Impermissible Risk**

To examine whether the essential elements of a crime have been satisfied, the first step is to determine that the actor created a risk that is not permitted by criminal law, and the second step is to evaluate whether that risk was realized in the ultimate social harm. A harmful result is not attributed to an actor if the risk was not realized in the final result. The requirement of realization of an impermissible risk is not met when (1) the risk was not realized.[72] For example, A shot B, causing B to be injured and hospitalized, while B died from a hospital fire. The commission of shooting another person created an impermissible risk, but in this instance, the victim did not die from the gunshot wound and the risk created by the shooting was not realized in the consequence. (2) The impermissible risk was not realized.[73] For instance, a manager failed to comply with the regulations to arrange for workers to disinfect the products, thus causing those workers to die from the bacteria carried by the unsterilized product. Furthermore, it was proven afterwards that even if they followed the rules and sterilized the product, the lethal bacteria could not be removed due to the limitations of current technology. In this case, the failure to fulfill the obligation to sterilize did create a substantial risk, but from an ex post facto perspective, the duty required was ineffective and thus the impermissible risk was deemed not realized. (3) The ultimate social harm

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CRIME THEORY (1) (Yamanaka Keiichi trans., 4th ed. 2019) 484.

[69] *Id*, at 486.

[70] *Id,* at 492-493.

[71] *Id,* at 488-489.

[72] *Id*, at 495-496.

[73] *Id,* at 498-499.

or the legal interest infringed does not fall under the protection of the norms about attention, in other words, a certain norm created to make an actor perform sufficient care is not intended to protect a certain legal interest.[74] For example, an actor was driving drunk on a highway and hit a victim who suddenly broke through the highway, causing the victim's death. The norm prohibiting drunk driving is to prevent traffic accidents due to the driver's loss or reduction of the capability of control. In this case, the driver was drunk but the cause of the accident was not the driver's state of intoxication, but the victim's violation of traffic rules. Thus, the consequence of the victim's death is not attributed to the driver. (4) Even if a lawful alternative conduct had been performed in the first place, the social harm could not have been averted. Moreover, Roxin added that this exclusionary rule (the principle of lawful alternative conduct) applies only if the lawful act inevitably leads to the same harmful result. In other words, if the perpetrator had carried out a lawful act, the harmful result, no matter how small the probability, could have been avoided, then the requirement of the realization of an impermissible risk would still be satisfied. For example, the surgeon who performs the surgery incurred gross negligence that resulted in the patient's death. The procedure was high-risk and the chances of success were slim, even if the surgeon had fully performed his duty of care. The rationale is that it is disallowed for a person to increase substantial risks in a way that is forbidden by criminal law. Therefore, if it can be proven that the operation had a chance of success if the doctor had fulfilled his/her duty of care, then the fact that the doctor failed to meet the duty and caused the patient's death can be attributed to that doctor.

**3. The Protection Scope Covered by the Essential Elements of a Substantive Crime**

When a social harm occurred is not within the protection scope of the essential elements of a substantive crime, the consequence specified in the definition of the crime is not attributed to the actor. Specifically, it is not a situation to be prevented by the essential elements of a substantive crime when (1) an actor engaged in another person's intentional self-endangerment.[75] According to German law, an accomplice to a suicide or an intentional self-injury is unpunishable.[76] Involvement in an intentional self-endangerment likewise could not be punishable.[77] An example is the sale of drugs to a drug addict and the drug addict overdosed and died. In this case, the drug user knew the risk of his/her conduct and decided to commit it. The consequence of his/her death

[74] *Id,* at 503-504.

[75] *Id,* at 519.

[76] *Id*.

[77] *Id*.

is not attributed to the actor (the drug seller). However, a harmful result of another person's self-endangerment is to be attributed to the actor, if the actor participated in another person's self-endangerment and knew that person did not understand the risk of his/her own conduct, such as selling drugs to a juvenile who is mentally immature. (2) Endangering another person on the basis of agreement.[78] When the victim had a clear perception and acceptance of a certain risk, and the actor has fulfilled his/her general duty of care, the ultimate social harm caused by the actor may not be attributed to the actor.[79] For example, a person asked a ferry captain to take him/her across the river during a stormy day. The captain warned the passenger not to do so, telling him/her it would be too dangerous. The passenger insisted on the request, and the captain took the risk. Due to the heavy weather, the boat capsized, and the passenger drowned. The law does not expressly prohibit boating in stormy weather, and the captain had warned the passengers of the risks, thus the captain had performed his/her duty of care. The passenger, as a fully self-responsible person, was liable for his/her own choice when agreeing to travel on the boat knowing the risks and possible consequences of doing so. The death of the passenger is not attributed to the ferry captain. (3) When the duty to avert certain social harm came under another person's area of responsibility.[80] For example, A was driving a truck without taillights at night. The police officer discovered it and pulled the police car in front of A to stop A's truck. In order to protect the safety of other coming vehicles behind, the police placed a flashlight on the back of A's truck. The police officer instructed A to drive the truck to the next gas station and intended to drive along with A's truck. However, before A set off, the police took the flashlight away. Immediately after that, the victim's van was coming and crashed into A's truck, and the victim was seriously injured. In this case, the police officer who pulled over a vehicle was obligated to take and maintain measures to prevent the pulled over vehicle from colliding with subsequent vehicles. In other words, although a driver who did not turn on the taillights while driving at night violated traffic rules, preventing A's vehicle from colliding with other vehicles was within the police officer's area of responsibility, and the result of the police officer's failure to fulfill this duty to cause a vehicle collision was attributed to the police officer, not to the driver A.

**B. The Doctrine of Objective Attribution and the Actus Reus of Negligence**

The author advocates using the doctrine of objective attribution to examine whether the essential

[78] *Id,* at 530.

[79] *Id,* at 531.

[80] *Id,* at 540.

elements of a substantive crime of negligence have been satisfied. Negligent conduct that caused a social harm is what may establish a negligent crime. Under either the doctrine of objective attribution or the new theory of negligence, most negligence crimes are considered result crimes. Therefore, criminal negligence consists of at least two elements: (1) a violation of a code of conduct; and (2) a realization of the social harm specified in the definition of a substantive crime. According to the new theory of negligence, a violation of a code of conduct means a violation of the duty of care. Slightly different from the new theory of negligence, under the doctrine of objective attribution, a violation of a code of conduct means that the actor's performance has created a risk that is not permitted by criminal law. A breach of a duty by the actor is not a sufficient condition for the creation of an impermissible risk, while it is an important reference for the court to determine whether an actor has created an impermissible risk. In addition to the requirements of (1) a violation of a code of conduct; and (2) a realization of the social harm specified in the definition of a substantive crime; it requires an analysis of the scope of protection covered by the constituent elements of a substantive crime. That is, the violation committed by the actor and the social harm caused have to be consistent with what is prohibited by a particular substantive crime.

The prevailing view in Japan on the essential elements of negligent crimes is the new theory of negligence, in which a violation of the duty of care is taken as the constituent element of negligent crimes. Furthermore, Nakayama Keiichi, a Japanese scholar, who is also a proponent of the idea of objective attribution, advocated a combination of the two doctrines. He broke down the duty of care into two parts: (1) a duty to foresee possible social harms; and (2) a duty to avoid the ultimate social harm. When an actor violated a duty of prediction and committed a violation of codes of conduct, the actor has created an impermissible risk. To determine whether an actor violated his/her obligation to foresee possible social harms, the judge analyzes the actor's foreseeability of the harmful result from the ex-ante perspective with an ordinary man standard.[81] When the actor violated the duty to avoid the ultimate social harm, this actor has realized the risk, and then the harmful result could be attributed to this actor. To decide whether the actor violated the duty of consequence avoidance, the judge analyzes from the ex-post perspective that if the actor's violation of the duty substantially increased the risk of social harm occurring, and if the hazard result had a possibility of being avoided.[82] In this way, the doctrine of a violation of duty

[81] YAMANAKA KEIICHI, CRIMINAL LAW: GENERAL PART (3nd ed. 2015) 396-397.

[82] *Id,* at 432-433.

is incorporated into the doctrine of objective attribution, combining the two to evaluate the satisfaction of the essential elements of negligent crimes.

On the other hand, Claus Roxin, a German scholar who is a proponent of the doctrine of objective attribution, argued that, under the doctrine of objective attribution, the components of the outermost frame in the traditional theories of negligence such as the violation of duty of care, the duty to foresee possible social harms and the duty to avoid the ultimate social harm could all be discarded.[83] Duties of care which beyond the criminal statutes and can be found in other written codes of conduct are not essential elements but the references for the court to decide whether an actor's conduct has created an impermissible risk. Before a violation of duty is determined to be an actus reus which created an impermissible risk, it requires more analyses from a normative way.[84] The impermissible risk in the context of criminal law refers to a situation that is sufficient to cause the realization of all essential elements of a substantive crime. Once the constituent elements of a substantive crime are realized, the interest protected by the criminal law are infringed. An actus rues refers to the conduct that created the previous impermissible risk.

In short, only the act that created an impressible risk and infringed legal interests is considered an actus reus of negligence. Therefore, a piece of conduct, no matter how dangerous it is based on life experience, is not the actus reus of a substantive negligent crime, as long as it was not a creation of impermissible risk from the criminal normative perspective. Under the doctrine of objective attribution, a violation of duty is no longer an essential element required for commission of a substantive crime. It is downgraded to a reference for analyzing whether the conduct created an impermissible risk.[85]

### C. The Doctrine of Objective Attribution and Result-based Imputation

#### 1. Negligence Conduct and the Doctrine of Adequate Causation

For how to understand and determine the causal relationship between an actus reus and a harmful

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[83] CLAUS ROXIN, CRIMINAL LAW GENERAL PART (1): A BASIC STRUCTURE OF THE THEORY OF CRIME (Wang Shizhou trans., 2014) 715.

[84] Claus Roxin, *The Doctrine of Objective Attribution*, No. 50 CHENGCHI LAW REV. 19 (Xu Yuxiu trans., 1994).

[85] Yamanaka Keiichi, *Significance of "Avoidability" in Negligent Offences*, No. 407 KENSYU 11 (2007).

result, the doctrine of objective attribution is the prevailing view in Germany, while the doctrine of adequate causation is the majority view in Japan.[86] According to the doctrine of adequate causation, if, by the experience of the social life of ordinary people, the performance of a certain act usually produces a certain result, then the process from this act to the result is evaluated as general or adequate, so that the causal relationship between that act and the result is affirmed. There are two main difficulties in determining adequate causes: (1) limiting and filtering the facts for adequacy assessment; such limited facts are then used as a premise to decide (2) whether the requirement of adequacy is met or not.[87] With regard to (1), the actor committed an act sometimes with special circumstances attached to it, and we have to decide whether to include the special circumstances as a prerequisite for the adequacy assessment. There are currently two main approaches regarding whether special circumstances should be taken as a prerequisite for determining adequacy, namely, the objective theory and eclectic theory.[88]

The eclectic theory is that the prerequisites for adequacy assessment include circumstances that an ordinary person could know or foresee at the time of committing the conduct, as well as the special circumstances that have been predicted by the actor in the case. In contrast, the objective theory holds that all circumstances that have objectively existed at the time of the act of the actor, as well as those occurred subsequently with the act that an ordinary person could predicated, are prerequisites for the adequacy assessment. These two ideas have produced different conclusions when dealing with cases where the victim's particular physical condition had a decisive influence on the final result. The following case of robbery causing death is a classic. The defendant covered

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[86] The doctrine of adequate causation was first proposed by a German physiological psychologist Johannes von Kries. He presented his insights on the probability theory in the book named the Principles of the Probability Calculus: A Logical Investigation (Principien der Wahrscheinlichkeitsrechnung, eine logische Untersuchung) which was published in 1886; see FURITSU TAKAYUKI, A STUDY ON THE THEORY OF UNLAWFULLNESS IN CRIMINAL LAW (1996) 74.
The doctrine of adequate causation originated in Germany, but it is a minority view there.

[87] HASHIZUME TAKASHI, KEY POINTS OF CRIMINAL LAW: GENERAL PART (2020) 2.

[88] The subjective theory was once also advocated, but now there are few proponents of this view. The subjective theory states that whether the causation exists is to be decided on the basis of what the actor had known and foreseen at the time of the conduct, and what the actor could have known and predicted.

the victim's mouth and nose with a blanket to suppress the victim's resistance and robbed the victim's cash and bankbook.[89] During the course of the violence, the victim died of a heart attack.[90] The first trial (Tokyo District Court) found the defendant guilty of robbery causing death. The court held that although the victim died of a heart attack, it could not be considered as an accidental death of disease unrelated to the defendant's commission of violence.[91] It was an accepted conclusion that the cause of the victim's death was the sudden cardiac death triggered by the defendant's actus reus.[92]

However, the second trial (Tokyo High Court) overruled the judgment of the first instance and held that the distinction should be made between the social facts and the legal causation. Tokyo High Court stated that the District Court correctly determined the cause of the death from the perspective of social facts, however, as far as causation is concerned, whether the victim's death could be attributed to the defendant is doubtful. In other words, it could not be denied that the victim's death was caused by the acute cardiac death triggered by the defendant's force, but the decision could not be made so easily that there was a legal causation. To affirm the causal relationship between the defendant's actus reus and the victim's death, it is required that the actus reus in this case would normally lead to such a result based on social experience. When analyze an adequate cause, what an ordinary person with general care could know or predict at the time of the conduct, as well as what the actor in this case had known or predicted, are used as prerequisites for determining adequacy (the eclectic theory). Thus, the High Court's analysis of adequacy excluded the fact that the victim had a heart disease, and the court denied there was an adequate cause between the defendant's violence and the victim's death on the following two facts: (1) the defendant's actus reus did not reach the level of causing death, and (2) even the victim's doctor did not know that she was suffering from heart disease.[93]

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[89] Facts and courts' decisions, see Kawasaki Tomomi, *Aggravated Offences for a More Serious Result and the Causation*, *in* SELECTED CRIMINAL LAW PRECEDENTS 18–19 (Yamaguchi Atsushi & Saeki Hitoshi eds., 7th ed. 2014); Keishu, Showa 45 (A) : Robbery, Counterfeiting and Using Private Documents, Fraud, 25, No. 4 567.

[90] Kawasaki , *supra* note 89.

[91] *Id*.

[92] *Id*.

[93] *Id*.

On the other hand, the Supreme Court made a different decision than the High Court did. When analyzing the adequate cause, the High Court adopted the eclectic theory, while the Supreme Court applied the objective theory. The Supreme Court held that the violence committed by the defendant was the cause of the victim's death and that is not required to be the sole or direct cause of death. Even if it was a coincidental event that the victim suffered from a serious illness and that disease, together with the defendant's actus reus, resulted in the victim's death, this coincidence does not prevent the crime of Robbery Causing Death from being established. The Supreme Court denied the eclectic theory and it noted that it does not matter that without the heart disease, the defendant's violence would not have resulted in the victim's death. It also does not matter that the defendant could not foresee the victim's disease and the death. The Supreme Court applied the objective theory and stated that as long as it is a fact that the combination of the actus reus committed by the perpetrator and the victim's special condition resulted in the consequence, there is room to recognize the adequate causation.[94]

As mentioned previously, there are two main difficulties in determining adequate causes: (1) limiting and filtering the facts for adequacy assessment; such limited facts are then used as a premise to decide (2) whether the requirement of adequacy is met or not. As for (2), we are discussing the criteria for determining an adequate cause. At present opinions are diverse and have not yet formed a mainstream view. For example, adequacy refers to the general possibility that an act could result in a certain consequence (Kimura Kameji) [95]; Adequacy means the generality of an act leading to a certain result in terms of experience (Dando Shigemitsu)[96]; The bar of adequacy is low and only excludes extremely fortuitous cases (Hirono Ryuichi)[97]; Reaching the "adequate" degree means that such conduct produces such result is common in daily life, but it does not imply a high degree of certainty here (Otsuka Hitoshi)[98]; Adequacy refers to a highly stereotyped development (Inoue Masaharu)[99]; Adequacy requires that there is a high degree of

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94 *Id*.

95 KAMEJI KIMURA, CRIMINAL LAW: GENERAL PART (1973) 122-123.

96 DANDO SHIGEMITSU, ESSENTIALS OF CRIMINAL LAW: GENERAL PART (revised ed. 1979) 159.

97 RYUICHI, *supra* note 4, at 142.

98 OTSUKA HITOSHI, AN OVERVIEW OF CRIMINAL LAW: GENERAL PART (4th ed. 2008) 227.

99 INOUE MASAJI, THEORIES OF NEGLIGENCE AS MANIFESTED IN JUDICIAL PRECEDENTS (1959) 33.

certainty that the conduct leads to an outcome (Kawabata Hiroshi)[100]; Adequacy means common probability (more than 50% probability) (Uchida Fumiaki)[101], et cetera. Scholars have not accumulated sufficient argumentations about the method of evaluating adequacy.[102] The unclear evaluation standards for adequacy is one of the reasons for the confusions in the doctrine of adequate causation.[103]

**2. The Crisis of the Doctrine of Adequate Causation**

Despite the prevailing view, the doctrine of adequate causation has been criticized for the lack of clarity on the concept of adequacy and its evaluation criteria.[104] In particular, the U.S. Soldier Hit-and-run Case and the Osaka South Port Case brought about the crisis of the doctrine of adequate causation. In the case of U.S. Soldier Hit-and-run[105], the Supreme Court of Japan ruled

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[100] KAWABATA HIROSHI, LECTURES ON CRIMINAL LAW: GENERAL PART (3rd ed. 2013) 168.

[101] UCHIDA FUMIAKI, CRIMINAL LAW: GENERAL PART (1) (revised ed. 2009) 151.

[102] TAKASHI, *supra* note 87, at 2.

[103] *Id,* at 3.

[104] OKANO MITSUI, THEORIES OF CAUSATION IN CRIMINAL LAW (1977) 177.

[105] The summary of the facts of the U.S. Soldier Hit-and-run Case: the defendant, a member of Yokata Air Base (a United States Air Force base) was driving and failed to look ahead at an intersection. The car ran into a bike which was crossing the road and tossed the bicyclist away. The victim was catapulted to the top the defendant's car and lost consciousness. The defendant kept driving and when the car drove to a place 4km away from the accident scene, A who was in the co-pilot seat noticed the victim's presence. A dragged the victim off the top of the moving car which was at approximately10km/h, causing the victim to fall onto the asphalt road. The victim died after being transported to the hospital due to subarachnoid hemorrhage and intraparenchymal hemorrhage which were caused by the head injury either resulting from the initial car crash or hitting the ground due to A's discarding.

The first trial (Tokyo District Court) found the defendant guilty of Causing Death through Negligence in the Pursuit of Social Activities (Article 211 of Japanese Criminal Code). The defense counsel challenged the existence of causation. Because it was unclear whether the victim's death was caused by the car crash resulting from the defendant or the victim's head hitting the ground due to the co-pilot A's dragging. The second trial (Tokyo High Court) affirmed that there was a causation. It held that the conclusion could be reached by the rule of thumb, namely,

that the fact that passenger A dragged the victim off the car roof and dropped him onto the road was unforeseeable. In particular, it is indeterminable whether the head injury that resulted in the victim's death was caused by the initial collision with the defendant's car, or it was caused when passenger A dragged the victim off the moving car and had him falling onto the road. Therefore, it cannot be determined that the defendant's conduct of negligence was the cause of the victim's death according to the rule of thumb. For the above reasons, the Supreme Court found that the conclusion made by the High Court that the defendant was guilty of Causing Death through Negligence in the Pursuit of Social Activities was a misjudgment on the issue of causation and an error in the application of the statute.[106] The Supreme Court gave importance to the fact that the third party's intervention was abnormal in this case. The intervening event broke the causal chain, and the defendant did not have the causation with the result.

In Osaka South Port Case[107], however, the Supreme Court changed the view on adequate causation,

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it is the collision force triggered by the defendant's car caused the victim's death. The defense counsel appealed on the grounds that the causation was unclear. The Supreme Court Japan dismissed the appeal by admitting the error in the application of laws in the former judgment, and holding that absence of reversing the former judgment could not be seen as an obvious violation of justice. The facts and the courts' decisions, see Hayashi Yoichi, *Intervention of a Third Party and Causation (1)*, *in* SELECTED CRIMINAL LAW PRECEDENTS (1) 20–21 (Yamaguchi Atsushi & Saeki Hitoshi eds., 7th ed. 2014). Keishu, Showa42(A)710: Violation of the Traffic Law and Causing Death through Negligence in the Pursuit of Social Activities, 21(8) 1116, https://www.courts.go.jp/app/hanrei_jp/detail2?id=50870.

[106] *Id.*

[107] The summary of the facts of the Osaka South Port Case: the defendant was kept hitting the victim's head with the bottom of a washbasin and a belt at a restaurant between 8 p.m. and 9 p.m. (assault No. 1), as a result of which, the victim lost consciousness due to hypertensive cerebral hemorrhage caused by fear and other psychological stress. Afterwards, the defendant moved the victim to a material depository at Osaka South Port and ran away. The victim died of hypertensive cerebral hemorrhage in the early morning of the following day. It was later found that while the victim was placed in the material warehouse, he/she was beaten on the head several times by wood by a third party (assault No. 2), which exacerbated the cerebral hemorrhage and more or less advanced the time of death. More facts and courts' decisions, see Yamanaka Keiichi, *Intervention of a Third Party and Causation (2)*, *in* SELECTED CRIMINAL LAW PRECEDENTS (1)

holding that an abnormal intervening event does not necessarily break the causal chain. In this case, the defendant's assault caused the first injury of the victim, and the assault was one reason for the victim's death. Even if the victim's death was advanced due to the violence committed by a third party, the causation between the defendant's actus reus and the death is still established.[108] Provided that the idea of adequate causation which was adopted in the U.S. Soldier Hit-and-run Case were applied to the Osaka South Port Case, since the intervening event of the victim being hit in the head by another person with intent was out of ordinary and unforeseeable, thus it broke the causal chain and the defendant would not be the adequate cause to the result. It can be said that the occurrence of this intervening factor could not be predicted by an ordinary man. While, in this case, the Supreme Court gave weight to the fact that the defendant's actus reus (Assault No. 1) had caused significant injury which connected to the victim's death, thereby affirming the defendant's causation.

According to the judgment of the Osaka South Port Case, the Supreme Court clarified the following two points: (1) Even if an intervening factor is abnormal, it does not necessarily break the causal chain, and the former actus reus is possible to be the adequate cause to the ultimate social harm. (2) When analyzing causation, the extent to which an actus reus has an impact on the occurrence of the ultimate social harm is critical. Thus, in this case, the fact that the intervening event was bizarre was considered unimportant, instead the Supreme Court was more concerned with the first defendant's contribution to the ultimate social harm. As can be seen by the Supreme Court's decisions in the U.S. Soldier Hit-and-run Case and the Osaka South Port Case, the doctrine of adequate causation cannot be said to be generic.

### 3. Replacement of the Doctrine of Objective Attribution with the Doctrine of Adequate Causation

Despite the crisis of the doctrine of adequate causation, the proponents still doubt the necessity of introducing the doctrine of objective attribution and try to maintain it or to sustain it by improving it. One opinion, represented by Oya Minoru, is that the creation and increase of a risk simply indicates that the actor has committed an actus reus, and does not include the attribution

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22–23 (Yamaguchi Atsushi & Saeki Hitoshi eds., 7th ed. 2014). Keishu, Showa63(A)1124: Injury Causing Death and Injury, 44(8) 837, https://www.courts.go.jp/app/hanrei_jp/detail2?id=50373.

[108] *Id.*

of responsibility.[109] And the requirement of protection scope covered by essential elements of a substantive crime is too vague and lacks specific criteria for determination.[110] The idea of the essential elements is to formalize the process of determining that an act is an actus reus and to typify the actus reus, thus a clearer evaluation standard is required.[111] He supports the doctrine of adequate causation and presented adopting the reasoning process. (1) Deciding what types of conduct are prohibited by criminal law based on socially accepted idea, i.e., typifying actus reus; (2) The actus reus as an actual cause may have led to multiple harmful results, but only the harmful result realized by the actus reus can be attributed to the perpetrator, and this attribution of that result to the perpetrator must be socially acceptable; (3) The perpetrator is responsible only for the social harm attributed to him/her.[112]

Another insight attempts to ameliorate the doctrine of adequate causation. Scholars typified clusters of cases with intervening events and discussed the criteria for determining "adequacy" in those cases.[113] Under such attempts of typifying cases, the previous practice of ignoring the specifics of individual cases and determining "adequacy" had been ruled out, since the previous criteria is too abstract.[114] To solve this problem, proponents proposed more substantive and concrete criteria.[115] But, such a change of idea has deviated from the traditional idea of adequate causation. For example, Maeda Masahide suggested a more comprehensive way to analyze "causation", which is on the basis of the probability of the conduct causing the consequence, the degree of the abnormality of the intervening event, and the contribution of the intervening event to the harmful result.[116] As can be seen, both in Oya Minoru's approach to reasoning about causation and in the revised doctrine of other proponents, the idea that "the specific risk created by the actus reus has been realized in the result" has been stressed. Such an idea has deviated from the understanding of the traditional adequate causation. Because, under the doctrine of adequate

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[109] MINORU OTANI, LECTURES ON THE GENERAL PART OF CRIMINAL LAW (new 4th ed. 2013) 204.

[110] *Id*.

[111] *Id*.

[112] *Id,* at 206.

[113] Hayashi Yoichi, *Adequate Causation in Criminal Law (4)*, 104(1) HOGAKU KYOKAI ZASSI 97 (1987).

[114] *Id*.

[115] *Id*.

[116] MAEDA MASAHIDE, FUNDAMENTALS OF CRIMINAL LAW: GENERAL PART (1993) 110-111.

causation, abnormal intervening event would break the causal chain. In the Osaka South Port Case, according to it, there was no causal relationship between the defendant and the death of the victim. In contrast, under the doctrine of objective attribution, the defendant's contribution was seen in the result, since the defendant had fiercely assaulted the victim, who died of a cerebral hemorrhage. The idea of the current version of adequate causation has borrowed from the doctrine of objective attribution, and it is no longer in the original one. As Itoh Kensuke commented, the doctrine of adequate causation in Japan has been developed beyond the original structure.[117] To avoid the conceptual confusion, since the theoretical structure of the adequate causation has been left behind, the doctrine of objective attribution should be accepted and constructed instead.[118] The idea of adequate causation was first proposed with the probability theory in a book named the Principles of the Probability Calculus: A Logical Investigation. Thus, initially, the idea of the doctrine was to estimate the general probability of an action producing a social harm based on experience, and to consider the action as the legal cause of the social harm if the probability is high. The basis of the idea is physical laws, without a normative analysis, and it has been missing concerns about the ends and justifications for the criminal law as a whole. As for how to analyze causation under the doctrine of objective attribution, it was discussed in Chapter 5.

**IV Summary**

Under the old theory of negligence, the idea is that an act is unlawful because it infringed the interests protected by the law. Whether the actor was intentional or negligent determines liability. Theoretically, a driver who obeyed the traffic rules and was involved in a traffic accident because of another person's illegal behavior is unlawful, because objectively the driver made an infringement of legal interests. This driver is not guilty and not liable simply because he was neither negligent nor intentional. The new theory of negligence fixed the loophole in the old theory by arguing that negligence is not only embodied in the mental state and determines liability. It is also embodied in the conduct of the actor, and thus negligence is also an objective element of unlawfulness. Specifically, an actus reus of negligence refers to a violation of duty of care. The essential element of negligent crimes is a violation of the duty of care and this view is currently the prevailing view in Japan. The problem with the idea of violation of duty is that the approach does not limit criminal liability to serious offences. The conduct that is denied by criminal law is

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[117] Ito Kensuke, *The Content of "the Crisis of the Doctrine of Adequate Causation" and a Discussion of "the Doctrine of Objective Attribution"*, NO.4 MOD. CRIM. LAW 20 (1999).

[118] *Id.*

supposed to be a violation of codes of conduct in a penal sense. But the duty of care is not strictly limited. It applies the ordinary standards of care, which are found in statutes and regulations, as well as in written and unwritten codes of conduct beneath the world of formal legal norms.

The doctrine of objective attribution is adopted here. Under the doctrine of objective attribution, the idea of what are the essential elements of a negligent crime has changed. The essential elements of a negligent crime are meet when (1) a piece of conduct created an impermissible risk which was presupposed in the constituent elements of a crime; and (2) this risk has realized in the ultimate social harm; and (3) the harmful result realized, or the legal interest infringed falls within the protection scope for which this statute was enacted. Thus, the actus reus of negligent crimes refers to a creation of a risk that is not permitted by criminal law. The actus reus of co-principals of negligence refers to a co-creation of a risk impermissible under criminal law. Subsequently, a co-violation of a joint duty is no longer an essential element when analyzing whether the components of co-principals of negligence are satisfied. This criterion is relegated to a reference, which provides evidence and information to help determine whether multiple actors satisfy the requirement of co-creation of an impermissible risk.

Therefore, the author splits "violation of the duty of care" requirement and proposes a more restricted criteria for assessing the "duty of care" and the "violation". That is, "violation of the duty of care" required in criminal negligence refers to "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 duty that is imposed by criminal law pertains to matters that have no technical barriers. In addition, criminal negligence has to be a gross deviation so "flagrant" that it is punishable as a crime. It 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.

## Chapter 3 Principalness of the Negligence Perpetrator

The main issue to be addressed in this chapter is to find a criteria for determining whether a participant is a principal in a medical negligence offence. The following case (3%Nuperukain Case of National Sabae Hospital)[119] illustrated the issue in a concrete way. Defendant A (a pharmacist) prepared glucose injections and 3% Nuperukain solutions. As per the Pharmaceutical Affairs Law, Nuperukain is a dangerous drug which requires a label with a red frame on the surface of its container stating the name of the drug and the word "Danger". However, A did not follow the rules and placed the 3%Nuperukain solutions and glucose injections in the same size containers (100cc flasks), with the same label as glucose, and marked "3%Nuperukain" in blue instead of red. Furthermore, 3% Nuperukain solutions were placed in the same sterilizer as glucose injections.

The next day, defendant B (a clerk) mistakenly believed that the sterilizer was filled with only glucose injections. All flasks, including the 3% Nuperukain solutions that were mixed in them, were sorted out and placed in the storage cabinet. A, despite being present, forgot that 3% Nuperukain was also placed in the sterilizer. Nurse C from the internal medicine department requested a glucose injection, and B gave C 3% Nuperukain by mistake. In the office, C placed the solution on the disposal table. While preparing to administer glucose to a patient, nurse C noticed the label "3% Nuperukain" and became suspicious. C then positioned the solution in the corner of the disposal table. Despite the fact that the disposal table is available for public use in the nurses' office, injections to be administered were often placed on it, there was no precedent for dangerous drugs such as Nuperukain to be placed there. Around 13:00 that day, defendant D (a nurse in charge of Ward VI), who was preparing glucose for her patients, mistook the 3%Nuperukain on the disposal table, and she and another nurse injected the 3%Nuperukain into two patients' veils. Both patients died from poisoning that day as a result of the injection. The Supreme Court of Japan found defendants A (pharmacist), B (clerk) and D (ward nurse) each guilty of Causing Death through Negligence in the Pursuit of Social Activities (Article 211 of the

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[119] The facts and courts' decisions see Tatsui Satoko, *National Sabae Hospital Incident: 3%Nuperukain Case*, *in* SELECTED MEDICAL LAW PRECEDENTS 138–139 (Katsunori Kai & Tejima Yutaka eds., 2nd ed. 2014). Keishu, Showa27(A)3776: Violation of the Pharmaceutical Affairs Law and Causing Death due to Negligence in the Pursuit of Social Activities, 7(13) 2608, https://www.courts.go.jp/app/hanrei_jp/detail2?id=54693.

Japanese Criminal Code).[120]

A, B, and D were prosecuted, but only D was found guilty in the first trial. While A and B committed mistakes, C noticed and corrected them by placing the incorrect drug on the disposal table, so A and B were no longer liable for the death of the victim.[121] The second instance, on the other hand, held that C's conduct was not sufficient to correct A and B's negligence, but in fact maintained and increased the risk of the victim's death, thereby confirming the adequate causation of A and B.[122]

The dispute about this precedent is whether the defendants A (pharmacist) and B (clerk) were supposed to be liable for the patients' death? In order to answer this question, we must discuss the requirement of principalness, i.e., when a participant is considered to be a principal offender in a negligence offence. In addition, when there are multiple persons involved in negligence offence, does the intervening act of the later actor affect the liability of the initial actor? In the above case, assume that C, the nurse of the Internal Medicine Department, knew that the injection delivered by B was Nuperukain (the dangerous drug) rather than glucose and she left it on the disposal table purposely since she hated the hospital president and expected a major incident at this hospital. The question arises as to whether C's intentional act would break the causal chain started by A and B in this case? The following showed the various doctrinal understandings on negligence crimes and negligent principal offenders.

## I. Doctrines on Principals

### A. Basic Distinctions among Unified Principal Concept, Expanded Principal Concept and Restricted Principal Concept

In general, there are three ways to define principal offenders, namely by unified principal concept, expanded principal concept, and restricted principal concept. (1) The unified principal concept holds that all participants who contribute to a crime are principals, regardless of their level of participation.[123] No concept of accomplices, abettors, or aiders is used and as a result of an

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[120] Tatsui, *supra* note 119.

[121] *Id.*

[122] *Id.*

[123] HANS HEINRICH JESCHECK & THOMAS WEIGEND, TEXTBOOK OF GERMAN CRIMINAL LAW (Xu Jiusheng trans., 2017) 871. Nonetheless, a participant who is prima facie as a principal

assessment of the impact and significance of a participant's involvement in the crime, his/her sentence is determine.[124] (2) Expanded principal concept is an idea that was proposed after the unified principal concept and before the restricted principal concept. This concept challenged the general rule that the principal is the participant who committed the actus reus. To avoid loopholes in punishment, the concept takes into account all aspects of the crime and proposes that those who contribute significantly to the realization of a crime are principal offenders, regardless of whether they perform the commission of the actus reus or provide assistance to the principal. (3) Under the restricted principal concept, the principal is the participant who commits the actus reus required by a substantive crime (or who causes an innocent agent to do so); in other words, the participants are divided into two categories: principals and accomplices. Essentially, this concept states that the penal code prohibits a person from committing an actus reus that is specified in the definition of the crime. In keeping with the legislator's purpose, it is important to distinguish between a principal and an accomplice in an actus reus.[125]

For intent crimes, the restricted principal concept is used. As for negligent crimes, each negligent actor contributes to the offence with the violation and mental state, making it impossible to distinguish between a principal and an accomplice.[126] Each negligent actor has the same mens rea and actus reus, i.e., their mens rea is inattention and the actus reus is a violation of the duty of care. As a result, for negligence offences, the Japanese law can be regarded as adopting the unified principal concept or the expanded principal concept.[127] That is, participants who violate their duty of care and contribute to the ultimate social harm are all principals.[128] In the following, it showed

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through the principal character examination is possibly denied principal character in the second round of examination and excluded from liability. This rule of exculpation also applies to "expanded principal concept".

[124] *Id*.

[125] *Id,* at 877.

[126] *Id,* at 886.

[127] In the case of negligence offences, the expanded principal concept and the unified principal concept reach the same conclusion. Each negligence actor has the same actus reus and mens rea, and their degree of contribution to the crime is considered the same.

[128] It is important to note that it does not imply that all participants will be held responsible for the principal offenders. In fact, there is no contradiction between the "unified principal concept", "restricted principal concept" and "expanded principal concept", as indicated by Yoshinaka

a preference for the restricted principal concept since this dissertation abandons the application of the new and old theories and instead adopts an deductive approach to analyze the two situations in which the negligent offenders are likely to establish a co-relation.[129]

**B. But-for Doctrine and Classical System of Crime Theory**

The basis of the unified principal concept and the expanded principal concept is the but-for doctrine and equivalence doctrine. That is, the criminal conduct committed by each actor is considered equivalently evil, thus different types of conduct receives the same level of punishment and falls in the same sentence range. Subsequently, accomplices of negligence are also punishable. The problem is how to limit criminal liability under the influence of but-for doctrine. According to the classical system of crime theory proposed by Ernst von Beling and Franz von Liszt, causes for the result should be strictly distinguished from guilt of a perpetrator

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Nobuhito. Each of these concepts, when combined with "the doctrine of jointness of conduct" and the "doctrine of jointness of crime" and conduct, respectively, can plausibly limit negligence liability. Yoshinaka Nobuhito, *Crime System and the Nature of Co-offending*, *in* COLLECTIONS OF ESSAYS FOR PROFESSOR HIDAKA YOSHIHIRO'S 70 YEARS CELEBRATION (1) 429–433 (Takahashi Norio et al. eds., 2018).

The Italian criminal law theory, which is a typical case "unified perpetrator model" or "unified principal model", is perhaps indispensable for further study of the "unified perpetrator concept" or "unified principal concept". For details, see Yoshinaka Nobuhito, *Joint Principals in Italian Criminal Law (1),(2)*, 38(3),38(4) HIROSHIMA LAW J. 62–54, 66–58 (2015). Yoshinaka Nobuhito, *Joint Principals in Italian Criminal Law (3)*, 44(4) HIROSHIMA LAW J. 148 (2021).

[129] On the other hand, as stated by courts' decisions, it is a progression towards a "unified perpetrator model". Matsuzawa Shin, *The Distinction Between Accomplices and Principals: The Judge's Thinking and the Accomplice Theory*, *in* COLLECTIONS OF ESSAYS FOR PROFESSOR SONE TAKEHIKO AND PROFESSOR TAGUCHI MORIKAZU'S 70 YEARS CELEBRATION (VOL. 1) 5 (Takahashi Norio et al. eds., 2014).

[130], and Liszt pointed out that causation is not to be given undue weight.[131] The requirement of causation is met when the actor had the but-for cause or actual cause to the ultimate social harm, and all the causes connecting to the result are equally important in legal sense. Liszt suggested using causes to connect the facts happened without making any evaluation on those forces which promoted the process of the event.[132]

Therefore, according to Liszt, the evaluation standard of causation refers to but-for doctrine, and it does not include responsibility attribution. The liability is determined by a perpetrator's mens rea, i.e., intention or negligence. The problem of the idea is that each cause was in actual equivalent, but they were not necessarily the same in a legal sense. In other words, actual causes are not necessarily the legal causes or proximate causes. Removing the limitation of liability from the function of causation could overextend the punishment. For example, A wanted B to die from a thunderstroke, thus on a thunderstorm night, A persuaded B to go out for a walk. B did die from a lightning strike when he/she was walking outside. According to the but-for doctrine, without A's persuasion, B would not have died from a thunderstroke, therefore A's persuasion was causally linked to B's death. A is intentional when persuading B, thus A is to be convicted of homicide, while the conclusion is unreasonable.

**C. Doctrine of Retroactive Prohibition**

The doctrine of retroactive prohibition was proposed to cut off the tracing on the cause to limit the causation so that criminal liability could be restricted. The doctrine of discontinuation is the predecessor of the doctrine of retroactive prohibition, and the idea is that when a voluntary act of

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[130] In Japan and Germany, there are prerequisites of criminal liability, and the process is designed to help the court determine whether they have been met. One prerequisite is the satisfaction of the constituent elements of a crime: does the defendant's conduct satisfies the definition of an offence? Another is unlawfulness: was that formally criminal behavior also unlawful? And the remaining prerequisite is guilt: is the defendant blameworthy for the formally criminal and unlawful behavior. Justification is not a defense; it is simply the absence of unlawfulness. Excuse is not a defense; it is the absence of guilt or culpability or responsibility. See MARKUS DIRK DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH (2014) 418.

[131] FRANZ V. LISZT, TEXTBOOK OF GERMAN CRIMINAL LAW (Xu Jiusheng trans., Eberhard Schmidt, & He Binsong revised., 2006) 185.

[132] *Id,* at 185.

a third party intervenes, the causal chain of produced by the initial actor is broken, thus the ultimate social is not attributed to the first actor.[133] Each person is a moral agent and responsible for their voluntary act.[134] The doctrine of discontinuation was renamed as the doctrine of retroactive prohibition and it stated that despite the voluntary act, the causal chain would not be broken if the intervening cause was a negligent act.[135] Besides, when another perpetrator with intent intervened in a causal chain, this second perpetrator was a principals, while the first or the former offender would be downgraded to an accomplice.[136] Therefore, when the first offender was a negligent one, he/she would be downgraded to an accomplice of negligence. It implied that the concept of accomplice of negligence is possible. Supposing the nurse C in the case of 3%Nuperukain (National Sabae Hospital) had noticed the solution that clerk B gave him/her was the wrong one, however, C hated the hospital president and hoped a severe accident happen at hospital; thus, he/she left the dangerous solution on the disposal table. Under the doctrine of retroactive prohibition, C met the requirement of the causation and was guilty of homicide. While A and B who were the first offenders, since they were negligent, they were downgraded to accomplices of negligence and not punished. While, if the but-for doctrine is adopted, the conduct of A and B were actual causes, and they both were principals of negligence.

The Supreme Court of the German Empire and Weimar Republic (Reichsgericht） denied the doctrine of retroactive prohibition and adopted the but-for doctrine in the Warehouse Fire Case of 1927 (RGSt 61, 318(319)).[137] In this case, the defendant, an operator of a manual workshop, illegally built a dwelling in the attic, and rent it to an employee's family (eight persons). During the rental period, the eight persons died in a fire of unknown cause. The first and second trials of this case ruled that the defendant was guilty of Causing Death through Negligence. The court held that a large number of combustible materials were placed downstairs under the attic, and the staircase to the attic were not designed reasonably. Once a fire broke out, it would spread quickly and people in the attic were hardly able to escape. The defendant was possible to foresee the fact

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133 UTSUMI TOMOKO, CO-PRINCIPALS OF NEGLIGENCE (2013) 165.

134 *Id.*

135 *Id.*

136 *Id,* at 166.

137 The facts and the courts' decisions, see GERMAN CRIMINAL LAW BY PRECEDENTS: GENERAL PART, (Horiuchi Shozo, Machino Hajime, & Nishida Noriyuki eds., 1987) 18-19. TOMOKO, *supra* note 17, at 173.

that the tenants could not escape and would die in a fire but failed to take any measures and proceeded to let them live in that attic with potential danger. The court of the first instance decided that the defendant's negligent conduct was a cause to the death of the victims. It was approved by the court that the defendant could have foreseen the danger, and if he had been attentive and given thoughtful consideration to the construction of the building, he could have avoided the consequence. The defendant was found guilty of Causing Death through Negligence.

The defendant appealed to the Supreme Court of the German Empire and Weimar Republic and contended that there was a possibility that the fire was intentionally by a third party, therefore the causal chain between the defendant's conduct and the victims' death was probably broken. The defendant had no predictability of the consequence. The Supreme Court stated that the defendant created a cause leading to the social harm. He created such a state of danger for the residents that when a fire broke out, they were unable to escape from the fire. Without the joint contribution by the defendant, the victims would not have died. It does not matter that how the fire broke out, whether it was an accident, or set out negligently or intentionally by a third party. Even if the fire was set out intentionally by a third party, the causal chain created by the defendant would not be broken, since the cause produced by the defendant jointly contributed to the death of the victims.

Therefore, the doctrine of retroactive prohibition was denied, and, in this case, the but-for doctrine was adopted. All conditions provided by the offenders were regarded to have causation with the consequence. Following this approach, in cases of negligent offences, if an offender could have foreseen the ultimate social harm but participate in the offence in a negligent way, regardless of the intervening event, the negligent offender constituted a principal.

**D. The Expanded Principal Concept on the Basis of Teleological Concept of Action**

**1. Teleological Concept of Action and Participation in an Offence with Negligence**

The restricted principal concept was used to limit the scope of principal in intent offences. A person who committed the actus reus specified in a substantive crime is the principal, and the person who assisted the principal is an accomplice. In addition, when an intentional actus reus intervened in a negligent act, the causal chain created by the negligent offender should have been broken and the offender of negligence is not responsible for the ultimate social harm, however, this conclusion is contrary to the court's opinion described in the previous paragraph. To provide a rationale for the court's view and explain why intentional acts do not necessarily cut off the causal chain created by the prior negligent acts, Hellmuth Mayer proposed the idea of triggering

type offences to explain negligent offences. He separated negligent offences from intent offences by defining conduct. He categorized negligent offences as triggering type offences, and their essential elements are broader than that of intent offences.[138] Triggering type offences do not have a specific kind of conduct to be the actus reus. For example, an actor is guilty of Causing Death through Negligence if this actor negligently triggered another person's death. "Trigger" here means leading to the death of another person and it is different from killing that the actus reus specified in homicide.[139] With the idea of triggering type offences, it is impossible to distinguish between principals and accomplices in negligent offences. Because, objectively, participants of negligence all triggered the ultimate social harm and psychologically they were all inattentive. The participants of a negligent offence are all principals.[140]

This idea of triggering type offences was an innovation at the time, and it challenged the classical crime theory. Under the classical crime theory, an actus reus of intent and an actus reus of negligence are the same. For instance, the actus reus of Homicide and the actus reus of Causing Death through Negligence are the identical, that is infringement of another person's life. The difference between an intent offence and a negligent offence is only in the mental state of the actor. Distinct mental states determine their liabilities, i.e., a liability for negligence or a liability for intent. Under the idea of triggering type offences, the understanding of the actus reus changed. The actus reus of negligent offences refers to the unlawful conduct that triggered the harmful result. Hence, the actus reus of negligent offences were broader than that of intent offences. In such a context, Welzel then developed the teleological concept of action.

Combining the concept of principal and the teleological theory, Welzel argued that the linchpin of the principal offender is that they are the ones in teleological conduct control and dominate the commission of the actus reus of a crime.[141] In other words, a person who decided with will,

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[138] MATSUMIYA TAKAAKI, CONTEMPORARY ISSUES IN THE THEORY OF NEGLIGENT CRIMES (2004) 46-47.

[139] Adachi Kouji, *Development of the Doctrine of Objective Attribution and Its Challenges (1)*, No. 268 RITSUMEIKAN LAW REV. 152 (1999), at 169.

[140] *Id.*

[141] The concept of principal was proposed by Lobe in 1933. He wrote that the key to a principal is that the actus reus is under this person's control and that his/her will of perpetration controls and manipulates the crime, whereas the control of the result-oriented conduct of perpetration

purposively committing a piece of conduct and had the control over the conduct is a principal. In an intent offence, a principal could freely promote, change, and terminate his/her performance, thus they dominate the actus reus. While negligent offenders are different, because they did not have a purpose of realizing a harmful result and were not able to control over the actus reus. He provided a different theory to the negligent crimes and offenders of negligence. The prohibited negligent conduct is the conduct of inattentiveness.[142] When an actor failed to exercise the duty of care required by the society and caused a social harm, he/she is to be recognized as a sole perpetrator of negligence.[143] That is, the criteria for the intentional actus reus and the criteria for the negligent actus reus were distinguished. For cases of intent offences, Welzel advocated the restricted principal concept to draw a distinction between principals and accomplices. While for negligent offences, he denied co-principalship of negligence and the existence of accomplices of negligence. He suggested the expanded principal concept. When multiple persons were involved in negligence, each one who violated the duty and caused the harmful result is a sole perpetrator. The current prevailing theory on negligence continues Welzel's view and provides more specifically that the actus reus of negligence refers to a violation of the duty of care necessary in social life. Each of the negligent actors who violated the duty of care is a principal, regardless of how much the negligent act contributed to the ultimate social harm.

**2. The Problem with the Requirement of a Violation of the Duty of Care**

Welzel's concept of principal not only provided theoretical support for German judicial decisions, but also promoted the development of the crime theory. However, the adoption of expanded principal concept still leads to the problem of excessive expansion of negligent liability since the expanded principal concept is on the basis of the but-for doctrine. In response to this defect, Welzel put forward the idea of "social adequacy" to limit the scope of punishment. In our social life, there are many acts that involve the risk of infringement of legal interests, and many of them are indispensable to our life, such as driving cars and performing surgeries. The idea of social adequacy prohibits certain infringements of the legal interest that go beyond what is necessary

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would be lacking if this person is merely a secondary participant; see CLAUS ROXIN, CRIMINAL LAW GENERAL PART (2): SPECIAL MANIFESTATIONS OF CIMES (Wang Shizhou et al. trans., 2013) 15.

[142] Hans Joachim Hirsch, *The State of Theoretical Criminal Law in Germany*, No. 6 CRIM. LAW J. 50 (Ida Makoto trans., 2007).

[143] UTSUMI, *supra* note 133. at 174-175.

and unavoidable for the normal functioning of an orderly social life. In other words, socially appropriate acts are allowed even they are risky. When a person's conduct met the social adequacy and any ordinary person would find the conduct unavoidable, even though the conduct triggered the damage to legal interests, the conduct is considered lawful, and the requirement of unlawfulness is not satisfied. [144] The idea of dealing with negligent crimes as triggering type offences and applying the standard of social adequacy has not been always adopted by the courts in Germany. In the Truck Case (Lastwagen-Fall) (BGHSt11,1),[145] the defendant, a truck driver, overtook a cyclist on a straight and clear road. However, when doing so he only kept 75 cm from the cyclist instead of obligational 1m-1.5 m. The obligation of keeping this sufficient space is set out by the road traffic regulation. The cyclist, in a sudden panic reaction, steered his cycle to the left and got caught under the truck's back wheels suffering fatal injuries. The autopsy revealed that the cyclist had been severely drunk. The accused was charged with negligent manslaughter (§ 222).

The Federal Court of Justice (BGH) rejected the charge. The court admitted that the defendant's conduct was causally related to the cyclist's death. However, it could not be excluded beyond reasonable doubt that the cyclist would have been killed in any case.

> Due to his severe state of drunkenness and his sudden uncontrolled movement. It was highly probable that he would have been caught by the truck even if the defendant had kept the correct distance. The danger that is created by breaching a particular duty of care must manifest itself predominantly because of the accused's conduct. Here this was not the case. [146]

The defendant violated the duty of care stipulated in the road traffic law and triggered the cyclist's death. An ordinary person would not find that violating the safety distance while driving was unavoidable. Thus, the defendant satisfied the requirements of essential elements and unlawfulness of negligent manslaughter and was guilty. While the Federal Court of Justice held

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[144] Adachi Kouji, *The Development of Objective Attribution Principle and Its Challenges (2)*, No. 269 RITSUMEIKAN LAW REV. 263-264 (2000).

[145] The facts and court's decisions, see NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS (4th ed. 2010) 362.

[146] *Id.*

otherwise. Although in the sense of natural science, the defendant's manner of driving was one of the conditions that led to the cyclist's death. It did not mean that the defendant's violation of traffic regulations by overtaking a cyclist at an overly short distance could activate the crime of negligent manslaughter of Article 222 of the Criminal Code. In order to answer the question of the link between a behavior and a consequence, the criminal law with a focus on the principle of liability is not satisfied with a merely natural scientific connections…… what matters is whether the condition is material to the consequence in light of evaluation criteria in legal sense.[147]

According to the judgment, what is important is how the facts would have developed if the defendant performed legally permitted conduct. Providing the judge was convinced that an identical consequence would have happened without the defendant's violation or the possibility of having the identical consequence cannot be excluded, the conditional link created by the defendant was of no criminal significance to the consequence.

**E. Roxin's Doctrine of Objective Attribution and the Expanded Principal Concept**

Roxin maintains the expanded principal concept, i.e., anyone negligently caused the consequence is a principal.[148] Moreover, he adopts the principle of reliance and the doctrine of objective attribution instead of the doctrine of non-recourse when dealing with cases involving an intervening event.[149] In the past, if an intentional act intervened in a negligent act, with the doctrine of non-recourse, the intentional act broke the causal chain. Roxin argued that the causal chain should not be determined to be broken simply based on the fact that another offender acted with intent, and it intervened in the negligent act committed by another actor. If a negligent actor created an intolerable risk of intentional conduct, the ultimate social harm is also attributable to the negligent actor.[150] For example, A thoughtlessly told B that he/she wished for a fire, which

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[147] He Qingren, *The Doctrine of Obligation Criminals in German Criminal Law*, 1(24) CRIM. LAW REV. 237 (2009).

[148] ROXIN, *supra* note 25, at 10.

[149] The doctrine of objective attribution states that an act meets the essential elements of a substantive crime when (1) the actor created an impermissible risk; (2) the risk was realized in the ultimate social harm; (3) the harmful result is within the protection scope of the constituent elements of the substantive crime. More discussed in Chapter 5.

[150] CLAUS ROXIN, CRIMINAL LAW GENERAL PART (1): A BASIC STRUCTURE OF THE THEORY OF CRIME (Wang Shizhou trans., 2014) 719.

prompted B to set it. A constituted the crime of arson by negligence. When A argued that he/she was joking, all that could be excluded was his/her intent.[151] A could be aware of B's inclination to commit the actus reus of arson.[152] Based on Roxin's view, in the Warehouse Fire Case (RGSt 61, 318(319)), supposing the fire was caused by a third party's negligence, the risk of a fire arising from the negligence of another in an area where a large quantity of combustible materials had been stacked was easily predictable, and therefore the owner of the warehouse who created the fire risk was to be found guilty of negligence. When a fire was set intentionally by a third party, and the owner could not have known that a third person would set a fire, the residents' death was not attributed to the owner. Where the owner was unlikely to be aware of a potential third person's inclination to commit an intent crime, we can say that the owner could have trust that another person would not commit an intent crime.

Roxin holds that a negligent offender is liable as a sole perpetrator for the consequence which was in the furtherance of their agreement. Under the expanded principal concept, he denies the distinguishment between a principal and an accomplice in cases of negligence. For the Rolling Stone Case[153], the actus reus was committed in agreement between the two defendants, therefore they jointly created the danger and each of them was liable for the consequence as a sole perpetrator of negligence.[154] In other words, if an actor agreed and participated in the creation of a risk in negligence, even though "the realization of the risk" was satisfied by another participant, the ultimate social harm would be attributed to this actor and the actor would be liable as a sole perpetrator. Although he is advocating the expanded principal concept in negligent crimes, he assessed that the court's decision in Rolling Stone Case is not unnatural.[155] In addition, he gave an example that in the case where a company was giving out products to people for free, although those products had caused health damage to some users, the company decided to continue distributing them by a vote of an expert panel of the company. Based on majority rule, one negative vote was not enough to change the process of the whole matter. Each member who voted in favor was able to argue that the result would happen even without his/her affirmative vote. It would be difficult to prove the causation between each consent vote and the consequence and

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151 *Id.*

152 *Id.*

153 For the facts and judgment, see Chapter 1.

154 UTSUMI, *supra* note 133. at 196.

155 ROXIN, *supra* note 25, at 73.

independent sole perpetrators of negligence were not established.[156] They would be unpunishable. However, if the experts are admitted being negligent co-principals, each of them who had favored the continued distribution of the harmful products would be liable based on the principle of full responsibility for partial commission of the crime.[157]

## II. Restricted Principal Concept and Negligent Joint Crimes

### A. Doctrine of Dominating the Causal Process by Harro Otto

The adoption of expanded principal concept in negligent offences would expand punishment.[158] Otto pointed out that

> a principal in an intent offence refers to a person who enjoys a dominant status over the casual flow leading to the conduct's purpose. Unlike an intentional offender, a negligent offender does not aim at any result of the infringement of legal interests. Nevertheless, it is still possible to limit the principal of a negligent offence to the one who dominated the objective causal flow of the crime. On this premise, the offender who dominated the causal process has the first-degree duty of care to avoid the harmful result, while a person in a subordinate status may not be subject to the duty of care even if he/she was participating in the causal process.[159]

According to Otto, a social event where multiple persons jointly participated, some of them were central figures in the development of the event and others were peripheral. The criminal law takes this social reality as a precondition to identify the former as principals and the latter as accomplices. In addition, the criterion of central figure is corresponding to the role played by the actor in co-participation, and this actor's role is an important consideration in determining his/her duty of care.[160] For instance, A encouraged B to go out for a walk on a thunderstorm day, in the

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[156] *Id.*

[157] *Id.*

[158] Adachi Kouji, *Development of the Doctrine of Objective Attribution and Its Challenges (3)*, No. 270 RITSUMEIKAN LAW REV. 55 (2000).

[159] Otto is an adherent to the positive theory on negligent co-principalship. He holds that multiple persons who committed joint conduct through division of labor for the same social purpose could be regarded as an entity of co-participation. UTSUMI, *supra* note 17, at 212.

[160] *Id,* at 213.

hope that B would die from a thunderstroke. B went out and died from a thunderstroke. According to Otto's doctrine, A in this case is not necessarily unguilty. Providing A has an overwhelming knowledge of thunder and lightning, for example, A knew that the probability of being struck by lightning was very high in certain places and encouraged B to go for a walk in those places. It can be said that A freely determined the causal flow of the event through his/her knowledge of thunder and lightning. The same is valid for crimes of negligence. A doctor asked a nurse to administer a specific drug into a patient, and as a result the patient died of an allergic reaction to the drug. There is no doubt that the doctor violated the duty of care, but the nurse was subordinate to the doctor, and it is possible that the nurse would not be considered to have violated the duty of care and would not be held criminally liable.

To determine a principal of a crime, in addition to causation and predictability of the result and the possibility of consequence avoidance, this person must have a likelihood of dominating the causal process of the facts. In other words, a principal is liable for the facts that was under his/her possibility of control.[161] It is unnecessary for an offender to have control over the entire course of the fact pattern. An offender is deemed to have the possibility of controlling the causal process if he/she created or increased the risk that the harmful result would occur.[162] The author of the dissertation agrees with Otto that principals and accomplices could be distinguished in negligent offences, and the one who dominated the causal process of a crime is a principal. Furthermore, the criterion for deciding that the offender dominated the causal process is that he/she created or increased the risk of legal interest infringement. The duty of care is a reference material for determining whether the actor created or increased an impermissible risk. As long as the actor fulfilled the duty of care, specifically refers to obligations without technical barriers, he/she would not create or increase the impermissible risk of a social harm. Contrary to the Otto's view, the author holds that social roles or positions do not relate to the assessment of principalness. For example, in medical cases, unless explicitly stated, doctors have no obligation to supervise nurses. Confirmation of allergies, verification of the name of the agent, et cetera, are assigned to doctors and nurses as their respective duties. The obligations required by the criminal law, such as checking doses and confirming the identity of patients, are basic obligations before entering the area of expertise. Criminal law expects individuals to fulfill basic obligations, because these duties do not involve specialized skills and can evade the infringement of legal interests if they are

[161] Adachi, *supra* note 158, at 52.

[162] *Id*.

fulfilled in accordance with adequate performance, which, when violated, can lead to serious consequences. Therefore, to analyze whether an actor has created an impermissible risk under criminal law, we have to determine whether this actor violated a fundamental obligation and whether this violation created or increased the realization of a legal interest infringement.

**B. Self-Responsibility Principle by Joachim Renzikowski**

Renzikowski also advocates the restricted principal concept in negligent offences, and he holds that there is distinction between a principal's liability and an accomplice's liability in cases of negligence.[163] Renzikowski takes self-responsibility as the standard to distinguish a principal from an accomplice.[164] Self-responsibility means that apart from special circumstances, each person is liable only for the consequence caused by his/her own conduct, and has no need to be responsible for the result caused by another person.[165] In other words, the offender who personally realized the harmful result is a principal and liable for the result. While the backer of the principal is an accomplice and is responsible for the assistance they provide to the principal. Furthermore, a principal is who violated the prohibition of infringing legal interests; an accomplice is the one who set up an environment for the principal in which the infringement of legal interests was more likely to be achieved. The essence of the actus rues of an accomplice, abetting and aiding, is to increase the risk of infringement of the legal interests by the principal's actus reus.[166] Subsequently, a principal and an accomplice violate different codes of conduct. A principal breached the prohibition of "a direct infringement of legal interests"; an accomplice violated the prohibition of "an indirect infringement of legal interests".[167]

**III. Distinguishing Between a Principal and an Accomplice from a Normative Perspective**

There are two main understandings regarding the participants to a crime. One is the restricted principal concept, under which principals and accomplices are distinguished (hereinafter "dualism"). The other one is the unified principal concept, according to which principals and accomplices are indistinguishable and all the criminal participants are regarded as principals (hereinafter "monism"). Monistic approach simplifies legal application by sidestepping the

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[163] *Id,* at 53.

[164] *Id,* at 54.

[165] *Id*.

[166] *Id,* at 55.

[167] *Id*.

definition of principals, abettors, and aiders.[168] Both the Japanese and German prevailing view has adopted the monistic approach when analyzing negligent offences. That is, principals and accomplices in negligent offences are not distinguished, and all participants who violated the duty of care are principals of negligence.[169] On the other hand, this dissertation advocates the restricted principal concept in negligent offences. The restricted principal concept places emphasis on the typification of actus reus. It makes clear a principal's core status in co-offending and is conducive to the determination of individual's liability. It is only that how to distinguish between a principal and an accomplice in a negligent offence has been a predicament. In the author's view, rootically, from normative perspective, the criminal law norms that violated by a principal and an accomplice are different and a distinction is supposed to be made between the two.

Criminal law norms consist of codes of conduct and sanctions. For example, Article 199 of Japanese Criminal Code (homicide) states that a person who kills another shall be punished by the death penalty or imprisonment with work for life or for a definite term of not less than 5 years. The requirement of homicide is "killing another" and behind it lies the code of conduct that prohibits killing. It is only when this code of conduct is violated that the corresponding sanction is to be activated. A principal is an offender who violated the code of conduct specified in the Special Offences of Criminal Code. While an accomplice's actus reus does not satisfy the prohibition norms indicated in the Special Offences of Criminal Code. What norm is violated by an accomplice needs further exploration. The norms infringed by a principal and an accomplice are different. In negligent offences, a principal and an accomplice are possible to be distinguished and the restricted principal concept is to be adopted.

**A. Codes of Conduct and Norms of Sanctions**

A description of a substantive crime in the criminal code consists of two parts. The first half of the statute sets out the constituent elements of a substantive crime and the second half sets forth the penalties for this crime. An offender is who breached the code of the conduct behind the constituent elements of the crime and deserves a penalty.[170] Codes of conduct are the rules that

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[168] ROXIN, *supra* note 25, at 8.

[169] JESCHECK AND WEIGEND, *supra* note 7, at 886-887. SAEKI HITOSHI, THINKING AND ENJOYING CRIMINAL LAW (2013) 427.

[170] Li Shiyang, *A New Structure of Joint Crimes from a Normative Perspective*, No. 11 LEG. SCI. 99 (2017).

have effect on the whole population and are expressed in terms of prohibitions, orders, or permissions.[171] From an ordinary person's point of view, if the actor's conduct in that case is dangerous to infringe the legal interest, the act is found to be in violation of the code of conduct, and this is an ex-ante assessment.[172] A sanction is activated only when the violation of the code of conduct reaches the degree of punishability. The norm of sanctions is embodied in the exercise of adjudication authority by judges.[173] A sanction is activated when a risk of infringement of a legal interest has occurs or realized, and its evaluation is an ex-post assessment, that is, a judge makes the decision on the basis of the facts that have existed at the time of the judgment.[174]

Codes of conduct and sanctions are combined, nevertheless they have differences in terms of function, evaluation criteria and grounds for justification. Codes of conduct set expectations for national's actions, and when the normative expectations are broken, the criminal law could activate sanctions, imposing penalties on those who violate them. A code of conduct is evaluated prospectively, and the ex-ante assessment is based on the code of conduct; a norm of sanctions is evaluated retrospectively, and the ex-post assessment is on the basis of norms of sanctions. The ex-post assessment does not go beyond the framework of ex-ante evaluation. Because if a piece of conduct is legal under codes of conduct but illegal under norms of sanctions, codes of conduct is invalidated. On the other hand, where a piece of conduct is evaluated to be illegal ex-ante, unless an exception is made, it is illegal ex-post. The author of the dissertation advocates the doctrine of objective attribution that examines the negligent joint crimes from normative perspective because this approach has accommodated the three-tier system and goes beyond it to analyze offences with a reflection on why the criminal law provides as it does.[175]

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[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] The three-tier system is the structure used to examine each offence. The first tier is the satisfaction of the constituent elements of a crime: is the offender's conduct the type of conduct prohibited by the Criminal Code? Another is unlawfulness: is that formally criminal behavior also unlawful? The third is guilt: is the defendant blameworthy for the formally prohibited and unlawful behavior. If these requirements are met, the offender is criminally liable.

**B. The Distinction Between Principals and Accomplices in Terms of Codes of Conduct**

According to Joachim Renzikowski, the distinction between a principal and an accomplice is that the two violate different codes of conduct. The code of conduct for accomplices is a prohibition of bringing risks to legal interests, that is, accomplices are not allowed to abet and aid principals to commit actus reus. Whereas the code of conduct for principals refers to a prohibition of direct infringement of legal interests.[176] Combining the doctrine of offender-based unlawfulness[177] and the self-responsibility principle, Joachim Renzikowski argued that an accomplice is not liable for principals' autonomous conduct.[178] Masuda Yutaka also supports the doctrine of unlawfulness in conduct and the principle of self-responsibility.[179] Whether an actor is an accomplice is examined with codes of conduct.[180] The content of "unlawfulness in consequence", namely, the

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[176] Adachi, *supra* note 42, at 55.

[177] The idea of offender-based unlawfulness indicates that the unlawfulness of an offence is not reflected in the consequence. Since the consequence of the infringement legal interests separates from the personality of the offender. The conduct can be evaluated as unlawful only when it is regarded as a product of the offender. What the concept of unlawfulness denies or devalues is the conduct related to a human subject, and unlawfulness means the wrongful conduct of "an individual". The term of "an infringement legal interests" (*Erfolgsunwer*t, unlawfulness in consequence or anti-value consequence) has criminal significance only in the context of unlawful conduct of a human being; see Seki Tetsuo, *The Conflict Between the Doctrine of Unlawfulness in Consequence and the Doctrine of Unlawfulness in Conduct in Japan*, No. 49 KOKUSHIKAN LAW REV. 175 (2016).

[178] Adachi, *supra* note 42, at 55.

[179] There are two views on the essence of the unlawfulness. One is the unlawfulness in consequence (*Erfolgsunwert*) and the other one is the unlawfulness in conduct (*Handlungsunwert*). The former is the idea that an act is unlawful because the ultimate social harm/the harmful result/the infringement of legal interests. The latter attaches importance to the nature of the conduct committed by the actor; that is, an act is unlawful because it violated codes of conduct. Besides, proponents of the doctrine of unlawfulness in consequence emphasize the protection of legal interests or prevention of social harm. Proponents pf unlawfulness in conduct always support the doctrine of offender-based unlawfulness, stressing the function of maintaining social order and codes of conduct.

[180] Masuda Yutaka, *The Normative Structure of Complicity and the Theory of Wrongful Personhood: Grounds and Conditions for Punishement of Accomplices*, 71(6) HORITSU RONSO

consequence of a social harm is not an issue until the norm of sanction is activated.[181] Based on the self-responsibility principle, an offender's actus reus was autonomous and the autonomous conduct is the basis for his/her punishment. Put differently, the ground for punishment is the code of conduct. Subsequently, the basis for punishing an accomplice follows from the codes of conduct of accomplices, which are different from those of principals. An accomplice is punished due to his/her own inherent unlawfulness. The codes of conduct for an accomplice are expressed in the prohibition of indirectly damaging legal interests through participation in the actus reus committed by a principal.[182] The unlawfulness of accomplices is assessed ex-ante according to the codes of conduct of the accomplice which are separate from those of principals.[183] An offender acted with criminal intent to support a person in self-defense to hurt another person, and this offender's assistance is considered unlawful, and could be punished. The unlawfulness of an accomplice is not affected by whether nor not a principal has committed an actus reus, complicity is unlawful and punishable because an accomplice has violated the code of conduct for accomplices.

### C. Distinguishing Between Principals and Accomplices with Codes of Conduct and Sanctions and the Criterion for Determining the Principalness of Co-principals of Negligence

On the view of Joachim Renzikowski, accomplices and principals are distinct since accomplices violate the codes of conduct of an accomplice. Whether an accomplice's conduct is unlawful and whether it violated the codes of conduct is separate and independent from the assessment of the principal offender's conduct. An accomplice is established when a person abets or aids the principal. Abetting and aiding become conduct-based crimes, i.e., once the act is committed, it is considered a crime, regardless of whether the actus reus has posed a harm or an imminent threat to the society. However, compared with consequence-based crimes which require the creation of social harm or imminent danger to society to be established, conduct-based crimes are the ones more dangerous. An accomplice is not a highly dangerous, and an accomplice is usually less dangerous than a principal. The actus reus of a principal directly damages legal interests, and their violation of the codes of conduct is closer to the legal interest's infringement, while an accomplice

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21 (1999).

[181] *Id.*

[182] *Id,* at 20.

[183] *Id,* at 22-23.

plays an indirect role in infringing legal interests, thus their violation of the codes of conduct is farther from the legal interest's infringement and enjoys relatively lower degree of imminency. Complicity is not supposed to be identified as conduct-based crimes. Nor is the distinction between principals and accomplices based on more than the fact that they violate different codes of conduct.

The author of the dissertation advocates the "restricted principal" concept that distinguishes between a principal offender and an accomplice when analyzing negligent fact pattern. In short, not only are the codes of conduct different, but the norms of sanctions for accomplices also differ from those of principal offenders. Firstly, an accomplice violates the code of conduct of an accomplice. In contrast to Joachim Renzikowski's view, the author argues that the code of conduct of an accomplice is partially subordinate to those of the principal. That is, the complicity is unlawful not only because of the accomplice's violation of the codes of conduct of for an accomplice, but that the unlawfulness of an accomplice partially follows that of the principal offender. Because principals meet the requirements of substantive crimes, while accomplices do not. An accomplice does not have a commission of the actus rues, and they cause the ultimate social harm by participating in the crime committed by the principal. The prohibition of complicity is intended to complementarily protect the legal interests infringed by the principal offender. The punishment for accomplices is a result of an expansion of the norms and punishment provided for the principal. Thus, the codes of conduct for accomplices are subordinate to the codes of conduct for the principal.

Besides, a code of conduct refers to more than just the element of conduct. Violation of codes of conduct is tightly linked to the consequence of the legal interest's infringement. A code of conduct also contains the element of consequence. Since an accomplice's code of conduct is subordinate to that of the principal, its unlawfulness, i.e., the evaluation of the legal interest infringement committed by the accomplice is subordinate to that of the principal offender. It means that complicity is not established until the principal offender has met the essential elements of a substantive crime and had no lawful justification. For instance, X with criminal intent provided assistance to Y who was in self-defense to fight back against an aggressor, resulting in injuries to the aggressor. Because Y was acting in self-defense, the unlawfulness was absent. X as an accomplice, X's unlawfulness is subordinate to Y's, and thus X lacked unlawfulness. X did not constitute an accomplice. An accomplice is established only if the principal has committed an actus reus and the principal's conduct is unlawful. The exception is when the victim participates

in the criminal fact pattern as an accomplice. In the case of a female child, who was not capable of sexual consent, inducing an adult man to have sexual intercourse with her, the man's acceptance is unlawful, while the victim as a secondary participant cannot infringe her own legal interests and her inducement is considered illegal. In conclusion, the unlawfulness of an accomplice is partially subordinated to the unlawfulness of the principal. On the other hand, it is partly from the unlawfulness of the accomplice's conduct itself. In other words, the conduct of accomplices is subject to separate analysis to determine whether the conduct infringed the legal interests. exceptionally recognizes that a secondary participation into an offence could be lawful while the principal offender is illegal. The secondary participation is regarded not unlawful, if the act of a secondary participant cannot be evaluated as an indirect infringement of the specific legal interest. Thus, under the hybrid doctrine of triggering, in the case of a female child, who was not capable of sexual consent, inducing an adult man to have sexual intercourse with her, the man's acceptance was unlawful, while the victim as a secondary participant cannot infringe her own legal interests and her inducement was not illegal. Therefore, to determine the unlawfulness of a secondary participant, it is not sufficient to rely on the conjunctive unlawfulness between the accomplice and the principal, but also to analyze the conduct of the secondary participant itself.

In addition to the codes of conduct, the norms of sanction applicable to accomplices are different from those of the principal. A person who jointly committed a crime with others could be a principal offender or an accomplice. Whether to punish the offender and what penalty to impose is an ex-post evaluation. Article 199 of Japanese Criminal Code (homicide) states that a person who kills another shall be punished by the death penalty or imprisonment with work for life or for a definite term of not less than 5 years. The second half of the article is the norm of sanction, and it presupposes that this norm of sanction applies only to a sole perpetrator. Thus, the norms of sanctions specified in the Part II Crimes of the Criminal Code applies only to sole perpetrators. The punishment for joint offenders is on the basis of the supplemental provisions of article 60 (co-principals), article 61 (abetting) and article 62 (aiding) which are in the Part I General Provisions of the Criminal Code. For example, combing article 199 and article 60 and co-principals of homicide are to be punished. Article 60 (co-principals) is a part of sanction norms for co-principals. Article 61 (abetting) and article 62 (aiding) are partial sanction norms for accomplices. Therefore, violations of different codes of conduct activate distinct norms of sanctions, and there are different sanction norms for principals and accomplices. The author of the dissertation adopts Otto's doctrine of domination of causal process. In a joint offence, the one who dominated the causal process is a principal offender. Moreover, a principal in a negligent

offence is the one who violated the basic duty of care and thus created or increased the risk of an infringement of the legal interest. For medical negligence cases, when a medical practitioner violated the basic medical duty and consequently created or increased the risk of a patient's severe injury or death, this actor is a principal offender. The basic medical duties are very narrow, and its violation is also remarkably narrow situation. The discussion of the duty of care was addressed in Section IV of this chapter.

**D. Non-punishability of Accomplices of Negligence**

Under the restricted principal concept, a distinction is made between a principal and an accomplice in a negligent offence. The principal is liable for the consequence, however, whether an accomplice is punishable needs additional exploration. In the Criminal Code of Germany, abetting and abiding is only possible in intent crimes, and therefore the accomplice of negligence is decriminalized.[184] However, the Criminal Code of Japan has not limited complicity to assistance with intent. There are different views on the punishability of accomplices of negligence. When co-perpetrators committed a crime with intent, but the consequence deviated from their intent and resulted in more grievous harm than they had intended, we could consider that those co-perpetrators caused the ultimate social harm with no intent, in other words, they were negligent about the aggravated result.[185] In the result aggravated type of crimes, the accomplice is generally considered to be liable.[186] Therefore, an accomplice with negligence could be penalized.[187] However, Yamaguchi Atsushi denies the punishability of accomplices of negligence since it lacks provisions for the punishment of accomplices in the Criminal Code.[188]

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[184] Article 26 of Criminal Code of Germany (abetting): Whoever intentionally induces another to intentionally commit an unlawful conduct (abettor) incurs the same penalty as a principal.
Article 27 (aiding) (1): Whoever intentionally assists another in the intentional commission of an unlawful conduct incurs a penalty as an aider.

[185] This type of offence is known as "aggravated result crimes". It refers to the offence where the offender caused a more grievous consequence than expected and the offender is given a heavier sentence.

[186] NISHIDA NORIYUKI, CRIMINAL LAW: GENERAL PART (REVISED BY HASHIZUME TAKASHI) (3rd ed. 2019) 412.

[187] *Id*.

[188] YAMAGUCHI ATSUSHI, CRIMINAL LAW: GENERAL PART (3rd ed. 2016) 381.

### 1. Non-punishability of Negligent Abetting

An abettor of negligence refers to a person who negligently caused another person who had no criminal mind developed a criminal mind and committed a crime. There are two main categories: (1) Negligently causing another person to commit an intent crime. For example, A inadvertently revealed in a small talk that neighbor X was on a vacation abroad and had left the house unattended. After hearing this, B developed an intent to steal and committed a theft. (2) Negligently causing another person to commit a negligent crime. For example, A urged taxi driver B to speed up in order not to be later for work. B explained that the speed in that area was limited. A repeatedly urged B, and B chose to break the law and exceed the speed limit which caused a traffic accident and a pedestrian died. The first type of negligent abetment is unpunishable. Otherwise, there is a risk of infringing the basic right of freedom of speech. No one can foretell which of his/her inadvertent remarks will lead to another person's commission of an offence. For the second case, a person who was encouraged committed an offence with negligence could constitute a negligent crime while the person who provided the encouragement and advice with negligence is not a criminal. The social harm and punishability of negligently encouraged another person to commit a crime of negligence is absent.

### 2. Non-punishability of Negligent Aiding

An aider of negligence refers to a person who negligently helped another person to commit an offence. Aiding with negligence can happen in two ways: (1) Negligently aiding another person to commit an intent offence. For example, policeman A went to B's home to investigate a case and left the gun at B's home without knowing it. B later used this gun to kill X. (2) Negligently helping another person to commit a negligent offence. For example, A knew that B did not have a driving license but still lent the car to B. While driving, B violated traffic rules and killed a pedestrian. It is not theoretically inconceivable of a negligent aider. A person violated the duty of care, and the violation helped a principal's commission a crime, according to the doctrine of jointness in conduct, the actus reus of negligence could be considered a criminal aiding. Then under the doctrine of causality-based co-perpetrators, an accomplice of negligence makes the causal contribution to the ultimate social harm, thus is punishable. The author suggests that the punishability of a negligent aider is to be denied from the perspective of criminal policy. The adoption of the restricted principal concept in determining a principal of negligence has the aim to limit the punishment on negligent crimes. Furthermore, unlike the attitude towards intent crimes, the recognition and punishment of negligent offences is the exception in the field of criminal law. An accomplice of negligence is farther away from the consequence than a negligent

principal and is indirectly connected to the harmful result. With the principle of restraint in the criminal law, accomplices of negligence are unpunishable.

## IV. A Discussion of 3%Nuperukain Case of National Sabae Hospital

### A. The Gist of the Judgment of 3%Nuperukain Case[189]

The court of first instance found ward nurse D guilty, while pharmacist A and clerk B acquitted. The court held that the one who was supposed to be responsible for pharmacist A's failure to differentiate the solutions as required by the Pharmaceutical Affairs Law was the chief of the pharmacy department. Thus, the court denied the charge against A. Clerk B gave the wrong solution to nurse C and B was negligent. However, C corrected the errors of A and B, since C noticed that the drug was Nuperukain and set aside the solution on the disposal table. C's correction broke the causal chain. There was no adequate causation between the conduct of A and B and the victims' death. The prosecutor and all the defendants appealed. While the court of second instance found defendants A (pharmacist), B (clerk) and D (ward nurse) all guilty. The court held that in addition to being under the instruction and supervision of the head of the pharmacy department, A as a pharmacist had the duty to comply with Pharmaceutical Affairs Law. Thus, A violated Pharmaceutical Affairs Law and committed the actus reus of negligence. C failed to terminate the mistake, and C's conduct was not sufficient to be taken as a correction of A and B's negligence. C maintained and increased the risk of the victims' death. Defendants A and B were found guilty of Causing Death or Injuring through Negligence in the Pursuit of Social Activities (Article 211 of Japanese Penal Code). For the second trial's decision, all defendants appealed.

The Supreme Court dismissed the appeal and made the following comments:

> (1) Defendant A is a technical official and a pharmacist. When preparing a drug, a pharmacist has the duty to affix a qualified label onto the drug bottle in accordance with the requirements of Pharmaceutical Affairs Law. …Even based on the pharmacy department's work allocation list, there is no reason found to exempt A from the aforesaid obligations. (2) There is no reason to believe that Pharmaceutical Affairs Law does not apply to the work of drug preparation in a state-owned hospital. (3) If a nurse administered

[189] For the summary of the facts, see the opening section of this chapter. The courts' decisions, see Tatsui, *supra* note 119. KEISHU, *supra* note 119.

an intravenous injection to a patient according to a doctor's instruction and caused injury or death due to negligence, the nurse must be held liable under Article 211 of Japanese Criminal Code (Causing Death or Injury through Negligence in the Pursuit of Social Activities). The former court's judgment on other defendants' negligence and adequate causation was legitimate. [190]

**B. Discussion on the Principalness of the Defendants**

According to the doctrine of domination of causal process, the principalness of a co-principal is reflected in the fact that the principal's violation played a dominant role in the creation or increase of the risk of infringement of legal interests. A failed to differentiate the solutions as required by the Pharmaceutical Affairs Law and created the risk of patients dying from the wrong medicine. B did not carefully verify the medicine and delivered the wrong one to nurse C, increasing the risk of patients' death. Both A and B dominated the causal process that led to the patients' death. Moreover, the commission of the actus reus that realized the death would have failed if any of them has complied with the duty, thence each of them dominated the commission of the actus reus of the substantive crime. Defendants A and B are both principals of negligence.

Since the appellate court stated that nurse C's conduct was insufficient to correct A and B's negligence, but rather maintained and increased the risk. An issue here is that is C a principal of negligence? C checked and realized that B had probably delivered the wrong medicine. C placed the suspicious drug on the disposal table for further verification. While the disposal table is a place for public use in the nurses' office; injections to be administered are often placed on it. No one had ever put a dangerous drug like Nuperukain on the disposal table. C did not hide the suspicious drug in a more discreet place so that other nurses could not access it. Did C's insufficient care increase the risk and constitute criminal negligence? In my opinion, C set aside the toxic drug on the communal table and failed to shut off other medical staffs' access to such drug. C did not eliminate the risk that created and increased by defendants A and B. However, the fact that C interrupted the flow of the drug into the ward is undeniable. C's conduct of placing the drug at the disposal table at least sent out a message that "the drug cannot be used without confirmation", thus C at most maintained the risk produced by A and B, even eased the danger to some extent, but never increased the impermissible risk. The conduct evaluated as "failure to completely eliminate the risk" does not play a dominant role in creating and increasing a risk of

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[190] Tatsui, *supra* note 119.

infringement of legal interests. Despite C's indiscretion, C is not qualified as a principal of negligence.

Supposedly, nurse C knew that the injection delivered by B was Nuperukain and left it on the disposal table purposely since she hated the hospital president and expected a severe incident at this hospital. In such a situation, would C's actus reus with intent broke the causal chain produced by defendants A and B and would the patients' death be attributed to A and B? The principalness of perpetrator is manifested by the perpetrator's dominance of the casual process of the criminal fact pattern. Specifically, when an actor created and increased the risk of the infringement of the legal interest, the actor is a principal. In this assumption, B and C did create and increase the risk of the patient's death due to their violation of duties. Regardless of C's intentional actus reus or a negligent one, C's commission of the actus reus was in the furtherance of B and C's violation. Thus, B and C were principals of negligence in terms of the "dominating causal process" element.

**V. Summary**

This part adopted the restricted principal concept in analysis of negligent offences. In other words, in a case of negligent offence, a distinction is made between an accomplice and a principal offender. An accomplice and a principal can be distinguished because norms for an accomplice are different from that for a principal offender. The codes of conduct for an accomplice refers to the prohibition of infringing legal interests in an indirect way through participating in the actus reus committed by a principal. The code of conduct for a principal is the prohibition of direct infringement of legal interests. Besides, an accomplice and a principal are associated with different norms of sanctions. The article 61 (abetting) and article 62 (aiding) which are in the Part I General Provisions of the Criminal Code are the norms for accomplices. As for the criteria for determining the principal of negligence, the author adopts the doctrine of domination of causal process. In a joint offence, the one who dominated the causal process is a principal offender. Moreover, a principal of a negligent offence is the one who grossly violated the basic duty of care and thus created or increased the risk of an infringement of the legal interest. On the other hand, the person who violated the basic obligation did not create or increase the risk, but only maintained the risk of an infringement of the legal interest or failed to prevent the ultimate social harm is an accomplice. The complicity in negligent offences is not punishable with the principle of restraint.

Regarding the legal cause or proximate cause, i.e., whether an intervening event would break the

causal chain, the doctrine of retroactive prohibition held that an actus reus of intent always cuts off the causal chain, while an actus reus of negligence does not. German courts have not unanimously adopted the doctrine of retroactive prohibition to determine causation. The author asserts that causation presents the attribution of the ultimate social harm and cannot be assessed mechanically on the basis of whether the intervening conduct was intentional or negligent. When an impermissible risk was created by the actor, the intervening conduct, whether negligent or intentional, merely maintained or in furtherance of the same risk of the infringement of the legal interest, the ultimate social harm would still be attributed to the initial actor. But if the intervening conduct created another criminal fact pattern, and the new criminal fact led to the harmful result, the intervening event had broken the causal chain which was produced by the initial act.

In 3%Nuperukain Case of National Sabae Hospital, ward nurse D violated the basic duty to verify the name of the agent and personally realized the death of the patients, if we leave aside for the moment the inquiry as to whether her violation rose to the level of flagrancy, the violation of the basic duty that created the risk of the patient's death is likely to be considered a principal offence. Pharmacist A breached the obligation to separate the dangerous agents and regular agents, and clerk B failed in the duty to confirm the names of the agents. If their violations could be evaluated as gross negligence, then they both violated the basic duty of care under criminal law. A and B’s violations created and increased the risk of the patients’ death, and thus they were principals. Due to indiscretion, nurse C failed to completely eliminate the risk and maintained the risk produced by A and B. C did not dominate the causal process, and C was not one of the principals. Assuming that nurse C placed the 3%Nuperukain on the disposal table intentionally and expected the dangerous agent to be taken by mistake causing a serious medical accident, C’s intentional actus reus would not be able to break the causal chain. Because C furthered the risk of death of the patients A and B created, and C did not produce a new unforeseeable criminal fact pattern. A and B created the risk of the patients' death by violating the basic duties of care and that impermissible risk was realized in the consequence, thus the outcome of the patients' death would be attributed to A and B.

## Chapter 4 Jointness of Co-principals of Negligence

When a patient's death or serious injury was caused by the negligence of multiple medical personnel and they were all responsible, in most cases these medical practitioners were recognized as parallel principal offenders. However, whether they could be held liable as co-principals or whether it makes more sense to identify them as co-principals of negligence is open to discuss. In the incident of mistaken patients in Yokohama City University Hospital,[191] according to the Supreme Court, the defendants were parallel principals of negligence. Four doctors and two nurses failed in their duties to identify patients, resulting in two patients receiving the wrong surgery and suffering serious injuries. While in the Tokyo Metropolitan Hiroo Hospital Case,[192] the Supreme Court found the two defendant nurses guilty of negligence joint crime. When nurse A prepared Heparin Sodium (anticoagulation) for a rheumatoid arthritis patient, she mistook Hibitane Gluconate (disinfectant) and put it at the patient's bedside. Nurse B did not confirm the medicine and injected the patient with intravenous drips of the disinfectant, causing the patient's death. Nurse A and nurse B were convicted of Causing Death through Negligence in the Pursuit of Social Activities (Article 211 of Japanese Criminal Code) and assume the responsibility as co-principals of negligence.

The medical personnel in the incident of mistaken patients in Yokohama City University Hospital failed to meet their obligation to identify the patients. Two nurses in the Tokyo Metropolitan Hiroo Hospital Case failed to meet their duty to confirm that the agent was correct. The defendants in both cases jointly violated a joint duty of care and they satisfied - a co-violation of a joint duty - the essential element of a negligent joint crime. Why was the former case a parallel perpetrator, i.e., a joint relationship between the defendants was negated, whereas the latter case was a joint

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[191] The fact pattern and courts' decision see Chapter 3.

[192] More facts see KATSUNORI KAI, MEDICAL ACCIDENTS AND CRIMINAL LAW (2012) 86-87. COMMITTEE FOR PROMOTION OF MEASURES TO PREVENT MEDICAL ACCIDENTS AT METROPOLITAN HOSPITALS AND MATERNITY HOSPITALS, REPORT ON MEDICAL ACCIDENT AT HIROO METROPOLITAN HOSPITAL: VERIFICATION AND SUGGESTIONS (1999), https://www.byouin.metro.tokyo.lg.jp/hokoku/hokoku/documents/hiroojiko.pdf. Keishu, Heisei15(A)1560: Violation of the Medical Practitioners' Act and Making False Sealed Official Documents and Using Them, 58(4) 247, https://www.courts.go.jp/app/hanrei_jp/detail2?id=50058.

negligence crime? This shows that the difference between parallel principals of negligence and co-principals of negligence does not lie in this objective element. This chapter started from the viewpoints on jointness or a joint relationship which are based on the idea of mental causality and mental connection, then discussed why mental connection between the participants is not requisite for a joint negligence crime. Next, it discussed the elements of jointness, which are the requirements that must be met in order for multiple actors of negligence to be held as co-principals.

**I. The Justifications for the Principle of Full Responsibility for Partial Commission of the Crime**

A co-principal offender bears a full liability for the ultimate social harm, even if he/she partially contributed to the crime. This legal effect is called full responsibility for partial commission of the crime. As to what the basis of this legal effect is, three doctrines have been put forward: (1) the doctrine of a mind-merged agent; (2) the idea of causality-based co-perpetrators (also known as "doctrine of triggering"); (3) the doctrine of dominant behavior. The doctrine of dominant behavior is the prevailing view in Germany and the idea of causality-based co-perpetrators or the doctrine of triggering doctrine is prevailing in Japan. As for the doctrine of mind-merged agent, as discussed in chapter 1, it regards all participants as one subject. A co-offence is committed by a subject formed by multiple persons who shared a mens rea and it is a unique socio-psychological phenomenon.[193] When psychologically and physically different participants are integrated with a common purpose of committing a certain crime, a subject with a joint mens rea is formed.[194] As long as one participant in this group committed an actus reus, all members as the subject with a shared mens rea, is supposed to assume the liability for the consequence. The defects of this doctrine have been expounded in chapter 1 and will not be repeated hereby. The doctrine of a mind-merged agent asserts that mental connection between the participants is an essential element for a joint crime, and it can only be formed between the offenders with intent to commit a crime; thus, it takes the negative opinion towards the concept of negligent co-principalship.

[193] KUSANO HYOICHIRO, LECTURES ON THE GENERAL PART IN CRIMINAL LAW (1) (1935) 193-194.

[194] *Id.*

**A. The Understanding of Jointness Based on the Idea of Causality-based Co-perpetrators**

**1. Mental Causality and Physical Causality**

Although the proponents of the doctrine of jointness of conduct emphasizes that a joint crime of negligence was established when actors co-violated a joint duty of care and the participants do not need to have communicated and agreed on their violation, those scholars have overlooked the hidden subjective element inherent in the doctrine of causality-based co-perpetrators. According to the doctrine of causality-based co-perpetrators, each co-offender is liable not only for his/her own actus reus, but also for the crime committed by another participant and this is because each of them causally contributed to the consequence, and everyone is liable for it. The idea of the doctrine is grounded in the assumption that each participant had a psychological causality and a physical causality with the ultimate social harm. That is, a joint crime can be seen as the combination of a participant's causal force with another one's causal force or intervening act to produce a social harm ultimately and the given causal force includes both physical and mental causality.[195] The physical causality is a contribution by conduct to make the commission of a crime easier and more likely to achieve the result; the mental causality is the phycological contribution that created, maintained, and reinforced another participant's mens rea.[196] Mental causality was manifested in the fact that the slack mental state or attitude of each participant interacted with each other to promote an overall inattentive and negligent mentality. In other words, when we found an offender to be a co-principal, it implies that this offender had a mental causality to the result and had a psychological interplay or mental connection with other participants even it was a negligent offence.[197] For participants to satisfy the requirement of jointness or establish a joint relationship, they must have made a mental connection regarding the violation of the obligation to avoid harmful consequences.[198]

**2. The Basis for Punishing Accomplices Does Not Apply to Co-principals**

Initially, the idea of causality-based co-perpetrators was put forward as the foundation for punishing accomplices and it did not relate principals. It explained why an accomplice who did

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[195] YAMAGUCHI ATSUSHI, CRIMINAL LAW (3rd ed. 2017) 155.

[196] *Id*.

[197] Machino Hajime, *Improving and Inspecting the Doctrine of Causality-based Co-perpetrators: Subordination of Unlawfulness and Causality in Co-offences*, *in* THE CONTEMPORARY STATE OF CRIMINAL LAW AND PROFESSOR NAITO KEN'S 70 YEARS CELEBRATION 133 (1994).

[198] SAEKI, *supra* note 7, at 430.

not commit the actus reus specified in the substantive crime is to be punished and held liable for the crime committed by the principal. A principal offender committed the actus reus indicated in the essential elements of a crime and the principal's commission of the actus reus directly infringes the legal interests, thus the principal's conduct is unlawful and punishable for the ultimate social harm. According to the generally accepted view, an accomplice is punishable since an accomplice participated in the principal's perpetration, jointly with the principal offender, triggering a social harm.[199] That is, we hold accomplices responsible for the crime committed by the principal because they causally contributed to the harmful consequence. This idea was known as the doctrine of causality-based co-perpetrators and this doctrine is applied to co-principals to demonstrate why a co-principal as a participant who shared in some of the commission of an actus reus is to be held fully responsible for the ultimate social harm. In other words, the reason why a co-principal is held fully liable for the result is for the same rationale as an accomplice. It is because each co-principal made a causal contribution to the infringement of the legal interest. The problem of this approach is that co-principal is supposed to be a principal offender, and there is no need to use the rules for accomplices who is at a different level to justify the responsibility of a co-principal. A co-principal is a principal offender, and he/she committed the actus reus that directly infringed the legal interest. The basis for punishment of co-principals is to be sought based on the nature of principals.

**B. The Doctrine of Special Danger**

To justify the requirement of the mental causality and the mental connection between co-offenders in the case of negligence, Utsumi Tomoko introduced the doctrine of special danger into Japan. The doctrine of special danger, put forward by the German scholar Christoph Knauer, is based on the idea that when multiple persons cooperated to commit a crime, the likelihood of a crime being achieved increased, because the participants' criminal mental states were strengthened.[200] The co-perpetrators' liability comes from the mutual attribution of actus reus that is based on the participants' mental connection.[201] By communication of consciousness, co-offenders reduce the contingency of the result and increase the danger of infringement of the legal interests compared

[199] In other words, the unlawfulness of the accomplice is subordinate to the unlawfulness of the principal.

[200] UTSUMI TOMOKO, CO-PRINCIPALS OF NEGLIGENCE (2013) 115.

[201] *Id,* at 143.

with the cases where an offence was committed by a sole perpetrator .[202] Utsumi Tomoko extended this idea to negligent offences.

> When multiple persons participated in a joint social activity, each participant knew that they were performing with a common purpose. Each of them could develop a slack attitude when he/she saw co-workers disobeying rules, thinking that it does not matter if others are behaving so inattentively and he/she performs the task with the same attitude, then she/she would decrease prudence and slacken the attention. Therefore, even if the participants had no criminal intent, any of them, by adopting a wrong attitude that was incompatible with social expectations, gave co-workers a sense of reassurance about the violation, causing others to drop attention and work with the same sloppy attitude. The co-worker's attitude, in turn, promoted and strengthened the given actor's careless attitude. In this way, it can be considered that all participants have reached an agreement on an inattentiveness.[203]

The idea of the doctrine of special danger to negligent offences was inspired by the social-psychological phenomenon of social loafing. It means that a person tends to exert less effort to accomplish work when they work in a group than when working individually. When multiple persons cooperate for the same purpose, such collective conduct is objectively more dangerous than individual conduct. The doctrine of special danger then assumed that a social harm occurred in the cooperation of multiple persons because these participants contributed to each other's careless attitudes and developed a joint mens rea and actus reus. Mental connection between the participants is a requirement for establishing a negligent co-principalship.[204] For some negligent crimes, it could be proved that the perpetrators contributed to each other's inattentiveness and formed a joint mens rea without intent. But not all cases prove this. Criminal negligence in Japanese law is divided into negligence with conscious awareness and negligence without conscious awareness. Negligence with conscious awareness means that although the perpetrator knew that his/her action might cause harmful consequences, this perpetrator believed without a reasonable basis that the harmful results would not happen and failed to take appropriate preventive measures, which eventually led to the ultimate social harm. Negligence without conscious awareness means that the perpetrator completely lacked awareness of the unlawfulness

[202] *Id*.

[203] *Id,* at 141.

[204] *Id,* at 143.

of his/her conduct, in other words, the actor had the duty of care and the ability to pay attention, but forgot or failed to pay attention to the duty, and did not take measures to avoid the harmful consequences, which eventually led to damage to the legal interests. In the case of offences of negligence without conscious awareness, it is difficult to prove that the perpetrators contributed to each other's inattention, creating a joint mens rea.

Tasks that are difficult for one person to accomplish are more easily accomplished by several people working together through division of labor. The perpetrators support each other psychologically and physically. This reflects the danger of joint perpetration, but usually refers to intentional crimes. We punish intent offences and negligent offences for different reasons, punishing intent offences because of the evil person and the evil conduct, while punishing negligent offences more because of the harmful result. That is why in negligence offences, attempts and accomplices are not penalized. By punishing specific offenders for their negligence, criminal law calls the attention of other people, which has a general deterrence effect. The essential elements of the negligent joint crime and the intent joint crime are not the same. Co-conspiracy or mental connection between the participants is a requirement for intent joint crimes, but not necessary for negligent joint crimes. In other words, the subjective element is not a requirement of jointness.

**C. No Criminal Liability for Negligence without Conscious Awareness**

Kai Katsunori raised the issue that there is a tendency for criminal liability to be continuously expanded in Japan.[205] He reinforced the distinction between negligence with conscious awareness and negligence without conscious awareness and opposed the imposition of liability on the negligence without conscious awareness.[206] In a case in which the truck driver, while traveling at a speed exceeding twice the maximum speed limit, made a wrong turn and crashed into a traffic light pole, killing two passengers hiding in the cargo carrier without the driver's knowledge, the court stated that even if the defendant had not been aware of the fact that the two victims were hiding in the back of the truck, it would not prevent him from being convicted of Causing Death due to Negligence in the Pursuit of Social Activities with regard to the two victims' death.[207]

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[205] KATSUNORI KAI, THE PRINCIPLE OF CULPABILITY AND THE THEORY OF CRIMINAL NEGLIGENCE (expanded ed. 2019) 141.

[206] *Id,* at 144.

[207] Keishu, Showa61(A)193: Causing Death or Injury due to Negligence in the Pursuit of Social

Negligence without conscious awareness implies that the perpetrator did not foresee the harmful result. So, Kai Katsunori challenged the judgment that since the defendant did not foresee the ultimate social harm, it could not be confirmed that he was able to foresee the result and was able to avert it.[208] Criminal liability is a conscious awareness-based responsibility, and it requires that the perpetrator had been aware of the specific danger involved in his/her actions, including the causal process, when he/she began the commission of the actus reus.[209] Because when deciding whether to hold someone responsible, we need to consider whether the person should be blamed, not whether it is possible to blame them.[210] Responsibility is born out of a voluntary decision with awareness of wrongdoing.[211] Negligence without conscious awareness does not reflect any form of liability and does not entail substantive responsibility.[212] According to Kai Katsunori's argument, negligence without conscious awareness is not criminal negligence.

Kai Katsunori noted that the distinction between negligence co-principals and parallel principals of negligence is important and needs further study to clarify. Offenders of negligence with conscious awareness who knew his/her action was dangerous and could theoretically lead to harmful results, but acted in overconfidence that the negative consequence could have been avoided and eventually realized the social harm could be liable being negligence co-principals. However, offenders of negligence with no conscious awareness who failed to recognize that his/her actions were containing considerable danger did not foresee the ultimate social harm and thus they are not supposed to be held criminal liable and co-principalship is excluded. Kai Katsunori has effectively narrowed the negligence liability by removing the negligence without conscious awareness from criminal negligence. His argument relies on the stance of old theory of negligence whereby negligence is only a mental state and the negligence actus reus is not typified. The offenders of negligence with no conscious awareness did not foresee the social harm and thus is not criminally liable for their negligence.

The perpetrator of the negligence with conscious awareness was overconfident and credulous that

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Activities, 43(3) 262, https://www.courts.go.jp/app/hanrei_jp/detail2?id=50342.

[208] KAI, *supra* note 15, at 147.

[209] *Id,* at 152.

[210] *Id,* at 140.

[211] *Id*.

[212] *Id*.

his/her inattentive behavior would not result in social harm. That is, the perpetrator refused to accept the risk that a harmful outcome would occur. This is the same mental state as the perpetrator of negligence with no conscious awareness who did not recognize that he/she was committing an act of lack of attention. They are both negligence. These two subjective states (1) the fluke mentality, i.e., the belief that even if the illegal act is committed, it will not cause harmful results, and (2) the lack of necessary alertness to illegal acts, reflect the failure to foresee that the ultimate social harm the actor is expected to foresee. The two subjective states do not show that the former is culpable while the latter is not. Japanese law does not penalize the attempt of negligent crimes and negligent accomplices. Negligence is a result-based crime, meaning that there is no crime without a harmful result. Hence, the subjective component is not the core of what makes negligence a crime. The realization of the legal interest infringement (a harmful result) is the is a prima facie ground for negligence liability. In addition, narrowing negligence liability can be done by limiting the scope of impermissible risks by criminal law, i.e., scaling down the duty of care. The author maintained that, as stated in Chapter 3, when a participant grossly violated a basic duty below the standard of care expected of a reasonably careful person, and consequently created or increased the risk of an infringement of the legal interest, this participant is a negligence offender. When "jointness" requirement is met, both "negligence with conscious awareness" and "negligence with no conscious awareness" could be liable being co-principals, while mental connection is not an essential element for a joint relationship.

**D. The Doctrine of Dominant Behavior**

Hashimoto Masahiro's view blended with the German doctrine of Dominant Behavior and Uchida Fumiaki's view to argue for the essential elements of a negligent joint crime. A negligent joint crime is that multiple persons had jointly dominated a criminal fact pattern by a joint commission after their mental connection.[213] Uchida Fumiaki's view has been set out in Chapter 1. His main point is that multiple actors produced inattention in the process of performing a factual act together consciously and willingly.[214] This joint factual act in which those actors shared inattention, and in which they as a whole satisfied the actus reus specified in a crime.[215] Therefore,

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[213] HASHIMOTO MASAHIRO, THE DOCTRINE OF DOMINANT BEHAVIOR AND THE THEORY OF THE PRINCIPAL OFFENDERS (2000) 200.

[214] UCHIDA FUMIAKI, THE THEORY OF NEGLIGENT CO-COMMISSION IN CRIMINAL LAW (1973) 61.

[215] *Id.*

the negligence actus reus is such a combination of consciousness of the act itself and unconsciousness of the harmful result.[216] Moreover, Hashimoto Masahiro advocated a structure of negligence joint crime that is symmetrical with the structure of intent joint crime. Intentional crimes require conspiracy, and correspondingly, negligent crimes require joint inattention.[217] Negligence co-principals do not have intent, but they agree to engage in an act that is risky of violating the law. Such mental connection between the actors is a reinforcing factor toward the realization of a substantive crime.[218] When those actors have the conscious awareness to jointly practice the negligence actus reus, it means that each of them subjectively has the awareness to dominate or control the actus reus.[219] In addition, they jointly commit inattentive acts, showing that they objectively dominate the negligence actus reus.[220]

He further cited two examples to illustrate when we can determine that actors had mental connection in their actus reus. Example (1): A and B went hunting together in the forest, and a bullet fired by one of them hit C nearby, resulting in C's death. Example (2): A and B went to the roof to jointly remove tiles; they placed a pile of tiles randomly and the tiles fell off and hit C under the eaves, resulting in C's death.[221] In the first example, the actus reus specified in the crime of Causing Death through Negligence (article 210 of Japanese Criminal Code) cannot be understood as a generalized activity, thus co-hunting is not the actus reus. Shooting or firing is the conduct that is subject to assessment, however, shooting is not a joint act of A and B in this case.[222] By contrast, the second example demonstrated a negligent joint crime. Because removing tiles is a more specific act than hunting, and both knew they were removing tiles.[223]

### II. The Elements of Jointness

#### A. The Subjective Element of Unlawfulness Not Essential for Negligent Perpetrators

So far, scholars have been trying to build a structure of negligence joint crimes parallel to the

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[216] HASHIMOTO, *supra* note 214, at 196-197.

[217] *Id.*

[218] *Id,* at199.

[219] *Id,* at200.

[220] *Id.*

[221] *Id,* at 199-200.

[222] *Id.*

[223] *Id,* at 200.

structure of intent joint crimes. They argued for not only mental connection between the actors, but also the subjective element of the unlawfulness in a negligent perpetrator. The subjective element of unlawfulness refers to the negligent perpetrator's the mentality in performing the impermissible and dangerous conduct linked to a social harm.[224] It is manifested as a psychological process whereby the actor weighs whether his/her behavior will result in a social harm.[225] However, criminal negligence refers to the failure to meet basic obligations to the extent that it is a gross deviation from the standard of care expected of a reasonable and prudent person would do in that situation. This extreme negligence can be committed in a state of conscious awareness or without conscious awareness. In other words, the subjective element of unlawfulness is not an essential element for negligent perpetrators. For persons who lack caution to an extreme and intolerable degree, each of them may constitute negligence without conscious awareness, but they do not affect each other. Thus, perpetrators of negligence without conscious awareness form a joint relationship based not on the mental connection.

**B. Equal Status**

The requirement of a negligent joint crime is to be met when a joint duty of care was legally imposed on the co-actors, and they violated that duty. Those perpetrators can be held liable as co-principals. There is a further dispute over the specifics of the co-violation of the joint duty. According to Otsuka Hitoshi, a joint duty of care is recognized only when all of the co-actors are in an equal position.[226] Although surgeons and surgical nurses have to pay attention to each other to avert criminal consequences jointly, due to their distinct job positions and functions, their legal duties are not identical.[227] They do not share a joint duty and thus they are not be held liable as co-principals.[228] In other words, for multiple persons who jointly perform a social activity, albeit each of them is required to exercise caution, if they are in different job positions, it is hard to determine that these co-actors are assuming a collective duty of care where each of them takes responsibility for it as a co-principal.[229]

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[224] HANAI TETSUYA, THE BASIC STRUCTURE OF NEGLIGENT OFFENCES (1992) 115.

[225] *Id,* at 114.

[226] Otsuka Hitoshi, *Requirements for Establishment of Negligent Co-principals*, 43(6) LAWYERS ASSOC. J. 6 (1991).

[227] *Id*.

[228] *Id*.

[229] *Id*.

However, multiple persons are performing a task in which their duties usually partially overlap. It seems possible that regardless of their job positions, they could violate an identical obligation. Subsequently, when those co-actors grossly violated the same basic duty, they form a co-principalship. A case to be reiterated here is "the incident of mistaken patients in Yokohama City University Hospital". Two nurses, two anesthetists and two surgeons failed in their duties to identify the two patients, confusing the patients, and performing the wrong procedures on them.[230] The Supreme Court decided that every member of the medical team was guilty of Causing Injury through Negligence in the Pursuit of Social Activities (article 211 of the Japanese Penal Code). The surgeon, nurse, and anesthesiologist are different professional positions and perform distinct functions, but in this case, the identical specific obligation was assigned to each of them repeatedly. In other words, different positions or persons of different status may be burdened with the same duty.

**C. Same Tasks**

It has become common practice to divide the workload over a variety of tasks as the work becomes more complex. When it comes to medical cases, the concept of treatment is broad, and whether it can be used to align with "the joint duty" is subject to debate.[231] Even if it is accepted, individual violations that occurred during treatment are difficult to prove to be a joint negligent actus reus.[232] In the Tokyo Metropolitan Hiroo Hospital Case, two nurses administered the wrong medication and the patient died.[233] The nurse who prepared the agent mistook the disinfectant for the agent, and another nurse administered the agent directly to the patient without verifying its name. Although both preparation and injection of pharmaceuticals can be considered as having the duty to identify pharmaceuticals, strictly speaking they are different activities. The different tasks carry different risks and different obligations of risk prevention, and thus they do not satisfy the requirement of a joint duty.[234]

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[230] For more facts and the courts' decisions, see Chapter 2.

[231] Onagi Akihiro, *Negligence Concurrence and Co-principals of Negligence*, No. 1818 HANREIJIHO 217 (2003).

[232] *Id.*

[233] For the fact pattern and the courts' decisions, see the initial paragraphs of this chapter.

[234] Kitagawa Kayoko, *Issues Surrounding the Punishment of Multiple Persons for Negligence: Mistaken Patients at Yokohama City University Hospital as a Case Study*, *in* COLLECTIONS OF

Rather than requiring the actor to have performed the same tasks, the court found the two nurses in the Tokyo Metropolitan Hiroo Hospital Case were guilty of co-principals of negligence. Both the nurse who prepared the agent and the nurse who administered the agent to the patient breached their duty to confirm the type of medication, and it is their joint duty.[235] They co-violated a joint duty of care and resulted in the patient's death; thus, they were liable as co-principals. This dissertation supports the court's conclusion that co-principalship could be established between the two nurses. On the other hand, it holds a different view that the establishment of a negligent joint crime does not require multiple persons to violate the same code of conduct. Either a violation of a concrete work regulation argued by Onagi Akihiro and Kitagawa Kayoko, or a co-violation of a more encompassing obligation as determined by the Court, they both refer to a breach of the same code of conduct. A negligent joint crime is one in which several persons who have breached their duties bear principal liability for the ultimate social harm. That is, it is possible that in cooperation they violated different codes of conduct and the negative changes they caused translated into a harmful outcome. Each member of a medical team, who grossly violated their code of conduct and caused the death of a patient, was liable for the result as a principal offender. They established a co-principalship, not parallel principals, because they had formed a joint relationship. Whenever a team of medical personnel is assembled to treat a patient, each member has a duty to prevent harmful outcomes to the patient. Including the responsibility for each member to stop the violations committed by other members, but not the same obligation for them to supervise each other. Thus, it is not related to other medical staff of this hospital, and a joint relationship has been established between these several medical staff of the team. When a harmful outcome occurs and they assume principal responsibility for it, they are held liable as co-principals.

### D. A Joint Responsibility Expected by Society

Based on the doctrine of objective attribution and the concept of normalized jointness, Kaneko Hiroshi argued that a joint crime is based on the fact that the participants co-violated a joint duty to avoid harmful consequences.[236] The scope of the responsibility was determined by examining

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ESSAYS FOR PROFESSOR SONE TAKEHIKO AND PROFESSOR TAGUCHI MORIKAZU'S 70 YEARS CELEBRATION (VOL. 1) 635 (Takahashi Norio et al. eds., 2014).

[235] Hanreijiho, Tokyo District Court (December 27, 2012), No. 1771 168.

[236] Kaneko, *supra* note 36.

the significance of the behavior of each participant leading to the consequence, and then deciding the duty each participant should assume in accordance with that contribution.[237] In other words, a joint liability is recognized if the society expects those participants to jointly prevent the harmful consequence. He came up with this idea in social expectation doctrine. According to the social expectation doctrine, the essential elements of a substantive crime will not be met, unless the ultimate social harm can be fairly attributed to the actors because from the social expectation perspective, it fell within in the scope of the actor's accountability.[238] Otherwise, due to the principle of reliance or else, an actor does not belong to the realm of accountability for the realization of essential elements of a substantive crime, the result cannot be attributed to him/her in the first place.[239]

Prior to the social expectation doctrine, the previous idea was usually to examine negligent joint offences through the lens of negligent crime's structure. A joint crime is established when the multiple persons violated a common duty together. As a result, Kaneko Hiroshi takes a new perspective on joint crimes, i.e., society expects that multiple persons will jointly prevent a harmful outcome, so that the ultimate social harm is ascribed to them, and they are held liable as co-principals. His approach is smart because it rejects the obsession with whether multiple people violated a joint code of conduct and focuses on whether the result can be fairly ascribed to them. Criminal medical negligence is a result-based crime, which means that despite the breach of duty, medical personnel will not constitute a crime as long as there is no social harm. Medical offences are analyzed by first considering whether the harmful result is attributed to each of the participants. A second question to be addressed is in what form the participants are responsible, i.e., whether they committed the crime concurrently or jointly. In spite of this, the main weakness of the social expectation doctrine is the vague nature of "social expectation" as a standard for determining punishment necessity.[240] There is no offence is able to completely excludes the social views, however, if a joint criminal liability is thoroughly determined by social expectation, the author is afraid that this approach would lead to an improper expansion of criminal lability. And it contradicts principle of legality.[241]

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[237] *Id,* at 167.

[238] *Id,* at 125.

[239] *Id*.

[240] Otsuka Hiroshi, *Co-principals of Negligence*, No. 28 CRIM. LAW J. 17 (2011).

[241] Matsumiya, *supra* note 53.

### E. Discussion of Joint Relationship

The mental state of a negligent perpetrator is inattentive but rejects the occurrence of harmful consequences. A perpetrator's awareness or absence of awareness of the danger involved in his/her actions is not a subjective element of the negligence crime. Negligence with conscious awareness and negligence without conscious awareness are two forms of negligence. Negligent joint crimes can be classified into two types. (1) Multiple persons agreeing to commit an immoral or unlawful act together (hereinafter "agreement-based negligence"), such as the "Rolling Stones" case; (2) In the absence of agreement among multiple actors, the violations committed by each of them result in a harmful outcome, as in most criminal medical negligence (hereinafter "non-agreement negligence").

In agreement-based negligence, the joint relationship of the actors is based on their mutual consent and their joint actus reus committed in the furtherance of the agreement. A rock case, for example, involved two defendants pushing two boulders from a hill in agreement, but one of the boulders struck and killed a fisherman who was at the foot of the hill. In non-agreement negligence, the actors who bear criminal responsibility are all principals with a causal link to the result. This is to say that their criminal liability is well defined, and whether or not they are involved in a joint relationship only indicates in what form they are liable, whether in the form of a joint crime or a concurrent crime. A team of medical professionals providing medical assistance to a patient is obligated to avoid an unnecessary harm resulting from their collaboration. This duty to avoid harmful consequences does not imply supervisory obligations between the co-workers, despite Otsuka Hiroshi's view that co-actors must have a duty to supervise each other to meet the requirement of jointness for a negligent joint crime.[242] The medical practitioners' duty to avoid harmful outcomes stems from the contract with the patient and the patient's vulnerability. Team members have a contractual duty with the patient to ensure that they take care of the patient, and they are the guarantors of the patient's life and health. But this duty of care does not naturally convert into an obligation of supervision and make medical personnel mutual guarantors of each other. According to the duty to prevent harm, any member of the health care team has a duty to stop the behavior of other participants when he/she knows that such behavior is detrimental to the life and health of the patient. Due to a lack of supervisory obligations, an obligor cannot be held liable for harm caused by another participant if there is no evidence that the obligor knew of the

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[242] Otsuka Hiroshi, *supra* note 3.

unlawful conduct.

**III. A Discussion of the Joint Relationship between the Defendants in the Case of the Incident of Mistaken Patients in Yokohama City University Hospital**[243]

As discussed in Chapter 3, this paper argues that the anesthesiologist C did not commit a gross violation to an extreme degree so as to be punished as a principal. In addition, the operating room received a reply from the ward that the questioned patient had been sent to the operating room, and the surgeons decided to proceed with the operation. A better course of action would be for the senior surgeon to take more seriously the anesthesiologist's concerns, suspend the procedure, and verify the patient's identity thoroughly. In this case, the surgeon disagreed with the anesthesiologist's concerns, and the surgeon is undoubtedly ethically responsible. However, the author believes that there is room for discussion regarding whether the surgeon's error amounted to a crime. To limit criminal liability for medical negligence, judges and juries might choose not to incriminate doctors and even nurses. It is the opinion of the author that the accused medical personnel did not meet the criteria of gross violation and did not constitute principal offenders. Due to the fact that Japanese law only punishes the principal of negligence, each defendant does not constitute a crime, and therefore it is unnecessary to examine whether they are joint criminals. In order to discuss the elements of establishing a joint relationship between multiple actors below, it is assumed that each defendant was guilty of principal .

Two nurses were unaware that they had confused two patients and sent them to the wrong operating room. When other medical personnel denied the suspicion of the patient's identity, the anesthesiologist's suspicion was not eliminated, but perhaps reduced. According to the surgeon, the patient had not been misidentified, so the surgery was continued without questioning the patient's identity. The above facts do not indicate that the medical staff agreed to slacken the verification of the patient's identity. Rather, it appears that medical practitioners did not realize that mistakes had been made when verifying the patient's identity. Therefore, this is a non-agreement negligence. The Supreme Court found that each defendant in this case violated the duty of care resulting in serious injury to the patient. They are all principal offenders and are liable as parallel principals. Assuming that each medial staff in this case is a principal offender, this dissertation considers them to constitute a joint crime. As a result of the medical contract and the vulnerability of the patient, every medical staff responsible for the treatment has a duty to take

[243] For the facts see Chapter 3.

care of the patient. Several health care professionals work together to treat a patient, all having the same duty to prevent harm, and they must also prevent other members from endangering the patient's life. Hence, those medical personnel established a joint relationship based on the same result avoidance obligation and mutual prevention duty.

**IV. Summary**

In this chapter, it is argued that the mental connection between the actors is not essential to the establishment of negligent joint crime. As a result of the doctrine of causality-based co-perpetrators, the above conclusion was reached. The doctrine of causality-based co-perpetrators has been developed to explain the distribution of responsibility in a joint crime, including principals and accomplices. While co-principals' of responsibility does not necessarily have to be illuminated by it. It is important to note that co-principals, as well as sole principal offenders and accomplices, do not belong to the same category of criminal participants. The responsibility of co-principals should be determined by the characteristics of the principals. And in Chapter 3 of this dissertation, it held that the actor who dominated the causal process of the fact pattern is a principal offender and in light of the principal's substantial contribution to the harmful consequence, they are responsible for the entire crime. Along this idea, the mental connection between the principals or mental causality is no longer an essential element to establish a negligent joint crime.

Negligence with conscious awareness and negligence without conscious awareness are two forms of negligence. Negligent joint crimes can be classified into two types, namely, agreement-based negligence and non-agreement negligence. In agreement-based negligence, the joint relationship of the actors is based on their mutual consent and their joint actus reus committed in the furtherance of the agreement. For non-agreement negligence, when each principal is causally related to the ultimate social harm and they share the same duty to avoid the harmful result based on a certain legal relationship, they have established a joint relationship. In medical cases, medical team members have a contractual duty to avoid harmful outcomes for one patient and a duty to prevent other members' illegal acts from harming that patient. This suggests that these medical professionals have a joint relationship. When team members each commit a grossly negligent actus reus that results in the death or serious injury of a patient, they are liable as co-principals. Based on the view of this dissertation regarding the elements of jointness or a joint relationship, assuming that each of the medical personnel involved is a principal in the incident of Mistaken Patients in Yokohama City University Hospital, they constituted co-principals, which is unlike

the opinion of the Supreme Court. Those medical personnel had established a joint relationship based on the same result avoidance obligation and mutual prevention duty.

## Chapter 5 Exclusionary Rules on Causation

In analyzing negligent joint crimes, the traditional approach is to first determine whether multiple actors co-violated a joint duty of care, and then determine violation was the adequate cause of the harmful result. Therefore, negligence and causation are evaluated separately and with different assessment criteria. In this dissertation, the objective attribution doctrine is used as a framework for analyzing negligence as well as causation. Moreover, the consideration of causation is always included in the analysis of negligence. For instance, the first requirement is to determine whether those perpetrators created an impermissible risk. This includes establishing that the perpetrator violated a basic duty as well as dominated the causal process. The three requirements advocated by the objective attribution doctrine have been introduced in Chapter 2. The purpose of this section was to discuss the exclusionary rules which are to be taken into account when applying the objective attribution doctrine to the analysis of causality.

### I. Exclusionary Rules for Creating an Impermissible Risk

A co-principalship of negligence requires that multiple offenders jointly create an impermissible risk. This condition differs from the "co-violation of a joint duty" standard which is the prevailing view in Japan. The author does not remove the "a violation of duty of care" as a requirement for establishing a negligence crime but propose to relegate it to a sub-requirement. Analyzing whether the perpetrator has grossly violated a basic duty in order to determine whether he/she has created a risk that is not permitted by criminal law. "Gross violation" and "basic duties" are addressed in Chapter 3. This section discusses the creation of impermissible risks from the perspective of the exclusionary rules to further constrain negligence liability.

#### A. Risk Reduction

If the conduct of an actor minimizes the risk, it is not creating any risk and is not imputable. For example, to save a patient's life with osteosarcoma, a doctor performed an amputation on the patient. Amputation resulted in a significant part of the patient's body permanently losing its function, but it prevented the patient from dying. In this case, the amputation was the act that reduced the risk, and the doctor cannot be regarded as having created an impermissible risk. The result of the patient's physical injury is not to be attributed to the doctor.

#### B. No Risk Created

The harmful consequences cannot be attributed to an actor whose conduct did not create or

enhance the risk within the law-valued scope, but simply contributed to the usual social activities. During a thunderstorm, A convinced B to go outside in order for him to die from a lightning strike. B was struck by lightning and died as a result. While there was an actual causal relationship between A's persuasion and B's death, persuading others to carry out daily activities is not of normative significance, and daily behaviors, such as transportation and recreation, are not evaluated under criminal law.

**C. Permissible Risk Created**

Whenever the risk created by the conduct is permissible, the actor is not liable for the harmful outcome. There is a strong correlation between the idea of permissible risk and the new theory of negligence, which seeks to value the social benefit of risky conduct and limit the negligence liability. In order to determine a permissible risk, we considered the absence and inadequacy of due diligence objectively and the principle of social adequacy, and this approach reveals the idea of unlawfulness in conduct.[244] While, from the standpoint of the theory of unlawfulness in consequence, "interest balancing" standard is adopted for the evaluation, according to which the usefulness, necessity and the risk of the conduct are to be weighed, and when the former two elements stand out, the commission of such conduct is permissible.[245] The idea of interest balancing is viewed with suspicion. Using this idea, the risk created by an ambulance speeding to rescue a casualty is acceptable, as the health and life of the rescued person outweigh the risk caused by the ambulance's speed. However, in the case of an ambulance speeding and causing a traffic accident in which more people were injured or killed, it is difficult to explain whether the speeding of an ambulance could be excluded from the liability attribution for permissible risk by balancing legal interests.

Under the structure indicated by the idea of objective attribution, when an act creates a permissible

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[244] Regarding the essence of the unlawfulness, two views were offered, i.e., unlawfulness in consequence (*Erfolgsunwert*) and unlawfulness in conduct (*Handlungsunwert*). The former approach focuses on the infringement of legal interests. In other words, an action is considered unlawful because it has realized a harmful result. In contrast, the latter emphasizes the illegal conduct, namely the violation of codes of conduct that results in an act being regarded as unlawful.

[245] Fukamachi Shinya, *Principle of Reliance*, *in* A COLLECTION OF ESSAYS CELEBRATING PROFESSOR KAMIYAMA TOSHIO'S 70TH BIRTHDAY (VOLUME 1) 119–120 (Saito Toyoji et al. eds., 2006).

risk, it does not qualify as an actus reus as described in the constituent elements of a substantive crime. Further, whether a particular conduct meets the constituent elements is not solely determined by the harmful result. Conduct that satisfies the essential elements of a crime is itself in violation of criminal law's codes of conduct. In order to determine whether the conduct constitutes a commission of actus reus, a substantive assessment should be made considering both "the unlawfulness in consequence" idea and "the unlawfulness in conduct" idea.

In many cases, the idea of interest balancing, namely measuring the usefulness and the risk of conduct has been transformed into specific codes of conduct by law. Building seismic standards, for example, are regulated by weighing the risk of collapse caused by earthquakes against the social usefulness of the building, including the reasonable construction costs and the construction period. There is no need to set building standards with high seismic requirements in areas where the crustal structure is stable and not susceptible to earthquakes. For the purpose of avoiding potential damage caused by earthquakes, it is not necessary to prohibit the construction of all structures, but rather to construct them in accordance with the seismic standards set forth by law. Therefore, the permissibility of the risk depends on whether seismic standards are observed, which reflects the viewpoint of unlawfulness in the conduct. Additionally, in the case of negligence, negligent conduct that does not result in harm is unpunishable. That is, it is also essential to decide from the standpoint of unlawfulness in consequence. In addition, negligent behavior that does not result in any harm is not punishable. In other words, it is also necessary to consider unlawfulness in consequence when making a decision. Accordingly, the determination of whether a piece of conduct creates an impermissible risk must be made from both the perspectives of unlawfulness in conduct and unlawfulness in consequence.

**II. Exclusionary Rules for Realization of the Risk in the Result**

A liability may only be attributed to the actor if the impermissible risk was realized in the end. The co-principals must have created a joint relationship and each of them must have created an impermissible risk. Nevertheless, it is irrelevant whether each of them had a causal relationship with the result. It is possible for the danger created by one of them to be realized in the outcome, just as it is possible for the danger created by each participant to be realized in the result. This is what is meant by the principle of "full responsibility for partial commission of the crime". Several special cases must be considered when analyzing whether the risk has been reflected in the results.

**A. Risk not Realized**

The ultimate social harm does not arise from an actor's impermissible risk, but is an incidental harm; the actor cannot be held liable for the unforeseen cause. As an example, A shot B with the intent to kill B. As a result of A's shooting, B was injured and hospitalized. During the course of B's hospitalization, he was killed in a hospital fire. Despite the fact that A put B's life at risk, B's death was not caused by the realization of the risk created by A's shooting. In a legal sense, A did not create or increase the risk of B's death by fire. B's death was not attributed to A, and in this case, an attempted murder rather than a murder was established. Thus, the realization of risk is determined by the causal process, emphasizing the relationship between an actor's actus reus and the result. The conduct creating the initial risk cannot be considered as proof of the ultimate social harm if there is no typical causal flow (adequacy of the causal process). Accordingly, if the risk created by someone is not realized in consequence, then the result cannot be attributed to them.

**B. Lawful Substitute Conduct and the Requirement of Risk Increased**

**1. Ineffective Duty**

Lawful substitute conduct is intended to address whether the ultimate social harm can be attributed to an actor if the actor violated the duty of care, but even if there is no violation, the result will still occur. As Roxin suggests, if an actor commits a lawful act, the causal flow will be completely identical with that of the impermissible conduct, disallowing the actor from being held liable for the adverse results.[246] For example, in the Goat Hair Case,[247] where a brush factory director failed to sterilize Chinese goat hair in advance and directly provided it to female workers for processing, four female workers died from the infection of bacillus anthracis. There was, however, a later discovery that the recommended sterilization measures were ineffective against the bacteria, which were unknown in Europe at the time. Ex-ante, the actor's conduct created an impermissible risk; however, ex-post, the observance of the rule could not prevent the outcome. It is contrary to the principle of equality if the consequence is attributed to the actor, in order to penalize the actor for failing to perform the ineffective duty.[248] Thus, it is not possible to establish a causal relationship between the violation of the actor's duty and the realization of the risk if the duty owed by the actor is an ineffective one. Without affirmed causation, the director's negligent

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[246] CLAUS ROXIN, CRIMINAL LAW GENERAL PART: FUNDAMENTALS, THE STRUCTURE OF THE CRIME THEORY (1) (Yamanaka Keiichi trans., 4th ed. 2019) 499.

[247] *Id.*

[248] *Id.*

conduct was regarded as attempted negligence and it was unpunished.

**2. The Requirement of Risk Increased**

When a lawful act results in an ultimate social harm that can't be prevented, the actor cannot be held responsible. In spite of this, the rule of lawful substitute conduct does not exclude liability in all cases. Accordingly, the author holds a different opinion of the Truck Case (*Lastwagen-Fall*), [249] where the Federal Court of Justice of Germany (BGH) found the accused driver not guilty because the cyclist would have been killed regardless, that is even if the truck driver kept the legal distance from the roadside, the cyclist's drunken state and sudden uncontrolled movements would highly likely have led to his being caught by the truck.

A suggestion might be to conduct a further evaluation with an "increased risk" standard whenever the lawful substitute conduct does not undeniably prevent the consequence. Since the legislators will inevitably require the actor to adhere to such norms of care if their compliance will increase their chances of protecting legal interests, even if it is not guaranteed that the harmful result will not occur.[250] For instance, a surgeon's gross negligence caused the death of a patient during a high-risk surgery. Those who support the view that the surgeon should not be punished believe that because the surgery is highly risky, it cannot be ruled out that the patient will die even if the procedure was performed according to medical regulations.[251] As a result of such a view, all requirements of the actor's duty of care are waived in situations requiring a high degree of care, and this view is supported by more than one precedent. It was held that medical practitioners are not guilty of medical negligence causing death in Germany if the patient's more prolonged survival could not be assured even if medical rules were followed (BGH StV 1994, 425).[252] The liability is to be imputed to the surgeon only if the performance of the duty of care would positively have prevented the harmful result. We would then arrive at the strange conclusion that if an operation is of high risk, any attribution of consequence is excluded regardless of the doctor's negligence. To protect legal interests, medical practitioners must adhere to the norms of care during high-risk medical treatments for the possibility of having a positive outcome, otherwise, liability can be ascribed.

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[249] NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS (4th ed. 2010) 362.

[250] ROXIN, *supra* note 3, at 508-509.

[251] *Id,* at 509.

[252] *Id*.

The requirement for increased risk suggests that when an actor exceeds the permissible scope, creates the risk, and realizes the prohibited risk, the consequence is attributed to the actor even when obedience does not always eliminate the harmful result.[253] Causation demonstrates the actual association of the conduct with a consequence. As a result of the actor's conduct, the outcome occurs in a particular way at a specific time. A hypothetical causal process cannot invalidate an actual cause. Even so, the author agrees that criminal negligence is and must be distinct from civil negligence, and must also be more demanding. By limiting the requirement of a violation of duty of care, a higher threshold for criminal negligence liability can be set to constrain negligence liability. Criminal law can refuse to affirm convictions for medical negligence and traffic violations that are not considered absurd. Earlier in Chapter 3, this dissertation has discussed the conditions that need to be met in order to satisfy the requirement of an impermissible risk under criminal law.

**C. A Result Beyond the Protection Scope of Attention Norms**

The impermissible risk created by the violation is considered not to have been realized in the result if the realized social harm does not fall within the protective purpose of the attention norm. Typically, this occurs when the interest being damaged is not the legal interest the duty of care is intended to safeguard. In order to examine the protective purpose of attention norms, we must confirm that there is a coherent correlation in terms of purpose between the realized essential elements of a crime and the security rules that prevent the realization of these essential elements. In order to prevent the constituent elements of a crime from realization, certain conduct is prohibited. While, if the causal process goes beyond the ambit of the attention norm, the misconduct actor is not criminally liable for the ultimate social harm, since the social harm is not caused by the conduct prohibited by the norm. For example, in the Bicycle Lighting Case (Radleuchtenfall RGSt 63, 392),[254] two cyclists (A and B) were riding bicycles without lights on in the evening, B following A. Due to a lack of light, A (the front cyclist) crashed into another cyclist coming from the front. The accident could have been avoided if B (the rear cyclist) had turned on the bicycle light. Between sunset and sunrise, bicycle lights are required by law. Is the rear cyclist responsible for this traffic accident due to his/her failure to turn on the bicycle light?

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[253] Wolfgang Frisch, *The Current State of the Debate on the Doctrine of Objective Attribution and Its Problems*, 39(1) COMP. LAW REV. 169 (Okaue Masami trans., 2005).

[254] ROXIN, *supra* note 3, at 504.

Despite the fact that the rear cyclist failed to turn on his bicycle light, this increased the leading cyclist's risk of a traffic accident. However, the purpose of the mandated bicycle light requirement is to prevent traffic accidents caused by bicycles without lights rather than to protect other road users.[255] Turning on bicycle lights in order to protect other road users from traffic accidents is incompatible with the protective purpose of the attention norm. Thus, that cyclist is not liable for the traffic accident even though he violated the law.

### III. Evaluation of Realization of an Impermissible Risk in Cases with Intervening Events

It is possible for an impermissible risk to be realized directly or indirectly. In the former case, the actus reus is decisive in determining the result; in the latter case, an intervening event is responsible for the ultimate social; however, the former actus reus contains the risk that such an intervening cause will occur. In the following section, it examined the analysis of causation that accompanies the intervening act.

#### A. Deficiencies of the Principle of Non-Recourse

According to the principle of non-recourse, if a piece of conduct committed with free will and consciousness (intentional and culpable) becomes a condition for the occurrence of a social harm, the precondition of such condition is not considered a cause of that harm.[256] Essentially, if a culpable and intentional offender intervenes into the situation, the initial cause is denied. As the latter perpetrator breaks the causal chain, the first offender is relieved of liability for the ultimate social harm. In intent crimes, the initial perpetrator is convicted of an attempted crime. When it comes to negligent offences, the attempted perpetration is unpunishable, and therefore the first offender without any causation will be found innocent. However, if participants in negligence behind the intentional principals are excluded from the liability without exception, this approach would create problems. For instance, the punishability of supervisory and regulatory failures due to negligence would lose its theoretical basis. As a matter of fact, judicial decisions have held that even when intentional conduct is involved, negligent conduct may be imputed as well, as was the case in the Warehouse Fire case in Germany (RGSt 61，318（319))[257], where the Supreme Court denied the defendant's defense of retroactivity and found him guilty of Causing Death through Negligence.

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[255] *Id.*

[256] UTSUMI TOMOKO, CO-PRINCIPALS OF NEGLIGENCE (2013) 165.

[257] For facts and judicial decisions, see Chapter 3.

The non-recourse concept has the advantage of solving the problem of unlimited retroactivity brought about by the but-for doctrine, by determining a point at which the causal link can be severed. The dissertation has another idea regarding the causation, which is that the underlying rationale for the causation being cut off does not refer to the actual causality per se, but to normative reasons. It is more likely that the underlying rationale behind the causation is linked to concerns about fair attribution, rather than the initial offender's moral innocence towards the intervening act. The doctrine of objective attribution may be used to resolve disputes regarding the rule of non-recourse. The idea behind it is that liability attribution should be limited, and on this basis, banning retroactivity can be considered. Consequently, the emphasis shifted from the interruption of causation or retroactive prohibition to the prohibition of retroactive “liability”.

**B. Deficiencies of the Doctrine of Accountability Scope**

By defining the dominating area and scope of accountability for each actor, the doctrine of accountability scope attempts to limit criminal liability in situations involving multiple participants.[258] It is founded on the principle of self-discipline or self-responsibility, i.e., only a free and self-disciplined actor can face criminal liability. It considers criminal law a code of conduct. Criminal law as a norm predetermines the method of protecting legal interests. It refers to a code of conduct that indicates what must be observed by the objects of the norm, and the objects are required to comply with the codes of conduct in order to avoid infringement of legal interests. A second benefit of the principle of self-responsibility is that it prevents unlimited retroactivity in causation.[259] Individuals are only responsible for social harm caused by their actions.

The concept of accountability scope originated from the principle of self-responsibility and has evolved into the idea of liability attribution.[260] It is a functional approximation of the doctrine of non-recourse. Therefore, when the second perpetrator's self-disciplined action intervened in the causal chain and caused the ultimate harm, the second perpetrator is liable as a principal for the harm caused, whereas the initial offender is not liable as a principal. In the context of the

[258] Sugimoto Kazutoshi, *Adequate Causation and Avoidability of the Consequences (5)*, No. 105 WASEDA DAIGAKU DAIGAKUIN HOKEN RONSHU 188 (2003).

[259] *Id,* at 190.

[260] *Id.*

accountability scope, if an intentional offender intervened in a negligent offense, the negligent offender was always released from responsibility, due to the fact that he/she was removed from the causal chain. The author would suggest that we do not apply the idea of limiting responsibility scope and non-recourse in a mechanical and rigid manner. An initial offender's imputability is to be determined on a case-by-case basis. It is necessary to weigh the scope of accountability prescribed by law when making the decision. An example of this is the Warehouse Fire case (RGSt 61，318（319））[261], where the owner failed to use fireproof construction materials and to set up fire extinguishing facilities in accordance with the fire codes. Despite the possibility that a third party may have intervened in the causal chain and set the fire intentionally resulting in the deaths of the victims, the court found the owner (the initial actor of negligence) to be responsible. The statute of Causing Death by Negligence prohibits anyone from placing the lives of others in unnecessary danger. In the attic of the property, the owner constructed an illegal dwelling and rent it out to others without removing the safety hazards. As a result of his actions, residents were unable to escape the fire when it occurred. It is not relevant whether the owner could have predicted that a fire would be started by a third party. He was able to alter the fact pattern and change the outcome, however he failed to fulfill his duty of care and set up the hidden danger of death for the victims, resulting in their death.

**C. The Initial Conduct Deemed as Directly Realizing the Consequence**

Each person is regarded as a moral agent and is not responsible for the consequences caused by others. Nonetheless, if the actor’s conduct can be determined as a dominant factor for the consequence, the consequence can be seen as a “product” of the actor and attributed to this actor. In the Osaka South Port Case, the Supreme Court held that since the defendant created the injury, and it became the significant condition of the victim’s death, regardless of the unforeseeable intervention of the third party’s actus reus, the causation between the defendant’s violence and the death is to be affirmed.[262] There is an intervening event here, i.e., a third party assaulted the victim when he was placed in the warehouse, and this second violent assault may have resulted in the victim's death earlier. Specifically, the actus reus (first violence) of the defendant poses the risk that the victim would have died from a cerebral hemorrhage at a time much later than the time the victim actually died. On the other hand, even if there was no intervention from the second violence, a slight delay or advance in the time of death is predictable when a grievous injury has

[261] For facts and judicial decisions, see Chapter 3.

[262] For the facts and courts’ decisions, see Chapter 2.

been sustained.

As such, it is possible to establish causation between the defendant's perpetration and the death of the victim when the defendant's actus reus (the first violence) contained a high risk of causing the victim's death. As an example, if the defendant committed an assault that caused a cerebral hemorrhage, and a third party also committed an assault that caused the victim's death from a cerebral hemorrhage, it can be abstracted within a certain range the time of the victim's death despite the intervention of the third party.[263] In consequence, the defendant could be deemed to have directly realized the risk of his initial actus reus.[264] In these types of cases, although the intervening cause is abnormal, and the actor is unable to predict it, causation between the actus reus of the first offender and the ultimate social harm should be retained.

**D. The Initial Conduct Indirectly Realizing the Consequence**

The typical case of the indirect realization type is the Highway Break-in Case,[265] in which six defendants inflicted violence (the first violence) on the victim in a public restroom in a parking lot late at night from approximately 11:50 pm to 2:00 am, and then assaulted (the second violence) the victim in an apartment from nearly 3:00 am to 3:45 am. In the absence of the aggressors, the victim escaped from the apartment. He ran onto a highway and was hit and killed by a car. The direct cause of the victim’s death was being struck by a car. However, the victim was struck by a car as a result of escaping the defendants’ atrocity. An indirect realization occurs when the risk created by the actor is indirectly realized by the intervening event. According to the doctrine of adequate causation, it is generally accepted that the victim's breaking into the highway is abnormal conduct and an unforeseeable event; thus, this out of ordinary intervening act broke the causal chain between the defendants' actus reus and the victim's death. The Supreme Court, however, reached a different conclusion.

There was intense and persistent violence perpetrated against the victim by multiple

[263] HASHIZUME TAKASHI, KEY POINTS OF CRIMINAL LAW: GENERAL PART (2020) 20.

[264] *Id.*

[265] Higuchi Ryosuke, *Intervention of the Victim’s Conduct and Causation (2)*, *in* ONE HUNDRED CRIMINAL PRECEDENTS (1): GENERAL PROVISIONS 28–29 (Yamaguchi Atsushi & Saeki Hitoshi eds., 7th ed. 2014).Keishu, Heisei15(A)35: Injury Causing Death, 57(7) 950, https://www.courts.go.jp/app/hanrei_jp/detail2?id=50064.

defendants and the victim was in a state of extreme fear. During his desperate attempt to escape, the victim made a split-second decision to run into the highway. Although breaking into the highway was extremely dangerous, it could not be construed as unnatural or inadequate considering that the victim was trying to escape the defendants' atrocity. Defendants' actus reus was the cause of the death of the victim in the car accident, and their actus reus maintained a causal connection.[266]

In the event that the defendants indirectly realize a risk, it is necessary to evaluate whether the actus reus contains the risk of causing the intervening cause when determining the "realization of the risk".[267] Intervening events cannot be evaluated separately. In spite of the fact that the intervening event was abnormal, as long as it was a dependent event or a response to the initial actus reus, the causal chain created by the previous actus reus would remain intact.

**IV. Summary**

When adopting objective attribution doctrine to analyze negligent joint crimes, it does not only describe negligent actus reus, but also the causation. It states that when an actor (1) creates an impermissible risk, and (2) risk ultimately manifests in the harmful consequence, this actor is the cause of the ultimate social harm. This section discussed the exclusionary rules that are to be considered when applying the objective attribution doctrine to the analysis of causation. For the first requirement, if an actor’s conduct minimized the risk; a certain performance of worsening another's situation is not considered as a risk; the risk created is within the legal limits, the requirement of creating an impermissible risk is not met. On the second requirement, an actor cannot be attributed a social harm if that harm does not arise as a result of the actor’s impermissible risk, but rather as a result of an unforeseen harm. The result of the harm caused by an invalid obligation is also not to be ascribed to the actor. While it is imperative to note that a hypothetical causal process would not negate a factual cause. The third exception to the requirement of risk realization is that when the realized social harm does not fall within the protective purpose of the attention norm, the impermissible risk created by the violation is considered not to have been realized.

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[266] Higuchi, *supra* note 266.

[267] HASHIZUME, *supra* note 87. Saeki Hitoshi, *Theories of Causation*, *in* ADVANCED CRIMINAL LAW THEORIES 22 (Yamaguchi Atsushi, Saeki Hitoshi, & Ida Makoto eds., 2001).

When analyzing a causal line with intervening events, it is important to restrict negligence liability; however, the author would suggest that we do not apply the idea of limiting responsibility scope and non-recourse in a mechanical and rigid manner. The rationale for cutting off a causal chain does not necessarily relate to the denial of actual causality, but rather to a prohibition on retroactive liability. Since the causation is concerned with fair attribution. An initial offender's imputability is to be determined on a case-by-case basis. Exceptionally, even if the causal chain is interrupted due to circumstances that the initial actor could not predict, the causal link is maintained, and the first actor remains responsible. In the case that the actor's conduct is proven to be the predominant factor in the consequence, then it may be appropriate to view the consequence as a “product” of the actor. Additionally, even if an intervening event was abnormal, as long as it was a dependent event or a response to the previous actus reus, the causation of the previous actus reus would sustain.

## Conclusion

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 lenient standard 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.

Under the restricted principal concept, negligence liability is narrower than under the unified principal concept and the expanded principal concept, and as a result, this dissertation recommended adopting the restricted principal concept for determining negligent principals. 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.

While this dissertation employed “restricted principal concept”, either “unified principal concept” or “expanded principal concept” can restrict negligence liability by combining them with “the doctrine of jointness of conduct” and “the doctrine of jointness of crime”. As Yoshinaka Nobuhito suggested, these concepts are not inherently antagonistic to each other, and by pairing them these doctrines have affinity. Moreover, as Shin Matsuzawa indicated that courts’ attitude is progressing toward the unified perpetrator model, using case studies to analyze how courts apply the “unified

principal concept" and limit criminal liability is another topic worthy of research. Additionally, since negligence crimes deal with violations of the duty of care, there is a concern that the inaction without guarantor status might be misinterpreted as a violation of the duty of care and penalized. It should be stressed that inactions by non-guarantor participants must not be punished as criminal negligence. Accordingly, a clear distinction should be made between the duty of action and the duty of care.

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