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## Doctrines of Causation in Japan

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### Abstract

*The theory of adequate causation as the criterion for determining the causation in criminal cases had held a dominant status in Japan until the Osaka South Port Case. In recent discussions, the doctrine of risk has received increasing attention, and the Supreme Court of Japan has expressly adopted the realization of the risk criterion. This concept is derived from the German doctrine of accurate attribution (Objektive Zurechnung). However, merely two basic concepts in the doctrine of objective attribution are well known in Japan. To optimize the determination of causation, the evaluation criteria of causation based on the doctrine of objective attribution are worth further exploration. As findings, the evaluations on whether the conduct creates an impermissible risk and whether the risk is realized in consequence are made through exclusionary rules of liability ascription. Additionally, in cases where the causes of the result produced by the first and second violence can be recognized as identical, the risk of the first conduct is deemed to have directly realized the consequence, and the causation is to be acknowledged. In cases where the first conduct indirectly realizes the consequence, the causation between the first conduct and the consequence will be sustained if the first conduct generally triggers the intervening event.*

Keywords: Causation, The Doctrine of Objective Attribution, German Doctrines, Japanese Doctrines, The Theory of Adequate Causation.

### Introduction

In Japan, the theory of adequate causation had been the dominant view as the criterion for determining causation in cases until the Osaka South Port Case. In recent discussions, the doctrine of realization of risk, which recognizes the causation in an offense when the risk of the criminally proscribed conduct is realized in consequence, has received increasing attention (Cohen & Cohen, 1997; Leflar, 1996). In the judgment of the case Near Miss of Japan Airlines Jet 2010 (Friedman & Wickelgren, 2010) the court has expressly adopted the "realization of risk" criterion (Koehler, 2014). This view is derived from the German doctrine of objective attribution (*Objektive Zurechnung*). Simply, two elements of the doctrine of objective attribution

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are well known in Japan, including creating an impermissible risk and realizing an impermissible risk. Its inner structure has not received much attention. Its application and jurisprudential interpretation of its exclusionary rules have not been fully explored. Thus, the evaluation criteria of causation based on the doctrine of objective attribution are worth further development.

As a tool for determining causation, the doctrine of objective attribution is the prevalent view in Germany, while the theory of adequate causation is the majority view in Japan. The theory of adequate causation holds that in a case where a piece of conduct leads to a consequence, providing the causal process is considered general and adequate based on the experience in social life, the causation is to be acknowledged. Moreover, suppose the intervening factor is unusual (unpredictable). In that case, another factor intervenes in the causal process produced by the first conduct and leads to the consequence if the intervening factor is unusual (unpredictable). The causal chain between the previous conduct and the consequence is interrupted, and the previous conduct is considered to have no causation with the result. In contrast, if the occurrence of the intervention is adequate and general since the first conduct, the causation between the first conduct and the consequence is maintained. According to the theory of adequate causation, the causation would have been denied in the Osaka South Port Case:

The summary of the facts in the Osaka South Port Case is that the defendant beat the victim repeatedly with the bottom of the washbasin and a belt on the 'victim's head at a restaurant (atrocity No. 1). Because of this, the victim lost consciousness due to a hypertensive cerebral hemorrhage caused by fear and other psychological stress. Afterward, the defendant moved the victim to the material depository at Osaka South Port and left. The victim died of a 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, they were beaten on the head several times with wood by a third party (atrocity No. 2). It exacerbated the existing cerebral hemorrhage and more or less made it possible to advance the time of death (Huggins et al., 2002).

Since the intervening fact of a third party intentionally hitting the 'victim's head is hardly a usual case. It can be said that an ordinary man could not predict this intervention, and the intervening factor has cut off the causation between atrocity No. 1 and the 'victim's death. However, the supreme court gave weight to the fact that atrocity No. 1 caused the significant injury connected to the 'victim's death, thereby affirming the causation (Atsushi, 2016). That is, the generality of the intervention became unimportant. The 'court's decision challenged the traditional way of determining causation through the theory of adequate causation.

In the face of the crisis of the theory of adequate causation, scholars who support this doctrine still have doubts about the necessity of importing the doctrine of objective attribution and try to maintain and improve the theory of adequate causation (Kadish, 1985; Stone, 1989; Turner, 1983). Nevertheless, the so-called reconstruction of the theory of adequate causation borrows from the doctrine of objective attribution, and the reformed theory is no longer in its original form. As Itoh Kensuke commented, the theory of adequate causation in Japan has been developed beyond the original structure (Mehra, 2013). To avoid conceptual confusion, since the

formal structure of adequate causation has been left behind, the theory of objective attribution should be accepted and constructed instead (Wright, 1987). The structure of the doctrine of objective attribution is determined in three parts: (1) an 'actor's conduct creates an impermissible risk to the object of the conduct; (2) the risk is realized in consequence; (3) such consequence is within the protection scope corresponding to the constituent elements of the crime.

### **Evaluation of Creating an Impermissible Risk**

The risk is a state in which the consequence has become possible before any causally explainable result occurs (Weiss, 1990). Before the consequence, the state of risk has always been present. For example, a passenger who died in an airplane crash was objectively in danger before their death. Thus, anyone who prompted the victim to travel by airplane put them in danger. Since a stage precedes any consequence with risk where the consequence possibly occurs, any real cause also creates the consequence's risk (McKinnon, 2019). However, if a consequence is imputed to a person because they created a real risk, there is no limitation on the constituent elements of a crime. Therefore, the risk created by a person must be legally impermissible. Creating an impermissible risk becomes a condition for meeting the objective constituent elements of a crime.

In Japan, providing plural participants cause a harmful result due to co-negligence, such as the negligence of a medical team leading to a 'patient's death. The offenders could constitute co-offenders; namely, negligent co-principalship is affirmed. According to the concept of creating an impermissible risk, in the case of co-negligence, that plural offenders create an impermissible risk jointly is a condition for establishing a co-principalship. This view differs from the prevailing opinion in Japan, which recognizes the 'actors' violation of a duty of care as the determining element for negligent crimes. The author argues that violating a duty of care outside of criminal law, such as civil law and industry code of practices, is not equivalent to violating a duty of care in criminal negligence. The duty of care outside the criminal law norms is merely a reference for determining whether an actor had created a risk that is not permitted by criminal law. Instead of violating a duty of care, creating an impermissible risk is the decisive element for establishing a negligent crime (Clapham, 2008).

### ***Creation of an Impermissible Risk and Violation of a Duty of Care***

According to the doctrine of objective attribution, the conduct indicated in the constituent elements of a crime in the case of negligence refers to a piece of conduct that creates an impermissible risk. The reference standard for determining whether an impermissible risk has been created is whether the conduct violates the duty of care. When an actor violates their duties, the creation of an impermissible risk is generally affirmed, but not absolutely. For example, the Practice Guidelines for Surgical Care (after this referred to as "the Guidelines") is an industry code. Norms result from a comprehensive assessment of possible medical risks based on general life experience, medical experience, and the general law of society. Violations of these norms usually produce risks not permitted by criminal law. In the Guidelines, it stipulates that

'According to the WHO surgical safety checklist, before introducing anesthesia, information such as the patient's name and the surgical site must be confirmed by an anesthesiologist and an operating nurse. However, the surgeon responsible for the surgery must also participate in the above confirmation (Kasatpibal et al., 2018).

Article 211 of the Japanese Criminal Code states that a person who fails to exercise due care required in the pursuit of social activities and thereby causes the death or injury of another shall be punished by imprisonment with or without work for not more than five years or a fine of not more than 1,000,000 yen. The social activities in the criminal law provisions include medical activities, and due care at this moment can mostly be understood as the norms of the medical industry. Therefore, a surgeon who violated the Guidelines and negligently failed to confirm a 'patient's identity and thus caused the 'patient's death or severe injury can be considered to have created an impermissible risk.

Under the new theory of negligence (The theory of negligence in Japan has undergone different theoretical changes, i.e., the old theory of negligence, the revised old theory of negligence, the new theory of negligence, and the new-new theory of negligence; the new theory of negligence is currently the dominant one.), the violation of duty beyond the scope of criminal law is also considered a violation of a duty of care of criminal negligence. However, according to the doctrine of objective attribution, violating a duty of care outside of criminal law does not necessarily constitute a negligent crime. The duty of care violation is not equivalent to criminally negligent conduct. Norms beyond the scope of criminal law are only the references for evaluating whether an impermissible risk has been created. Whether an actor substantially creates an impermissible risk requires a further normative evaluation.

Conversely, even if an actor abides by the industry standards, it cannot be directly presumed that their conduct satisfies the requirements of the norms required by criminal law. For instance, in the case of the incident of mistaken patients in Yokohama City University Hospital, the anesthesiologist carried out the process of confirming the 'patient's identity following medical practice by calling the 'patient's name and receiving the 'patient's response, but it cannot be thus affirmed that they had fulfilled the duty of care required by criminal law. The Supreme Court held that

Before the surgery, the patient was likely to be in a state of extreme anxiety and nervousness or unconscious due to the illness or the effects of medication, et cetera. Predictably, the patient might not have noticed their name was miscalled. ...Confirming a patient's identity is a prerequisite for justifying a piece of conduct as proper medical treatment. In this case, each medical staff should have "thoroughly confirmed the patient's identity " (Andersen, 2004).

### ***Exclusionary Rules for Creating an Impermissible Risk Risk Reduction***

Providing an 'actor's conduct minimizes the risk. It is not creating risk and is not objectively imputable. For example, a doctor performs an amputation on a patient to save a patient's life with osteosarcoma. Although amputation results in a significant part of the 's body permanently losing its function, amputation prevents the patient's

death. The amputation was the conduct that reduced the risk, and the doctor cannot be considered to have created an impermissible risk. The consequence of the 'patient's physical injury is not to be attributed to the doctor.

### *No-Risk Created*

Suppose an actor's conduct does not create or enhance the risk within the law-valued scope but merely contributes to the usual social activities. In that case, the harmful consequence cannot be attributed to the actors. For instance, A wanted B to die from a lightning strike and persuaded B to go outside during a thunderstorm. B went out and died from a lightning strike. There was factual causation between 'persuasion and B's death. However, persuading others to carry out daily activities is not of normative significance. Daily behaviors such as transportation and recreation are not included in the criminal law's evaluation scope.

### *Permissible Risk Created*

Provided the risk created by the conduct is permissible, the liability for the harmful consequence is not to be attributed to the actor. The theory of acceptable risk is compatible with the new theory of negligence, which aims to value the social usefulness of risky conduct and limit the scope of punishment for negligence. The doctrine of objective attribution, as a development of the new theory of negligence, also inherits this conception. Namely, when the conduct creates acceptable risk, liability for the consequence is not attributed to the actor. What the acceptable risk is, and the standard for evaluating whether the risk created by the conduct falls into the permissible scope.

From the standpoint of the theory of unlawfulness in conduct (Concerning the essence of the unlawfulness, two views, i.e., unlawfulness in consequence (*Erfolgsunwert*) and unlawfulness in conduct (*Handlungsunwert*), were proposed. The former interprets the essence of unlawfulness by focusing on the consequence of legal 'interests' infringement. The latter attaches importance to violating the norms of conduct; namely, the essence of unlawfulness is reflected in criminal conduct.) the evaluation is based on the absence and insufficiency of due diligence in objective terms and the doctrine of social adequacy. While, from the standpoint of the theory of unlawfulness, in consequence, the method of interest measurement is adopted for evaluation, according to which the usefulness, necessity, and the risk of the conduct are to be weighed. When the former two elements stand out, the commission of such conduct is permissible (Ratner, 2001). However, there are doubts about the doctrine of interest measurement. According to this doctrine, the risk created by an ambulance speeding to rescue a casualty is permissible because the health or life interest of the rescued person outweighs the risk caused by the 'vehicle's speeding. However, in the case of an ambulance speeding and causing a traffic accident in which more people are injured or killed, it is difficult to explain whether the speeding of an ambulance can be excluded from liability attribution on the grounds of acceptable risk by the legal 'interests' comparison or interest measurement.

In the 'author's view, given that the doctrine of objective attribution is adopted to substantiate the constituent elements of a crime, creating acceptable risk is not the constitutive conduct of a crime from the beginning. Creating an impermissible risk is

one of the constituent elements of a crime, rather than a mere issue of unlawfulness (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 s conduct satisfy the definition of an offense? Another is unlawfulness: was that formally criminal behavior also unlawful? Besides, 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. The excuse is not a defense; it is the absence of guilt or responsibility (Robinson, 1982).

Furthermore, whether a piece of conduct satisfies the constituent elements is not only evaluated through consequence because a piece of conduct that satisfies the constituent elements of a crime violates the norms of conduct of criminal law. The substantive determination of whether the conduct qualifies as constituent element conduct cannot be based on unlawfulness in the outcome or the conduct. Both the new theory of negligence and objective attribution emphasize illegality. In many cases, measuring the usefulness and risk of conduct has been transformed into specific norms of conduct by law. For example, the regulation of seismic standards for buildings is based on weighing the risk of building collapse caused by an earthquake against the social usefulness, including the reasonable cost of the building and the time required for construction. In areas where the crustal structure is stable and not prone to earthquakes, there is no need to set building standards with high-level seismic requirements. To avoid possible damage caused by earthquakes, what should be done is not to forbid the construction of all buildings but to construct buildings following the seismic standards stipulated by law. Therefore, whether the risk is permissible depends on whether the seismic standards are observed, reflecting the standpoint of unlawful conduct. However, 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 conclusion, it is determining whether a piece of conduct creates an impermissible risk is to be made from both perspectives of unlawfulness in the conduct and unlawfulness in consequence.

### **Exclusionary Rules for Realization of the Risk in a Consequence**

According to the doctrine of objective attribution, only when the impermissible risk is realized in consequence can the liability be attributed to the actor. Exclusionary liability standards analyze the reality of unacceptable risk. To constitute co-offenses, the offenders must jointly create an impermissible risk. Still, whether one person's or multiple people's conduct jointly realizes the consequence is irrelevant. This is what is meant by "full liability for partial conduct" for co-offenses (In Japan and Germany, "full liability for partial conduct" is the jurisprudence on the liability attribution for joint offenders).

### ***Risk not Realized***

Attribution of a criminal result to an actor presupposes that the impermissible risk created by the actor has been realized in consequence. In other words, although the conduct creates an impermissible risk, the final result is not caused by such risk but occurs incidentally at the time of the risk; the ascription of liability for consequence

is excluded. For example, A shot B, intending to kill B. A's shooting resulted in B's injury and hospitalization. During B's hospitalization, B died in a hospital fire. In this case, although A's conduct created a risk to B's life, B's death was not the result of the realization of the risk created by A. In the legal sense, A's shooting did not create or increase the risk of B's death by fire. The consequence of B's death is not attributed to A; in this case, an attempted murder rather than a completed murder is established. Thus, the determination on the realization of risk is made based on the actual process of the incident, emphasizing the relationship between an actor's conduct (the first risk) and the consequence. Providing no typical causal flow (adequacy of the causal process) is found, the conduct creating the first risk cannot be deemed as the foundation for the final consequence. If the risk created by an actor is not realized in consequence, the consequence is not attributed to the actor.

### ***Lawful Substitute Conduct and the Theory of Risk Increased An Ineffective Duty***

The lawful substitute conduct is an idea intending to answer whether the consequence can be attributed to an actor in the case where the actor violated the duty of care. However, the consequence will still occur even if no such violation of a duty of care exists. According to Roxin, if an actor commits acceptable risk, the causal flow is to be completely identical to the actual process with the impermissible conduct, and the ascription of liability for the consequence will be excluded (Posner, 1998). For example, in the Goat Hair Case (Katyal, 1997), the director of a brush factory did not comply with the rules to sterilize Chinese goat hair in advance and directly gave such goat hair to female workers for processing. Four female workers died from the infection of bacillus anthracis. It was found out later that the prescribed sterilization measures were ineffective against such bacteria, which was unknown in Europe at the time. In other words, from the ex-ante evaluation, the actor's conduct created an impermissible risk. Still, through the ex-post evaluation, the observance of rules could not prevent the result. Supposing the consequence is attributed to the actor, the actor is punished for failing to perform an ineffective duty, contrary to the principle of equality (Ratner, 2001). Therefore, if the duty owed by the actor is ineffective, no legal causation is established between the violation of duty and the realization of risk. In the Goat Hair Case, without affirmed causation, the factory director's negligent conduct only constituted attempted negligence and was unpunishable.

### ***The Theory of Risk Increased***

As stated above, providing it is impossible to prevent the consequence even though lawful conduct is carried out, such a consequence is not attributed to the actor. However, the author argues that the rule of lawful substitute conduct is not an absolute rule to exclude the ascription of liability. The Federal Court of Justice of Germany (BGH) held in the Truck Case (*Lastwagen-Fall*) that the accused driver was not guilty since it could not be excluded beyond reasonable doubt that the cyclist would have been killed in any case. Due to the cyclist's 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 truck driver had kept the correct distance to the roadside prescribed by law (Pollatsek & Tversky, 1970).

Nevertheless, in the case where the lawful substitute conduct does not undeniably prevent the consequence, the author advocates that it is necessary to make a further evaluation with the theory of increased risk. As long as the compliance with norms of care can increase the chances of protecting legal interests, although it is not guaranteed that the consequence will not occur with the lawful conduct, the legislators will inevitably require the actor to obey such norms of care (Gregory et al., 2006). For example, in a high-risk surgery, the surgeon caused the 'patient's death due to gross negligence. The view that the surgeon deserves no punishment argues that since the specific surgery is highly risky, the possibility of the 'patient's death cannot be ruled out even if the operation was performed in compliance with medical rules. Such a position suggests that the actor's duty of care is abrogated in situations demanding exceptional care. This view has precedent. According to German law (BGH StV 1994, 425), a doctor is not guilty of medical negligence causing death if the patient's survival could not be prolonged even if medical guidelines were followed. The liability is to be attributed to the surgeon only if the performance of the duty of care would positively have prevented the consequence. Once the operation is of high risk, the attribution of consequence is excluded regardless of the medical 'practitioner's violation of the duty of care (Gregory et al., 2006).

However, from the perspective of the protection of legal interests, in the cases of medical treatment with high risk, to pursue the possibility of having a good result, medical practitioners ought to be required to operate following the norms of care; otherwise, the ascription of liability cannot be excluded. Based on such an idea, the theory of risk increased argues that if the actor has exceeded the permissible scope and created the risk and realizes such prohibited risk, the consequence is attributed to the actor even though the obedience does not always eliminate harmful results (Foster & Sule, 2010).

### ***A Consequence beyond the Protection Scope of Norms of Care***

Suppose the realized consequence does not fall within the protective purpose of care norms. In that situation, the inadmissible danger produced by the violation of care norms is not judged to have been realized since the result is not the object to be protected by the duty of care. Examining the protective function of norms confirms a consistent association between the committed aspects of a crime and the security standards that prevent them. To prevent the specific constituent elements of a crime from realization, any risk sufficient to lead to the realization of the constituent elements is included in the prohibition scope, and the pattern of conduct contributing to such risk is within the scope of the prohibition. If the consequence goes beyond the protective purpose of norms of care, the consequence is not caused by the prohibited conduct; thus, the normative correlation between the violation and the consequence is excluded. For example, in the Bicycle Lighting Case (Radleuchtenfall RGSt 63, 392)(Roxin, 2019), two cyclists (A and B) were riding without lights at night, 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. According to the legal requirements for cycling, bicycle lights are mandatory between sunset and sunrise. Then, is the rear cyclist liable for this traffic accident due to their violation of a duty of care to turn on the bicycle light?

According to the principle of excluding liability ascription due to the consequence exceeding the protective purpose of norms of care, the purpose of the mandatory stipulation on bicycle lights is to avoid the accident caused by the bicycle with the light off, not to protect other road users from traffic accidents (Nambu, 2016). Therefore, the risk created by the rear cyclist was not realized because of their violation; liability is not to be attributed to this cyclist.

### **Evaluation of Realization of an Impermissible Risk in Cases with Intervening Factors**

An impermissible risk may be realized either directly or indirectly. The former means that the criminally proscribed conduct has a decisive impact on incurring the consequence; the latter means that an intervening event leads to the consequence, but the first criminally proscribed conduct has the risk of incurring such intervening event.

### ***Deficiencies of the Doctrine of a Ban on Retroactivity***

According to the doctrine of a ban on retroactivity, given that a piece of free and conscious (intentional and culpable) conduct becomes a condition for the occurrence of a result, the precondition of such condition is not considered a cause of the consequence (Fisch, 1997). In other words, an actor (the first actor) behind an intentional and culpable offender (the perpetrator of the latter act) is not retroactively held causally connected to the result. In intentional offenses without causation, the offender establishes attempted offenders and is liable for the consequence. However, in the case of negligence, attempted offenders are unpunishable. Suppose the negligent participants behind the intentional principals are entirely excluded from the scope of liability ascription. In that case, it is difficult to draw a proper conclusion on the issues such as the liability of the responsible person for accidents and the punishability of supervisory and regulatory negligence would lose its theoretical foundation.

Moreover, according to judicial cases, notwithstanding intentional conduct, the negligent conduct behind it was not always excluded from the imputation, for example, the Warehouse Fire case in Germany. In this case, the defendant, an operator of a manual workshop, illegally built a dwelling in the attic and rented it to an employee's family (eight persons). During the rental period, eight members of the 'employee's family 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 defendant appealed to the Supreme Court of the German Empire and the Weimar Republic and contended that there was a possibility of setting fire negligently or deliberately by a third party. In this case, thus, the causation between the 'defendant's conduct and the 'victims' death could be discontinued; besides, the defendant had no predictability of the consequence (RGSt 61, 318 (319)) (Ratner, 2001). The Supreme Court made a judgment that:

The defendant created a cause leading to the harmful consequence. That is, he created such a state of danger for the residents that when a fire broke out, the residents could not escape the danger of fire. Without the joint contribution of the cause created by the defendant, the victims

would not have died. It does not matter how the fire broke out, whether it was an accident; set out negligently or deliberately. Even if the fire were set out deliberately, the causal link created by the defendant would not be discontinued by a third party's conduct. The cause created by the defendant jointly contributed to the death of the victims (Shozo et al., 1987).

The supreme court denied the defense against retroactivity and found the defendant guilty of Causing Death through Negligence. The issue to be settled by the doctrine of a ban on retroactivity can be settled through objective attribution instead. The doctrine of a ban on retroactivity addressed the problem of unlimited retroactivity posed by the but-for doctrine. It sought to find a point at which the causal link could be severed. However, the basis for the causation being cut off is not the factual causality per se. The theory of liability attribution was adopted for normative reasons, and a conclusion of banning retroactivity was made. The way of thinking needs to shift from the interruption of causation to the prohibition of retroactive liability.

### ***The Deficiency of the Doctrine of Responsibility Scope***

The doctrine of responsibility scope aims to delimit the scope of liability in cases where plural actors are involved by defining each actor's dominating area and responsibility scope (Koehler, 2014). The theoretical foundation of this doctrine is the self-discipline principle or the self-responsibility principle, i.e., only a free and self-disciplined actor can be the subject of criminal liability. The basis of the principle of self-responsibility lies in criminal law as a norm of conduct. The essence of criminal law norms is the predetermination of the way of protecting legal interests, meaning a code of conduct that the target of the norm must follow to prevent infringing on legal interests. Secondly, the principle of self-responsibility seeks to avoid unlimited retroactivity in causation. According to the self-responsibility principle, an individual is responsible only for the consequence caused by their conduct. In this case, the person who self-responsibly commits the conduct that causes the consequence is a principal, and the person behind such principal is a second participant (Kadish, 1985).

The doctrine of the scope of responsibility is based on self-responsibility but has developed. It is a functional approximation to the principle of a ban on retroactivity (Baudenbacher, 1999). Providing a second actor's self-disciplined conduct intervenes in the first actor's conduct and causes the consequence, the second actor assumes the liability for the consequence as a principal, and the first actor is not a principal.

In the case where an intentional offender intervenes in a negligent offense, according to the doctrine of the scope of responsibility, the negligent actor is always non-imputable. The first negligent actor is not a principal but constitutes a secondary participant of negligence. A secondary negligent offender is unpunishable in Japan and Germany. However, it is questionable to mechanically adopt the idea of the scope of responsibility to deal with cases. The author considers whether the first offense is imputable or not is to be determined in a case-by-case manner according to the responsibility scope prescribed by the law. For instance, in the warehouse fire case (RGSt 61, 318 (319)), the owner failed to comply with fire codes to use fireproof construction materials and set up necessary fire extinguishing facilities. Even though, as claimed by the lawyer, it is possible that a third party set a fire and resulted in the

'victims' death, the owner (the first actor of negligence) behind the arsonist still constituted a principle of negligence because the owner was obliged to take measures to prevent the fire and enjoyed the possibility of dominating the consequence.

### ***the First Conduct Deemed as Directly Realizing the Consequence***

As stated above, an actor may, in principle, regard others as moral agents and assumes no liability for the consequence caused by the conduct of others. Nonetheless, if the 'actor's conduct enjoys dominance, the consequence can be regarded as a "product" of the actor and attributed to the actor. For example, in the Osaka South Port Case, the Supreme Court held that when an offender created the injury, and it became the significant condition of the 'victim's death, regardless of the unforeseeable intervention, the causation between the 'offender's violence and the death is to be affirmed. In this case, an intervening event exists, i.e., a third party committed atrocity (the second violence) against the victim when the victim was placed in the warehouse and created the possibility of an earlier time of death for the victim. Strictly speaking, the risk inherent in the 'actor's criminally proscribed conduct (the first violence) is that the victim would have died from a cerebral hemorrhage at a time a little more delayed than the actual time of death. However, even supposing there was no intervention of the second violence, a small advance or delay in the time of death is predictable in the case of a grievous injury.

Therefore, it can be argued that the criminally proscribed conduct (the first violence) contained the risk of causing the 'victim's death, and it is possible to affirm the causation. In other words, if the causes of death can be recognized as identical, which refers to the atrocities causing a cerebral hemorrhage resulting in death in this case, the time of death can be abstracted within a certain range; thus, the risk of the first criminally proscribed conduct is to be deemed directly realized in consequence (Huggins et al., 2002). In those cases, although the intervening event is abnormal, and the actor cannot predict such an intervention, causation between the 'intervention conduct and the result is to be sustained.

### ***the First Conduct Indirectly Realizing the Consequence***

The representative case of the indirect realization type is the Highway Break-in Case,

The 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. The victim took advantage of a break to escape from the apartment, ran onto the highway, and was hit and killed by a car (Preacher & Kelley, 2011).

The direct cause of the 'victim's death, in this case, was being struck by a speeding car. However, the victim was hit by a car to escape the 'defendants' atrocity. The indirect realization means that the criminally proscribed conduct's risk is indirectly realized through the medium of intervening factors. In the above case, according to the doctrine of adequate causation, it is generally considered that the 'victim's breaking into the highway is abnormal conduct and an unforeseeable event; thus, the causation between the 'actors' criminally proscribed conduct and the consequence was interrupted. However, the Supreme Court gave the opinion that

The victim was subjected to intense and persistent brutality from multiple defendants and was in extreme fear. The victim decided to run into the highway during their desperate escape. Although extremely dangerous, breaking onto the highway could not be said to be unnatural and inadequate, considering that the victim was trying to escape from the 'defendants' violence (Robinson, 1982).

The Supreme Court held that the 'defendants' conduct could be evaluated as the cause of the 'victim's death by collision and having causation with the death (McInnes, 1996). As a type of indirect realization, when determining the "realization of the risk," it is necessary to evaluate whether the criminally proscribed conduct contains the risk of causing the intervening event (McInnes, 1996). In other words, though the intervening event is abnormal, providing the high probability of the intervention induced by the criminally proscribed conduct can be affirmed, the fact of the realization of risk by the conduct is to be affirmed. Taking "inducement" as a criterion is also reflected in the judgment of the Scuba Diving Case:

The defendant conducted a night diving course for six students, including the victim, while instructing three assistant coaches in a diving coach. The defendant assigned an assistant coach to observe and protect two students. After starting the dive, the defendant thought that students would follow them and moved forward without giving special instructions to the teaching assistants or checking the situation behind. After a while, when the defendant looked back, only two teaching assistants followed. The defendant returned to where they started moving, looking for students, but failed and even lost their way. During this period, another teaching assistant and six students did not notice the 's departure, stayed in place, and were later washed ashore by the waves. The teaching assistant went into the water searching for the defendant, and the students moved after. After moving a few dozen meters, the teaching assistant confirmed that the remaining air pressure in the 'victim's diving cylinder was low. They surfaced for a time, and the strong wind and waves made it difficult to move on the surface. Thus the teaching assistant instructed the students to move underwater. The victim ran out of air while moving underwater and fell into a state of panic, unable to take appropriate measures on their own, resulting in death (Ellis et al., 1979).

The Supreme Court held that it could not be denied that the teaching assistant acted inappropriately with the victim after the loss of contact with the defendant, but the fact that the defendant induced their improper action approves the causation between the 'defendant's conduct and the 'victim's death.

The but-for doctrine is no longer applied today, and the causation is to be denied if the conduct only serves as a factual condition indirectly causing the consequence. To affirm the causation in the case of indirect realization, the relationship between the criminally proscribed conduct and the induced intervening event cannot be evaluated as abnormal. The generality of the intervening event is a critical evaluation criterion, and the relationship between the conduct and the intervention must be evaluated as the criminally proscribed conduct generally induces the intervening event. This point is not much different from the theory of adequate causation.

## Summary

According to the objective attribution theory, if an impermissible risk created by an actor or jointly created by plural actors is realized in consequence, the satisfaction of the constituent elements of a negligent crime is to be affirmed, and the damage to legal interests is attributed to the actor. This is the case whether the risk was created by a single actor or jointly created by plural actors. In contrast to the new theory of negligence, the theory of objective attribution holds that the breach of a duty of care is not conclusive evidence but serves as an evaluative reference for determining whether or not the behavior in question has resulted in unacceptable danger. The application of exclusionary standards of liability ascription allows for determining whether or not the behavior in question generates an unacceptable risk and whether or not the risk materializes in the outcome. Providing the conduct reduces the risk, does not create the risk in a legal sense, or creates an acceptable risk, the consequence of damage to legal interests is not attributed to the actor. In determining the realization of risk, given that 1) the risk created by the actor does not cause the consequence; or 2) the lawful substitute conduct cannot prevent the consequence from happening; or 3) the consequence goes beyond the scope of the protective purpose of norms of care, it can be considered that the risk created by the conduct is not realized in consequence, and the actor is excluded from the liability ascription.

In cases where an intervening event exists between the first conduct and the consequence, the causation is determined according to the responsibility scope prescribed by the criminal law. Additionally, in cases where the causes of the consequence produced by the first violence and the second violence can be recognized as identical, the time of the occurrence of the consequence can be abstracted within a certain range. The risk of the first conduct is deemed to have a directly realized consequence, i.e., the causation is to be acknowledged, regardless that the intervening event is abnormal. The actor cannot predict the intervention. In cases where the first conduct indirectly realizes the consequence, if the first conduct generally causes the intervening event, the causation between the first conduct and the consequence is to be sustained.

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