Irakli Dvalidze*

Objective Imputation of the Result and the Liability for Negligent Keeping of Firearms According to Georgian Criminal Legislation

The present article examines the justification of the existence of art. 238 of the criminal code (negligent keeping of firearm, including hunting smoothbore gun). Its current formulation is in conflict with theory of objective imputation. As the result of analysis of views expressed in legal literature and the court caselaw, an alternative legislative formulation of art. 238 is provided.

Keyword: *negligent keeping of arms.*

1. Introduction

According to Georgian criminal law, a physical person may bear liability only for a guilty conduct. However, the conduct stipulated in par. 1 of art. 7 of Georgian criminal procedure code implies not only the act or omission, but also specific results. The doctrine of causality as well as the equality of conditions, or equivalency doctrine developed initially in criminal law could not deal with problematic cases. Namely, even if the result was brought about in accordance with natural regularity, from normative point of view, it was impossible to properly solve the issue of criminal liability of the person for results occurred (for example, factual causation of the harm as the result of two independent actors (so called, atypical causation), so called "concurrent causation")

In criminal law, some offences are deemed to be completed and entail criminal liability only when a certain harm is present. However, in some cases, despite the occurrence of certain result, it is impossible to impose criminal liability due to the principle of individual responsibility. Dating back from Soviet times, the liability for illegal storage of firearms is retained in the form of art. 238 of criminal code of Georgia. Study of the theory of objective imputation in legal literature and case-law evidences the necessity of radical changes in this article of criminal code.

2. Objective Imputation of the Result, as a Guarantor of the Principle of Individual Responsibility

A legal assessment of the occurred harm also implies the application of normative criteria in final stage. Therefore, in the chain of causation, it is indispensable to identify every ring which is not only causally linked to the outcome, but is normatively considered to be the work of the actor. Such understanding of the conduct is indispensable due to the principle of individual responsibility.

* Doctor of Law, Associate Professor at Ivane Javakhishvili Tbilisi State University Faculty of Law.

"According to this principle, which has recently turned into an independent criteria of imputation, every person is principally responsible only for his own conduct. In application of this principle and based on objective imputation, it is possible to identify several layers of responsibility. In addition, above all, it is important to separate the risks which are created by the victim, namely for freely assumed self risk or self injury. In addition, this principle can also help us to solve the cases in which the third actor interferes negligently or intentionally"[1].

All the above factors, together with the other circumstances have contributed to the elaboration of doctrine of objective imputation in German and Austrian criminal law. This doctrine proposes two step system of imputation of result for problematic cases (causation + objective imputation).[2]

When we are assessing specific cases in the light of criminal law, it is sometimes necessary to introduce normative filter in the infinite chain of causation, which in the end enables the rational solution of the matter. It is interesting to analyze the art. 238 of the criminal code in the light of the principle of objective imputation of the result. According to this article "negligent storage of firearm, including smoothbore hunting weapon, which created a possibility of its use by other person, resulting in the death of a person or some other grave consequence."

3. Principle Offender of the Crime Stipulated by Art. 238 of the Criminal Code

In order to properly analyze the boundaries of the article of the crime stipulated by art 238 of the criminal code, it is interesting to find out who can be the subject of this crime.

A view has been expressed in the legal literature, according to which "the subject of the given crime can be anyone who is in lawful custody of the weapon. If an unlawful guardian of the weapon causes a grave consequence by its negligent storage, he/she must be liable for unlawful possession. However, the harm which have occurred should be taken into account while defining the sentence, because the unlawful storage of the weapon is punished more severely than its negligent storage"[3].

Similar comments are made to art. 234 of the Russian criminal code in force[4]. Analogous view is also expressed in Georgian criminal legal literature. "In art. 238 of Georgian there is no reference to the legality or illegality of the custody of the weapon. Therefore this question is interpreted differently by different authors in legal literature. It is more logical to punish only lawful custodian for negligent storage of the firearm. The latter is properly instructed on the rules of due care from competent

---

1 *Wessels J., Beulke W., Satzger H.*, Strafrecht Allgemeiner Teil, 43. Auflage, 2013, 72.

2 In details see *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 215-259 (in Georgian).

3 *Ignatov V.N.,* Course of the Soviet Criminal Law. Team of Authors, Editorial Board *Piontkovsky A.A., Romashkin P.C., Chkhikvadze V.M.,* Vol.6, M., 1971, 388 *(*in Russian).

4 Compare *Komissapov V.C.,* Course of the Soviet Criminal Law. The Textbook for Higher Education Institutions. Team of Authors, Edited by *Borzenkov G.N., Komissapov V.C.,* In five Volumes, Vol.4, M.,2002, 340-34,1 *(*in Russian); *Kostareva T.A.,* in Commentaries: Commentary to the Criminal Code of the Russian Federation. Team of Authors. Under the General Edition of *Skuratov Yu. I., Lebedev V.M.*, M., 1996, 507 *(*in Russian).

authorities. If an illegal custodian, knowingly or without knowledge, violates safety rules of the storage of the weapon, this conduct shall be covered by unlawful possession of the firearm and no additional qualification of the case under art. 238 is required. Therefore, an unlawful possession of the weapon also covers the violation of safety rules of its storage. "[5].

Hereby, according to the proposed view, the subject of the given crime can only be the lawful custodian of the weapon, however, this conclusion does not necessarily flow from the text of the law. It is not proper to say that an illicit custodian of the weapon who is causing grave consequences by disregarding safety rules should be liable only for the unlawful possession of the firearm and the grave consequence of the conduct should be taken into account only in deciding the proper sentence, because the unlawful possession of the weapon is punished more severely than the negligent storage. Neither is it correct to say that unlawful storage of the weapon also covers grave consequences.

We are more in favor of the view, according to which the subject of art. 238 of the criminal code is the lawful as well as unlawful guardian of the gun. Ignatof unjustly criticizes Matishevski, according to whom the negligent keeper of the weapon should bear liability for multitude of crimes (negligent storage of the weapon as well as illegal possession[6]). Kudriavcev also thinks that in this case we have an ideal unity of crimes. "K was keeping a pistol illegally in his drawer. The children managed to get hold of the weapon and started to play, which has resulted in death of one child. We are having an ideal unity of two crimes, one of which is an unlawful possession of the weapon (art. 222.1. of Russian criminal code) and negligent keeping of the weapon (art. 224 of Russian criminal code[7]"

The crime stipulated by art. 236 of the criminal code may never include the crime stipulated by art. 238 of the criminal code, because none of the rules competition between norms shall apply (such as overlap, subsidiarity, etc)

We must also take into account the following situation. What will happen if law of amnesty absolves the crime covered art. 236 of the criminal code. Namely, if we say that the subject of art. 238 of the criminal code can only be a lawful owner and if an illegal owner of the gun also violates the safety rules resulting in any of the consequences described in art. 238, than he or she must bear liability only for unlawful possession of the weapon and the result must be taken into account only in sentencing phase. However, due to the amnesty law, the a person may never bear any criminal liability, because the defendant was not charged under art. 238 of the criminal code. Therefore, the given position is not justified neither for criminal policy considerations. Hence it is more appropriate to conclude that the subject of art. 238 can be any person and in given situation the conducts must be charged under art. 236 and art. 238 of the criminal code.

---

5 *Todua N., Lekveishvili M., Todua N., Mamulashvili G.,* Team of Authors, Private Part of Criminal Law, Part I, Tbilisi, 2016, 675 (in Georgian).

6 *Ignatov V.N.,* Course of the Soviet Criminal Law. Team of Authors, Editorial Board *Piontkovsky A.A., Romashkin P.C., Chkhikvadze V.M.,* Vol. 6, M., 1971, 388 (in Russian). Unegligent Storage of firearm was by the Time Stipulated in Art. 219 of the Criminal Code of Russian Federation.

7 *KudriavtsevV.N.,* General Theory Qualification of Crimes, M. 2001, 245 (in Russian).

4. Who is the User of the Firearm?

In order to properly analyze the *corpus delicti* stipulated by art. 238 of the criminal code, of central important is the question of who is the user of the firearm. For this reason, first we should clarify what is meant by the term "use"

A firearm can be used only by its firing and in no case its application as a blunt object of physical assault can be considered as use. For example if a person gets hold of negligently stored pistol and hits it in the head of another person causing grave injury, this cannot be understood as a cause of any of the consequences described in art. 238, because we are normatively restricting the mechanic causation in the light to the purpose of the norm. The legislator criminalized the negligent storage of the firearm because its functional application creates an increased danger.

We must now turn our attention to a following question: does the corpus delicti of the given crime imply suicide as a consequence.

A particularly interested case related to justification of art. 238 is the case number 5 cited below, because provision of a weapon to a legally competent individual with the knowledge that it shall be used for homicide (which shall in fact be carried out), does not trigger criminal responsibility because the suicide is not punishable.

As it is often pointed out in academic literature, "the grave consequence implies different types of physical injury – murder, suicide, use of weapon for the commission of the crime and etc. Its up to the court to decide whether or not the grave consequence stipulated by article 238 is present[8]. Other scholars have also expressed similar view at times. [9]

There are different views expressed in Georgian legal literature related to the suicide. Namely, one of the authors argue that suicide can be considered as a grave consequence only if the weapon was discharged by a child or mentally incompetent person"[10]. We believe that this position is correct, because we are facing a ground excluding objective imputation – self endangerment created by the victim. As *Mr. Turava* correctly points out, the personal responsibility of the victim is excluded if the victim has no freedom of choice due to insanity or any other ground[11]. In addition if corpus delicti stipulated by art. 238 includes suicide committed by mentally competent person, than we shall have a logical contradiction, namely, it is widely accepted that a purposeful delivery of the weapon to another person for purpose for suicide does not trigger criminal liability, because based on derivative nature of

---

8 *Komissapov V.C.* in the book: Course of the Soviet Criminal Law. The Textbook for Higher Education Institutions. Team of Authors, Edited by *G. N. Borzenkov, V.C. Komissapov.* In five volumes, Vol. 4, M., 2002, 341 (in Russian).

9 Compare *Kostareva T.A.* in commentaries: Commentary to the Criminal Code of the Russian Federation. Team of Authors. Under the General edition of *Yu. I. Skuratov, V.M. Lebedeva*, M., 1996 507 *(*In Russian); *Khomchik V.V.* in the Commentaries: Commentary to the Criminal Code of the Russian Federation. Team of Authors. Editor-in-Chief *Lebedev V. M.*, M., 2007. 527 *(*in Russian).

10 See *Todua N., Lekveishvili M., Todua N., Mamulashvili G.,* Team of Authors, Private Part of Criminal Law, Part I, Tbilisi, 2016, 676 (in Georgian).

11 See *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 236 (in Georgian).

complicity, an accomplice is not liable in the absence of liability of the principle offender. Therefore its logically impossible to impose liability for negligence.

In this situation, based on the principle of individual responsibility, no one can be liable for harming legal interest owned by the offender himself. When we talk about complicity in self inflicted danger or harm, we have several limitations for the imputation of the result. For example, when there is a suicide, or self infliction of the body harm, an accomplice is not as a rule liable if the result was known to the victim, it was also desired and executed through self endangerment or infliction of harm, while a third person participated in it only through the contribution or interference. The area of protection envisaged by the norm, for example in art. 222, 223, 229 of the criminal code, which is aiming at the protection of the legal interest from the interference of the third person ends at a point where the territory of the victims personal responsibility starts. Hence, in such cases, according to the general formula of objective imputation, no significant danger to the legal interest has been created[12]"

M. Turava is citing an example from the court case law: "A policemen recklessly left a gun lawfully possessed by him on the table. His girlfriend, which was not a minor and was mentally competent committed a suicide by using the weapon"[13]

"Because the principle of objective imputation has not yet been fully developed in Georgian criminal law, including the caselaw, the policeman was convicted for this crime under art. 238 of the criminal code. If we accept the doctrine of objective imputation, the result shall not be attributed to the policemen because the victim committed suicide by her free will. However, we shall have a different legal outcome, if mentally incompetent person (art. 33-34 of criminal code) commits suicide with that weapon. In such case, the outcome shall be objectively be attributed to the policemen in accordance with the general rule[*]."[14]

From the cited example, we can clearly see that self infliction of the harm by the victim at free will excludes the grounds of criminal liability of the defendant.

Similar approach is adopted in German legal literature "for example A has self injected the heroine delivered by B. Even though the drug had lethal effect, B cannot be punished under art. 222 of the criminal code"[15]

"The court also applies the same principles. In the past an accomplice could also be liable for negligent offences, however this is problematic taking into account the aspects of self endangerment[16]"

As a recommendation, we may say that the user of the weapon in art. 238 cannot be any person. This only implies a person, who is exempt of criminal responsibility due to insanity or other ground. Of

---

12 *Wessels J., Beulke W.,Satzger H.*, Strafrecht Allgemeiner Teil, 43. Auflage, 2013, 72.

13 *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 236 (in Georgian).

* "Similar case is provided in German literature, in which the issue is solved in the same manner. See e.g. the book of *Rengier R.*: Strafrecht, AT, 2nd ed.,, 2010, 90. In the book it is pointed out that policeman should not be punished. Reference is made: Here it is implied deprivation of own life, both intentionally and recklessly." Reference cited: *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 237 (in Georgian).

14 *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 236-237 (in Georgian).

15 *Wessels J., Beulke W., Satzger H.*, Strafrecht Allgemeiner Teil, 43. Auflage, 2013, 72.

16 Ibid.

course the liability of the contributor exists when the awareness of the risk in some cases goes beyond the freedom of the victim (**increased awareness**). [17]

Example: A doctor has prescribed a substitute to heroin addict. However, due to the regular use of the substitute, the patient became addicted to both drugs. The patient did not know about the additional danger of addiction. Subsequently the doctor can be liable for the caused injury."[18]

If the legislator wants to punish the person who has brought some contribution in self infliction of the harm by the victim, then the legislator shall convert the factual aider or instigator into a principle by creating a special offence – delictum sui generis.

5. For Interpretation of the Storage of the Firearm

For proper interpretation of the negligent storage of the firearm we should apply the law on firearm adopted on May 8 2003. Based on art. 20 of this law, the Ministry of Interior issued several decrees setting down the rules for the storage, transportation and etc. of lawfully possessed firearms. Particularly interesting is the decree of Minister of Interior dated by February 28, 2014 (N. 164), the art. 18 of which reads as follows:

1. The firearms and explosives must be kept in the state and in the conditions which ensure their protection and safety, prevent unexpected discharge and the access of the third person to the weapon.

2. The weapons and explosives envisaged by art. 9 (2) "k", "l", m" of the law on Firerams of Georgia must be kept in fire resistant metal safe, excluding the access of the third person. For the withdrawal of the weapon, a special journal must be kept, which shall be bound and certified by relevant division / responsible person of the Ministry of Interior"

In order to properly interpret the word "storage" in the meaning of art. 238 of the criminal code, it is important to extend the precautionary measures conceived for the storage to the process transportation. Chapter 4 of the decree 164 of February 28, 2014 of the Minister of Interior, stipulates the standards for he safe transportation of the weapon. For example articles 21-23 of the decree read as follows:.

"Art. 21

1. Upon domestic transportation of the weapon and explosives by airplane, the weapons and explosives belonging to a physical person shall be temporarily handed to the member of the crew of the plane for custody during the flight and shall be returned to the owner in the airport upon completion of the flight. The crew member appointed by the plane captain as a person responsible for storage and transportation of the weapon during the flight shall receive weapons and explosives, register relevant documentation, ensure the transportation of the weapon and explosives on board of the plane and delivery.

2. The authorized officers of security service of civil aviation shall ensure the registration of the relevant documents, the delivery of the weapons and explosives on board of the plane and delivery in the airport.

---

[17] See ibid, 68.

[18] Ibid.

Art. 22

1. Upon transportation by airplane, the weapons and explosives should be placed in packed, sealed and locked container in a baggage compartment of the airplane. In the airplanes, which do not have isolated baggage compartments, the weapons and explosives belonging to physical persons can be stored in the cabin of the crew in isolated and protected area".

Therefore, during transportation of the firearm by domestic flight where the relevant conditions exist, the subject of art. 238 can be a crew member of the airplane.

For the proper interpretation of art. 238 we should highlight the specific problem of causation between the negligent storage of the weapon and the grave consequence. In order to charge a person under art. 238 of the criminal code, its necessary to prove the existence of the risk of using the weapon by another weapon. If there is no such risk, the criminal liability under art. 238 of the criminal code shall be ruled out. For example, if a military serviceman keeps a weapon on the table in a space where no stranger can lawfully be admitted, however a stranger still manages to penetrate the area and uses the weapon entailing grave consequences, no liability under art. 238 can be imposed.

Before we talk about the justification of the existence of the art. 238, its interesting to find out whether we should stick to criminal liability under this article in the case, where the weapon was apparently was stored properly in the safe, though the key or the code of the safe was accessible to a third person. For example, A locked his weapon in the safe, however, he/she forgot the key of the safe in publicly accessible area and a mentally ill person got hold of the weapon and killed his neighbor. We can logically say that this case can be charged by art. 238 of the criminal code. Because safe storage of the weapon implies observance of all conditions which prevent the access of third parties to the weapon.

It is properly stressed in legal literature that " if the person was acting purposely with regard to the result, than he/she should be liable for graver intentional crime, (such as murder, complicity to murder, etc)[19]

6. The Experience of United States

The United States are known to be part of common law legal system, however they are not unfamiliar with statutory law. For thorough research of the given question, it is interesting to bring examples from several US state legislations.

Under Connecticut Penal Code "art. 53a 217 – Criminally negligent storage of a firearm: Class D felony:

(a) A person is guilty of criminally negligent storage of a firearm when such person violates the provisions of section 29-37i and a minor or, a resident of the premises who is ineligible to possess a firearm under state or federal law or who poses a risk of imminent personal injury to himself or herself or to other individuals, obtains the firearm and causes the injury or death of such minor, resident or any other person.[*] For the purposes of this section, "minor" means any person under the age of sixteen years.

---

[19] *Ignatov V.N.,* Course of the Soviet Criminal Law. Team of Authors, Editorial board *Piontkovsky A.A., Romashkin P.C., Chkhikvadze V.M.,* Vol. 6. M., 1971, 388 *(*in Russian).

[*] Here it is meant as intention, carelessness (negligence).

(b) The provisions of this section shall not apply if the minor obtains the firearm as a result of an unlawful entry to any premises by any person.

New Hampshire state criminal legislation (650-c.1 Negligent storage of firarms) extensively outlines the crime of negligent storage of weapon:

II. As used in this section, "child," "juvenile" or "youth" shall mean any person under 16 years of age.

III. Any person who stores or leaves on premises under that person's control a loaded firearm, and who knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or guardian, is guilty of a violation if a child gains access to a firearm and:

- (a) The firearm is used in a reckless or threatening manner;
- (b) The firearm is used during the commission of any misdemeanor or felony; or
- (c) The firearm is negligently or recklessly discharged.

Part 5 of the same article outlines in detail circumstances, excluding criminal liability

" V. This section shall not apply whenever any of the following occurs:

(a) The child has completed firearm safety instructions by a certified firearms safety instructor or has successfully completed a certified hunter safety course.

(b) The firearm is kept secured in a locked box, gun safe, or other secure locked space, or in a location which a reasonable person would believe to be secure, or is secured with a trigger lock or similar device that prevents the firearm from discharging.

(c) The firearm is carried on the person or within such a close proximity thereto so that the individual can readily retrieve and use the firearm as if carried on the person.

(d) The child obtains or obtains and discharges the firearm in a lawful act of self-defense or defense of another person.

(e) The person who keeps a loaded firearm on any premises which are under such person's custody or control has no reasonable expectation, based on objective facts and circumstances, that a child is likely to be present on the premises.

(f) The child obtains the firearm as a result of an illegal entry of any premises by any person or an illegal taking of the firearm from the premises of the owner without permission of the owner.

VI. A parent or guardian of a child who is injured or who dies of an accidental shooting shall be prosecuted under this section only in those instances in which the parent or guardian behaved in a grossly negligent manner".

According to Cal. Penal Code § 12035 (West 1992). The provisions of the California statute include:

(b)(1) Except as provided in subdivision (c), a person commits the crime of "criminal storage of a firearm of the first degree" if he or she keeps any loaded firearm within any premise which is under his or her custody or control and he or she knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian and the child obtains access to the firearm and thereby causes death or great bodily injury to himself, herself, or any other person.

(2) Except as provided in subdivision (c), a person commits the crime of "criminal storage of a firearm of the second degree" if he or she keeps any loaded firearm within any premise which is under his or her custody or control and he or she knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child's parent or legal guardian and the child obtains access to the firearm and thereby causes injury, other than great bodily injury, to himself, herself, or any other person, or exhibits the firearm either in a public place or in violation of Section 417.

Haw. Rev. Stat. Ann. § 134-10.5 (Michie Supp.1992). The statute provides:

No person shall store or keep any firearm on any premises under the person's control if the person knows or reasonably should know that a minor is likely to gain access to the firearm without the permission of the parent or guardian of the minor, unless the person:

(1) Keeps the firearm in a securely locked box or other container or in a location that a reasonable person would believe to be secure; or

(2) Carries the firearm on the person or within such close proximity thereto that the person readily can retrieve and use it as if it were carried on the person.

For purposes of this section, "minor" means any person under the age of sixteen years.

New Jersey (§ 2C:58-15),Florida (§ 790.174) Wisconsin (§ 948.55), have similar articles, though in Wisconsin a “child” implies a person under 14.

7. Solution of the Matter in the Light of Specific Cases

Its much better if we approach the issue ofjustification of the art. 238 of the criminal code in the light of the examination of specific cases: 1. A left a pistol on the shelf and entered the bathroom. His 14 year old sun grabbed the weapon and started to play. Accidentally the gun was discharged and killed his friend which was also 14 years old. 2. Case n. 2. A left a gun on the shelf and entered the bathroom. His 14 year old son grabbed the weapon and started to play, the gun was accidentally discharged and took the life of B. 3. A landed his gun to B, who committed the murder. A was not aware of B s intention. 4. A left a gun on the shelf and entered the bathroom. His 14 year old son grabbed the weapon and committed a suicide. 5. B asked A to lend his weapon to him in order to commit suicide. A handed his weapon to B and the latter committed suicide. 6. A left his gun on the shelf and entered the bathroom. His 14 year old son grabbed the weapon and killed his friend. 7. A left his gun hanging on the wall. The gun fell down and discharged and took the life of a person. 8. A left his gun on the shelf. B grabbed the gun and gravely injured A.

In the given cases, the legal assessment of the conduct committed by A from the viewpoint of Georgian or Russian criminal law doctrines shall be following: 1. A’s conduct shall be charged under art. 238 of the criminal code, however this qualification is against the principle of objective imputation. 2. A’s conduct shall be charged under art. 238 of the criminal code, which is against the principle of objective imputation 3. A’s conduct shall be charged under art. 236.4 of the criminal code (the sale of weapon). 4. A’s conduct shall be charged under art. 238 of the criminal code or A shall be exempt from

criminal liability (this opinion which is absolutely correct is expressed by Nona Todua[20]), 5. A shall be exempted from liability for murder based on derivative nature of complicity. However A shall be charged under art. 236.4 of the criminal code (sale of weapon). 6. A s conduct shall be charged under art. 238 of the criminal code, which is against the principle of objective imputation. 7. In this situation, A cannot be charged under art. 238 of the criminal code, because this article requires effective use of weapon by third person, which has not occurred in given situation, in other word, we don't have specific causation, however, we may charge this case under art. 116.1 of the criminal code (negligent homicide), because from the violation of the norms of the due care to the occurrence of the result, there has been no interference of any third person and therefore the results can entirely be attributed to the person who negligently stored the weapon. 8. No opinion has been expressed in legal literature on this case either, however, according to the dominating doctrine, we can quite legitimately use the art. 238 of the criminal code which again runs against the principle of objective imputation

8. For the Interpretation of Other Grave Consequences

One of the important issues, which concern the result described in art. 238 of the criminal code is its boundaries. Namely, is any grave consequence implied in art. 238 or should we have any limitation here.

First of all, we must find out what is meant by the words "have triggered". Namely, this implies only the negligence of the final user or the negligence, as well as intention. From the literature that we have analyzed it is clear that the causing the result implies the negligence as well as the intention. The court caselaw illustrates several examples:

I. According to the judgment of the court, A committed a murder, after which he left the revolver with bullets in the house of his friend's aunt. He was keeping the arm in a small plastic box, while the box was under the couch in the dormitory. While the box was locked, it could be opened by other person. The son of B knew the existence of the gun. He grabbed the gun and committed suicide[21].

II. If is evident from the court judgment that A acquired a pistol, which he could duly guard. Namely, he kept the weapon on the top of the bookshelf in dormitory. B seized the gun and committed a murder.[22]

III. A was negligently keeping a firearm in his dormitory together with the cartridges. On October 30, 2014, his grandson, juvenile B secretly took the weapon, with which he and his friend started shooting in the air. Later they gave the gun to their friend D. Who discharged it by accident while causing minor injury to A and grave injury to B.[23]

---

20 *Todua N. in the book*: *Lekveishvili M., Todua N., Mamulashvili G.,* Team of Authors, Private Part of Criminal Law, Part I, Tbilisi, 2016, 669 (in Georgian).

21 See Criminal Case Chamber of Tbilisi City Court, Judgment of February 27, 2015, Case №1/894-15. The names of the participants have been coded, therefore we are using the initials.

22 See Criminal Case Chamber of Tbilisi City Court, Judgment of May 16, 2016, Case 1/4884-15.

23 See Criminal Case Chamber of Tbilisi City Court, Judgment of November 26, 2014, Case 1/6861-16.

Now, the question which arises is whether or not we can argue the application of art. 238, when the third person willfully interferes in the negligent storage of arms. The discussion of the two cases shall give us a much clearer view of the problem: 1. A husband which was acting violently towards family members kept the gun violation of due norms of safety. His wife decided to hide the weapon to some other place though also did it negligently. Their child used this opportunity and started to play with the weapon, though accidentally injured his own brother. What will be the legal evaluation of the conduct of the spouses? 2. A negligently stored the weapon, which was later stolen. The thief sold the weapon to a third person who committed a homicide with it. Shall A be punished under art. 238 of the criminal code? In the given case, in using the formula –*conditio sine qua non*, the chain of causation continues infinitely. In given situation, when legally blameable risk, which is created by one person is replaced by legally blameable risk created by another person, the responsibility of the initial actor must be excluded, because the willful interference of third person into the chain of causation transfers the objective imputation to this person.

Now we have to find out whether the attempted suicide committed by mentally insane person shall be considered as a legal outcome stipulated by art. 238[*].

First of all, must be noted that there are three ways of understanding the grave result described in art. 238. 1. This implies only material outcome, which means that the legal interest must be harmed. 2. This implies also the attempt to harm the legal interest, which did not result in the actual harm 3. This implies the attempt, which though could not harm the aimed legal interest, though harmed other legal interest. For example, the gun which was fired for the purpose murder caused bodily injury.

We believe that for proper interpretation of art. 238, the first and second ways are acceptable. Namely, it will not be correct to impose liability for the attempt, which did not cause harm to any legal interest. Any other understanding of the grave result would counter the will of the legislator. Sample list of grave results offered by legislator starts by death of the person, which implies materially harmed legal interest. We should view the other grave results in the same light.

If it is established with high degree of probability that the defendant could not avoid the result no matter if observed proper standards of due care, than the objective imputation is excluded namely by reason of absence of legal relationship between causes.

We must also note that, if negligently stored weapon is used to commit crime (murder, robbery, etc), than the end user should be charged with art. 236 (acquisition of firearm) or art. 237 (theft of firearm for wrongful misappropriation) together with relevant crime committed. Analogous view is encountered in Russian legal literature, which states that the user of the negligently kept weapon should be liable under art. 222 (illegal carriage, acquisition of arms) of criminal code of Russian Federation or art. 226 (illegal taking of arms for the purpose of misappropriation[24]). However, this later view requires

---

[*] Here we do not examine the suicide attempt by mentally competent person: based on the arguments developed above, we share the position according to which the grave results triggered by the use of weapon by legally competent person should not entail the results described in art. 238 of criminal code.

[24] See *Komissapov V.C.,* Course of the Soviet Criminal Law. The Textbook for Higher Education Institutions. Team of Authors, Edited by *G.N. Borzenkov, V.C. Komissapov.* In five volumes, Vol. 4*,* M.,2002, 341 *(*in Russian).

clarification. If the weapon is used spontaneously, than there is no need of separate qualification of unity of crimes together with acquisition of arms or illegal taking for the purpose of misappropriation.

Finally, how should we decide the issue, if the negligently stored weapon is used for self defense. In this case we believe that the result described in art. 238 implies only the result of wrongful action.

9. Conclusion

As the result of this research, we may offer following conclusions as to art. 238 of the criminal code:

First: The grave result does not imply the suicide or crime committed by mentally competent person, because in this case the liability may be limited based on objective imputation. Therefore, the user of the weapon should be legally incompetent person.

Second: the principle offender of the crime can be any person and it does not matter whether he/she has lawful or unlawful custody of the weapon

Third: For the uniformity of the court case law, it is recommended to amend art. 238 so that it shall read as follows:

"Negligent storage of firearm or explosive in lawful or unlawful custody, which created risk of its use by legally incompetent person and its application has triggered intentional or negligent homicide, bodily injury or property damage, or by its use, a legally incompetent person has committed any unlawful conduct stipulated by this code.

Bibliography

1. Criminal Code of Georgia (version: 2017).
2. California Penal Code (version: 2016).
3. Connecticut Penal Code (version: 2016).
4. Criminal Code Of Georgia (version: 2016).
5. Hawaii Code (version: 2011).
6. New Hampshire Criminal Code (version: 2016).
7. The New Jersey Code of Criminal justice (version: 2016).
8. Florida Statutes**,** TITLE XLVI – CRIMES (version: 2016).
9. Wisconsin Statutes & Annotations, criminal Code (version: 2016).
10. *Lekveishvili M., Todua N., Mamulashvili G.,* Team of Authors, Private Part of Criminal Law, Part I, Tbilisi, 2016, 669, 675, 676 (in Georgian).
11. *Turava M.*, General Part of Criminal Law, Theory of Crime, Tbilisi, 2011, 236, 237, 215-259 (in Georgian).
12. *Wessels J., Beulke W., Satzger H.*, Strafrecht Allgemeiner Teil, 43. Auflage, 2013, 72.
13. *Kudriavtsev V.N.,* General Theory Qualification of Crimes, M., 2001, 245 (in Russian).

14. Course of the Soviet Criminal Law. Team of authors, Editorial board *Piontkovsky A.A., Romashkin P.C., Chkhikvadze V.M.,* Vol. 6, M., 1971, 388 (in Russian).
15. Course of Criminal Law. The Textbook for Higher EducationInstitutions. Team of authors, Edited by *Borzenkov G.N., Komissapov V.C.,* In five volumes, Vol. 4, M.,2002, 340,341 (in Russian).
16. Commentary to the Criminal code of the Russian Federation. Team of Authors. Under the General Edition of *Skuratov Yu.I., Lebedev V. M.*, M., 1996, 507(in Russian).
17. Commentary to the Criminal Code of the Russian Federation. Team of Authors. Editor-in-Chief *LebedevV.M.* , M., 2007, 527(in Russian).
18. Criminal Case Chamber of Tbilisi City Court, Judgment of February 27, 2015, Case №1/894-15.
19. Criminal Case Chamber of Tbilisi City Court, Judgment of May 16, 2016, Case №1/4884-15.
20. Criminal Case Chamber of Tbilisi City Court, Judgment of November 26, 2014, Case №1/6861-16.