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## **LEGAL PROTECTION OF PATIENTS IN MEDICAL MALPRACTICE**

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### **Abstract**

Legal protection of patients concerning health services for the actions of doctors and health workers resulting in losses for the absolute patient is given as a form of state welfare law (welfare state). Protection for patients is carried out both in a preventive and repressive manner. Preventive legal protection is carried out by stipulating several obligations and prohibitions as guidelines that doctors and health workers must obey and heed concerning the provision of health services. Meanwhile, legal protection that is repressive is provided through the establishment of a dispute settlement institution by filing a lawsuit for default and/or actions against the law filed through the District Court.

**Keywords:** Legal protection, patient, medical malpractice

### **A. Introduction**

Through various reports, both print and electronic media including social media, it can be seen that there are various demands and/or lawsuits filed by patients to doctors and other health workers and even to hospitals as a result of losses suffered by patients in connection with the health services provided to them.

The emergence of various cases in the form of demands and/or lawsuits from patients is an indication that public legal awareness is increasing. The more people are aware of the rule of law, the more they will know their rights and obligations. This also causes the public (patients) to no longer want to accept the medical treatment for granted. Patients want to know how medical actions are carried out so that later they do not suffer losses due to errors and negligence of medical personnel.

Actions by doctors and/or other health workers that result in losses, concerning the health services provided, are known as medical malpractice, which can simply be interpreted as wrong treatment methods. In a situation like this, legal protection as part of human rights, the patient is given and it is the responsibility of the government as a manifestation of the implementation of Indonesia as a welfare state. In connection with this, the issue to be discussed is how the legal protection of patients in medical malpractice is viewed from a legal perspective.

### **B. Research methods**

The research method used in this research is normative juridical legal research, namely research that is focused on examining the application of the rules or norms in positive law, namely laws and regulations relating to health services and hospitals, using secondary data in the form of primary, secondary and tertiary legal materials. The data collection method used was document study through library research with qualitative data analysis.

### C. Analysis

In "The Contemporary English Indonesia Dictionary", *malpractice* means the act or misconduct (Ninik Mariyanti, 1988). "Malpractice" also means bad practice which promotes an attitude of wrong conduct. It can be said that malpractice means the wrong way of treatment or can be interpreted as a disaster that arises not on purpose (suspected beforehand), but there is an element of neglect that should not be done by a doctor and thus result in disability or death of the patient.

M. Yusuf Hanafiah stated that any definition of medical malpractice contains one of the following elements: (M. Yusuf Hanafiah, 2009)

- a) Doctors who lack medical knowledge and skills are generally accepted in the medical profession.
- b) Doctors provide sub-standard medical services.
- c) Doctors do severe negligence or carelessness, which may include:
  - 1) Not perform an action that should be done, or
  - 2) Perform an action that should not be done.
- d) Conducting medical action contrary to the law.

In terms of civil law, malpractice can be grouped into acts against the law or default, in the form of:

- a. Perform Default (Article 1239 of the Civil Code)
- b. Committing an act against the law (Article 1365 of the Civil Code)
- c. Performed negligence resulting in losses (Article 1366 of the Civil Code)
- d. Neglect of work as a person in charge (Article 1367 Paragraph 3 of the Civil Code)

Thus, according to civil law, the professional relationship between doctors and patients can occur due to 2 things, which are:

- a. Based on an agreement (*ius contractus*) in the form of a voluntary therapeutic contract between the doctor and the patient based on free will. Claims can be made if there is "default", namely denial of the things that were promised. The basis for the claim is not to be late, to do wrong, or to do something that cannot be done according to the agreement.
- b. Based on the law (*ius delicto*), the principle applies that those who harm others must provide compensation.

Hulman Panjaitan argued that civil liability arises when a person who feels that he has been harmed by the actions of a certain other person files a lawsuit to demand compensation from another person who has committed the detrimental act. In other words, civil legal responsibility arises concerning the existence of an illegal act known in civil law as *onrechtmatige daad* as regulated in Article 1365 of the Civil Code (Hulman Panjaitan, 1997).

If viewed from the regulatory model for the Indonesian Civil Code regarding other illegal acts, as well as the Civil Code in other countries in the Continental European legal system, the responsibility model is as follows:

1. Liability with an element of error (intentional and negligent), as contained in Article 1365 of the Civil Code.
2. Liability with an element of error, especially an element of negligence, as contained in Article 1366 of the Civil Code.
3. Absolute liability (without error) in a very limited sense is found in Article 1367 of the Civil Code.

Civil liability in cases of medical malpractice arises as a result of default and/or acts against the law. Default is based on the agreement between the doctor and the patient, which is specifically applied in the therapeutic contract between the doctor and the patient, where the doctor does not perform the achievement according to the therapeutic contract in question. A therapeutic agreement is an agreement between a doctor and a patient that gives the doctor the authority to carry out activities to provide health services to patients based on the expertise and skills possessed by the doctor (In Mukadimah Kode Etik Kedokteran Indonesia attached to the Decree of the Minister of Health of the Republic of Indonesia Number 434 / Men.Kes / X / 1983).

Civil liability based on illegal acts arises as a result of an act that violates the law (not an agreement) that is required by doctors and health workers concerning the health services provided. The elements are:

#### **a. An Act**

Actions referred to here can be in the form of positive or active actions, namely actions by doctors or health workers. Apart from that, it can also be in the form of passive or negative actions, in which the doctor or health worker does not commit an act, which by not doing the act will cause harm to the patient. Classically, what is meant by "action" in terms of an act against the law are:

- a) Nonfeasance is not doing something that is required by law.
- b) Misfeasance is an act that is done wrongly, an act that is an obligation or an act that he has the right to do.
- c) Malfeasance is an act committed even though the perpetrator has no right to do it.

The action in question, whether positive or negative, must contradict the law or statutory regulations (written or unwritten), propriety, or actions that are contrary to one's legal obligations, that is if the act is contrary to the legal obligation (*rechtsplicht*) of the perpetrator. With the term "legal obligation", what is meant is that an obligation is given by law to a person, both written law and unwritten law (*wettelijk plicht*), includes if it is contrary to the rights of others according to the law.

#### **b. An Error**

The doctor and/or another health worker must have an error, either in the form of deliberate action or negligence, or carelessness.

#### **c. A Loss**

The patient must be able to prove that there is a loss, both material loss and immaterial loss. The Supreme Court of the Republic of Indonesia in its decision No. 492 K/Sip/1970 dated 16 December 1970 and No. 550 K/Sip/1979 dated 8 May 1980 stipulated that a claim for compensation for a certain amount of money had to be rejected if the claim was not detailed (Hulman Panjaitan, 2014).

#### **d. A Causality**

The causal relationship that is meant is that the harm suffered by the patient is really due to an illegal act committed by the doctor and other health workers.

In such circumstances, due to default and/or illegal acts as described above, the patient must be given legal protection. In principle, the purpose of legal protection is to provide a sense of security, certainty, and justice for the community. The word "protection" itself means to protect the weak so that legal protection can also be interpreted as the protection provided by the government to someone to provide a sense of security, certainty, and justice for their rights in society and the life of the nation and state, whether in the form of services, laws, and regulations or other policies, including in the field of law enforcement. Patient protection is any effort that ensures legal certainty for the implementation of patient rights in a balanced relationship with health workers and provides compensation in the event of a deviation/failure of medical action and health/nursing care.

Philipus M. Hadjon argued that there are 2 (two) forms of legal protection for the people, namely preventive and repressive legal protection. Preventive legal protection aims to prevent disputes that lead to government action to be careful in making decisions based on discretion and repressive protection aimed at resolving disputes, including their handling in judicial institutions (Philipus M, 1987). Meanwhile, Rafael La Porta in the Journal of Financial Economics argued that the form of legal protection provided by a country has 2 (two) characteristics, namely, prohibited and sanctioned (Rafael La Porta, 1999).

Regarding health services, legal protection provided to patients in medical malpractice is carried out in the form of both preventive and regressive as stated by Philipus M. Hadjon and Rafael La Porta above. Preventive legal protection, provided through the stipulation of several obligations and prohibitions as guidelines that doctors and health workers must comply with various laws

and regulations in the field of health services, including Law No. 23 of 1992 jo. Law No. 36 of 2009 concerning Health, Law no. 29 of 2004 concerning Medical Practice, Law no. 44 of 2009 concerning Hospitals, including the Civil Code and other regulations relating to health service issues.

Repressive legal protection is provided through the establishment of a means for resolving civil disputes by filing a lawsuit for default and/or acts against the law through the District Court as part of the general court. As a form of legal protection for patients who have a weak position compared to doctors and health workers concerning health care, specifically in the law of evidence, it is necessary to consider the imposition of a reverse burden of proof (presumption of liability) as a doctrine in the system of accountability with the principle that business actors are always considered responsible as the opposite of the burden of proof based on fault (liability of fault) as regulated in Article 163 HIR/283 Rbg.

Based on the presumption of liability system, if there is a loss for a patient in connection with the health services provided to him, then the doctor or health worker or the hospital must prove his innocence. As long as they can prove that his party is innocent, then he will be released from responsibility. In other terms, a system of accountability like this is known as the *res ipsa loquitur* doctrine. The *Res Ipsa Loquitur* doctrine is a doctrine in the field of civil proof that determines that the victim of an illegal act in the form of negligence in certain cases does not need to prove that there is an element of negligence on the part of the perpetrator, but it is enough to show the facts that happened and draw the conclusion by yourself that the perpetrator is most likely to have committed the illegal act. The imposition of the burden of proof is reversed as already applied to consumer protection under No. 8 of 1999 concerning Consumer Protection (Indonesia, Law on Consumer Protection Number 8 of 1999).

In the Draft Patient Protection Law, it has been stipulated that patient protection is carried out by the Patient Protection Agency (BPP) as a public body that is independent in carrying out protection for patients who have duties and authorities, including:

- a. Establish a standard of compensation for patients.
- b. Assess the incidence of negative outcomes for active and passive therapeutic therapy.
- c. Monitor and supervise compliance with therapeutic standards.
- d. Provide compensation to patients for losses arising from negative results of therapy.

#### **D. Conclusions and suggestions**

In a malpractice case, legal protection given to a patient is given both preventive and repressive through several laws and regulations in the field of health services, including the Civil Code. According to civil law, legal protection provided to patients is through claims for compensation and/or default by filing a lawsuit through the District Court.

For all doctors and healthcare professionals, they can act more cautiously in good faith and adhere to established professional standards to avoid claims or challenges brought by patients.

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