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Physician, Patient and Malpractice Dalam Undang-Undang Nomor 23 Tahun 1992 Tentang Kesehatan

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Abstract

The purpose of this paper is to answer the questions and problems that give a rise to disputes between physicians and their patient and the liabilities of physicians to their patients in case a malpractice. The research method used was a juridical-normative approach, by studying applicable legislations, both contained in laws themselves and in legal references/books. The result in a juridical aspect was written in a descriptive-analytical form. The conclusion of this paper is: that disputes have occurred due to malpractices that the physicians committed to their patients, and that physicians' liability involved criminal, private, and administrative aspects.

Keywords: Physician, patient, malpractice, liability

1. Introduction

1.1. Background

The promotion of community health is directed to improve health level. It is of high significance for the development and maintenance of human resources in Indonesia and also to be a capital in implementing national development that essentially is the development of Indonesia's people comprehensively and development of the whole Indonesia's citizens. This is an effort to implement a rule as contained in the 1945 Constitution, Article 34 paragraph (3) that *State is responsible to make available feasible general health and service facilities*.

Physicians play a central role in realizing the aspiration contained in the Article 34 (3) of the 1945 Constitution.

The implementation of health development involves health measures and their resources that should be conducted in an integrated, sustainable way in order to achieve optimal results. Initially focused on the measures of healing sufferers, health measures have been slowly developing toward an integration of comprehensive health measures. Therefore, health development related to the measures of promoting health, disease prevention, disease healing, and health recovery should be carried out comprehensively, in an integrated, continuously way, and conducted by the government together with community, including physicians.

Receiving health service is a basic right of anyone, the implementation of which is the responsibility of government. The government realizes that health community is an asset and a main objective in achieving fair, prosper community. Thus, government is under obligation to: implement health measures that are equitable and affordable to community; finance health services which are public goods in nature, such as immunization, transmittable disease eradication; and be responsible to finance health services for the poor and elders.

Basically, the change of relationship between physicians and their patients is in line with the development in science and technology, be they in law and in medicine science itself, and also caused by the growth in legal awareness of community, particularly in Indonesia, as one of the results of development.

The change in characteristics of physicians as the service provider and the change of community as the medicine service receiver, if not supported by improvement of communication between physicians and their patients may result in dissatisfaction and conflict between both of them. Such conflicts frequently take place resulting from a malpractice a physician committed against his or her patient. The occurrence of conflicts is indicated by, among others, fact that community health level is still low and there are still many malpractices in patient treatment that cause injury or death.

Based on the description above, there are several problems in this writing, namely: *What are the reasons of dispute/conflict between physicians and their patients? What are the liabilities of physicians to their patients in case there occur a malpractice by a physician?*

2. Theoretical Frameworks

To examine the problems above, it needs some theoretical frameworks that may help describe and explain all problems above, namely:

2.1 Condition Sine Qua Non

This theory that von Bury proposes suggests that anyone who committed law-breaking act should be liable if the act causes any harm to others. This theory is in conformity with provisions of civil law, that is, Article 1365 and Article 1366 of Indonesian Civil Code. Every law-breaking act that causes a harm to others obliges the person, who because of his or fault resulted in the harm, to compensate the harm. And anyone is liable for not only the harm his or her act caused, but also for harm caused by his or her negligence or carelessness.

A practicing physician may be found guilty of committing a mistake/negligence. To decide that a law-breaking person has to pay some damages, there should be a close relationship between the mistake/negligence and the damages caused. The application of this principle makes the liability according to Article 1365 Civil Code to be considerably broadened.

Law-breaking act in the broad meaning based on Arrest Hoge Raad 31st January 1919 in Lindeboum vs. Cohen includes a meaning: committing or omitting something that violates any right of others, and in contrary to legal responsibility or liability, moral, or fairness within the community, either it is against person or others' property. It means that a mistake/negligence is defined widely to include: deliberateness and negligence. As for the fault of physicians in carrying out their profession or professional error, it is basically related to obligations that rise due to their professions, or so called professional duties.

2.2. Adequate Veroorzaking

According to Von Kries, damage is resulted from a law-breaking act if the damage may, according to human common sense, be a consequence of a law-breaking act that can be predicted in advance and such damage is, according to experience, a consequence of law-breaking act. Therefore, the damage here should have a causal relationship with the occurrence of a fault (law-breaking act) that a physician committed against his or her patient.

In a relationship between a physician and a patient, an example of negligence is if a physician is careless when he operated the patient so that an object (scissors/lint) had been unintentionally left in the patient's body. Such negligence is a law-breaking act and causes damage against the patient, that is, he or she to be sick, suffers infection, or even may die from the infection.

This Von Kries's theory was applied by The Dutch's Supreme Court in 1927. The Dutch's Supreme Court has accepted and declared *Adequate Theory* intended to make a limitation of liability.

3. Legality Principle

The main goal of law is to achieve justice. This theory is sprung from a thought on natural law, that is, a result of Aristotle's thought. However, in its further development, the goal of

law is actually not only the achievement of justice, but also legal certainty. This is born from the thinking process of positive law school (rechts positivism). The thought of recths positivism was generated in aufclarung/enlightenment age in Prussia. This school is in line with legality principle.

In Indonesia's legal system, as reflected in the provision of Article 1 paragraph (1) of Criminal Code. Legality principle is also called as *Nullum delictum* principle. "*Nullum Delictum noela poena praevia sine lege poenali"*. This principle is accommodated in Indonesia's Criminal Code in Article 1 paragraph (1) that sounds as follows:

"*No act might be punished except for the force of criminal provisions in Law, which has existed before the act*".

From the letters of Article 1 paragraph (1), we can infer that criminal provisions should be stipulated in applicable legislation, and judges should and may try an offender only on a basis of a positive (prevailing) law in form of legislation. It means that judges could not hear and adjudicate and decide a criminal case based on customary law or written law. This is to ensure legal certainty in community.

In addition to Article 1 paragraph (1), we can infer that criminal provisions in legislation cannot be applied to an act that had been conducted before the enactment of criminal provision in legislation. It means that law/legislation cannot be retroactive.

It is noteworthy to mention this principle, a principle that is made as a rationale in this writing because, in relation to malpractice a physician committed to his or her patient, the resolution of such legal event should ensure legal certainty.

4. Symbolic interactionism

Blumer's theory explains a concept on an interactional relationship between a physician and hierarkhi or her patient, a concept on law and norm, and how the function of national legal development implemented in Indonesia is. To apply an understanding theoretically to an interactional relationship between physicians and their patient, a symbolic interactionalism theory is used.

Interdependent relationship between physicians and their patient is a very personal one individual and another. According to Blumer, term 'symbolic interactionism' indicates the characteristic of interaction among humans. Its characteristic is that humans mutually interpret and define their own acts, not only merely as reaction of an act of one to another. Interaction between individuals is marked by the utilization of symbols, interpretations, or mutually attempts to mutually understand the intention of the act of each. Thus, the human interaction process is not a process where the presence of an automatic, direct stimulus induces a response.

5. Medical law and Health law

Medical law is defined as a law that regulates the products of physician profession, due to the existence of relationship with other parties, be they patients and other health workers.

Accordingly, it relates to only physician profession, or in the other words, "a group of persons in a community as a system, who possess expertise and special skills."

Indonesia doesn't have not medical law yet in the meaning one that is compiled in a separated law (codified). The existing law is only a health law as contained in Law No. 23 of 1992 on Health. However, based on the provisions contained in Law No. 23 of 1992 it could be studied on the provisions of which articles that provide for the relationship between physicians in one side and patients or other health workers in other side, particularly in measures of health service. Legal relationship as provided for in Law Number 23 of 1992 on Health can be related to civil law and general criminal law that are provided for in *Burgerlijk Wetboek*/Civil Code and Criminal Code.

The norms contained in the health law are rules that regulate all aspects related to measures and treatments in health area. The difference between health law and medical law lies in their scopes. The scope of health law involves all aspects related to health, that is, bodily, spiritual, and social health comprehensively. Meanwhile, the scope of medical law involves only those areas that are related to the medical profession. Given that medical aspects are also included in the scope of health law, then medical law is a part of health law. Viewed from its essence, both health law and medical law are the application of a set of civil, criminal, and administrative laws in health area.

6. Hospital

The meaning of hospital is defined by the Statute of Indonesian Hospital Association (PERSI), Chapter I, Article 1: "*That hospital is a facility in a link of national health system that carries out a duty of health service for all community".*

Hospital is "a facility as a part of health service system that carries on hospitalization, outpatient service, and rehabilitation, together with all their supports".

Thus, hospital is a place to carry on one of the health measures, that is, health service measure.

Related to law as a social system, hospital is an organ that is self-sufficient in conducting legal act. Hospital is not a *persooonlijke* that can do something in legal traffic within a community as natural person (*natuurlijk persoon*), but hospital is assigned a status according to law as "*persoon*" and therefore it is a *"rechtperson"*. It is law that makes hospital as *"rechtpersoon*" and therefore hospital has legal rights and duties over the acts it do. It is in doing a legal act as a legal subject that a hospital involves someone with medical profession or health worker that consist of not only physicians and dentists but also all areas of health.

Concerning agreement to take a job, a physician is provided for by Article 1601 BW, based on certain terms, by receiving a fee. The terms can be contained in a job description defined by a hospital as a legal person and as the party that provides the job and a health worker that is involved as the receiver the job.

In fact, those physicians who work for a hospital can be grouped as follows: Employee Physician and visiting physician.

The employee physicians of hospital come during working hours and conduct medical services in the course of their working hours and on behalf of the hospital and tied to the hospital rules. Meanwhile, visitor physicians work incidentally.

6. Negligence

Medical negligence is a condition where someone acted carelessly according to reasonable standards, because omitted what he or she should has done.

Negligence included 2 (two) conditions: either doing something that should not be done or omitting something that should has been done.

Negligence, according to Keeton in *Medical Negligence – The Standard of Care, 1980*, is an attitude-act that people consider as harmful in an unreasonable manner and it is such classified because: the person may foresee or should has foreseen that the act may risk others, and that the nature of the risk is such heavy that he or she should has acted in a more careful way.

Physician profession should submit and obey common norms, including one that is said in the opinion above (Civil Code and Criminal Code), as well as accurate and careful. Legal norm serves to realize order in society, so that the relationships among people go on smoothly and orderly. Physicians can be made liable for their professional negligence if their attitude or act is not in conformity with commonly accepted standards in the profession, so that a patient suffered an injury resulting from the physician negligence.

It is an obligation of physicians to keep pace with the advancements of science, including what Keeton said above. And if it is due to the lag of knowledge so that a patient suffered an injury, it also falls into negligence.

It is so viewed from ethic aspect as well. KODEKI Article 18 states: "*each physician should always keep pace with the advancement of science and always keep faith with honorable aspirations*".

7. Benchmark/standard of medical negligence

A physician can be said as making a fault if he or she may be censured by people for committing his or her act. Then, why he or she committed the act that is harmful to people, whereas he or she is able to recognize the act, and therefore he or she should has avoid from doing it if he or she eventually committed it, it means that he or she intentionally committed the act. Therefore, the censure becomes: why did he or she commit an act that he or she recognized would be harmful to people. He or she knows that his or her act is forbidden.

A negligence/carelessness takes place if someone commits the act because he or she is neglect/careless of his or her duty that he or she should not according to common societal order. Therefore, why did he or she not conduct the duty he or she should conduct so that community is not damaged?

Meanwhile, deliberateness is meant as an act that is committed consciously, understood, and recognized as such, so that there is no mis-interfpretation/misunderstanding element.

Accordingly, for a fault element to exist, there should be a close relationship between the inner condition of doer and the act conducted. It is the inner condition of doer that accompanies the act so as to cause the censured act in form of deliberateness and or negligence/carelessness. Therefore, in literature, it is said that deliberateness—*dolus*—and negligence or carelessness—*culpa*—are forms of fault.

In language terminology, negligence connotes mistake, that is, that inner attitude of the person who results in the forbidden condition doesn't want or approve the occurrence of the forbidden act, but rather because of the doer's mistake or fault, his or her mistake in inner self when committing the act, resulting in the forbidden condition, because he or she didn't heed the prohibition. It is by his or her act that he or she is neglect, careless, or senseless.

Legal science says that negligence contains two terms: not doing prediction as law commands, and not doing carefulness as law commands.

The former may take place from 2 (two) possibilities: (a) the doer thinks that there would be no consequence of his or her act. In fact, his or her thought is not true. In this case, a conscious negligence—*bewuste culpa*—has occurred. The doer didn't predict previously because he or she didn't think at all that there would be a fatal consequence resulting from his or her act.

Meanwhile, meant by 'not doing carefulness" is that the doer didn't conduct an inquiry and preventive efforts against an event that potentially to be a reality under a certain condition.

From the description above it could be concluded that negligence or carelessness essentially contain three elements, namely: *First*, the doer committed (or omitted), other than what he or she should (or should not), so that by committing (or omitting) that he or she has done a law-breaking act. *Second*, the doer has been negligent, careless, or not reasonably thought. *Third*, the doer's act can be censured, and therefore the doer should be liable for the consequence that occurred due to his or her act.

A review from civil law perspective in relation to a fault or negligence in conducting physician profession originates in the relationship between two parties, namely physician and patients, which is in civil law relationship, may be in positions of plaintiff and defendant. Between the plaintiff and defendant (physician and patient) there occurs a legal relationship, so called therapeutic transaction. In a therapeutic transaction there is an agreement between both parties that each of them shall fulfill terms as agreed on. In this case, each party, that is physician and patient, have mutual rights and obligations. That is, the physician shall provide medical services, while the patient shall pay some payment for the service that the physician has provided. A lawsuit by a patient may be filed if the physician didn't fulfill what is agreed on (non-performance). The non-performance may occur because the physician didn't diagnose accurately the patient grievances so that the physician didn't fulfill wholly his or her duties, or the duties were accomplished but not in conformity with what had been promised, or he or she fulfilled but were not as promised, so that the patient feels damaged.

8. Malpractice

Term 'malpractice', according to Daris, Peter Salim in "*The Contemporary English Indonesia Dictionary*", is meant as a faulty act, referring to every faulty attitude or act. According to John M. Echols and Hassan Sadily in English-Indonesia Dictionary, "*malpractice*" means a faulty method of treating a patient. Its scope includes the lack of competence to conduct professional duties or based on confidence. Thus, malpractice is one of the causes of dispute/conflict between physicians and patients.

9. Malpractice Proofing

If the fault of a physician is a professional error, then it is not easy for whoever who is not familiar with the profession to prove it before a court. Nevertheless, it doesn't mean that the physician's fault cannot be evidenced. Then, how to prove a malpractice?

The proof of criminal malpractice is based on whether or not criminal elements are fulfilled. That is, it depends on the type of alleged criminal malpractice. In a case where a physician is alleged of committing a negligence that causes the patient dead, seriously injurious, or considerably injurious, then what is to prove is that the presence of a faulty act element that was committed under a negligent or careless condition?

It should be recognized that not every result of a treatment that is not as expected by the patient represents a proof of the presence of criminal malpractice, given that such event may also be a part of the risks of the medical act. An error in diagnosis can also not be automatically made as a criterion of the presence of criminal practice because there are a lot of other factors that influence diagnosis accuracy, occasionally some of the factors are beyond of the physician's control. The two aspects above can only be made as an allegation the criminal elements of which should be evidenced.

If it is found of guilty, the physician can be sentenced criminally according to the type of crime he or she committed. In addition, the physician still may be sued by civil court on a basis of law-breaking act (onrechtmatige daad).

A civil malpractice can be evidenced by two ways, namely, either directly or indirectly.

Directly, that is, by proving the four elements directly, consisting of obligation, omitting obligation, health impairment, and the existence of direct relationship between an act of omitting an obligation and health impairment.

Indirectly, that is, by seeking facts based on *Res Ipsa Loquitor* doctrine can evidence the existence of fault in the physician side. However, not all faults of physician abandon such fact. The *Res Ipsa Loquitor* doctrine is actually a variant of a 'doctrine of common knowledge', but here a bit of aid of expert testimony is needed to test whether the fact found can indeed be made as a proof of physician negligence.

If there is a scissors or pliers left inadvertently in the womb of a patient who had been surgically treated, then, based on *Res Ipsa Loquitor* doctrine, the scissors or pliers can be made as a fact that indirectly evidence the fault of physician, because it is impossible the

object is left in the womb unless there is a negligence. The scissors or pliers that is left should has been under control of the physician, whereas the patient was unconscious from anesthetic, so that he or she would has no role to play for the left object.

10. Responsibility

Meant by the legal responsibility of physician here is a liability, that is, the "tying" of physician to legal rules in implementing his or her profession.

The responsibility of physician in legal aspect may occur in civil and or criminal areas.

A physician is said as being responsible in civil law area if either he or she doesn't conduct his or her duty (nonperformance), that is, he or she doesn't make his or her performance as agreed on or because of a law-breaking act.

Physician's acts that may be categorized as nonperformance if among others: the physician doesn't conduct what he or she should do according to agreement; conducted what he or she should do according to agreement but delayed; conducted what he or she should do but not completely; and conducted what should not be done according to agreement. In theses case, the physician may be of committing a law-breaking act if the act were found to violate Articles 1365, 1366, and 1367 Civil Code, that is, among others: *every law-breaking act, that makes harm to other, obliges the person who because of his or her fault incurs the harm, to compensate the harm. Anyone is responsible to not only the harm caused by his or her act, but also to the harm caused by his or her negligence/carelessness, and anyone is not only responsible for any harm caused by his or her act, but also for harm caused by someone who is under his or her responsibility or caused properties under his or her control.*

Thus, a physician should be responsible for his or her fault/negligence that causes a patient injure or even die. The responsibility is in form of compensation materially and immaterially to the patient/patient's family. An example of a law-breaking act is when a surgeon has, because of his or her carelessness, left a lint/object in a patient's body, so that the patient suffers an infection and hence injury, and even it may cause the patient die from a complication.

The physician is responsible not only for his or her negligence but also for the negligence of others who are under his or her control. For example, a surgeon is responsible for an act conducted by a nurse who aided him or her in doing an operation in a surgery room.

A responsibility may be either individual or corporate. In addition, it can also transferred to others based on a principle of vicarious liability. Based on the principle, the hospital may be held liable for the fault its physicians committed, provided that it can be proved that the physician's act was in implementing the hospital's duties.

11. Due to nonperformance

Nonperformance is meant as a condition where someone doesn't fulfill his or her duties based on an agreement or contract.

In an event of nonperformance by a physician, a suitcase on a basis of nonperformance

should be proved that the physician has really entered an agreement, and that he or she has then committed nonperformance to the agreement (should be based on a professional fault). The patient should showed the evidences of damages resulting from the nonperformance of the physician's duties according to the medical profession standards applicable in a therapeutic contract. However, in practice, it is not easy to implement, because patients have not received sufficient information from their physician concerning what acts are the physician's obligation in a therapeutic contract. It is very hard to prove it, given that an agreement between a physician and a patient is *inspaningsverbintenis* in nature.

12. Due to law-breaking act onrechtmatigedaad

Patients may sue physician because the latter has committed a law-breaking act, as provided for in Article 1365 of Civil Code that states that: "Every law-breaking act, that incurs damages to others, obliges the person who because of his or her fault incurs the fault, to compensate the damages."

The law doesn't provide a definition of a legal-breaking act, so that courts should interpret it. It is initially meant as everything in contrary to law, hence an act that breaks law. However, since 1919, jurisprudence has defined a meaning, that is, every act or negligence that: Violates others' rights; in contrary to the legal duties themselves; breaches commonly accepted ethical views (good customary); and not in conformity with fairness and prudence as a requirement on self and individual property in societal life.

The broad meaning of law-breaking act based on Arrest Hoge Raad 31 January 1919 on Arrest Lindeboum vs. Cohen is: committing or omitting something that violate others' rights, and in contrary to the legal duties (liability) and moral or fairness in community, against others or their properties. It means that a fault is defined broadly to include: deliberateness, negligence, and carelessness. And concerning physicians' fault in implementing their profession or professional fault is basically related to the obligations that rise due to their profession or so called professional duties.

Besides from being in a position that cane be sued on a basis of nonperformance and law-breaking as above, physicians can also be sued on a basis of negligence that causes damages. Lawsuit on a basis of negligence is provided for in Article 1366 of Civil Code, sounding as follows: "Anyone is responsible not only for damages caused by his or her act, but also for damages caused by his or her negligence or carelessness".

13. Criminal Liability

The fault or negligence of health workers may occur in criminal law area, as provided for in: Articles 263, 267, 294 paragraph (2), 299, 304, 322, 344, 347, 348, 351, 359, 360, 361, 531 of Criminal Code.

Concerning criminal malpractice in forms of carelessness/negligence, there are many cases that occur in hospitals.

In the literature of medical law of Anglo-Saxon states, such as by Taylor, it is said that a physician can only be blamed and sued according to law if he or she has fulfilled 4-D: Duty,

derelictions of the duty, damage, and direct causal.

Duty may be based on an agreement or contract (*ius contractu*) or according to law (*ius delicto*). It is also the duty of physician to work according to professional standards. At present, it is a duty of physicians to obtain informed consent, that is, they should convey sufficient, comprehensible information before doing treatment. The information includes among others: risks that are inherent to the proposed acts, possible side effects, other alternatives if any, the consequences of non-action, etc. The rules on the approval of medical treatment is contained in Regulation of Republic of Indonesia Minister of Health No. 585 of 1989.

Provision on derelictions of medical profession standards is based on the facts case by case that should be considered by experts and expert witnesses. However, too often patients confuse a consequence and a negligence. A negligence should be proved explicitly. It should be proved at first that the physician has committed a 'breach of duty'.

By 'damage' is meant that a damage suffered by a patient should be physical, financial, emotional, or various categories of other damages. In literature, it is distinguished between: *general damages*, including the loss of income, pain, and suffering, and *special damages*, that is, actual financial damages that should be incurred, such as medication and forgone wage.

From criminal aspect as provided for in Indonesia's Criminal Code and from so many articles of criminal code that round up malpractice act a physician committed to his or her patient, Articles 359 and 360 KUHP should receive special attention.

Article 359:

"*Anyone who because of his or her fault causes the death of person shall be punished by a jail sentence of no longer than five years or detention of no longer than one year*".

From the content of the article, we can infer one meaning that the death of the person had not been intended and it was not the aim of the crime doer, but the death was only a consequence of the carelessness or negligence of the doer (*culpa delict*). It may occur when a physician conduct a surgery of a patient, but in fact after the surgery there has been an object left unintentionally in the patient's body (such as bandage and cutter). It may cause the death of the patient. However, the leaving of bandage or cutter was not intended, instead it was only a negligence or carelessness of the physician. Because it was so, the physician may be punished either by employing article 338 KUHP (ordinary manslaughter) or by article 340 (pogrom).

Article 360:

Paragraph (1):

"*Anyone who because of his or her fault causes others suffer severe injury shall be punished by a jail sentence of no longer than five year or detention of no longer than one year*".

Paragraph (2)

"*Anyone who because of his or her fault causes others injure such that the others become sick*

temporarily or can not conduct hierarkhi or her position or job temporarily, shall be punished by a jail of no longer than nine months or detention sentence of no longer than six months or fine sentence of at most Rp.4,500."

The formulation of article 360 paragraphs (1) and (2) is nearly the same as that of article 359. A difference between them is in the consequence of the doer's act. While according to article 359 the consequence is a death, in article 360 paragraph (1) it is severe injury, whereas according to paragraph (2) the consequence is an injury such that the person either to be sick temporarily or cannot conduct his or her position or job temporarily.

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