

Mediation as an Alternative for Settlement of Medical Disputes Between Doctors and Patients in Therapeutic Agreements



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ABSTRACT : The therapeutic transaction agreement is an agreement between a doctor and a patient which is a legal relationship. Therefore, it gives birth to rights and obligations between doctors and patients which have the potential to cause medical disputes between doctors and patients (malpractice). There are two ways to process medical dispute resolution, namely litigation (through court) and non-litigation (outside court). The litigation process is costly and time-consuming, and often results in one party being the winner and the other party being the loser. The protracted process in court causes a lot of sharp criticism of the judiciary when carrying out its functions, therefore it is necessary to improve the judicial system towards being effective and efficient, especially in medical disputes between doctors and patients. So the medical dispute mediation route between doctors and patients can be an alternative dispute resolution (ADR) that is more effective and efficient. The purpose of this study was to analyze the elements of a therapeutic agreement based on contract law in the Civil Code. And Analyzing mediation as an alternative to dispute resolution of therapeutic agreements for doctors and patients. To achieve this objective, research was conducted using normative juridical legal research methods. So this research approach uses the Statute Approach or research approach to legal products, by examining all laws and regulations related to what will be researched.

KEYWORDS: Therapeutic Agreement, Medical Dispute, Mediation

I. PRELIMINARY

Health is a human right. Talking about health is closely related to the harmonization of the relationship between doctors and patients. The relationship between doctor and patient since Hippocrates (460 BC - 370 BC) is based on mutual trust, such as the relationship between children and parents (paternalistic). It was only in 1972-1975 that along with social, political and economic developments, the social status of the community changed, resulting in a critical attitude of society that judged that paternalistic nature had ignored the value of patient rights.

The relationship between doctor and patient is a legal relationship known as a therapeutic agreement. Therapeutic agreements are relationships between doctors and patients and sufferers that are carried out in an atmosphere of mutual trust (confidential), and are always filled with all emotions, hopes and concerns of human beings. The form of this agreement is known as informed consent, namely the submission of information to ask for the consent of the patient or his family to accept medical efforts that will be carried out by doctors for patients.

The therapeutic contractual relationship looks simple. Therapeutic contracts must meet the conditions for the validity of the agreement as regulated in Article 1320 of the Civil Code, and Article 1233 of the Civil Code, which regulates engagements born due to an agreement or due to law. In the agreement of course there are rights and obligations, therefore there is the potential for medical disputes between doctors and patients. Medical disputes in law are known as malpractice.

There are two ways of resolving medical disputes, namely litigation (through court) and non-litigation (outside court). The proceedings in court are protracted, costly and time consuming. Therefore, it is necessary for the judicial system to be effective and efficient in resolving medical disputes between doctors and patients. And mediation as an alternative form of dispute resolution outside the court (alternative dispute resolution / ADR).

There are many rules of mediation that can be used as an alternative to resolving medical disputes. In HIR article 130 and Staatsblad 1941 No 44, article 154 Regulation of the Procedural Law for Regions Outside Java and Madura (RBg) Staatsblad 1927 No 227 also encourages litigants to take a peace process that is in line with Supreme Court Regulation No.1 of 2016 concerning mediation procedures in court, law no.36 of 2009 on health article 29, in constitution no.44, 2009 years on hospitals article 60 letter (f).

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So based on the scattered rules regarding mediation in existing regulations, it can be a legal reason for resolving medical disputes between doctors and patients to be resolved by mediation. As a comparison material in the banking sector, the Financial Services Authority Regulation No.1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector Article 39 paragraph (2) explains "Out-of-court dispute resolution as referred to in paragraph (1) is carried out through alternative institutions dispute resolution".

In the banking sector, based on the above OJK regulations, there are known Banking Mediation Institutions (LMP), such as the Indonesian Banking Dispute Resolution Alternative Institution (LAPSPI). A dispute resolution institution that can be an alternative for consumers who have problems with the value of banking disputes. the mediation institution above, its role should be taken by the Indonesian Medical Ethics Council (MKEK) and the Indonesian Medical Discipline Honorary Council (MKDKI), to become a medical dispute severing institution that is binding on both parties.

II. LITERATURE REVIEW

A. About Doctor and Patient Relations in medical services

The relationship between doctor and patient since Hippocrates (460 BC - 370 BC) is built on mutual trust, such as the relationship between children and parents (paternalistic). Since 1972-1975 along with social, political, and economic developments, the social status of the community has changed and the critical attitude of society has emerged. So that the paternalistic nature is considered to ignore the patient's human rights. Doctors and Patients are parties who have rights and obligations. The legal relationship that occurs between doctors and patients is usually called a therapeutic agreement.

B. Therapeutic Agreement

In the Preamble to the Indonesian Medical Ethics Code which is attached to the Decree of the Minister of Health of the Republic of Indonesia Number 434/Men.Kes /X/1983 concerning the Enforcement of the Indonesian Medical Code of Ethics for Doctors in Indonesia, it states that therapeutic transactions are the relationship between doctors and patients and sufferers carried out in an atmosphere of mutual trust (confidential), and always filled with all the emotions, hopes and worries of human beings.

Therapeutic agreements are included in the Inspanningverbintenis agreement, namely an effort agreement, meaning that the parties promise or agree to make maximum treatment efforts to realize the patient's health with the joint efforts of doctors and patients. Because without the patient's togetherness and enthusiasm for his recovery, the doctor's medical actions will not achieve maximum results. The form of a therapeutic agreement is informed consent, i.e. the submission of information to seek consent from the patient or his family to accept the medical efforts that will be made against him.

Therapeutic agreements are different from other agreements in general because they are only based on mutual trust between patients and doctors. The legal basis for therapeutic agreements is regulated in articles 1320, 1354, 1233, 1338, 1339 of the Civil Code and Minister of Health Regulation No. 1419 of 2005 concerning the Practice of Doctors and Dentists Article 13 paragraph (1). In the agreement of course there are rights and obligations, therefore there is the potential for medical disputes between doctors and patients.

C. Medical Dispute

Constitution of No. 29, 2004 years, concerning Medical Practice Article 66 Paragraph (1) implicitly states that a medical dispute is a dispute that occurs between a doctor and a patient as a result of a doctor's medical actions that are deemed detrimental to the patient. Safitri Hariani said "a medical dispute is a condition where there is a dispute in the practice of medicine". While the legal basis demands due to medical disputes, although it is not explicitly stated in constitution no. 36, 2009 years concerning Health in article 58 paragraph (1) which regulates the right of every person (patient) to claim compensation for health workers, and/or health providers if they suffer losses due to errors or negligence in health services.

D. Mediation as an alternative for resolving disputes between doctors and patients

The protracted judicial process is costly and time consuming. An effective and efficient judicial system is needed, especially disputes that occur between doctors and patients. Therefore, mediation is considered justifiable to serve as an alternative form of dispute resolution out of court (alternative dispute resolution/ADR). Mediation is a method of resolving disputes through a negotiation process to obtain an agreement between the parties, assisted or not by a mediator, either through court or out of court. According to Soetrisno, mediation has advantages and disadvantages, namely, voluntary, flexible, informal settlement, shorter time, low cost, free of emotions and grudges.

III. RESEARCH METHODS

The approach method used in this research is normative juridical, by collecting secondary data library materials, namely books, diaries, laws and regulations, court decisions, legal theories and opinions of leading legal scholars. Then analyze all the laws and regulations related to what will be researched. According to Sugiono "Research methods are scientific ways to obtain valid data,

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with the aim of being able to find, develop and prove certain knowledge, so that in turn it can be used to understand, solve, and anticipate problems".

The primary legal materials used and related to the research include: HIR, the third book of the Civil Code concerning Engagement, in constitution No.36, 1999 years concerning health, article 29, in constitution No.44, 2009 years concerning Hospitals, article 60 letter (f), Dading/Peace as regulated in the Civil Code article 1858, Supreme Court Regulation No.1 of 2016 concerning mediation procedures in court, Prosecutor's Regulation No.15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, PerKap of National Police Chief No.6 of 2019 concerning Criminal Investigation Article 12, Financial Services Authority Regulation No.1/POJK.07/2013 concerning Consumer Protection in the Financial Services Sector.

Whereas as for secondary legal materials, namely legal materials that provide an explanation of primary legal materials, such as: Central Jakarta District Court Decision No. 283/Pdt.G/2017/PN.JKT.PST, Seminars, Legal Journals, Scientific Papers, Internet. While tertiary legal materials are supporting legal materials that provide instructions and explanations for primary and secondary legal materials, such as: legal dictionaries, encyclopedias, relevant magazines/journals in accordance with the objectives of the research.

All data obtained in this study were then analyzed qualitatively, i.e. the data obtained were then compiled systematically for further analysis to achieve clarity regarding whether the therapeutic agreement has fulfilled the elements of the agreement stipulated in the Civil Code concerning Agreements and whether mediation can be an alternative in overcoming settlement of medical disputes between doctors and patients based on therapeutic agreements.

IV. RESEARCH RESULTS AND DISCUSSION

A. Doctor and Patient Relationship in Therapeutic Agreement

The relationship between doctors and patients since Hippocrates 460 BC - 370 BC (the father of world medicine) was built on mutual trust, such as the relationship between children and parents (paternalistic). It was only from 1972-1975 that along with social, political, and economic developments, the social status of the community changed and the critical attitude of the community emerged. Paternalistic nature is considered to ignore the patient's human rights.

The doctor's legal relationship with the patient is bound by a therapeutic agreement. Therapeutic agreements are relationships between doctors and patients and sufferers that are carried out in an atmosphere of mutual trust (confidential), and are always filled with all emotions, hopes and concerns of human beings. In the agreement arise the rights and obligations of the parties. The agreement of the parties is said to be valid if it fulfills the conditions for the validity of the agreement regulated in 1320 of the Civil Code and is made without error, coercion or fraud as regulated in article 1321 of the Civil Code. The form of a therapeutic agreement is informed consent, that is the submission of information to seek consent from the patient or his family to accept the medical efforts that will be made against him.

Therapeutic agreements are different from other agreements in general. The agreement is based on a patient's trust in the doctor. Legal basis The therapeutic agreement is regulated in articles 1320, 1354, 1233, 1338, 1339 of the Civil Code and Minister of Health Regulation No. 1419 of 2005 concerning the Practice of Doctors and Dentists Article 13 paragraph (1). In the agreement, of course there are rights and obligations, the emergence of rights and obligations due to legal relations between doctors and patients has the potential to cause medical disputes between doctors and patients.

In article 1320 of the Civil Code, the objective conditions for a valid agreement are the existence of an object that is agreed upon and something that is lawful which is not legally prohibited. The therapeutic agreement which is the object of the agreement is a cure for a disease that is not prohibited by law. Therapeutic agreement is an Inspanningverbintenis agreement, namely an effort agreement, meaning that the parties promise or agree to make maximum treatment efforts to realize the patient's health. While the patient is maximally enthusiastic about his recovery efforts.

Then in the therapeutic agreement there is an agreement between the doctor and the patient. Therefore all rights and obligations are binding on the parties. Indeed, there is a specificity in the therapeutic agreement, but if it is parsed, the legal conditions of the agreement are regulated in 1320 of the Civil Code. In a therapeutic agreement, the subject is a doctor and a patient, where a doctor with qualified expertise and a patient need help. The object of a therapeutic agreement is a medical action for a disease that is lawful and does not violate the law and is characterized by providing assistance with the aim of maintaining the patient's health.

Therapeutic agreement is a legal relationship that occurs between doctors and patients. Therefore, the therapeutic agreement also applies the legal principle of agreement as conveyed by Veronica Komalawati, namely the principle of legality of medical personnel, the principle of balancing the interests of doctors and patients in medical actions, the principle of punctuality in handling medical actions that should not harm the patient, the principle of good faith in appropriate doctor's actions. with professional standards, the principle of honesty by providing correct information to patients, the principle of prudence in carrying

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out medical actions so that it does not threaten the patient's life, the principle of openness so that good communication is established in medical actions.

B. Medical Disputes and settlement by Mediation

In constitution No. 29, 2004 years concerning Medical Practice Article 66 Paragraph (1) implicitly states, medical disputes are disputes that occur between doctors and patients due to medical actions of doctors that are felt to be detrimental to patients. Safitri Hariani said "a medical dispute is a condition where there is a dispute in the practice of medicine". While the legal basis for medical disputes and compensation, although not explicitly stated, In constitution no. 36, 2009 years concerning Health in article 58 paragraph (1) regulates the right of every person (patient) to claim compensation for health workers, and/or health providers if they suffer losses due to errors or negligence in health services.

Proceedings in court are costly and time-consuming, conventional court systems often result in one party being the winner and the other party being the loser. For example, how is the value of justice for the patient (victim) to the decisions of three obstetricians, (dr. Dewa Ayu Sasiary Prawani, dr. Hendry Simanjuntak and dr. Hendy Siagian), who were acquitted by the Supreme Court in 2014 by the Supreme Court. Whereas previously found guilty by the Supreme Court through its cassation decision. Then how is Siti Chomsatun a malpractice victim who almost lost her life who was only given compensation in the amount of Rp. 17,620,933 by RS Kramat 128 in Decision 287/Pdt.G/2017/PN.JKT.PST.

The above decision may seem unfair to the other party. In fact, according to Geny, one of the goals of law is "that the purpose of law is solely for justice". Medical dispute decisions may occur because of the judges' ignorance about the medical world. Because a doctor according to J.J. Leenen (Professor of social medicine and law from the University of Amsterdam) has a basic principle, namely *Aegroti Salus Lex Suprema* which means patient safety is the highest law. Therefore, in the resolution of medical disputes between doctors and patients, the judicial system needs to be effective and efficient. And mediation is considered as an alternative form of dispute resolution (ADR) for medical disputes that occur between doctors and patients.

There are many rules on which mediation can be used as an alternative for resolving medical disputes. The rules regarding mediation are contained in Article 130 of HIR and Staatsblad 1941 No. 44 and Article 154 of the Regulation of the Procedural Law for Regions Outside Java and Madura (RBg) of Staatsblad 1927 No. 227 which encourages litigants to pursue a peace process. This is in line with Supreme Court Regulation No.1 of 2016 concerning mediation procedures in courts of first instance. There are also in constitution No.36, 2009 years concerning health article 29, constitution No.44, 2009 years concerning Hospitals, article 60 letter (f).

V. CONCLUSIONS AND SUGGESTIONS

A. Conclusion

So then from the results of research and discussion it can be concluded as follows:

1. Mediation is the main solution for resolving medical disputes between doctors and patients based on therapeutic agreements that have not been prioritized by law enforcers;
2. There are still several obstacles to mediate the resolution of medical disputes. Although settlement by mediation is widely spread in the existing laws and regulations. It is still considered that the regulations governing medical mediation are not explicitly stated in the Law or Government Regulation. So that medical disputes are still resolved through a long and time-consuming court process. The government is expected to form derivative rules related to medical mediation, or establish a Medical Dispute Resolution Agency, or give more roles to the Medical Ethics Honorary Council (MKEK), the Indonesian Medical Discipline Honorary Council (MKDKI), or IDI for handling medical disputes.

B. Suggestion

1. In the future, it is necessary to establish a Health Dispute Resolution Agency or Institution as a derivative of Article 29 in constitution no. 36, 2009 years concerning Health by maximizing the role of the MKEK Council and the Indonesian Medical Discipline Honorary Council (MKDKI), which already exist with a large fine for the negligence of a doctor;
2. Therefore, for the sake of legal certainty regarding the resolution of medical disputes by making mediation the main solution, it is better if Article 29 in constitution no. 36, 2009 years issued derivative rules from the law, such as Government Regulations, Regulation of the Minister of Health which contains mediation as the main thing in the resolution of medical disputes, sanctions and procedural law;
3. Settlement of mediation as the main thing in medical disputes between doctors and patients will reduce the burden on the state for the costs incurred because it is deemed unnecessary to increase prison congestion by imprisoning professional doctors whose oath is to seek patient recovery is the main thing.

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VI. BIBLIOGRAPHY

A. Book

- 1) Endang Kusumah Astuti. (2003), *Legal Relations Between Doctors and Patients in Medical Service Efforts*, Semarang, p. 3.
- 2) Sofwan Dahlan. *Health Law, Third Edition* (Semarang: Diponegoro University Publishing Agency, p. 33
- 3) Desriza Ratman. (2014), *Legal Aspects of Implementing Medical Practice and Medical Malpractice*, Bandung: Kencana Media, p. 2-3.
- 4) Safitri Hariyani. (2005), *Medical Disputes: alternative dispute resolution between doctors and patients*, Jakarta :Diadit Media, p. 65.
- 5) Satjipto Rahardjo. (1991), *Legal Studies*, Bandung:PT. Citra Aditya Bakti, p. 253
- 6) Subekti. (1998), *Principles of Civil Law*, Jakarta: PT. Intermasa, p.41.
- 7) Liliana Tedjosaputro, (2010), *Lecture material on health consumer protection law*, Semarang :UNTAG, Unpublished.
- 8) Veronica Komalawati. (1999), *The Role of Informed Consent in Therapeutic Agreements*, Bandung :Citra Aditya Bakti, p. 126.
- 9) Muhammad Sadi Is. (2017), *Introduction to law*, 2nd printing, January, Kencana Publisher.