

Legal Formulation Patient Protection in Medical Malpractice



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ABSTRACT: Health development is directed at improving the health status of the community and the state is responsible for the provision of appropriate health service facilities and public service facilities Article 34 paragraph 3 of the 1945 Constitution. Health efforts which were originally focused on curing sufferers have gradually developed towards comprehensive health integration so that the government is obliged to carry out health efforts that are equitable and affordable. The use of the method is intended as an attempt to approach and seek objective truth from the problems under study. Basically, a research process is taken from theories, concepts, and views from the discovery of concrete legal principles and ends with the discovery of real and relevant legal principles. The author tries to collect library data through books and laws and regulations related to the subject matter. Legal Formulation of Patient Protection in Medical Malpractice. Doctors in carrying out their duties have noble reasons, namely trying to maintain the patient's body so that it remains healthy or trying to nourish the patient's body or at least reduce the patient's suffering. It is considered difficult to resolve issues related to malpractice while legal liability to doctors who commit malpractice is only seen from negligence, namely mistakes that are not intentional. Patient Protection Legal Formulation in Medical Malpractice. Doctors in carrying out their duties have noble reasons, namely trying to maintain the patient's body so that it remains healthy or trying to nourish the patient's body or at least reduce the patient's suffering. It is considered difficult to resolve issues related to malpractice while legal liability to doctors who commit malpractice is only seen from negligence, namely mistakes that are not intentional. Patient Protection Legal Formulation in Medical Malpractice. Doctors in carrying out their duties have noble reasons, namely trying to maintain the patient's body so that it remains healthy or trying to nourish the patient's body or at least reduce the patient's suffering. It is considered difficult to resolve issues related to malpractice while legal liability to doctors who commit malpractice is only seen from negligence, namely mistakes that are not intentional.

KEYWORDS: Formulation; Legal Protection; Malpractice

I. INTRODUCTION

Health development is directed at increasing the degree of public health and the state is responsible for providing proper health service facilities and public service facilities (Article 34 paragraph (3) of the 1945 Constitution). Health efforts that were originally focused on curing sufferers have gradually developed towards comprehensive health integration so that the government is obliged to organize health efforts that are equitable and affordable.

The existence of health law has a very big influence on the field of health development. Health law includes *Lex Specialis* law which specifically protects the duties of health professionals (providers) in human health service programs towards the goals of the Health for All declaration and special protection for patients (receivers) to obtain health services (Nusye KL Jayanti, 2009).

Changes in the characteristics of society as service users and doctors as service providers need to be supported by increased communication between the two parties so that it does not cause conflict/dissatisfaction due to malpractice/"Violations of medical discipline". This can happen because the level of public health is still low and there are many errors in the treatment of patients that result in disability or death. If indeed there is sufficient evidence that doctors and medical personnel can be held legally responsible for negligence or negligence, regarding:

- a) Obligation,
- b) breach of duty,
- c) Cause, and
- d) loss.

Referring to Law No. 29 of 2004 concerning Medical Practice, making people more aware of their rights as patients to get health services and starting to criticize and pay serious attention to the behaviour and professional actions of health workers. The relationship between doctors and patients (*sufferers*) according to law is a business agreement relationship (*inspanningverbintenis*), meaning that doctors will try their best to provide medical services to patients, but doctors cannot guarantee that they will always be successful in providing medical services (Suharto, 2005).

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The existence of these rights and obligations requires legal formulations/specific guidelines to determine and deal with medical malpractice. Therefore, the government must be able to provide legal protection and certainty to every patient who is a victim of medical malpractice and health standards that do not meet medical service standards, even though substantive law (Criminal Law, Civil Law and Administrative Law) in Indonesia does not yet recognize the building of malpractice law. Precisely the main and fundamental is in Law no. 23 of 1992 concerning Health, which officially mentions errors or negligence in carrying out the profession (Articles 54 and Article 55) and the Law has been changed to Law no. 36 of 2009.

The issue of legal protection is also mandated in Article 3 of Law no. 29 of 2004 concerning Medical Practice, which states that the regulation of medical practice aims to:

- a) Provide protection to patients
- b) Maintain and improve the quality of medical services provided by doctors and dentists,
- c) Providing legal certainty to the public, doctors and dentists.

So that it is necessary to study specifically in order to obtain a formulation of understanding and limitations regarding the term malpractice because the absence of a unified understanding causes medical malpractice cases to often fail in the middle of the road due to the difficulty of proving related to legal instrument issues in laws and regulations, because malpractice can occur in all kinds of professions. This study aims to examine the legal formulation of patient protection in medical malpractice.

II. FORMULATION OF THE PROBLEM

What is the legal formulation of patient protection in medical malpractice?

III. RESEARCH METHODS

The use of the method is intended as an attempt to approach and seek objective truth from the problems under study. Basically, a research process is taken from theories, concepts, views/findings of inconcrete legal principles and ends with the discovery of real and relevant legal principles. The author tries to collect library data through books and laws and regulations related to the subject matter. The goal of social science research is to serve as a tool for studying social research and its interconnections as laws that can generally be discovered, explained and documented.

IV. DISCUSSION

A. Patient Protection Legal Formulation in Medical Malpractice

Doctors in carrying out their duties have noble reasons, namely trying to maintain the patient's body so that it remains healthy or trying to make the patient's body healthy or at least reduce the patient's suffering. However, a doctor's service to patients is not always successful, there are times when these efforts experience failure, disability and patient death so that in carrying out medical practice it is mandatory to follow medical and dental service standards (Article 44 of Law No. 29 of 2004 concerning Medical Practice).

Every implementation of medical practice which is the core of health activities must be carried out by doctors and dentists who have high ethics and morals, expertise and authority in accordance with developments in knowledge and technology. Therefore, doctors and medical personnel can be held legally responsible in providing health services to patients if there is indication of negligence or negligence which results in loss of disability and death of the patient. It is also the government's responsibility to provide legal protection and certainty to every patient who is a victim of medical malpractice and health services that do not meet medical service standards.

Legal protection is important for a country and is a right for every citizen. Legal protection is a series of activities that guarantee and protect someone/an activity to guarantee someone that is carried out through legal procedures or based on law (Ediwarman, 2003). Laws are made with the aim of creating peace and a sense of security for every legal subject or object.

According to Amri Amir, legal protection in health law includes legal components of medicine and dentistry, nursing, clinical pharmacy law, hospital law, environmental health law and so on (Ediwarman, 2003).

A doctor in carrying out his duties tries to improve the health and reduce the suffering of patients, but this does not always work well and sometimes it even fails so that the patient becomes a victim due to negligence or negligence in the practice of doctors and health workers who do not meet health standards. Doctor's mistakes in carrying out medical actions are often referred to as professional errors or better known as malpractice.

The community considers that mistakes in carrying out the medical profession are a form of violation of the law so that they can be complained to the Indonesian Medical Discipline Honorary Council (MKDKI) or prosecution/lawsuit through medical organizations in this case the Indonesian Doctors Association (IDI) cq Indonesian Medical Discipline Honorary Council (MKDKI).

It is necessary to look for the limits of a doctor's authority in carrying out his profession, both legal, moral, ethical and disciplinary (professional aspects) so that if a doctor has carried out his duties according to his profession and meets the specified requirements

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even though there are parties who feel aggrieved by the doctor's actions, they cannot casually said the doctor had committed malpractice (Soewono, 2007).

Doctors as members of the community have various responsibilities related to order in society, such as legal norms/legal order which contain orders/prohibitions for all parties who violate them and provide strict sanctions for the sake of public peace and order. These legal responsibilities can be in the form of civil law responsibilities, criminal law or administrative law in addition to legal rules determined by the profession itself.

There are 3 (three) elements that must be considered, in the purpose of law enforcement, namely legal certainty, benefit and justice. In the implementation of law enforcement, the community expects that the law can provide justice for their interests (Yulia & Prakarsa, 2020). Meanwhile, one of the benefits in law enforcement is intended for the development of public health, which is directed at increasing health status. Therefore, the government is obliged to carry out health efforts that are equitable and affordable for the community, finance services that are public goods such as immunization, eradication of infectious diseases, finance health services for the poor and the elderly.

The legal relationship between doctors and patients is regulated in Law no. 36 of 2009 concerning Health. The existing norms in health law are rules that regulate all aspects related to efforts and maintenance in the health sector, while the scope of medicine is only on issues related to the medical profession and is part of health law. So that changes in the characteristics of the community and doctors as providers and users of health services if not supported by good communication will lead to conflict between the two as a result of malpractice by doctors on patients who cause disability or death.

In providing medical services to a patient, a doctor is based on a Therapeutic transaction, namely a transaction that determines or seeks the most appropriate therapy for the patient, so that if the doctor is negligent/inaccurate in carrying out professional actions and results in disability or death for the patient, he can be held legally responsible (Nurdin, 2015).

Patients as recipients of services in medical practice need attention and have the right to legal protection as stipulated in Article 52 of Law no. 29 of 2004 concerning Medical Practice, as follows:

- a) Obtain a complete explanation of the medical action referred to in Article 45 paragraph (3),
- b) Ask the opinion of another doctor or dentist,
- c) Get services according to your needs
- d) Refusing medical action
- e) Get the contents of the medical record.

Increased public/patient legal awareness along with increasing technological advances in the medical field, has resulted in many patients or their families suing doctors which have led to allegations of malpractice against the medical profession. Malpractice actions can occur in the event of:

- a) Mistakes in the practice of a doctor or done inappropriately,
- b) Occurs in terms of medical practice has violated the law,
- c) This includes if the doctor has violated the code of ethics.

The factor that creates this situation is because the public/patients as lay people do not know things related to medical problems. So the patient gives full trust to the doctor to take action on the illness he is suffering from and if malpractice occurs it will bring up demands from the community/patient for legal accountability.

Unfortunately, in the legal system in Indonesia (substantive law) that applies, there is no known malpractice either in the Health Law or in the Medical Practice Law. However, if you pay attention to the previous Health Law, namely Law no. 23 of 1992, in Article 54 and Article 55 referred to as a doctor's mistake or negligence. Meanwhile, in Law no. 29 of 2004, especially in Article 84, it is said that malpractice is a violation of medical discipline.

Therefore, in Article 3 of Law no. 29 of 2004, confirms that the regulation of medical practice aims to:

- a) Provide protection to patients.
- b) Maintain and improve the quality of medical services provided by doctors and dentists; And
- c) Providing legal certainty to the public, doctors and dentists.

Meanwhile, patient obligations are regulated in Article 53, Law no. 29 of 2004 which states that patients, in receiving services in medical practice, have the obligation to:

- a) Provide complete and honest information about their health problems.
- b) Follow the advice and instructions of a doctor or dentist.
- c) Comply with the provisions that apply in health care facilities.
- d) Provide compensation for services received.

According to the Big Indonesian Dictionary (KBBI) there is no word malpractice in Indonesian. However, the thing in question can have meaning if the word "mala" is combined with the word "practice", so that it means harm caused in the performance of work (doctors, lawyers, etc.). In the current Indonesian laws and regulations, there is no definition of malpractice. The definition of malpractice can be found in Article 11 paragraph (1) letter b UU no. 6 of 1963 concerning Health Workers and declared deleted in UU no. 23 of 1992 concerning Health.

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Legislatively, according to Syahrul Machmud the provisions of Article 11 paragraph (1) letter b of the Health Worker Law can be used as a reference for the meaning of malpractice which identifies malpractice with neglect of obligation, meaning not doing something that should be done.

Malpractice has been widely used in Indonesia as a translation of "malpractice", while negligence is a translation for "negligence".

There are several opinions of scholars regarding the meaning of malpractice.

- a) Veronica stated that malpractice is an error in carrying out the profession that arises as a result of obligations that must be carried out by doctors.
- b) Danny Wiradharma views malpractice from the point of view of the responsibility of a doctor who is in an engagement with a patient, that is, the doctor performs bad practices.
- c) Ngesti Lestari interprets malpractice literally as wrong implementation or action

According to Daris Peter Salim in "The Contemporary English Indonesia Dictionary", the term malpractice or malpractice means wrong action or action, which shows the wrong attitude of action. While John M, Echols and Hanssen Sadily in the English-Indonesian dictionary, malpractice is the wrong way of treating patients whose scope includes a lack of ability to carry out professional obligations so that it is one of the causes of disputes/conflicts between doctors and patients.

From some of the definitions of malpractice above, it means that medical malpractice is a doctor's mistake for not using knowledge and skill levels according to professional standards, resulting in patients being injured, disabled and dead. Patient dissatisfaction with the services provided by doctors will always exist. Moreover, medical action requires scientific knowledge before various invasive actions, diagnostic, medical, surgical and various other activities that are often not understood by the public (Engel, 2010).

Malpractice can happen in terms of:

- a) Mistakes in a doctor's practice, done improperly,
- b) Occurs in the event that the practice of a doctor has violated the law,
- c) This includes if the doctor has violated the code of ethics.

The main guideline used to determine the existence of malpractice is quite clear, namely a professional error committed by a doctor when carrying out treatment and there are other parties who are harmed by the doctor's actions and in fact it is not easy to determine when there was such a professional error.

According to Azrul Azwar quoting Benard Knight's opinion, in daily practice there are 3 (three) criteria for determining professional error:

- a) Doctors are obliged to provide medical services to patients

The starting point for professional mistakes that cause harm to other people is the doctor's obligation to carry out medical procedures and comply with contractual law.

- b) There is a violation of the doctor's obligations towards his patient, such as not carrying out professional obligations like a doctor, contra-therapeutic events occur, not asking for patient approval before carrying out medical procedures, not performing services according to professional standards and promising medical action results whose results are not in accordance with the agreement.
- c) As a result of violation of obligations, the patient suffers loss, because of a professional error, not because of the risk of a medical action.

Therefore, there needs to be a doctor's responsibility in cases of medical malpractice, bearing in mind the development of public awareness of the need for higher legal protection in the health sector as a basic right and individual rights. In the world of health, handling malpractice issues is not only a civil matter/claim for damages but often develops into a criminal matter.

Article 1365 of the Civil Code, explains that every unlawful act that causes harm to other people, obliges the person who because of his mistake to issue a loss. The development of violating the law in its development is expanded to (Heryanto, 2010):

- a) Contrary to the legal obligations of the offender,
- b) Against the law of the subjective rights of others,
- c) Against the rules of morality,
- d) Contrary to propriety.

The problem of doctor's responsibility in medical malpractice has relevance to the unlawful act of Article 1366 and Article 1364 of the Civil Code, provided that (Soewono, 2007):

- a) The patient must experience a loss,
- b) There is an error or omission,
- c) There is a causal relationship between loss and error,
- d) This act violates the law

If a person at the time of carrying out a legal action knows that his actions will result in harm to another party, then that person can generally be held accountable. This action error is due to the lack of thoroughness of the doctor in observing the patient so that

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unwanted actions occur which can be categorized as acts against the law.

Vollman, questioned the existence of subjective and objective conditions in error. Subjective meaning (concrete) whether the act can be blamed on the perpetrator, for the state of his soul in such a way that he realizes the purpose of the act to be held accountable. Meanwhile, mistakes in the objective sense mean that the perpetrator can generally be held accountable/blamed for an act and he must be able to prevent the consequences of a concrete action from arising (Djojodirdjo, 1982).

The term formulation in the Big Indonesian Dictionary (KBBI) is formulation. Policies, formulations can be identified with policies in formulating laws and regulations. In the legal sense, formulation is a set of regulations made by state authorities or the government officially through legal institutions or institutions to regulate behavior in society, are coercive, and have sanctions that must be obeyed by the community.

Law is the most important system in the implementation of institutional power series. According to Sunaryati Hartono, the law does not concern a person's personal life but concerns and regulates various human activities in relation to other human beings. In other words, the law regulates various human activities in social life. Forms of law abuse involve power, politics, economy in various ways and act in social relations between communities that are criminalized.

The legal system in Indonesia as one of its components is substantive law and the issue of malpractice is more focused on legal issues because medical malpractice is a medical practice that is against the law, causing fatal consequences for patients. However, the problem is why it is so difficult to bring malpractice cases to court, is it because the legal instruments or statutory regulations are not sufficient to resolve malpractice issues.

The doctor's responsibility to the patient in terms of malpractice is the responsibility of the doctor's "attachment" to legal provisions in carrying out his profession, which can occur in civil law or criminal law. Doctors are considered responsible in civil law if doctors do not carry out their obligations (breaking promises/defaults), namely not providing achievements as agreed upon or due to acts against the law. In this case the doctor can be blamed for committing an unlawful act (*onrechtmatige daad*) for his mistake/negligence and violating Article 1365 of the Civil Code.

Based on Article 1365 of the Civil Code, doctors can also be sued for default or negligence as stated in Article 1366 of the Civil Code. That "everyone is responsible not only for losses caused by his actions but also for losses caused by negligence or carelessness".

Meanwhile, negligence and errors by health workers can also occur in the field of criminal law, as stipulated in Article 263, Article 267, Article 294 paragraph (2), Article 299, Article 304, Article 322, Article 344, Article 347, Article 348, Article 349, Article 351, Article 359, Article 360, Article 361 and Article 531 of the Criminal Code. Regarding criminal malpractice in the form of carelessness/negligence that occurs in hospitals.

In Law no. 29 of 2004 concerning Medical Practice only regulates the rights and obligations of patients in Article 52 and Article 53. If a doctor is suspected of committing a malpractice act, it is not examined by MKEK but rather by MKDKI, then MKDKI will receive complaints, examine and make decisions regarding violations of medical discipline. In resolving cases of complaints MKDKI does not justify mediation, reconciliation and negotiations between doctors and patients or their proxies. So patient complaints to MKDKI do not eliminate the patient's right to report suspected malpractice to the authorities or claim compensation to court. The aim is to provide protection for the rights of victims/patients who receive malpractice actions. However, Regulations in the Criminal Code regulate more on the consequences of malpractice acts so that there is a need for a special formulation that regulates the qualifications of malpractice acts committed by doctors as a clear juridical basis, as well as future policy studies. Like :

- a. Article 267 of the Criminal Code can be imposed on doctors as legal subjects who are wrong in determining the diagnosis so that they are also wrong in issuing a statement so that the action can be included as an element of negligence.
- b. Article 299, Article 346, Article 348 and Article 349 of the Criminal Code. The issue of abortion has been specifically and strictly regulated in the Criminal Code, but if there is no medical indication it will become a separate problem for a doctor in saving the patient's life to avoid malpractice (criminal abortion).
- c. Article 338, Article 340, Article 344, Article 345 and Article 359 of the Criminal Code, that the issue of euthanasia with active or passive requests is clearly prohibited and included in the crime of loss of other people's lives.
- d. Article 351 regarding maltreatment, the actions of doctors that include injections or circumcision, even though they can cause unavoidable pain in achieving a proper goal, these actions do not include persecution.

There are provisions above that distinguish between the regulations in the Criminal Code policies and Law No. 29 of 2004 after the Constitutional Court Decision, concerning the type and duration of the sentence imposed. In this regard, in the future a legal policy is needed in overcoming criminal acts of medical malpractice. As Barda Nawawi Arief argues, the existence of a special minimum sentence for certain offenses has a basis for reducing criminal disparities and for meeting the demands of society that requires minimum standards that are detrimental and harmful to society and to make general prevention more effective (Arief, 2010). The future policy formulation especially in Law no. 29 of 2004, can be expanded not only to focus on the issue of violations, but also on corporate responsibility in making a list of doctors who practice medicine without including sanctions for violations of these obligations (Adi, 2013).

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CONCLUSIONS

There is no specific regulation regarding malpractice in the Substantive Law in Indonesia as well as in the Health Law and the Medical Practice Law, it is difficult to resolve issues related to malpractice while legal responsibility for doctors who commit malpractice is only seen from negligence, namely mistakes that are not intentional. So that in the future it is necessary to formulate a legal policy regarding the responsibility of doctors and corporations in the form of a special minimum sentence for certain offenses as a basis for reducing criminal disparities and for more effective general prevention as a form of legal protection for patients in the event of medical malpractice.

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