

Responsibility for Negligence of Medical Personnel Against Patients in The Perspective of The Ius Constituendum

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ABSTRACT

The field of health services, when connected with the concepts of social sciences and law, is of course very closely related, where service to the community is inherent in the identity of a doctor as a medical worker who generates great trust from the community. Of course, the social relationship between doctors as medical personnel and the community as patients is very close. The problem raised in this dissertation is that there is a social relationship between doctors and patients, and doctors have a sizable responsibility in providing services to the community where every medical staff is expected to work in accordance with the provisions and rules of Standard Operating Procedures (SOP). There is no mistake that cannot be punished or there is no difference in the eyes of the law (Equality before the law) so that on this basis the law must be able to see the extent of legal responsibility (mensrea) for the services of a doctor to a patient who should be suspected of having committed an unlawful act (actus reus). Renewal of state law by referring to the values ??contained in Pancasila is one of the elements to carry out legal policies in the health aspect between doctors and patients where currently there are still imbalances and differences both in terms of protecting from wrong action or negligence or in terms of justice. This imbalance gave birth to the idea of ??restorative justice.

Keywords: ius contituendum, medical personnel, restorative justice, standard operating procedures.

INTRODUCTION

Universal Declaration of Human Rights (hereinafter referred to as the Universal Declaration of Human Rights) is an acknowledgment of human rights. The declaration recognizes basic human rights. In it, it is explained that recognition of basic human rights is the foundation of freedom, justice and world peace. Furthermore, it is explained that human rights need to be protected by law in order to create freedom of speech, religion, freedom from fear, and lack for mankind.

Indonesia as a legal state based on Pancasila wants to protect all of its people and obtain welfare for all Indonesian people, including obtaining justice, certainty to find benefits from the law itself. This is also inseparable from the social aspect where the relationship between society and society as well as society and law can run well and in accordance with the aspirations aspired to create a just and social society. So that reflecting on the concept of the intended aspect, of course this condition is very possible if there are legal instruments that regulate all sectors of life,

The development of public health is directed at increasing the degree of health for the community, of course it has a very large role for community development in the health sector and the development of Indonesia's own human resources and also as capital for the implementation of national development which is essentially the development of the whole Indonesian human being and the development of the entire Indonesian community. This is as contained in the 1945 Constitution Article 34 paragraph (3) "The state is responsible for the provision of proper health service facilities and public service facilities". Medical staff is

a pillar of the teacher who certainly has a very big contribution in realizing the ideals as stated in Article 34 paragraph (3) of the 1945 Constitution.

Medical personnel consist of several backgrounds of knowledge and expertise such as doctors, nurses and midwives. However, from this background of knowledge and expertise, medical personnel play an important role in providing health services to the community, namely doctors. So that in their services and actions they take, doctors are required to carry out all actions perfectly as expected by the community who expect healing and safety, especially for the lives of families handled by doctors.

The doctor is a health worker who is the patient's first point of contact with medical personnel who will handle or perform health services or solve health problems faced by the community regardless of the type of disease, organology, age group and gender, as early and as possible, as a whole, plenary, continuous, and in coordination and collaboration with other health professionals, using the principles of effective and efficient service and upholding professional, legal, ethical and moral responsibilities.

Patients or their families can know that the quality of service they receive is inadequate or has met the Standard Operating Procedures (SOP) in accordance with what is expected.

The application of legal violations and crimes in the field of medicine is still often heard among health workers, especially doctors, this is a legal intervention. In which many doctors think that KODEKI (Indonesian Code of Medical Ethics) is sufficient to regulate and supervise doctors in their work, so there is no need for legal intervention, furthermore the main concern is that the medical profession will lose its dignity when regulated by law.

Health services basically aim to carry out prevention and treatment of diseases, including medical services carried out on the basis of individual relationships between doctors and patients who need healing. In Health Efforts, Doctors are obliged to provide the best possible medical services for patients.

The concrete form of the demands in the doctor's obligations is stated in Article 51 of Law Number 29 of 2004 concerning Medical Practice, namely: (1) providing medical services in accordance with professional standards and standard operating procedures as well as the patient's medical needs; (2) refer the patient to another doctor or dentist who has better expertise or ability, if he is unable to carry out an examination or treatment; (3) keep everything he knows about the patient a secret, even after the patient dies; (4) carry out emergency assistance on the basis of humanity, unless he is sure that someone else is on duty and is able to do it; (5) increase knowledge and follow developments in medicine or dentistry.

Many actions are in the form of negligence (*culpa*) that we still encounter due to dissatisfaction with improper actions so that many patients feel they are victims and choose to use the criminal route.

In order for medical staff to be punished, in this case doctors, there are two conditions that must be met, namely an unlawful act (*wedderrechtelijk*) which is a criminal act and the act committed can be accounted for as a mistake (*schuld*).

Errors in the form of negligence/omissions in the Criminal Code are stated in the term "aan zijn schuld te wijten" which is contained in Article 344, Article 359 and Article 360 of the Criminal Code. Negligence (*Culpa*), Simon and Van Hamel argue:

1. **Simon**, requires two things for negligence (*culpa*):
2. Lack of caution (*het gemis van voorzichtigheid*);
3. Lack of attention to the consequences that might occur (*het gemis van de voorzienbaarheid van het gevolg*)

4. **Van Hamel**, also gives two conditions for negligence (*culpa*):
5. No estimators are needed
6. The absence of the necessary caution (*het gemis van nodige voorzichtigheid*).

The study of ordinary crimes lies in the consequences of criminal acts, while in medical crimes (medical malpractice) studies on the causes of criminal acts. In medical crimes, in relation to negligence (*culpa*), accountability must be proven in relation to professional errors, for example misdiagnosis or medication errors. Errors in medical action generally occur due to negligence committed by doctors, where the standard for errors in carrying out the duties of the medical profession in the form of negligence in criminal law is gross negligence (*culpa lata*), not minor negligence (*culpa levis*).

But what needs to be known, negligence (*culpa*) does not include unlawful acts if it does not cause harm to other people. In the legal doctrine: “*de minimus non curat lex*” (the law does not interfere in trivial matters), however, the exception is for gross negligence (*culpa lata*) which is regulated in article 359 of the Criminal Code.

Almost certainly, article 359 of the Criminal Code, is always charged with death allegedly caused by a doctor’s mistake (Adami Chazawi, 2007). Besides the mental attitude of the *culpa* there must be three more elements. The three elements referred to are the details of the sentence “cause another person to die”, namely:

1. There must be a form of Action;
2. There is a consequence in the form of death;
3. There is a causal verband between the form of action and the consequences of death.

Equality before the law found in almost all state constitutions. This is the norm that protects the human rights of citizens. “If this is included in the constitution, then the logical consequence is that the authorities and law enforcers must carry out and realize this principle in the life of the state”.

Doctor’s negligence or negligence is not the same as malpractice, but negligence is included in the meaning of malpractice, meaning that in malpractice there is not always an element of negligence. Negligence is any action taken and can violate standards resulting in injury/loss to others (Sampurno, 2005). It can be concluded that negligence is doing something that should be done at a scientific level but not being done or taking action below a predetermined standard.

Forms of negligence according to Sampurno, are as follows:

1. *Malfesanc* namely taking actions that violate the law or are inappropriate/proper, for example: carrying out nursing actions without adequate/proper indications.
2. *Misfesanc* namely making the right choice of nursing action but implemented inappropriately, for example: carrying out nursing actions by violating procedures.
3. Nonfeasance, namely not carrying out nursing actions which are their obligations, for example: the patient should be put on a bed guard but this is not done.

The impact as a result of the criminal justice system being offender oriented, thus providing a rationale for legal renewal with the need for the concept of settling cases outside the criminal justice system in the context of Restorative Justice. The concept of the Restorative Justice approach is an approach that focuses more on conditions for creating justice and balance for victims and perpetrators (Afthonul Afif, 2015).

The concept of Restorative Justice is a critique of the system concept criminal justice system that sees crime as a violation of state regulations. So that related to renewal in the field of legal aspects, of course the

Indonesian people have an ideal in which the legal aspect becomes something noble with the concept that not always a legal problem for the perpetrator becomes a way out by means of being criminalized as a form of final accountability for an act committed. but the concept of restorative justice is the main solution to solving legal problems between fellow citizens in order to achieve the goals of the law itself.

METHOD

The step to identify this type of research is to use Normative Research Methods supported by Empirical Research data, which This research method focuses on the relationship between the object of health sociology (the relationship between medical personnel and patients) and examines problems from the perspective of social aspects, health aspects and cannot be separated from legal concepts.

The approach in this writing is carried out in normative law research which includes:

Philosophical approach (philosophical approach)

This approach is applied because it examines values The legal basis is related to the actions of medical staff so that they find a new concept in the renewal of the country's law which is aspired to.

Approach to Legislation (statute approach)

It is an approach used to study and analyze:

1. All Laws; and
2. Regulations related to existing legal issues.
3. Conceptual Approach

The conceptual approach departs from the views that have developed in the science of law by studying these views in the science of law

The case approach

The case approach is carried out by examining cases related to the issues at hand which have become court decisions that have permanent legal force.

The sources of legal materials used in this dissertation are as follows:

1. Primary legal material is legal material that is authoritative, meaning it has authority or binding legal material
2. Secondary legal materials namely Secondary legal material in this case consists of books on law / Social and Health or relevant to the topic of study, legal journals, legal papers or views of legal experts contained in the mass media, legal dictionaries and encyclopedias, as well as sources of legal material. that comes from the internet.
3. Tertiary Legal Materials, namely legal materials which are complementary in nature to provide additional instructions or explanations to primary and secondary legal materials

RESULTS AND DISCUSSION

The Relationship between Medical Personnel and Patients in the Perspective of Health Law

Health services are efforts carried out by the Government together with the community in order to improve,

maintain and restore the health of the population which includes preventive, curative and rehabilitative promotions. In a narrow sense this effort is carried out by institutions that provide treatment to someone who is sick, in this case is a hospital (Sri Paptianingsih, 2006).

Patient Rights and Responsibilities

The patient's right to receive medical services is regulated in detail in Article 45 paragraph (3) of Law Number 29 of 2004 concerning Medical Practice, namely:

1. Get a complete explanation of medical procedures
2. Ask for the opinion of another doctor or dentist,
3. Get services according to medical needs,
4. Refusing medical action
5. Get the contents of the medical record.

patients also haveThe obligations referred to in RI Law No.29 Article 53 of 2009 concerning Medical Practice, namely;

1. Provide complete and honest information about their health problems.
2. Follow the advice and instructions of a doctor or dentist.
3. Comply with the provisions that apply in health care facilities.
4. Provide compensation for services rendered.
5. Fulfill the things that have been agreed / agreements that have been made

Doctor's Rights and Obligations

Doctor's rights as contained in Article 50 stipulates that doctors in carrying out medical practice have the right:

1. Obtain legal protection as long as carrying out duties in accordance with professional standards and standard operating procedures.
2. Providing medical services according to professional standards and standard operating procedures
3. Obtain complete and honest information from patients or their families; and
4. Receiving service fees.

Obligations as Article 51 explains that doctors and dentists in carrying out medical practice have the obligation to:

1. Providing medical services in accordance with professional standards and standard operating procedures as well as the medical needs of patients
2. Referring the patient to a doctor or dentist who has better expertise or ability, if unable to carry out an examination or treatment.
3. Keeps everything he knows about the patient a secret, even after the patient dies.
4. Carry out emergency aid on the basis of humanity, unless he is sure that someone else is on duty and does it.
5. Providing medical services according to professional standards and standard operating procedures
6. Obtain complete and honest information from patients or their families; and
7. Receiving service fees

Standard Operating Procedures

According to Article 29 Paragraph (1) of the Republic of Indonesia Law no29 of 2004 concerning Medical

Practice, it is mandatory to have authority, namely having a registration certificate (STR), whereas according to article 36 of the Republic of Indonesia Law number 29 of 2004 concerning Medical Practice, it is mandatory to have a Practice Permit (SIP). Violating either or both of these obligations can pave the way for medical malpractice.

Informed Consent

PERMENKES 290 / MENKES / PER / III / 2008 concerning Approval of Medical Actions, namely that before carrying out a medical action, it must be preceded by explanations regarding the actions, risks, that will be carried out on the patient. If this is not done by the doctor, the doctor is considered negligent in carrying out his profession and law. Informed consent cannot negate or prevent the holding of a claim before the court or release the doctor/hospital from their responsibilities if there is negligence. According to Sumaryono, the function of the professional code of ethics has 3 meanings (a) as a means of social control; (b) as a deterrent to interference from other parties and (c) as a deterrent to misunderstanding and conflict (E. Sumaryono-1998).

Responsibility for Negligence of Medical Personnel in the Perspective of Criminal Law

In this context, law is *conditio sine qua non*, an absolute requirement for society (Hendrojono Soewono, 2007). The view of legal sources is seen from a philosophical, standard objective law can create justice and prosperity which must be preceded by ideal conditions, namely law users are always principled, everyone must obey the law, so that justice and prosperity can be created (Mudakir Iskandar, 2017)

Basically the practice of a doctor is the provision of assistance individually by doctors to patients in the form of medical services. If someone comes to a doctor to take advantage of available medical services, then a legal relationship occurs between the doctor as a medical worker and the patient which is called a therapeutic transaction. This kind of legal relationship that does not promise any healing or death is called *inspanningsverbintenis*, which is different from the legal relationship that normally applies in agreements in general that promise a certain result (*risk verbentenis / resultaatsverbentenis*).

There is a similarity between ethics and law, that is, both require humans to do good and right in society. Besides that, in ethics and law to regulate sanctions that can be imposed.

The forms of violations committed by medical servants, in this case the medical profession, can be classified as follows:

1. Medical Responsibility in Professional Ethics Medical
2. Medical Responsibility in Medical Discipline
3. Medical Responsibility in Administrative Law
4. Medical Responsibility in Civil Law
5. Medical Liability in Criminal Law

Draft The Idea of ??Doctor's Negligence Liability for Patients as an Idea for Legal Reform (Ius Constituendum)

Development of Legal Materials is an assessment of regulatory legal norms (*Regeling-Recht*) which aims to carry out Regulatory Reform which aims (finally) can be in the form of recommendations in the form of Change (Revision), Replacement (Revocation-Revocation) or indeed maintaining (Preservation) the existing regulatory norms.

Development of National Law, in this case through the Analysis and Evaluation of the Development of the Criminal Law System is directed at a Restorative Justice approach that benefits the Community (Social

Welfare) (Idriyanto Seno Adji, 2016).

The restorative justice approach is assumed to be the most recent shift from the various models and mechanisms that work in the criminal justice system in dealing with criminal cases at this time, even though this movement began in the 1970s in North America and Europe which was marked by the presence of the Victim Offender Reconciliation Program. in Ontario, then discovery in Indiana and England (Muladi, Paper, 2012).

restorative justice policy is both a response and a critique against the implementation of the criminal justice system (general) with the prison system which so far has been proven to be ineffective in resolving legal issues. In Marian Leibmann's view, the concept of solving criminal problems with a restorative justice approach is more (Marian Leibmann, 2007): (1) prioritizing support and healing for victims, both physically and psychologically; (2) encourage perpetrators to be accountable for their actions to victims; (3) prioritizing dialogue or deliberation between victims and perpetrators to reach mutually beneficial agreements for the parties, so that the dispute resolution process brings benefits, especially for victims and perpetrators; (4) put in a correct and proportionate manner the losses suffered by the victim arising from the aforementioned legal event; (5) awaken the perpetrators and prevent the emergence or recurrence of new crimes of the same kind; and (6) involving the community in the process of integration between victims and perpetrators after an incident where there is generally disharmony, even grudges against each other, including the occurrence of disharmony of values ??in society.

According to Howard Zehr: *Restorative justice is not a particular program or a blueprint : Various programs embody restorative justice in part or in full. However, there is no pure model that can be seen as ideal or that can be simply implemented in any community. We are still on a steep learning curve in this field. The most exciting practices that have emerged in the past years were not even imagined by those of us who started the first programs, and many more new ideas will surely emerge through dialogue and experimentation* (Howard Zehr, 2001)

restorative justice is an alternative in the criminal justice system without forward an integral approach between perpetrators and victims and society as a unit to find solutions and return to patterns of good relations in society where this is a concept of legal expectation that every citizen dreams of so that they think that not all criminals must be punished in imprisonment as a last resort (Ultimum remedium), but expect a rule/legal system that makes mediation in a family manner the first or last resort as a form of settlement (Ius Constituendum).

In connection with criminal cases involving medical personnel, through restorative justice policies can be applied to deal with medical crimes effectively by:

1. Non-litigation, namely by applying the concept of a restorative justice approach through dialogue and deliberation between the parties involved.
2. Quasilitigation, i.e. by involving law enforcers as usual litigation process, but ends with peace in a dialogical manner (non-litigation)
3. Linvestigation, namely using a pure criminal law approach.

Of the three ways mentioned above it can be seen that Bathat restorative justice policies have good prospects in efforts to combat medical crime because empirically they are in line with socio-cultural values ??that exist, grow and develop in society, and are also in line with the Indonesian nation's philosophy, Pancasila. So, the restorative justice policy is the law of the future (ius constituendum) whose application can be carried out by the following methods: construction, codification, and unification.

Awareness of the importance of the concept of restorative justice as a soul and personality (volkgeist) of the

Indonesian people has made the government make legal breakthroughs, even though these legal breakthroughs are still partial. Regardless of the matter referred to, by considering the importance of legal settlement by means of restorative justice, three legal institutions namely the police, the Attorney General's Office and the Supreme Court have made and issued regulations related to restorative justice in the concept of settlement of criminal cases as a form of breakthrough for the renewal of Indonesian law as desired. ideal (*Ius Constituendum*), among others:

1. Republic of Indonesia Police

Based on the Chief of Police Regulation Number 8 of 2021, regarding the Handling of Crimes Based on Restorative Justice, according to the contents of Chapter I Article 1 3 that Restorative Justice is the settlement of a Crime by involving the perpetrator, victim, perpetrator's family, victim's family, community leaders, religious leaders, traditional leaders or stakeholders to collectively seek a just settlement through peace by emphasizing restoration to its original state.

2. Republic of Indonesia Attorney.

Based on Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, in accordance with the contents of Chapter I Article 1 1 that Restorative Justice is the settlement of a Crime by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation .

3. General Court (RI Supreme Court).

Based on the Decree of the Director General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia Number: 1691 / DJU / SK / PS.00 / 12 / 2020, December 22 2020 concerning Enforcement of Guidelines for the Implementation of Restorative Justice in the General Court Environment as contained in Chapter I letter D 2 which is contained in the Guidelines referred to the settlement of Crimes by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation.

CONCLUSION

1. Legal protection for the community as an object or part of services in the health sector (patients) carried out by doctors, especially related to medical actions taken as well as protection for the medical profession, especially doctors themselves, can apply Restorative Justice as a concept for solving legal problems faced by both
2. Unlawful acts committed by medical personnel / doctors from a medical action carried out against the community if an action is found outside the rules / SOP or the action is considered risky but the medical staff / doctor makes an error in the practice carried out, so of course accountability The law that is carried out must have a concept that represents a sense of justice for the patient.
3. Renewal of state law is something that is coveted by the community, inseparable from the existence of legal regulations that lead to the concept of justice. Restorative Justice (*restorative justice*) has good prospects in efforts to combat medical crime because empirically it is in line with the socio-cultural values that exist, grow and develop in society, and are also in line with the Indonesian nation's philosophy, Pancasila. So, the restorative justice policy is the law of the future (*ius constituendum*) which is in line with the concept of reforming state law.

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