

Criminal Legal Protection Against Doctor Malpractice in Indonesia

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Abstract

One of the Human Rights elements that must be achieved in accordance with the ideals of the Indonesian people is the Health aspect, the profession as a doctor devotes his/her knowledge to the public interests, has freedom and independence which is oriented to human values in accordance with the code of ethics. In implementing the code of medical ethics, it as much as possible avoids the occurrence of medical error. The error can occur in the diagnostic stage such as error or delay in diagnosis, not implementing the appropriate examination, using an examination method that is no longer used or does not act on the examination or observation result, etc. The risk that occur if it is not carried out thoroughly and carefully, is that it will result in a fatal error. The method used in this research is the normative juridism method, namely the addition method by holding on to the applied norms or legal rules. The result in this research is the liability's manifestation of the doctor who performs medical malpractice as a form of criminal legal protection in Indonesia, it is basically based on intentional or unintentional mistakes or negligence. If it results in the victim's death, it is equal to murder, and if the victim does not die it is called an act of persecution with the sanction of persecution.

Keywords: *Criminal, Legal Protection, Malpractice, Doctor*

Introduction

Health is element of Human Rights which must be realized in accordance with the ideals of the Indonesian people, the general welfare of national goals. To achieve the ability to live healthy for each people in order to realize an optimal degree of public health. The profession as a doctor devotes his/her knowledge to the public interests, it has freedom and independence which is oriented to human values in accordance with the code of ethics.⁽¹⁾ This code of medical ethics aims to prioritize the interests and the safety of patient, to ensure that the medical profession must always be carried out with noble intention and use the right way.⁽²⁾

In implementing the code of medical ethics, it avoids the occurrence of medical error as much as possible,⁽³⁾ namely a failure of a medical action that has been

planned to be completed resulting in not as expected, an error of action or wrong planning to achieve a goal. The error that occurred will result in or potentially injure to patient, it can be in the form Adverse Event (KTD). This is very detrimental and dangerous; the patient can experience bad things and the action giver can also be exposed to Article of law violation.⁽⁴⁾

Near Miss (NC) is an event resulting from carrying out an action or not taking the action that should be taken, which can injure the patient, but serious injury does not occur because of luck. This can be seen from the number of actions taken that are dangerous but can be prevented before they occur or are handled before they cause effects, for example, the patient receives a contra indication medicine but there is no drug reaction occurred, prevention of a medicine with an overdose will be given, but other staff know and cancel it before the medicine is given, and relief of a medicine with an overdose is given, it is known early and then given the antidote. Adverse Event (KTD) is an event resulting in an unexpected injury to the patient due to an action or not taking the action that should be taken, and not

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because of the patient's condition.⁽⁵⁾

The error can occur in the diagnostic stage,⁽⁶⁾ such as error or delay in diagnosis, not implementing the appropriate examination, using an examination method that is no longer used or does not act on the examination or observation result;⁽⁷⁾ In the treatment stage, such as error in treatment procedures, therapy treatment, drug use method, and delay in responding to the result of improper care checks; in the preventive stage, such as not providing prophylactic therapy as well as inadequate monitor and follow-up; or in other technical matter such as communication failure, device or other systems failure.⁽⁸⁾

The risk occurred in human is so vulnerable to an action. If it is not carried out carefully and thoroughly, it will result in a fatal error. The existence of medical risks, both those that have been detected previously and those that were not detected before or unexpected at all before, in the implementation of health services is only an adequate information.

Even so, in carrying out their professional duties, health workers are normatively obliged to remain cautious, to comply with the medical standard, to carry out the professional standard of expertise, and to respect the patient rights. This is done in order to obtain legal protection for them.

In this normative definition of a worker, it raises the definition that health worker who carries out the professional duties has a special legal position, it means that in carrying out their professional duties, they are exposed to high medical risk. Based on these explanations, it needs a criminal legal protection against doctor malpractice in Indonesia.

Research Method

This research used library research which is a research method that is carried out by reading and studying theories relevant to the subject matter. The data collected was then processed using data processing method which consists of: Normative juridism method, namely the addition method by holding on to the applied norms or legal rules. This discussion method is used in accordance with its need to produce an acceptable discussion both in juridical and scientific terms.

Discussion

A jargon that reads *errare humanum est* (error is

humane), seems need to be contemplated. A theory of respectable minority rule which states that a doctor is not considered negligent if he/she chooses one of the many ways of treatment that is recognized by the medical world. Basically, a doctor will be brought before a court if there has been a loss to the patient. The loss arises as a result of a breach of obligation in which an agreement had been previously made. Even though the doctor's obligations are not detailed in the therapeutic contract, but the doctor's obligations are not covered by the medical services standard. While the medical services standard is made based on the rights and obligations of the doctor, both those regulated in the Code of ethics and those regulated in statutory regulation.

Legal protection for the implementation of the doctor's duty and authority who has medical risk in the Criminal Code is formulated in Article 359 and 360, the action that causes others to be seriously injured or die which was done inadvertently. As for the elements of Article 359 and 360, there are the negligence element (*culpa*), the existence of certain form of action, and there are serious injuries or death of others, and the existence of a causal relation between the form of action with the result of that other person death.

Elements of medical risk and medical malpractice are as follow, in the medical risk is found the negligence element, while in the medical malpractice it is clear that there is a negligence element. In addition, specifically in health services, negligence is also associated with services that do not meet or below the medical services standard which in its practice also needs to be used to distinguish between medical risk and medical malpractice. If upon the patient, it has been performed procedures according to the medical services standard, but the patient ends up seriously injured or dead, this is a medical risk. Whereas for patient who has suffered serious injury or death as a result of doctor performing services below medical standard, this means that there is a medical malpractice.

In order to avoid misunderstanding about the emergence of risks that are detrimental to the patient, it is necessary to have clear and complete information by the doctor in a language that easily understood by the patient and by remembering where the communication is carried out. This is where the importance of a health interview is, so that in the end the patient is willing to give consent for the medical action to be taken by the doctor in the effort to cure his illness in a therapeutic

transaction.

It means that the negligence element is very instrumental in determining whether a doctor is convicted or not and negligence in the medical field is very closely related to the implementation of doctor professional standards. Not only the negligence element in medical risk, it also means that both Article 359 and 360 of the Criminal Code cannot be applied to the doctor's action that has medical risk, because one of the elements of Criminal Code Article 359 or 360 is not fulfilled in medical risk.

In the case of medical accident, there is a judge's decision to adjudicate a case that in Indonesia it indeed requires that a doctor must act carefully on every action taken. But we cannot just regard it as a negligence act for something that is actually an accident. Regarding the mistake of clinical examination, it is actually also understandable because after all, as a human being a doctor cannot escape from the possibility of making a mistake.

In addition, the doctor's action toward patient also has justification reason as mentioned in Criminal Code Article 50 and Article 51 paragraph 1. Meanwhile, for the conviction of an error that can be interpreted as liability in criminal law, it must meet 3 elements, namely: the ability to be responsible for the action, the inner connection between the actor and the action that can be intentional (*dolus*) or negligence (*culpa*), and there is no forgiving or erasing reason.

Thus, to make sure that a medical action is not against the law, the action must be performed in accordance with the medical profession standard or carried out legeartically, as reflected by: The existence of medical indication in accordance with the concrete treatment goal, performed according to the standardized medical procedures standard, fulfilled the patient's rights regarding informed consent.

We need to realize that doctor's medical actions sometimes indeed produce undesirable consequences both by the doctor and the patient, even though doctor has tried their best. Because almost all medical actions are essentially persecution justified by the Constitution, especially those related to acts of anesthesia and surgery. So that the possibility of the risk of injury or even death is very difficult to avoid. Based on the analysis, the criminal law adheres to the principle of "no criminal without error". Furthermore, in Article 2 of the Criminal

Code mentioned, "criminal provisions in Indonesian statutory regulation are applied to everyone who commits an offense in Indonesia".

The formulation of this article determines that every individual who is in the Indonesian legal territory, can be held liable for criminal liability upon the mistakes he/she made. Based on that provision, the doctor profession is inseparable from the provision of the article. Moreover, a doctor in his daily work is always involved in the acts regulated in the Criminal Code. Even though the criminal law recognizes the abolition of criminal act in the health service, namely justification and forgiving reasons as well as those contained in the jurisprudence, it does not necessarily mean the justification and forgiving reasons abolish a criminal offense for the doctor profession.

One of the jurisprudences that contains justification reason and forgiving reason in health services is the jurisprudence. This jurisprudence contains "informed consent" as a criminal offense omission. However, this does not mean that the doctor profession is freed from all criminal liability, because the justification reason and forgiving reason for the doctor's action is only in a certain exception.

Legal protection toward doctor's legal liability can be distinguished between liability that is not related to the implementation of his/her profession and legal liability related to his/her profession. The implementation of the doctor profession in Indonesia can still be distinguished between responsibility for professional provisions, namely the Indonesian Code of Medical Ethics (KODEKI) contained in the Decree of the Minister of Health No. 434/Men.Kes/SK/X/1983 and responsibility for legal provisions covering the administrative law, the criminal law and the civil law. Action or behavior of doctor as legal subject in their performance in society can be distinguished between daily actions that are not related to his/her profession.

There are special factors in Medicine that are not found in general applicable law, for example medical accident or risk of treatment. Some basis for the omission of penalties or special error in medicine, namely: Risk of treatment, Medical accident, Non-negligent error of judgment, *Volenti non fit iniura* and Contributory negligence.

Criminal law in Indonesia in the implementation of certain medical act, there is always a risk inherent in the medical act (inherent risk of treatment). If the doctor

performs the medical treatment carefully, with the patient's permission and based on the Medical Service Standard (SPM), but it turns out that the risk persists, for example if there is an unexpected allergic reaction, as well as complications that cannot be predicted beforehand (for example, there occurs amniotic water embolism during labor), then the doctor cannot be blamed.

Article 44 of Constitution on Medical Practice as an official explanation is determined as follows, "service standard" is a guideline that must be followed by doctor or dentist in carrying out medical practice. "Service facility level" is the level of service in which the standard of personnel and equipment are in accordance with the capabilities provided. Attitude and action that must be carried out by doctor are regulated in various standards. The profession has at least 3 kinds of standards, namely: Competency standard, Behavior standard, and Service standard.

Constitution No.36 of 2009 concerning Health has formulated the criminal threat, hence the criminal threat against the error or the negligence committed by doctor resulting in patient suffering from disabilities or injuries, no longer refers solely to the provision of Article 359, 360, and 361 of the Criminal Code. The threat is contained in Article 198 of Constitution No. 36 of 2009 concerning Health. The arrangement of doctor's legal liability towards patient in the event of malpractice, the Indonesian health law does not officially mention the term Malpractice, but only mention error or negligence in carrying out the profession (listed in Articles 54 and 55).

Thus, the malpractice term is a legal term used in Articles 54 and 55 mentioned above. Error or negligence in carrying out the profession is listed in articles 54 and 55 of Constitution No.36 of 2009 concerning Health. Article 54 and 55 stated that the sanction on medical malpractice is the imposition of disciplinary action determined by the Medical Disciplinary Council to doctor who based on the judgment of the Council have committed negligence. Whereas the compensation that must be fulfilled by the doctor concerned is carried out in accordance with the applicable statutory regulations.

Criminal offenses are listed in Article 80, Article 81 and Article 82, while criminal violation is listed in Article 84. If in the relation between a doctor and a patient in a therapeutic transaction based on the agreement of both

parties, there is an inadvertent or uncareful action by the doctor, so as to cause disability or death of the patient, then the consequences are regulated in criminal law.

Indonesian law gives full rights to its people to obtain justice and to obtain it, it is done by submitting application, complaint, and lawsuit. Both in civil, criminal or administrative cases. Therefore, as a legal protection for Indonesian people, they will be tried through a free and impartial judicial process, which referred to legal procedures that guarantee an objective examination by honest and fair judge. The sanction in criminal law is basically sanction in the form of torture or restriction of freedom against the perpetrator of criminal act. With the hope that after undergoing the criminal sanction, it will cause a deterrent effect on the perpetrator or there is a preventive element against others (the society).

Conclusion

Criminal legal protection against doctor malpractice in Indonesia in the Criminal Code can not be applied to the doctor's action who has medical risk. This is because at the medical risk, there is one element that cannot be fulfilled, namely the negligence element. However, if the negligence element from a doctor's action can be proven, then according to the Criminal Code, the doctor can be imposed on committing act that cause serious injury or loss of patient's life. Besides that, based on the basis of doctor's mistake omission, namely the justification reason (treatment risk) and forgiving reason (accident occurs in difficult operation). The liability's manifestation of the doctor who performs medical malpractice is basically based on intentional or unintentional mistake or negligence. For intentional mistake, if it results in the victim's death, it is equal with murder, and if the victim does not die it is called an act of persecution with the sanction of persecution.

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