

Legal Protection for Doctors in Health Service Practices

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Abstract : The advanced developments in technology, information, and knowledge, especially in the fields of health and law, will have a negative impact on the mindset of society, especially in health services. This is proven by the wide variety of demands on medical personnel, the doctors who practice medicine. Cases of suspected malpractice are often over-reported by the mass media and social media. Doctors are seen to have no responsibility or making mistakes in their profession. In fact, all the news that is delivered or written does not necessarily reflect reality. The actions were taken by the doctor corresponds with professional standards and standard for operating procedures. This study aims to explore the analysis of legal protection implementation and its weaknesses in a medical dispute between doctors and patients. This study employed a normative juridical approach by library research. The primary and secondary legal material sources were taken from laws, books, and scientific journals. The findings reveal that in doing medical practice, doctors must fulfill informed consent and medical records. This is to serve as evidence that can exempt the doctors from all lawsuits if malpractice allegations arise. There are many reasons for the repeal of the doctors' sentences to free them from lawsuits. This includes the risk of medication and medical accidents. In conclusion, a doctor who has carried out his duties based on professional standards, service standards, and standard operating procedures is entitled to proper legal protection based on the value of justice.

Keywords: Health services; medical malpractice; legal protection for doctors

Perlindungan Hukum terhadap Dokter dalam Praktik Pelayanan Kesehatan

Abstrak : Semakin meningkatnya perkembangan teknologi, informasi, maupun pengetahuan yang semakin maju, terutama di bidang kesehatan maupun hukum, maka akan dapat menimbulkan suatu dampak buruk dalam pola pikir masyarakat, khususnya di bidang pelayanan kesehatan. Hal ini dapat dibuktikan dengan maraknya berbagai macam tuntutan terhadap tenaga medis, khususnya bagi para dokter yang melakukan praktik kedokteran. Kasus-kasus dugaan malpraktik seringkali diberitakan secara berlebihan oleh media massa maupun media sosial. Para dokter dianggap tidak mempunyai tanggung jawab maupun melakukan kelalaian dalam menjalankan profesinya. Padahal semua berita yang disampaikan maupun ditulis belum tentu sesuai dengan kenyataan, dan sebenarnya tindakan yang dilakukan oleh dokter tersebut sudah sesuai dengan standar profesi dan standar operasional prosedur. Tujuan dari penelitian ini adalah untuk menggali analisa dalam penerapan perlindungan hukum dan kelemahannya dalam suatu sengketa medis antara dokter dan pasien. Metode penelitian yang digunakan adalah pendekatan yuridis normatif, memakai studi kepustakaan (library research), dengan sumber bahan hukum primer maupun sekunder dari peraturan perundang-undangan, buku, dan jurnal ilmiah. Hasil penelitian ini adalah dalam suatu pelaksanaan praktik kedokteran, dokter harus memenuhi informed consent dan rekam medik sebagai alat bukti yang bisa membebaskan dokter dari segala tuntutan hukum apabila terjadi dugaan malpraktik. Ada beberapa hal yang menjadi alasan peniadaan hukuman sehingga membebaskan dokter dari tuntutan hukum, antara lain yaitu risiko pengobatan dan kecelakaan medik. Sebagai simpulan seorang dokter yang telah melaksanakan tugas sesuai dengan standar profesi, standar pelayanan dan standar prosedur operasional berhak mendapatkan suatu perlindungan hukum yang layak dan berbasis nilai keadilan.

Kata Kunci : perlindungan hukum dokter, pelayanan kesehatan, malpraktik medik

INTRODUCTION

The doctors must meet the formal education standard academically and juridically. This means that the formal academic standards required by a doctor to pass the formal medical education are being able to perform the standard of medical service tasks. However, in recent developments, the initial standard is not enough for medical staff. This is because it must be added or equipped with developments in science and technology that keep developing, the skills of a doctor for instance. The

world of medicine continues to develop. The development is very dynamic and rapid. Medical personnel who do not follow the development of science and technology will be left behind. Thus, courses and seminars are always held by medical professional organizations. Medical personnel who are left behind will be classified as a medical worker who does not meet the sub-standards. Moreover, if in the practice, they cause negative effects, this will be considered as an error or negligence known as malpractice.¹

Medical malpractice is the wrongful act or negligence of a doctor in fulfilling his professional obligations. This covers carelessness and ignoring professional standards, medical service standards, standard operating procedures (SOP) that lead to disabilities, injuries, and death in a patient.² In a therapeutic transaction relationship (professional conduct), a medical dispute is triggered by an adverse event (unexpected event).³ According to Veronica,⁴ the term malpractice comes from the word "malpractice" which means a mistake arises due to an obligation that a doctor must perform in carrying out her profession. Medical malpractice by doctors are possible, either on purpose or negligence. However, as ordinary human beings full of flaws, doctors cannot escape the possibility of making mistakes. This is because a mistake is a human nature. The problem that arises in practice is when a doctor tries to help the patient but failed, even though she has implemented the professional standards and standard of operating procedures.⁵

The medical profession is not an all-in-certain field of science. The medical profession, according to Hippocrates, is a combination of science and art. The diagnosis is an art performed by a doctor. This is because after hearing the complaints from the patient, the doctor portrays an imagination, studies, and makes careful observations. Meanwhile, the science or medical theories and the experience he has become the basis for making a diagnosis of a patient's disease. This diagnosis is expected to approach the truth.⁶ In Article 50 letter (a) of the Republic of Indonesia Law Number 29 of 2004 concerning Medical Practice, which reads "In carrying out medical practice, a doctor or dentist has the right to obtain legal protection as long as he performs his duties based on the professional standards and standard for operating procedures". If a doctor or dentist has performed medical services or medical practice based on professional standards and standards for operating procedures, then, the doctor or dentist cannot be prosecuted, either administratively, civil, or criminally. The World Medical Association (WMA) states not all medical failures are medical malpractices. If an unforeseeable and adverse event occurs when a standard medical procedure is performed but results in injury to the patient, this is not considered malpractice.⁷

In reality, doctors who have practiced medicine based on applicable standards are still prosecuted and even imprisoned. This phenomenon occurred in the case of doctor Dewa Ayu and doctor Setyaningrum who were charged with alleged malpractice. Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice which is expected to protect and provide legal certainty, apparently, still has shortcomings. The elimination of articles on criminal threats in this law by the Constitutional Court (MK) causes the use of articles in the Criminal Code to ensnare doctors

¹ Mudakir Iskandar Syah, *Tuntutan Pidana & Perdata Malpraktik*, Permata Aksara, Jakarta, 2011, p. 5

² Syahrul Machmud, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal praktik*, Karya Putra Darwati, Bandung, 2012, p. 18-23

³ Setyo Trisnadi, *Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis*, Jurnal Pembaharuan Hukum, Vol 4 (1), January-April 2017, p. 24

⁴ Erina Pane, *Perlindungan Hukum Bagi Dokter dan Pasien Dalam Hubungannya Dengan Malpraktek dan Resiko Medik*, Jurnal Hukum Yustisia, Vol 76(1), January-April 2009, p. 41

⁵ Tri Agus Yuarsa, *Perlindungan Hukum Terhadap Dokter Atas Pelimpahan Kewenangan Medis Dokter Spesialis Kepada Dokter Jaga Di Rumah Sakit*, Syiar Hukum Jurnal Ilmu Hukum, Vol 17(2), September 2019, p. 168

⁶ Syahrul Machmud, *Op Cit*, p. 2

⁷ Setya Wahyudi, *Tanggung Jawab Rumah Sakit Terhadap Kerugian Akibat Kelalaian Tenaga Kesehatan dan Implikasinya*, Jurnal Dinamika Hukum, Vol 11(3), September 2011, p. 509

suspected of committing malpractice⁸. The resolution of malpractice cases is often brought to court (litigation). However, it is still questionable if the court is able to prove the truth in the medical field. Even if doctors or medical personnel become expert witnesses, can the judge understand the opinion in the medical world. Supposedly, medical dispute resolution should first be done through the stages of negotiation, mediation, or reported to the authorized institution to examine violations in the medical discipline, the Indonesian Medical Discipline Honorary Council (MKDKI). The lack of socialization makes the general public less familiar with MKDKI. Accordingly, they use legal channels. MKDKI has the authority to examine and give decisions on complaints relating to violations of medical discipline and its sanctions. For this reason, the researcher formulated the following research questions: How is the legal protection for doctors in health service practice? and What is the procedure provided by the Indonesian Medical Disciplinary Council (MKDKI) in resolving the medical disputes and providing legal protection for doctors.

RESEARCH METHODS

This legal research used a normative juridical approach (doctrinal). This study involved secondary data sources/library research. The primary legal material literature was the 1945 NRI Constitution, the Republic of Indonesia Law Number 29 of 2004 concerning Medical Practice, the Republic of Indonesia Law Number 36 of 2009 concerning Health, Law of the Republic of Indonesia Number 36 of 2014 concerning Health Workers. In addition, it also covered Government Regulation Number 32 Year 1996 concerning Health Workers, Indonesian Medical Council No. 2 of 2011 concerning Procedures for Handling Cases of Alleged Discipline Violation of Doctors and Dentists, Indonesian Medical Council No. 4 of 2011 concerning Professional Discipline of Doctors and Dentists, Indonesian Medical Council No.15 / KKI / PER / VIII / 2006 concerning the Organization and Work Procedure of MKDKI and MKDKI-P. The secondary data, on the other hand, was in the form of laws and regulations, books, scientific journals, and previous research related to legal protection of doctors.

RESULTS AND DISCUSSION

A. Legal Protection for Doctors in Providing Medical Services

Doctor refers to any person who has a doctorate, specialist doctor, superspecialist doctor, or consultant subspecialty doctor recognized by the Government of the Republic of Indonesia in accordance with the prevailing laws and regulations.⁹

The researcher has outlined several things, the legal protection for doctors who suspected of committing medical malpractice as follows: legal bases of legal protection for doctors, things to do to avoid prosecution, and reason for the non-punishment of doctors suspected of committing medical malpractice.

1. Legal Basics That Provide Legal Protection for Doctors in running the Medical Profession
Legal provisions protecting doctors from suspected malpractice are stated in the Medical Practice Law Number 29 of 2004 in Article 50; Law Number 23 Year 1992 concerning Health in Article 53; and Health Manpower Act Number 36 of 2014 in Article 75.
2. Things the doctors should do to avoid lawsuit¹⁰
 - a. *Informed Consent*

⁸ Suwari Akhmadhian. Analisis Pertanggungjawaban Tenaga Medis yang melakukan Tindak Pidana Malpraktek menurut UU Nomor 36 Tahun 2009 Tentang Kesehatan. *Unfikasi : Jurnal Ilmu Hukum*, Vol.1.No.1.2014.34,49

⁹ Andi Baji Sulolipu dan Susilo Handoyo, *Perlindungan Hukum Terhadap Profesi Dokter Dalam Penyelesaian Sengketa Medis Berdasarkan Prinsip Keadilan*, Jurnal Projudice, Vol 1(1), October 2019, p. 69

¹⁰ Olivia Putri Damayanti, *Pertanggungjawaban Pidana Dokter Pada kasus Malpraktek Dalam Berbagai Peraturan Perundang-undangan di Indonesia*, Recidive, Vol 2(2), Mei-Agustus 2013, p. 172

In running his profession as a doctor, informed consent becomes an obligation that must be fulfilled by a doctor. Informed consent consists of two words; the word "informed" means explanation or information, and the word "consent" means approval or giving permission. Thus, informed consent refers to consent given by the patient or his family after receiving information about medical treatment and its risks.¹¹ We need to realize a medical treatment by a doctor sometimes have unwanted consequences for the doctor and the patient even the doctor has tried his best.¹²

b. Medical Record or Health Information

Apart from informed consent, doctors have to make a "medical record" on every patient's health service. The medical record regulation states in Article 46 paragraph (1) of the Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice. Medical records are files containing notes and documents about the patient's identity, examination, treatment, actions, and services.¹³ Medical records are made for several purposes such as treating the patients, improving the quality services, education and research, financing, health statistics and legal proof, discipline and ethical issues.¹⁴

3. Reasons for Rescission Sentences against Doctors Suspected for Medical Malpractice:¹⁵

a. Treatment Risk

According to Danny Wiradharma, the risks of treatment cover:¹⁶

- 1) The inherent risk. The medical treatment by a doctor contains risks. Therefore, doctors must carry out their profession based on applicable operational standards. The risks include hair loss due to chemotherapy with cytostatics.

- 2) Hypersensitivity reactions

The body's excessive immune response to the entry of foreign objects (drugs) often cannot be predicted in advance. This is known as an allergic reaction.

- 3) Komplikasi yang terjadi tiba-tiba dan tidak bisa diduga sebelumnya. Seringkali terjadi bahwa prognosis pasien tampak sudah baik, tetapi tiba-tiba keadaan pasien memburuk bahkan meninggal tanpa diketahui penyebabnya, misalnya terjadinya emboli air ketuban.

Complications that occur suddenly and cannot be predicted beforehand. Commonly, the patients' prognosis appears to be good, but their condition suddenly worsens and dies without knowing the cause. For example, the amniotic fluid embolism.

b. Medical Accident

Medical accident is often regarded as malpractice. This is because this condition harm the patient. In fact, the two conditions should be distinguished because doctors are healing not harming the patients (inspanning verbintenis). If medical accident appears, the doctor's responsibility refers to how the accident occurred or the doctor must prove the accident occurred. It is impossible for a doctor to deliberately and consciously injure his patient.¹⁷

c. Contribution Negligence

¹¹ Ahrul Machmud, *Op Cit*, p. 85

¹² Mohamad Rizky Pontoh, *Penegakan Hukum Pidana Terhadap Resiko Medik dan Malpraktek Dalam Pelaksanaan Tugas Dokter*, *Lex Crimen*, Vol 2(7), November 2013, p. 77

¹³ Eriawan Agung Nugroho, *Implementasi Undang-Undang RI Nomor 11 Tahun 2008 (UU ITE) Terhadap Rekam Medis Elektronik*, *Jurnal Juristic*, Vol 1(3), December 2020, p. 278

¹⁴ Ahrul Machmud, *Op Cit*, p. 219

¹⁵ Michel Daniel Mangkey, *Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis*, *Lex et Societatis*, Vol 2(8) September-November 2014, p. 17

¹⁶ Danny Wiradharma, *Penuntun Kuliah Hukum Kedokteran*, Binarupa Aksara, Jakarta, 1996, p. 107

¹⁷ *Ibid*, p.108

The doctors cannot be blamed once they failed to treat his patient. If the patients do not explain honestly about their disease history and the drugs they used during illness or do not comply with the doctor's instructions or refuse the agreed treatment methods. This is considered as patient error known as the contribution negligence or the patient co-guilt. Honesty and obeying the doctor's advice and instructions are considered a patient's obligation to the doctor and to himself.¹⁸

d. *Respectable Minority Rules & Error Of (in) Judgment*

The field of medicine is very broad and complex. As in a treatment effort, there is often disagreement or the same opinion about suitable therapy for a particular medical situation. Medical science is an art, science, and technology which is matured in experience. So it is possible for the doctors to have a different way of approaching the disease.¹⁹ However, this still has to be based on accountable science. For these circumstances, a legal theory emerged by the court, the respectable minority rule, that is, a doctor is not considered negligent if he chooses one of many recognized treatment methods. There are so many surgical techniques or variations of treatment in the medical world.

The doctor's mistakes in choosing an alternative medical treatment for his patient emerges a new theory called the error of (in) judgment known as a medical judgment or medical error, which is the choice of medical treatment from a doctor who has been based on professional standards but it turn to be wrong.¹⁹

e. *Volent Non Fit Iniura or Assumption Of Risk*

Volent non-fit iniura or assumption of risk is an old doctrine in legal scienc. This can also be imposed on medical law, an assumption about the high medical risk to a patient if a medical treatment is performed on him. If a detailed explanation has been made and the patient or family agrees (informed consent), if a risk suspected arises, the doctor cannot be held responsible for his medical action. In addition, this doctrine can also be applied to cases of forced discharge (going home on their own, even though the doctor has not allowed it). This thing frees doctors and hospitals from legal charges.²⁰

f. *Res Ipsa Loquitur*

The *res ipsa loquitur* doctrine is directly related to the burden of proof (onus, burden of proof), namely the transfer of the burden of proof from the plaintiff (patient or family) to the defendant (medical personnel). The certain negligence which is obvious or clear by a layman or general knowledge between the layman or the medical profession or both, that disabilities, injuries, or evident facts is evident as a result of negligence in medical action. This thing does not require proof from the plaintiff. However, the defendant must prove that his actions were not categorized as negligent or wrong.²¹

B. Medical Dispute Resolution Procedures by MKDKI, an Effort of Providing Legal Protection to Doctors

The Supreme Court through its 1982 Circular (SEMA) has provided direction to the judges, the handling of doctors or other health workers cases who are suspected of negligence or error in carrying out medical actions or services, should not immediately proceed through legal channels, but ask for an opinion from ⁵ Honorary Council of Medical Ethics (MKEK). Currently, MKEK's function is replaced by the Indonesian Medical Discipline Honorary Council (MKDKI), an independent institution under the Indonesian Medical Council (KKI).²²

¹⁸ Syahrul Machmud, *Op Cit*, p. 283

¹⁹ *Ibid*, p. 284

²⁰ *Ibid*, p.285

²¹ *Ibid*, p. 287

²² *Ibid*, p.326-327

Law of the Republic of Indonesia Number 36 of 2009 concerning Health, Article 29 states if a health worker is suspected of negligence in carrying out his profession, the negligence must be resolved first through mediation. In its explanation, it was not clearly stated to which agency the mediation would be completed, but the Medical Practice Law mandated the establishment of an institution for resolving medical discipline, the Indonesian Medical Discipline Honorary Council (MKDKI). MKDKI is not a mediation institution in the context of mediating dispute resolution. However, MKDKI is a state institution that has the authority to determine an error committed by a doctor or dentist in the application of medication or dentistry disciplines and to impose sanctions on a doctor or dentist who is found guilty.²³

The procedure for handling cases by MKDKI has been regulated in the Regulation of the Indonesian Medical Council Number 2 of 2011, the Procedures for Handling Cases of Alleged Discipline Violation of Doctors and Dentists. This case is carried out after the complaint is made. The requirements for the complaint mentioned in Article 3 Perkonsil Number 2 of 2011. After the complaint is registered in MKDKI/MKDKI-P, the complainant can provide supporting data in the form of evidence and a statement regarding the truth of the complaint. This will be clarified by a special officer from MKDKI/MKDKI-P. Then, it is followed by Initial Examination. This initial examination stage is discussed in Articles 13-18 of Council Regulation No. 2 of 2011. At this stage, MKDKI checks whether the complaint is accepted, not accepted, or rejected. If the complaint is accepted, the Chairman of the MKDKI will form the MPD, namely the Disciplinary Examination Council. The members of the MPD come from the MKDKI. MPD can decide that the complaint cannot be accepted, rejected, or terminated. Finally, MPD conducts an investigation.

Investigations are carried out to collect information and evidence relating to the complained events. After the investigation, a disciplinary examination hearing was conducted.

If the doctor or dentist disciplinary examination trial is over, the MPD will make a decision on the defendant. The decision can be in the form of:

- a. Is declared not to violated the discipline of a doctor or dentist
- b. Giving disciplinary sanctions, in the form of:
 1. Written warning
 2. An obligation to attend education or training, which can be done in the form of:
 - a) Formal re-education at an accredited medical or dental education institution
 - b) Non-formal re-education under the supervision of a certain doctor or dentist at an accredited medical or dental education institution, health service facilities and networks, or other designated health service facilities, for at least two months and at the maximum one year
 3. Recommendations for the withdrawal of STR or SIP which are:
 - a) Temporary a maximum of one year
 - b) Permanent
 - c) Limitation of certain medical care and medical practice in the field of medical science or dentistry

If it is proven to committed a disciplinary violation, the doctor or dentist' action who is being complained of, They can submit an objection to the MKDKI decision to the Chairman of the MKDKI within 30 days from the reading or receipt of the decision. This can be done by submitting new evidence that supports the objection.²⁴ In terms of ensuring the neutrality of MKDKI, Article 59 paragraph (1) of the Medical Practice Law states MKDKI consists of three doctors and three dentists

²³ Eka Julianta dan Wahjoepramono, *Konsekuensi Hukum Dalam Profesi Medik*, Karya Putra Darwati, Bandung, 2012, p. 301

²⁴ Eka Julianta dan Wahjoepramono, *Op Cit*, p. 317

from their respective organizations, a doctor and a dentist represent the Hospital association and three law graduates.²⁵ Accordingly, there is no way that the doctor will defend his colleagues. The legal protection given by positive law in Indonesia and is approved by the doctors cover legal certainty for the medical profession which is based on the value of justice.²⁶

CONCLUSION

Doctors who have performed their duties based on professional standards, service standards, and standard operating procedures are entitled to legal protection. In doing medical practice, doctors must fulfill informed consent and medical records as evidence that can exempt doctors from all if malpractice allegations arise. There are several reasons for the imposition of a penalty to free doctors from lawsuits including the risk of treatment, medical accidents, contribution negligence, respectable minority rules & error of (in) judgment, non-fit volume or assumption of risk, and *res Ipsa Loquitur*. MKDKI has the authority to examine and make decisions on complaints relating to the discipline of doctors and dentists. MKDKI can determine whether or not the doctors and dentists making mistakes in the application of medical and dentistry disciplines. This institution is an autonomous institution from the Indonesian Medical Council (KKI) which is independent.

SUGGESTION

The doctor's therapeutic transaction should establish good communication with patients and carry out medical treatments based on professional standards, service standards, and standard operating procedures. The community and law enforcement officials should better understand the differences between medical malpractice and medical risks. In addition, the government should make specific legal rules regulating medical malpractice clearly. Thus, systematic legislation can provide protection and legal certainty for doctors and patients. Meanwhile, doctors and patients involved in medical disputes should first resolve by negotiation, mediation, or kinship. If there is the need to prove the existence of malpractice, it can be done through the MKDKI, the institution with the authority to resolve violations of doctor's discipline. Lastly, the government should be able to assist the socialization program for the introduction of MKDKI to the public. In addition, the government should enforce new regulations for each member of the MKDKI who is a doctor with an additional bachelor's or master's degree in law education.

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