



THE IMPORTANCE OF LIABILITY FOR HOSPITAL:

An Answer to the Dualism of Medical Dispute Resolution

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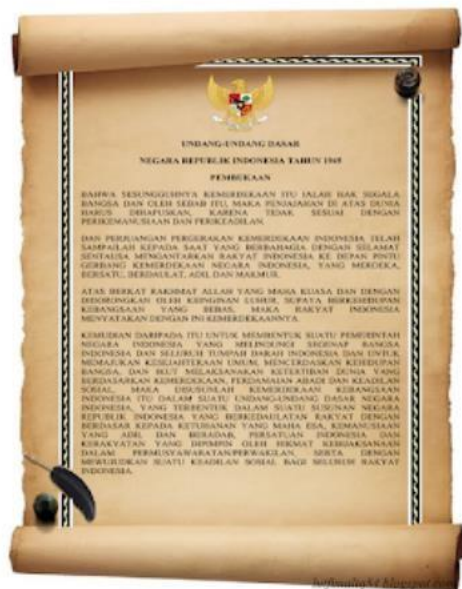
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Introduction

The right to health is emphasized in Article 28H (1) of the 1945 Constitution of the Republic of Indonesia *"Setiap orang berhak hidup sejahtera lahir batin, bertempat tinggal, dan mendapatkan lingkungan hidup yang baik dan sehat serta berhak memperoleh pelayanan kesehatan."*

which stated that every human being has the right to live in good physical and mental health, have a place of residence and a good and healthy living environment, and have the right to medical care.



Doctors as a noble profession

Doctors are a profession that must be practiced with high ethical standards. It is often said that this profession in the field of medicine always follows a moral and intellectual order.

A therapeutic relationship or the therapeutic transaction is known can be seen through the following flowchart :



Medical Disputes in Indonesia

To avoid or reduce medical disputes requires understanding the legal relationship between doctors and patients.

Legal action and legal consequences arise from this legal relationship; **who is responsible and to what extent they can be held accountable is inseparable.**

In Indonesia, medical disputes can be viewed from all sides. As stated on Law No. 29 of 2004 on Medical Practice, in general, the enforcement of **medical ethics** in medical disputes is often chosen to resolve cases of suspected **disciplinary** violations by physicians and dentists - administrative law.



Medical disputes can also be elucidated in criminal law, as the constituent elements are stipulated in criminal law.

The default or tort argument can also be used from a civil law perspective.

Can be consumer protection laws resolve medical disputes?
Are you considering whether the doctor-patient relationship can be equated with the businessman-consumer relationship?



The resolution of medical disputes in Indonesia is divided into 2 categories: judicial and extra-judicial (out-of-court). As stipulated in Article 29 of the Health Law No. 36 of 2009, any professional negligence committed by medical personnel, including doctors, must first resolved through mediation, i.e. non-litigation.



Discussion 1



An Ideal Model for Medical Dispute Resolution in Indonesia

- *Burgerlijk Wetboek* (Civil Code)
- Regulation of the Minister of Health of Republic of Indonesia
- Law No. 4/2009 on Hospitals
- Law No.8/1999 on Consumer Protection
- Law No.29/2004 on Medical Practice
- Minister Health Regulation

Discussion 2



Reduction of Liability in the Medical Field through Medical Professional Liability Insurance

- Professional liability insurance
- *Burgerlijk Wetboek* (Civil Code)
- Law No.29/2004 on Medical Practice



Discussion 1

- The doctor-patient relationship is a therapeutic transaction, namely a legal relationship that creates rights and obligations for both parties. In contrast to transactions that commonly carried out by the public, therapeutic transactions have different characteristics or characteristics, the specificity lies in the object, namely 'making efforts or therapy to cure patients'.
- As is generally an agreement, in a therapeutic transaction there are also parties who remind themselves, namely the doctor as the party carrying out or providing medical services and the patient as the party receiving medical services.

The therapeutic-based relationship (contract therapeutic relationship)

a legal relationship begins with an agreement both written and verbal, so that the wishes of both parties are assumed to have been accommodated from the start when both parties agreed on a diagnostic or treatment procedure

The legal-based relationship

Relationships under the law usually emphasize obligations imposed on doctors without seeking the patient's consent. Both of these relationships place legal, professional, and ethical responsibilities on doctors

4 legal requirements on the contract based on Article 1320 Burgerlijk Wetboek (strengthened by the Indonesian Medical Council)



1) DEAL

- Informed Consent → Juridically, the use of Informed Consent is a unilateral action because only the patient will sign, but the doctor does not have to
- If there is an agreement, then if one of the parties wants an annulment, the contract must also be agreed upon by the parties concerned. In this case it has the potential to result in a lawsuit for damages.
- In Indonesia, the importance of Informed Consent is expressly regulated on Minister of Health of the Republic of Indonesia No 290/MENKES/PER/III/2008 concerning Approval of Medical Treatment

Keywords in every medical action that will be performed on patients:

1. Consent (both written and oral)
2. Complete, correct, clear and honest information by explaining the medical procedure to be administered



2) ABILITY

A person who is legally competent if he/she is 21 years old, or for men if they are not yet 21 years old but are already married. Article 1330 of the Civil Code states that **a person who is incapable of agreeing is:**

1. Under the legal age, he is under 21 years old according to Article 330 of the Civil Code and is unmarried.
2. Guardians, i.e. persons aged 21 or over who are considered incapacitated due to a mental disability.
3. In this case, the woman continues to retain the status of wife in matters to which laws and regulations apply, and in general, all people are prohibited by law from entering into specific contracts. The Indonesian Medical Council reiterated that not all provisions of the above civil law are applicable. We can also take into account the provisions on who has the right to grant authorization in the Minister of Health Regulation on Authorization of Medical Measures. In fact, a doctor cannot refuse treatment if her patient under the age of 21 comes in alone. That regulation defines adulthood at the age of 21.

3) CERTAINLY

Provisions regarding 'certainly' are related to legal objects or objects in this case medical service, it is healing effort.

A doctor must try to cure the patient's disease as best as possible. Legally, this usually involves *inspanningverbintennis*, meaning that doctors do not guarantee certainty that the disease will be cured. However, doctors are expected to be able to use their dedication and expertise to assist in healing efforts.

4) HALAL REASONS

In that sense, it is legally recognized. That is, the legal object has a valid basis. Article 1337 BW states that it is prohibited if it is contrary to law, morality or public order. For example, Article 348 of the Criminal Code prohibits doctors from committing the offense of provocative abortion.



Legal doctrines



Legal Doctrine

In a medical dispute where a doctor is under the auspices of a hospital, there is 2 (two) known no-fault doctrines ***doctrine of strict liability*** dan ***doctrine of vicarious liability***. In general, *strict liability* is also called responsibility without fault, no-fault liability, or *liability without fault* because it allows liability to be pursued without the offender having to prove guilt. Therefore, anyone who commits a criminal offense falling under the provisions of the law must or may be punished

A. Strict Liability

- This theory can be interpreted as being able to exercise responsibility without considering the evidence of the responsible factor of economic agents → the action taken harmed the consumer (patient) and caused disability or death
- On this theory, hospitals can be held liable without proving negligence on the part of hospital medical personnel if, for example, they harm a patient by performing certain medical procedures that are not supported by standard equipment.



B. Vicarious liability

- Where one person takes responsibility for another person's misconduct
- This doctrine is essentially borrowed from civil law and applied to criminal law, usually to torts under the *respondeat superior doctrine*. Certain requirements must be met in order to exercise alternate liability.
- An employment relationship must exist, for example, between employer (supervisor) and employee (employee). Crimes committed by employees are related to the scope of work. In addition, this doctrine is also limited to the provision that the boss (company) is only responsible for the misconduct of the employee on the job. This is because the boss (company) has control and authority over the employees, and the profits earned are directly owned by the boss (company).
- Therefore, referring to the proxy liability theory, it can be interpreted that if a doctor makes an error in the performance of his or her duties, the hospital is responsible for that error. This is in accordance with Article 46 of the Republic of Indonesia Law No. 44 of 2009 on Hospitals, which stipulates that hospitals are legally liable for any form of conduct involving negligence or negligent harm in line with a doctor or medical staff working in a hospital.

C. Fiduciary Duty

- The position and liability of a limited liability company. Managing directors not only act as representatives of the company in carrying out their management duties, but also have a duty of loyalty.
- Fiduciary duty is a statutory obligation imposed on persons in a particular relationship, requiring them to act only in the interest of the beneficiaries, rather than in their own interests.

Consumer Protection Law in the Settlement of Medical Disputes in Indonesia

The Republic of Indonesia No. 8 of 1999 on Consumer Protection, patients become a consumer.



- If a hospital, as an businessman who is providing medical services, is found to have committed an act that is harmful to patients, it may be held criminally liable, and criminal prosecution is initiated under Article 61 of the Consumer Law
- Article 62 (3) of the Act also stipulates that in the case of a violation which causes serious injury, serious illness, permanent disability or death, the applicable penalties shall apply. Furthermore, the Consumer Protection Act implicitly stipulates in Article 19 that entrepreneurs are responsible for compensating for damage caused by pollution and/or consumer loss caused by consumption of goods and/or consumers.
- It also adheres to the no-fault liability doctrine contained in services produced or traded.



Consumer protection law in the settlement of medical disputes in Indonesia creates legal uncertainty

1) A medical dispute cannot be equated with the principles of consumer protection law

2) Positionally the business of a hospital and a doctor cannot be declared a 'seller' because the object of giving a doctor's action is far more complex than just buying and selling activities as the consumer protection law regulates.

Medical Dispute Resolution in Indonesia

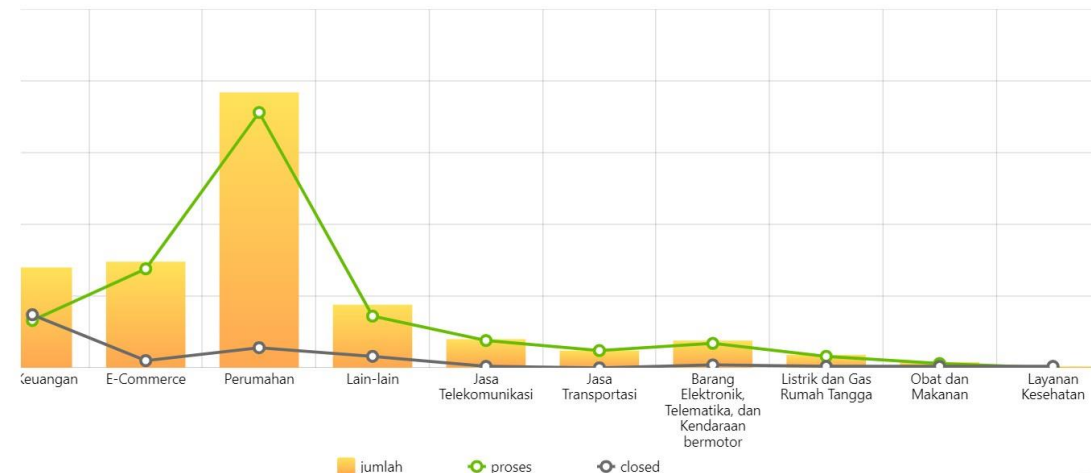


In Indonesia, an integrated mechanism for medical dispute resolution has yet to be found due to too many bodies providing dispute resolution.

- 01 Civil Law - District Court (*Pengadilan Negeri*)
- 02 Criminal Law - District Court (*Pengadilan Negeri*)
- 03 Administrative (ethical) - Medical Ethics Honor Council (MKEK) + Administrative Court (*Pengadilan Tata Usaha Negara*)
- 04 Consumer Protection Law - the Consumer Dispute Settlement Service (*Badan Penyelesaian Sengketa Medis*)

- ❖ Total consumer complaints received in Indonesia (2017 until 1 Juni 2023) :8.607 (<https://bpkn.go.id/>)
- ❖ Total consumer complaints received in Indonesia in 2023 :445 (<https://bpkn.go.id/>)
- ❖ Health services (*layanan kesehatan*) recorded only 1 complaint → ineffective

JUMLAH PENGADUAN KONSUMEN BPKN s/d 01 Juni 2023



Majelis Kehormatan Disiplin Kedokteran Indonesia (MKDKI)

the Indonesian Medical Honor Council

- the Republic of Indonesia Medical Practice Law No. 29 of 2004 (hereinafter referred to as the "Medical Practice Law") stipulates the establishment of the Indonesian Medical Honor Council (MKDKI) in an ethical manner. That's right. , to investigate complaints and make decisions on cases of suspected violations of the Medical Ethics Honor Council (MKEK) established by the Indonesian Medical Association for the Protection of Physician and Dentist Discipline and Health Professional Ethics.
- The MKDKI's mandate is to oversee the implementation of the Code of Medical Ethics and to serve as a forum for judgments and proceedings against physicians who commit violations. The objectives of the establishment of MKDKI include protecting patients, maintaining the quality of doctors, and preserving the honor of medical professionals. The authority of MKDKI is also fundamentally emphasized in Article 1(13) of the Minister of Health Regulation No. 512/MENKES/PER/IV/2007 of the Republic of Indonesia on Practice and Authorization to Practice Medical Practices, which states: is stated. That the MKDKI is a legislative body empowered to decide whether a physician has erred in applying medical discipline or imposing sanctions. Because there are no health service standards that define the basis for determining medical malpractice (medical disputes), decisions in the MKDKI process may be used as first line of evidence in court. In practice, however, there are still some civil lawsuits and police reports that cannot be carried out because the MKDKI has not yet approved the outcome of the sanctions decision.

the MKDKI is a legislative body empowered to decide whether a doctor has erred in applying medical discipline or imposing sanctions. Because there are no health service standards that define the basis for determining medical malpractice (medical disputes), decisions in the MKDKI process may be used as first line of evidence in court. In practice, however, there are still some civil lawsuits and police reports that cannot be carried out because the MKDKI has not yet approved the outcome of the sanctions decision.

Article 66 Paragraph 1 of the Medical Practice

Written Complaint addressed to the Chairman of MKDKI

However, Article 66 (3) emphasized that **the complaint referred to in Article 66 (1) does not invalidate the right to report suspected criminal offenses to the competent authorities and/or seek civil damages in court.**

Conclusion :

The same case can go hand in hand either through the MKDKI or other judicial institutions.

In fact, if the case goes to court without the results of an examination from the MKDKI trial, the case will be in vain because there is no initial court evidence, even though Article 55 paragraph (1) of the Medical Practice Act states that in order to uphold the discipline of doctors and dentists in carrying out medical practice, even though the main function of the MKDKI is to enforce the discipline of doctors and dentists. The confusion in this medical dispute settlement forum has created legal uncertainty for the parties to the dispute.

Complaint Procedures

Integrated Medical Dispute Resolution Institution

- Indonesia must have an institution focused on resolving medical disputes.
- Indonesia can form an institution that focuses on resolving medical disputes only in the realm of litigation and non-litigation



In comparison, the **Korean state presents the Korea Medical Dispute Mediation and Arbitration Agency** in the order of a legal institution that focuses on resolving medical disputes. If the expected settlement cannot be made through the Korean Medical Dispute Mediation and Arbitration Agency, then it can be decided whether the compensation claim needs to be filed in court or not.

Discussion 2



Reduction of liability in the medical field through *Medical Professional Liability Insurance*

- Liability in hospital disputes is a form of responsibility for medical personnel in carrying out medical actions that can result in harm to patients that can occur due to the relationship between doctors and patients. Claims in civil law can be filed in the form of default based on a therapeutic agreement or in the form of an unlawful act as referred to in Article 1365 BW.

“perbuatan melawan hukum didefinisikan sebagai tindakan yang merugikan orang lain dan mengharuskan pelaku yang bertanggung jawab atas kerugian tersebut untuk menggantinya” (an **unlawful act is defined as an act that harms another person and requires the perpetrator who is responsible for the loss to compensate**).

Given the importance of the medical profession which is carried out with high scientific knowledge, it is fitting that protection is given. One of them is through the concept of compensation through insurance, namely Professional Indemnity Insurance. Professional Indemnity Insurance is a form of insurance that provides protection guarantees for professional workers, in this case doctors, in the face of lawsuits from clients, namely patients, for violations of professional duties in carrying out their business and professional activities.

Professional Medical Liability Insurance

Professional medical liability insurance helps pay for losses resulting from medical accidents, negligence, or negligence on the part of medical professionals (doctors) in the provision of professional medical services. Relations with insured persons (doctors) in connection with their participation in negotiations and automated actions such as insults, loss of documents, infringement of intellectual property rights, emergency defense and legal representation costs, and insurance pre-financing Attorney's Fees and Attorney's Fees Associated with Warranty Extension Options.





The Advantages of Professional Liability Insurance



Safety

Assumes the risk of third-party claims in the event of injury or property damage as a result of the negligence of a medical professional, also coverage in the event of third party claims with legal costs such as litigation costs and legal aid.

Worthwhile

The mechanism of professional liability insurance is that a doctor, as a client, can transfer all the risks arising from a patient's claim against him by paying a certain premium to an insurance company. The latter carries out compensation for patients who file lawsuits.

From this, it can be concluded that coverage under the concept of professional liability insurance is limited only to civil disputes requiring compensation and is not available for criminal disputes. Insurance can protect doctors from some potential obligations they may have to fulfill, but it may require doctors to continue paying premiums, or they may be required to complete a claim process. Compliance with the requirements of the doctor cannot be separated from the doctor's professional responsibilities.

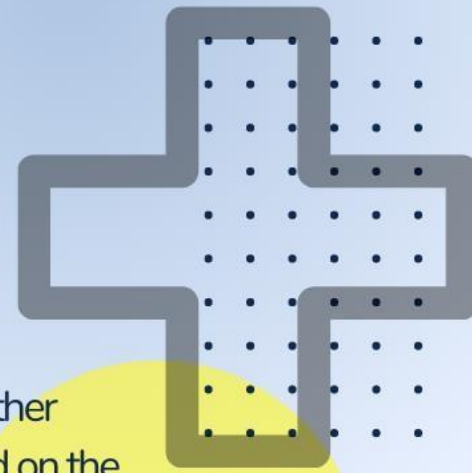
01.

Indonesia needs to amend existing regulations that also considers international instruments so the medical dispute can be more specific and consistent in the future [model medical dispute resolution, the process of filing litigation, bodies empowered to resolve medical dispute, types sanction]

Conclusion

02.

Medical dispute resolution mechanisms need further research by learning forms of responsibility based on the doctrine of strict liability, vicarious liability and fiduciary liability. This goes hand-in-hand with the process of professional liability insurance for third-party claims, as moving away from doctrinal research makes it easier to prove whether a hospital is always liable for each doctors's negligence. Related to the transfer of risk only compensates the patient as the plaintiff, professional liability insurance does not completely exempt the doctor from his professional duties.



THANK YOU

