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A health education law for the community in preventing the lawsuits on medical disputes☆

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Abstract
Objective: This paper aims to provide health law education to the public, in determine a medical action that is detrimental to the patient's category as malpractice.
Method: This research using study of literatures by gathering information or theories relevant to the topic of the problem and related to the material being studied using the normative and empirical health and law studies.
Results: A number of literatures about malpractice and its theory have been reviewed and it turns out the results of the study indicate that there are no criteria or limits specifically agreed upon as a standard for establishing a medical action that is called malpractice or not. This paper aims to provide health law education to the public, in determine a medical action that is detrimental to the patient's category as malpractice.
Conclusion: The results of the study above show that form the legal basis have not been able to explain the process of occurrence that is called medical malpractice. Malpractice theories also only explain the source of the malpractice. Proof of malpractice must been stated by experts, but on the other hand, the verification still faces challenges from the existence of a defense theory for medical personnel who face the demands of malpractice.

Introduction

Keeping and improving health is human need but the guarantee healthy effort does always success. The unfortunate conditions and cases if one's efforts could be unsuccessful or even more caused pain or dangerous health problem. If the result of someone's illness is not due to an element of medical error, it can be said there is no problem.

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However, if the illness comes because of an element of error or negligence of medical treatment, it will become a dilemma, because the purpose of a person's treatment is to seek healing or health improvement. When it happened, then this condition is possible caused of mistakes in acting medical personnel better known as malpractice case.

Malpractice is a problem related to health services also being debated in Indonesia. The amount malpractice cases can be easily accessed regarding the number of complaints from the public that are considered harmed patients in providing action. The increasing quantity of complaints shows people aware of their rights, in an effort to protect themselves from the actions of other parties that possible harm them. By using the services of lawyers, the public began to dare to sue the medical services that were suspected of having committed malpractice.[1] There are at least 10 (ten) legal basis[2] used for proper treatment or health facilities related to medical and or also mention about malpractice. Two of them are as follows. First, Law No. 23 of 1992 concerning health and Secondly, Law Number 29 Year 2004 concerning Medical Practices. Even that the law already exists but the still need of more approach in explain and enforce the malpractice, to be a guidance in educated the medical services of their responsibilities in preventing the law suits.

Methods

This research is a study of literatures by gathering information or theories relevant to the topic of the problem and related to the material being studied using the normative and empirical health and law studies.

Discussion

Malpractice theory

There are three theories that mention the source of malpractice, namely:

a. Contract Violation Theory, the source of malpractice is due to breach of contract. This is based on the principle that legally, a medical person has no obligation to care for someone if between the two there is no contractual relationship between the medical person and the new patient, if there is a contract between the two parties.[3] In connection with the relationship between the patient's contracts with the medical staff, it does not mean that the relationship between the medical staff and the patient always occurs with shared health. In cases where the patient is not self-conscious or in an emergency situation, for example, a person may not give their consent. If this happens, then the approval or contract of the patient's medical personnel can be requested from a third parties, the family of the patient acting on behalf of and representing the interests of the patient.
b. Theory of Deliberate Acts, the second theory that can be used by patients as a basis for suing medical personnel, because malpractice is an intentional tort, which results in someone physically injured (assault and battery). In other words, patients suffer losses. For example, a doctor will operate on the flesh that grows in the left ear, then because he also finds meat growing in the right ear, the doctor operates on the right side intentionally. Thus, the intent does not have to be intentional which results in a bad outcome for the patient, but the important thing is more directed to the violation or intentional acts.[4]
c. Theory of Negligence, states that the source of malpractice is negligence. Negligence that causes the source of actions that are categorized in this malpractice must be proven to exist, besides the negligence in question must be included in the category of gross negligence (culpa lata).

Medical malpractice criteria

From the existing understanding of medical malpractice, all scholars agree to interpret medical malpractice as the fault of medical personnel who for not using knowledge and skill levels in accordance with professional standards which ultimately results in injured or disabled patients or even death. In the medical world, malpractice is divided into 2 (two) parts, namely medical malpractice and pure malpractice. According to Alexandra I. Dewi,[5] parameters or indicators of the occurrence of medical malpractice, if they lack knowledge of medical/health science and technology that are generally accepted among medical workers/health professionals, provide health services below professional standards, commit gross negligence or provide careless services, and carrying out medical workers actions that are against the law.[3]

Furthermore, Alexandra I. Dewi also said that in order to declare that medical malpractice occurs, must cover: there was an action in the sense of doing or not doing it of course who did that was medical/medical personnel; actions in the form of medical measures, diagnosis, therapeutic, and health management; performed on patients; done in violation of law, propriety, decency or other professional principles; done intentionally or carelessly in this case negligent or careless; as well as resulting in wrong actions, pain, injury, disability, physical damage, death and loss.

To demand compensation for medical personnel (medical) due to malpractice, required elements must be fulfilled, namely: there is an obligation for doctors, nurses (medical workers) to injured patients, violations of medical service standards that are commonly used (need an expert witness), the plaintiff has suffered a real loss that can be asked for compensation, and in fact the loss is really caused by substandard actions.

The view of medical malpractice is linked to factors without authority or without competence can be accepted from the point of law of medical administration. A doctor's mistake because he does not have a Practice License (PL) or does not have a Registration Certificate (RC) is basically a violation of administrative law. Legal analysis or legal argumentation related to medical malpractice had various views. The view that comes from general public about doctor's actions, that starts from the consequences that occur to the patient. If the consequences are fatal, it tends to state that the doctor is malpractice. Some also views see a doctor's malpractice in terms of the doctor's obligations being

violated, meaning that the action or action is related to the doctor's obligation.

Nomensen Sinamo quotes Adami Chazawi that there will be no medical malpractice without a violation of the legal obligations held by doctors in the doctor-patient relationship. It is categorized as a doctor malpractice, if there is a legal obligation that is violated or ignored. This view is also, because there can be no medical malpractice in the context of the doctor-patient relationship, meaning that there is a relationship of rights and obligations between the doctor and patient in a therapeutic contract, in which the doctor's legal obligations are violated.

The non-uniform understanding of the problem of medical malpractice from the perspective of the law is not on these 3 (three) main aspects, but rather on the contents and conditions. The diversity of views/perceptions or understandings is also caused by the absence of laws regarding medical malpractice. Until now, medical law in Indonesia has not been able to be formulated independently; also the limits of medical malpractice have not been formulated. According to Chrisdiono MA,[5] that:

> the contents, understandings and limitations have not uniform, but depends on ''from which side'' people look at it.

Therefore, various cases of malpractice after being treated by doctors are not necessarily referred to as doctor malpractice, especially since various laws or government regulations do not explicitly and explicitly mention the term malpractice doctor or medical malpractice. In Law No. 29 of 2004 concerning doctors practice, it does not contain provisions concerning medical malpractice. In Article 66 of Law (1) the Act only states:

> ''Anyone who knows or has an interest being harmed by the actions of a doctor or dentist in carrying out medical practice, can make a written complaint to the head of the Indonesian Medical Disciplinary Board (MKDKI).

The norms from this article only provide a legal basis of reporting doctors to professional organizations, if there are indications of doctor actions that cause harm. So, article 66 is not a legal basis for claiming compensation for the actions of doctors, surely this article only has meaning from the point of view of medical administration law.

While article 58 paragraph (1) of Law No. 36 of 2009 concerning health, formulates more clearly the rights of patients to claim compensation due to errors or negligence in the health services they receive, but this article 58 paragraph 1 does not explain what the meaning and contents are so that the criteria for errors or omissions in health services still are unclear.

Similar provisions are also contained in article 77 of Law No. 36 of 2014 concerning medical personnel, which states ''every recipient of health services who feel disadvantaged due to errors or negligence of medical personnel can request compensation in accordance with statutory provisions.

Adami Chazawi[5] as saying the 3 laws above are not enough to provide knowledge, let alone be a guide (guidance) regarding the contents of the definition of medical malpractice, only the patient's right to claim compensation resulting from negligence or doctor's mistake. In medical understand medical malpractice according to the views, terms of understanding and contents as well as the legal consequences for the perpetrators, it must fully understand the contents and conditions contained in the 3 main aspects of medical malpractice mentioned above. Nomensen Sinamo state that actions in medical services that can be seen as medical malpractice on the examination, the method of examination provided, the instrument used in the examination, withdrawing the diagnosis of the results of the examination, the form of therapeutic treatment, and treatment (attitude) avoid the consequences of wrong diagnosis.

In fact, as long as the medical treatment of patients has been done correctly and properly according to professional standards and operational procedure standards and in accordance with the patient's medical needs, but without the expected healing results, it will not give birth to medical malpractice. However, if medical treatment occurs without the expected results (without recovery) or the disease may be more severe, because medical treatment is against medical professional standards or standard operating procedures or actions according to the patient's medical needs, then the doctor is in the medical malpractice case.

Proof of malpractice

The system or theory of proof is varied according to time and place (country).[6] If the medical workers done professional mistake, so it would need a next stage of prove. In criminal malpractice, the proof is based on whether or not the criminal element has been met, so therefore it depends on the type of malpractice that is alleged. In the case of doctors being accused of negligence, where patients treated die, suffer severe or moderate injuries, then what must be proven is the existence of an element of wrong doing which is carried out with a mental attitude in the form of negligence or carelessness.

It is important to understand that not every treatment result that is not in accordance with the patient's expectations is evidence of malpractice as such incidents can also be part of the risk of medical treatment. Misdiagnosis should also not automatically be used as a measure of criminal practice because many factors affect the accuracy of the diagnosis, sometimes some of these factors are beyond the authority of the doctor. Both of these can only be used as suspicions that still have to be proven criminal elements.

If proven guilty, the doctor can be convicted according to the type of criminal offense he committed. In addition, doctors can still be sued through civil justice on the basis of acts against the law (*onrechtmatige daad*). In civil malpractice the proof can be done in two ways, namely direct or indirect. Directly, namely by proving the four elements directly, which consists of elements of the obligation, neglecting obligations, damage to health and a direct relationship between the act of abandoning obligations with health damage.

As for indirectly, by looking for facts based on the doctrine of *res ipsa loquitor* can prove the existence of errors on the part of the doctor. But not all doctor negligence leaves such facts. The doctrine of *res ipsa loquitor* is actually a variant of the 'doctrine of common knowledge', it's just that here is still needed a little help from expert testimony to test whether the facts found can indeed be used as evidence of doctor negligence.

If there are scissors or pliers left in the stomach of the patient undergoing surgery, then the scissors or pliers based on the doctrine of *res ipsa loquitor*, can be used as facts that can indirectly prove the doctor's mistake, because the scissors or pliers cannot be left behind if there is no negligence, scissors or the leftover pliers are under the responsibility of the doctor, the patient is anesthetized, so that it is impossible to contribute to the lagging of these devices. From the description above it can be concluded that the cause of the conflict dispute between the medical workers and the patient is an error or neglect that causes malpractice and results in losses suffered by the patient.

Conclusion

The results of the study above show that form the legal basis have not been able to explain the process of occurrence that is called medical malpractice. Malpractice theories also only explain the source of the malpractice. Proof of malpractice must been stated by experts, but on the other hand, the verification still faces challenges from the existence of a defense theory for medical personnel who face the demands of malpractice. Meanwhile, regarding malpractice criteria, there is no specific agreement as a standard to determine whether a medical action is called malpractice or not. Therefore, today, tomorrow and in the future, in the context of holding doctors or medical workers accountable, as long as there are no criteria that formulate or limit actions to be categorized as medical malpractice, then malpractice lawsuits are need of the burden prove eventually.

Conflict of interest

The authors declare no conflict of interest.

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