ALTERNATIVE DISPUTE RESOLUTION FOR MEDICAL MALPRACTICE BASED ON
RESTORATIVE JUSTICE IN CENTRAL JAVA

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ABSTRACT

Dynamics of law matter is getting complicated. The law is expected to provide justice for the victims often cannot meet the wishes of the parties, particularly for the victims. Therefore, in the current development, emerging process a criminal settlement cases based on restorative justice. The type of settlement, offered is by confronted the parties, offender, victim and sometimes involve the role of the community. The resolution of criminal cases that are offered known as penal mediation. Penal mediation based on restorative justice aims to bring justice by involving the parties (victims and offenders) and the community, so that it can satisfy the desired sense of fairness. The resolution of criminal cases is no longer merely procedural but more on the substance of resolution desired by the parties. Based on the results of the research were ever writers do, there are medical malpractice case resolution based on restorative justice with the aim to provide justice for the parties. It is certainly very exciting to peeled thoroughly in the article that contains some of the research results and the analysis in terms of the law related to the settlement of the matter outside of court proceedings by penal mediation thus achieved the agreement between the parties.

Key words: Alternative Dispute Resolution; Medical Malpractice, Restorative Justice

INTRODUCTION

Health is one of the things that is absolutely needed by humans. Ironically, the ins and outs of the medical world are one of the few known by people in the world. The group of medical professionals and their expertise seems to be the only knowledge that is exclusive to them. This condition occurs, even when the patients are faced with a situation concerning their safety. Even though patients have the right to know everything related to medical treatment and the drugs they consumed. This is related to the consequences of costs, side effects, and the long-term effects of these consumption.

At the beginning of the establishment of the Indonesian Health Consumer Empowerment Foundation (YPKKI) in 1998, there were few complaints about alleged malpractice. But nowadays, there are increasingly widespread patients or families who complain about dissatisfaction with the services. In fact, from Puskesmas to international-class hospitals with modern buildings and facilities are not spared from complaints of alleged malpractice carried out by their health workers. However, complaints through the YPKKI are only a small part of the various cases revealed. Suspected cases of malpractices in medicine often occur. Many cases of alleged malpractice carried out by doctors are reported in various printed and electronic media, including the cases of Siamese twins Angi and Angelina, the case of Andreas from Jakarta and Zaki from Slawi, Central Java who are now physically disabled due to alleged malpractice. The case of malpractice with the defendant Dr. Wida Parama Astiti, who had received the Supreme Court's ruling, had committed malpractice so that the 3-year-old patient died and was sentenced to 10 months in prison because of Dr. Wida's action taking medical action by asking the nurse to inject KCL 12.5 ml without supervising the actions of the nurse and caused the patient (Deva) to convulse until she died. Another case that just happened in 2019, the alleged medical malpractice to a TransJakarta driver named Ira Puspita Rahayu who then sent a letter to the Indonesian Health Minister Nila F Moeloek over stomach burns that arose after undergoing appendicitis surgery at a hospital in the area of Bekasi (http://www.tribunnews.com/metropolitas).

Of the many alleged malpractice cases, only a few arrived at the court. Until March 2011, MKDKI had handled 127 complaints of disciplinary violations committed by doctors or dentists. Of this amount, about 80 percent was due to miscommunication between doctors and patients. The most common are general practitioners (48 cases), surgeons (33 cases), obstetricians and obstetricians (20 cases), pediatricians (11 cases), internists (10 case), pulmonary physician (4 cases), neurologist (4 cases), anesthesiologist (4 cases), ophthalmologist (3 cases), cardiologist (3 cases), radiologist (2 cases), and 1 case each by a psychiatrist, ENT specialist and dermatologist and genitals and 10 dentists. (http://www.depkes.go.id). In medical malpractice, in addition to aspects of civil law, it is also embedded in it the aspects of criminal law.

Settlement of medical malpractice cases that have criminal consequences is not an easy matter. The lack of clarity of the legislation governing medical malpractice and the difficulties in its proof due to lack of medical science caused many suspected malpractice cases that could not be resolved properly. Therefore, it is quite interesting to discuss further related to Alternative Dispute Resolution in the settlement of the medical malpractice case that applies the principle of restorative justice.

ANALYSIS AND DISCUSSION

Basically, the happening of malpractice is preceded by the relationship between doctors and patients. The relationship or attachment of doctors and patients is one of the things that allows the occurrence of demands for malpractice. In this relationship arises the rights and the obligations of each party both to the doctor and the patient. The relationship between the doctors and the patients is in the form of a business agreement, an inspiring intervention so that the doctor does not guarantee the success of the treatment. In addition, it also does not guarantee the side effects arising from medical actions taken. Provided that before a medical action is
taken, the doctor has fulfilled his/her obligation by providing complete information to the patient as well as the possibility of the risks which are then outlined in the Medical Action Agreement (Pertindik), or also called the Informed Consent (IC).

Different between Medical malpractice and Negligence

The Medic and Negligence Malpractice are two different things. Negligence includes medical malpractice, but in medical malpractice is not only a negligence aspect but also because of an element of intent. Medical malpractice is more widely interpreted, not only negligence but also includes the meaning of intentionally (dolus) and violating the law. Therefore, medical malpractice can be distinguished from the actions taken: (Yunanto et al, 2010: 37-38)

1. Intentionally (dolus) which is prohibited by law or malpractice in the narrow sense, for example by intentionally doing abortion without justifiable medical indications, doing euthanasia, giving a false statement. Actions are carried out consciously and the purpose of the action has been directed at the consequences, although knowing or should know that his actions are contrary to the law.

2. Negligence or culpa, for example abandoned the treatment of patients because they forgot or treated carelessly so that the patient got worse and later died. In this case, there is no motive or purpose to cause the consequences that occur because of the consequences caused by the negligence of his will.

Whereas according to Fred Ameln, a doctor does malpractice if he does a wrong-doing medical treatment or he does not take care of medication or patient care enough (neglect the patient by giving not or not enough care to the patient). (http://www.detik.com/berita/ 15 June 2004).

From the aspect of criminal law, the most important element in distinguishing between medical malpractice and medical risk is the element of doctor negligence. For the accountability of medical malpractice, it must be proven as a serious negligence that has a relationship with the result of the death or disability of the patient. If there is no proof, it means that the death or disability of the patient is not as a result of malpractice, but is a medical risk that may occur or because of the course of the disease (Benhard, 2017: 141-142).

Dispute Resolution for Medical malpractice

According to Munir Fuady (2005: 2-3), malpractice is any medical action performed by a doctor or people under his supervision, or a provider of health services performed on his patients, both in terms of diagnosis, therapeutic and management of diseases carried out in violation of the law. , consideration, decency and professional principles are either done intentionally or because they are careless which causes wrong acts of pain, injury, disability, body damage, death and other losses that cause the doctor or nurse to be responsible both administratively, civilly and criminal.

Related to the case of medical malpractice, not all cases are resolved through a litigation route or using the court as the result of resolving cases both civil and criminal. Based on the results of the research the author has done, that sometimes the settlement of cases using mediation is preferred by the parties (victims and perpetrators) which in this case the perpetrators are usually doctors from a hospital agency. The completion of using this mediation is expected to be able to provide maximum results in accordance with the expectations of both parties (perpetrators and victims), especially the fulfillment of the wishes or interests of the victims.

According to some informants met by researchers, there has never been a judge's decision regarding the case of medical malpractice in the city of Semarang. As the informant remembers, Mr. Banowo, S.H. as Chairman of the Civil Registry Clerk and also the statement of Mr. Kayat as the Head of Criminal Subdivision at the Semarang District Court Office, tried a medical malpractice case but had not come to the verification stage yet. By inviting expert witnesses from Indonesian Medical Association (IDI), there was a peace agreement during the trial process between the patient as the malpractice victim and the doctor as the party sued for alleged medical malpractice.

Based on information from informants, for malpractice cases the difficulty comes from verification in court because it relates to the presence of expert witnesses from the medical profession itself, besides that there is also an Informed Consent which causes all actions taken by doctors has been in accordance with the Standard Operating Procedure (SOP) that has been determined and has received approval from the patient or his/her family.

Dispute Resolution to Medical Malpractice Based on Restorative Justice

Negligence committed by health personnel in terms of carrying out the profession can be completed based on the provisions of Article 29 of Law Number 36 of 2009 on Health which reads: "In the event that health workers are suspected of negligence in carrying out their profession, such negligence must be resolved first through mediation". Based on these provisions, if there is an alleged medical malpractice then before proceeding to the settlement of a case through a court, then the mediation way is taken by appointing a mediator agreed upon by the parties. Settlement of cases through a mediation process is expected to bring together parties who are litigating in the hope that the case can be completed with a win-win solution. Through the mediation process, patients will get compensation as desired, while health workers will not be contaminated with the good name associated with the hospital agency where the health worker is under the protection. The advantage of settling suspected medical malpractice cases through mediation can save time and money when compared to a settlement through a court.
Based on the results of research conducted by the authors, the data on medical malpractice victims obtained from law firm in Semarang City, precisely at Law firm Harsuka, S.H., the authors found data on medical malpractice advocacy or legal defense. In short, medical malpractice cases handled by the Lawyer and Advocate Office of Harsuka, S.H. and colleagues, which is a patient who was treated at one of the hospitals in Semarang City. However, because he/she was not getting better, the patient decided to seek treatment at a Singapore Hospital. At Singapore hospital, doctors knew there were bandages left behind in the patient's body. Knowing this, the doctor told the family and they did not accept the actions of the doctor who worked in a Semarang hospital where the patient was treated before being taken to Singapore. The patient and family finally filed the case accompanied by a lawyer.

Institutionally, the hospital acknowledged that there was an error in the medical services of one of the employees' doctor. Afraid that medical malpractice is known to the public and has an impact on the loss of public trust in the hospital, finally the hospital and the doctor offered patient through their lawyers to resolve the medical malpractice with family by means of deliberation to reach consensus.

While at the Attorney and Advocate Office Soetrisno, S.H. and colleagues had handled 2 (two) medical malpractice patients. First, the settlement was done through mediation (peace). Malpractice problems arose when the patient was pregnant and it was known that the baby's weight reached 5 kg but the doctor did not take medical action according to medical standards of handling pregnant people and the births were naturally not by caesar so that the elderly organ damaged to the nerves of her eyes and the children were born dead.

For the case, the patient through his lawyer carried out a lawsuit but finally mediated by deliberation to reach a consensus in the form of civil compensation. For lawyers, medical malpractice legal process always has difficulties in obtaining legal protection and justice because of the difficulties in proving at the trial. This is because in malpractice, law enforcement is based on the testimony of expert witnesses, while the expert's statement itself is taken from the Indonesian Medical Association (IDM) which in its capacity as the Honorary Council of Medical Ethics (MKEK). The ones who know the medical standards the most are experts from MKEK themselves so that scientifically the most reliable truth is from expert witnesses themselves. Even though morally and institutionally fellow doctors tend to protect fellow professions. Therefore, the case of malpractice in its proving stage is like entering a glass room.

An action or deed taken by a doctor is classified as medical malpractice and can enter the domain of criminal law if it fulfills the requirements in 3 (three) aspects, namely: (Yunanto et al., 2010: 48)

1. Doctor's inner condition; is a deliberate or culpa condition in the form of an act in doing medical action.
2. Requirements in medical treatment are deviant.
3. Terms regarding the consequences, is a condition about the emergence of a loss for the health or life of the patient.

Regarding to the conditions, of course the fulfillment of the terms of the inner attitude is not easy to prove. This makes wrong actions can be justified for certain reasons, such as consideration and justification of general logic such as existing medical facts as a result of examination from the point of consideration is justified to draw the conclusion of the diagnosis. Of course, this can only be understood by doctors who understand that it is really related to the standard operating procedure of every action taken by a doctor.

In another case, Mr. Soetrisno, S.H. said until the time of proof, he had difficulties because the panel of judges in legal considerations had emphasized the testimony of expert witnesses who at that time were presented from the MKEK of Semarang City. In his testimony, the witness from MKEK explained that what was done by the doctor was in accordance with medical service standards. While the judge himself to give a decision must be based on evidence (expert witnesses) added with the conviction of the judge. So that the judge had difficulty in giving decisions related to medical malpractice.

In Indonesia, the completion of medical malpractice refers to Article 66 of Law Number 29 of 2004 on Medical Practice. Based on Article 66 of the Medical Practice Law, patients or families who feel aggrieved as a result of medical practice, whether it is the action of a doctor or dentist, can report in writing to the Chairperson of the Indonesian Medical Disciplinary Board (MKDKI). This step is a form of settlement through non-litigation way. However, if the patients or families of the affected consider medical malpractice to occur, then it is possible to go through litigation way both civil and criminal law. However, the settlement of suspected cases of medical malpractice through litigation is not an easy matter. Law enforcement officials are faced with the reality of the science limitations relating to the medical world. So that it still needs information from professional doctors, which is certainly not an easy thing to be able to find faults from the actions taken by a doctor.

In connection with the existence of MKDKI itself in this matter have the authority to handle public complaints to examine and to give decisions on complaints relating to the discipline of doctors and dentists. This institution will determine whether there are errors made by doctors and dentists in the application of medical disciplines.

Patient’s dissatisfaction with the doctor's actions that resulted in violating the law can also be resolved with the ADR institution. ADR institution is an institution that offers a win-win solution between warring parties, between patients and doctors or dentists, can be through conciliation, mediation, facilitation and negotiation, carried out outside the court, with or without compensation. In addition to through the ADR institution, MKDKI can also forward the complaints which after being examined will be determined whether a case includes an ethical violation that will be resolved through MKEK or a violation of the law which will then be brought to court. (Yunanto et al., 2010: 87)
Through Alternative Dispute Resolution, the court is not the only dispute resolution institution, but there are other institutions that are recognized for their existence and roles in the settlement of criminal cases commonly known as penal mediation. Penal Mediation has a good concept in solving cases in enforcing legal protection for victims. Penal Mediation becomes one of the access to justice that can be taken by victims and perpetrators, where the parties can create the expected demands so that benefits can be realized (Wulandari, 2018: 92).

Another factor is the difficulty of the medical malpractice legal process because before there is a legal relationship between medical services, there is an agreement between the doctor and the patient regarding the medical action to be taken. Under the Medical Practice Law, medical records are no longer a doctor's secret and must be explained to patients. This will be established as a form of transparency in medical services, but in other aspects this is a legal protection for doctors in medical services and legal protection when problems arise later.

The absence of complaints from medical malpractice services in consumer protection agencies and the Semarang City Health Service and also in the Court Office, there are two possibilities, the first one is that people do not know the legal rights are theirs when getting medical services. Second, the public knows their rights but does not know the procedure.

The difficulty of proving the case of medical malpractice opens the way for settlement through non-litigation way which has even been explicitly applied in Alternative Dispute Resolution institutions that have been offered in resolving the medical malpractice case by prioritizing the interests of the parties, namely patients or families of victims in this case the doctor or dentist in a hospital institution. With settlement through peaceful means, which is related to criminal cases commonly known as penal mediation. Settlement through penal mediation based on restorative justice which aims to restore the situation of the parties as before the occurrence of a crime, is more likely to provide justice, especially for victims by involving litigant parties.

The involvement of litigant parties (victims, perpetrators, and affected communities) is an important way to resolve cases to achieve justice desired by the parties. This shows signs of restorative justice. Each party, the perpetrator must acknowledge his actions and be responsible for the losses that have been caused. As for victims, this is a process that provides opportunities for victims to meet with perpetrator in a safe and structured settings, involved in settlement of cases with the help of mediators (Sharma, 2017: 41).

A method with the form of a circle of peace is a method of communication and problem solving derived from Aboriginal and Navajo traditions as a community-based way to resolve conflicts. The use of restorative justice as a means of repairing damage to victims and the community is understood as social activity. The circle of peace is considered the most inclusive process in realizing restorative justice (Gumz, Edward J. and Cynthia L. Grant, 2009: 122).

Regarding the rights of patients or families of patients with medical malpractice to obtain compensation, regulated in Article 58 paragraph (1) of Law Number 36 of 2009 on Health which reads in full: “Everyone has the right to claim compensation for someone, health personnel, and / or health providers that cause losses due to errors or omissions in the health services they receive “. Based on this provision, there is an opportunity for the aggrieved party to demand compensation from health workers or health providers in this case a hospital or health clinic. However, in the event that there is no negligence, in which the actions of health workers have been carried out in accordance with the Standard Operational Procedure, compensation claims cannot be made as regulated in Article 58 paragraph (2) of Law Number 36 of 2009 on Health: “Compensation as referred to in paragraph (1) does not apply to health workers who take action to save lives or prevent someone's disability in an emergency”.

As for the legal protection for medical malpractice victims also contained in Article 32 letter q and Article 46 of Law No.44 of 2009 on Hospitals. The provisions of Article 32 letter q regulate the patient's rights which read in full: “Every patient has the right to sue and / or sue the Hospital if the Hospital is suspected of providing services that are not in accordance with the standards either civil or criminal”. Furthermore, the provisions of Article 46 regulate the legal liability of the Hospital, read in full: “The hospital is legally responsible for all losses incurred for negligence committed by health workers in the Hospital”.

From several cases obtained through the results of research that have been analyzed, it can be seen that for resolved cases of medical malpractice using alternative dispute resolution by making peace between the parties in order to create restorative justice that balances the parties and restores the condition of the parties, especially patients or families of patients who have become a victim.

**CONCLUSION**

The alleged occurrence of medical malpractice is not an easy thing to prove and often faces significant obstacles, among others in the fulfillment of the right to compensation for patients as medical malpractice victims, difficulties in obtaining medical records, as well as proof of trial due to limited knowledge of official’s law enforcer. This is due to the absence of provisions that clearly regulate medical malpractice and provide clear differences with negligence, even in the Medical Practice Law, the Criminal Code and the Health Act. Therefore, alternative dispute resolution (penal mediation) is expected to be able to provide the justice desired by each party (patients or families of patients who are victims as well as doctors and hospital agencies). By using the concept of restorative justice, justice for patients or families who are victims of medical malpractice cases specifically related to criminal law can be well fulfilled and can be returned as the situation before the case of medical malpractice especially related to criminal law as described in the previous discussion.
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