

INFORMED CONSENT AS LEGAL LIABILITY *MAFIA* HEALTH MALPRACTICE

Arief Suryono **, Syifa Rana Tsary

Abstract-- *The study aims to examine the conduct of doctors or medical personnel who commit mistakes or omissions in malpractice and harm the patient, as well as the form of justice stipulated by the law to the patient malpractice victims if informed consent has been agreed upon in advance. This research uses normative methods by examining library material or secondary data. The formulation of the problem that is examined is the reason why informed consent can be made a protector for doctors who do malpractice, and the principle of justice in informed consent for malpractice patients. The results of this research are doctors or medical personnel considered malpractice when conducting medical actions that violate standard service and operational standards of the procedure. However, it is difficult to prove the doctor's fault and negligence, the patient or the patient's family has consented to informed consent with any consequences that will occur. Informed consent has not yet upheld the principle of justice for malpractice patients because the patient's legal efforts to protect its rights are not easy to do and Informed consent instead of providing legal immunity to doctors or medical personnel.*

Keywords: *Medical Malpractice; Informed Consent; Justice for patients.*

I. INTRODUCTION

The doctor's performance is governed by Law Number 29 of 2004 on Medical Practice (hereinafter referred to as LAW on medical practice). The medical practice ACT is considered as a medical law that rests on 2 (two) human rights, namely; The right to health care and the right to self-determination (or Zelf-Bechikkingsrecht) [1]. Meanwhile, article 1 figure (1) Law on Medical practice explains that: "Medical practice is a series of activities performed by doctors and dentists on patients in conducting health efforts." In addition to Law on medical practice, there is also Law Number 36 of 2009 about Health (hereinafter referred to as health law). Article 1 digit (6) Health Law reads: "Health workers are any people who devote themselves in the field of health and have the knowledge and/or skills through education in the health field that for a particular type requires the authority to conduct health efforts." [2]

**Arief Suryono, Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia. Email: Corresponding: ariefsuryono@staff.uns.ac.id
Syifa Rana Tsary, Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia.

The health profession has the privilege, one of which is made informed consent or statement of willingness to carry out medical action used as a shield of health professions to escape the responsibilities of the profession. [3] Informed consent is a standard of service that must exist before the medical action is done because with this agreement the parties have to bind themselves so that the rights and obligations arise, on the other hand also serves as a basis to prosecute if there is a medical action beyond what has been agreed. [4] In the medical world, patient safety is the main thing for Doctors (*Solus Aegroti Salus suprema Lex*), which is his obligation to comply with the Hippocrates oath as a guideline. In principle, the actions of the doctor will always result in 2 (two) possibilities; Succeeded and did not succeed. The inability of a physician to perform medical action is caused by *Overmacht* (state of force) and the implementation of medical actions that do not conform to professional standards (Prima Maharani Putri, Patria Bayu Murdi, 2019). The success is usually caused by errors or omissions of the patient's body or soul (in the Medical/legal world called *Malpractice*).[5]

According to Black's Law Dictionary, malpractice is every wrong attitude of the act, the lack of skill in the size of an unnatural level. The term is commonly used in response to doctors, lawyers, and accountants. Failure to provide professional service and to perform on the size of skill level and reasonable intelligence in the community by the average peer friend of the profession, resulting in injury, loss or damage to the recipient of the service that tends to trust them. Including the wrong attitude of professional acts, lack of unnatural skills or lack of prudence or legal obligations, bad practices, illegal or immoral attitudes *Malpractice* is professional conduct that contradicts Code of Ethics and prevailing laws and regulations, either intentional or due to negligence resulting in the loss or death of a person. In Indonesia, cases of medical malpractice often occur and patients as victims of malpractice who are harmed can claim their rights, in the form of damages or ask the criminal liability of the physician concerned.[6]

Prosecution of damages against doctors who do malpractice is not easy, because there are no specific rules that can be used as a guideline for determining and tackling medical malpractice in Indonesia. For example, Law on medical practice does not regulate clearly about malpractice sanctions and only governs administrative and criminal sanctions. This has an impact on the difficulty of demanding justice for patients with malpractice victims because doctors have a position that tends to be protected. Based on the explanation above, this study examines the problem of informed consent as a patron of Doctor malpractice, as well as the principle of justice in informed consent for patients with malpractice victims. The method used is normative, which is research conducted by examining the library material or secondary data. [7] This research also uses methods of data collection in the form of literature studies, by reading and studying the primary legal material, which is the law and secondary legal materials, namely from some literature, books, and other documents to examine the problems in this research.[8]

II. RESULTS AND FINDING

Informed Consent as Protective Physician Malpractice

The relationship between doctors and patients is juridical as a treaty. Doctors bind themselves and are obliged to provide services, while the patient is entitled to receive service. Thus there are 2 (two) traits in the Relationship Agreement, namely a consensual agreement, between doctors and patients on the provision of healthcare services and the existence of trust (fiduciary), because of the relationship of the contract based on mutual Trust Trust one another. [9] It is as stated in article 39 Law on Medical Practice: "The practice of

medicine is conducted based on an agreement between a physician or a dentist with the patient to maintain health, disease prevention, health enhancement, disease treatment, and health recovery." [10]

The relationship between doctors and patients can also be said as a therapeutic transaction. Therapeutic transactions are an agreement to find and determine the most appropriate healing therapy for patients.[11] Therapeutic transactions are distinguished in 2 (two) categories:[11] *Resultaats Verbintenis*, i.e. alliance based on performance or work result. Doctors can promise their work in patients, for example; The dentist makes a denture, an orthopedic expert doctor makes the foot Prothesa, the Doctor of cosmetic surgeons turn the nose into an angular or other body part shape. *Inspannings Verbintenis*, namely the alliance based on the effort/effort/endeavors maximum to achieve a result. The patient gives a full "Trust" that the physician will be empowered, endeavoring, to the fullest extent possible to cure it (fiduciary relationship, trust, *Vertrouwen*). The doctor does not promise the patient must recover. If the doctor promises or guarantees the cure of the patient, then the juridical *inspanning Sverbintenis* turns into a *verbintenis resultaats*. [12]

To obtain the consent of the patient, the doctor or medical personnel will provide informed consent, i.e. permission or statement of the patient given freely, consciously and rationally after he got the information understood from the doctor about his illness.[13] Informed consent arises because the relationship between doctors and patients through therapeutic transactions that give rise to the rights and obligations of each Party, namely the provider (medical providers) and recipients of services (medical receivers) that are binding, must be respected both parties. The doctor is obliged to conduct health care in the form of diagnosis, treatment and other medical actions best according to the knowledge of the profession, while the patient has the right to determine the treatment or other medical action that will be performed. [14]

The explanation of article 44 paragraph (1) Law on the practice of Medicine explains the ministry, namely: "The standard of Service" is a guideline to be followed by a physician or dentist in conducting medical practice. "The following are the obligations of doctors mentioned in article 51 Law on Medical Practice: "Doctors or dentists in carrying out medical practice have an obligation:

- a. Provide medical services under professional standards and standards of operational procedures and medical needs of patients;
- b. Refer patients to other doctors or dentists who have better skills or abilities, if unable to perform an examination or treatment;
- c. Keep Confidential everything he knows about the patient, even after the patient dies;
- d. Conduct emergency assistance based on the eminent, unless he believes that someone else is on duty and able to do so;
- e. To increase science and follow the development of medical science or dentistry.

Informed consent can be verbal and written approval.[15] Informed consent is a statement of approval to perform a signed medical action of the patient. The signing is through an explanation procedure of what action to take, the level of success, the possible risks and costs to be borne. The explanation process is done orally, as the technical implementation is reported in medical records. Furthermore, the patient or his family must sign a statement that contains a willingness to take medical action, realize the risks and will not sue the Doctor who cared for him (Leonard, T., Pakpahan, E.F., Heriyatia, Karjoko, L., Handayani, I.G.A.K.R., 2020). The understanding of medical records is a file containing notes and documents on the identity of the patient, examination, treatment, actions, and other services to the patient, on the health services. The following

statement of Indonesian Physician Association (IDI) on the provisions of informed consent stated in PB IDI decree Number 319/PB/A4/88:

- a. The healthy and spiritually mature man has the right to fully determine what to do with his body. Doctors do not have the right to conduct medical actions contrary to the patient's will, even for the benefit of patients themselves.
- b. All medical action (diagnostic, therapeutic or palliative) requires informed consent orally or in writing.
- c. Any medical action that has substantial risk, requiring the written consent of the patient signed after the patient has obtained adequate information about the need for the medical action in question and risk.
- d. For actions not included in Item 3, verbal approval or silent attitude is required.
- e. Information about medical action should be provided to the patient, whether requested or not requested by the patient. Withhold information may not unless the doctor assesses that the information may harm the patient's health interests. In this case, the doctor can provide information to the patient's closest family. In providing information to the closest family to the patient, the presence of a nurse/another paramedic as a witness is important.
- f. The contents of the information include the advantages and disadvantages of planned medical action, whether diagnostic, therapeutic or palliative. Information is usually given orally, but may also be in writing (relating to informed consent).

The existence of informed consent is aimed to make the doctor more cautious in providing medical service information to the patient and minimize the occurrence of malpractice due to the big responsibility that it thinks. Malpractice is a deed done by people who have normal credibility, quality, and psychiatric condition. When doing actions that are not under the rules of play that have determined the ethics of the profession of medicine as a standard of conduct in conducting medical services that must be implemented and adhered to, or regulations, then can be held accountable according to the prevailing rules. [16] Actions that do not comply with those standart procedures may result in errors or omissions. Mistakes in medical malpractice occur because doctors do something that should not be done. While negligence occurs because the doctor does not do what it should do. Both lead to malpractice actions that could result in disability or death. However, although fatal, if there is no element of omission or error, the doctor cannot be blamed. For the medical profession, dispute resolution is deemed better if resolved through a profession court, not a general court. [17]

Medical practice is based on the therapeutic transaction of inspanning Verbenenis i.e. doctors must carry out their obligations according to SP and SOP. If the doctor is a tort for violating that law on the medical practice, so adverse patients then the doctor is considered malpractice. Conversely, if the doctor has executed the obligation of the law on the medical practices, but, the result is not as expected for example; resulting in disability or death of the patient, then the doctor can not be said malpractice. Thus, the existence of informed consent is used as a shield or a protector that can free the doctor or medical personnel from a lawsuit or claim on accountability. [18]

Principles of Justice in Informed Consent for Malpractice Victim Patients

All law enforcement officers should be able to implement their obligations to enforce applicable law under their intentions and objectives, one of which is to create justice for the community. According to Hans Kelsen, a rule is fair if it is applied to all cases that according to its content, this rule should be applied. The most important thing for the license is that the application of the law applies to all people. [19] The established laws are expected to fulfill the rights and obligations of each person. Patients who come to physicians or medical personnel, other than entitled to health care, are also entitled to other matters stipulated in article 52 Law on Medical Practice.

In principle, the basic rights of patients in the health sector are the right of health care and the right of self-determination, which means that every human being has the right to health service and entitled to his own body. The doctor cannot force the patient to be surgical or other medical action, and the patient has the right to reject any action against his body. *Salus Aegroti Suprema Lex*, meaning human power is the highest is regulating itself. Therefore, before carrying out any medical action, the doctor or medical personnel must provide informed consent in advance. [19]

Informed consent is a unilateral statement of the patient allowing the doctor to perform the necessary medical action to restore the condition better. However, if carefully viewed all of the provisions stated in informed consent only govern the patient's obligations, including a willingness to accept a risk without requiring a physician to take care of him. It is a statement contrary to the sense of fairness because of the trust that has been given by the patient, should the doctor or other medical personnel carry out the trust with full responsibility. Informed consent is applied in writing necessary on medical actions that have a high risk, whereas Informed consent can be done orally on medical action with a small risk. The patient was in a weak position because he was in a sick state, unable to think clearly, worried and was about what would happen to him. Therefore, it is reasonably legal to protect patients based on humanitarian considerations, so that risks and failures are the responsibility of patients and families, as well as other physicians or medical personnel who take care of them. [20]

If informed consent is made only to protect the doctor under the pretext of what is happening at the green table has become the destiny of God is unfair, be it good results and the patient recovering from his illness, or bad results resulting in disability or even death patients. Should informed consent be made as fair as possible, containing the doctor's and patients' rights and obligations, including in the case of dispute resolution, in the event of malpractice. Doctors are considered malpractice if the patient or family filed a lawsuit or lawsuit because the doctor violates the statutory regulations as well as the doctor's professional Code of ethics. As for article 29 the health law mentions that: "If health workers allegedly commit negligence in carrying out their profession, such negligence must be resolved first by mediation." [21]

The patient can sue and sue the Doctor who is doing negligence and error if it can be proved. The sanctioned sanctions are administrative, civil and criminal sanctions, even claims to professional organizations, in the form of temporary dismissal or revocation of permits and excluded from membership of the Organization. This can be addressed to the police, attorney, health office or Honorary Council of Indonesian medical Discipline in writing or orally. (Sari, S.D., Handayani, I.G.A.K.R., Pujiyono, 2019). Decree of Health Minister of Republic of Indonesia Number 756/MEN. KES/SK/VI/2004 on the preparation for the liberalization of trade and services in the health sector stated that healthcare services include business. The World Trade Organisation (WTO) also

includes hospitals, doctors, midwives, and nurses as business actors. Therefore, patients with medical malpractice victims are considered as consumers and can obtain legal protection as stipulated in article 19 paragraph (1) of Law Number 8 of 1999 on consumer protection stating: "Actors are responsible for compensation for damage, pollution, and/or loss of consumers due to consumer goods and/or services produced or traded."

Lawsuits for malpractice victims through civil litigation arise in violation of the rules of the Civil Code:

- a. The agreed therapeutic agreement is not performed or in the event of default, subject to article 1239 Civil Code: "Each alliance to do something, or not to do something if the debt does not fulfill its obligations, get the solution in the obligation to provide the reimbursement, loss, and interest."
- b. Act against the law, governed by article 1365 Civil Code: "Any unlawful deed, which brings harm to another, obliges the person who wronged in issuing the loss, reimburse the damages."
- c. Negligence or unkindness in doing or acting, subject to article 1366 Civil Code: "Everyone is responsible not only for damages caused by his actions but also for damages caused by negligence or lack of prudence"

Meanwhile, demands for a physician's malpractice are proposed to the criminal realm, as it is from the doctor's actions resulting in death, severe injuries, pain, or wounds that lead to illness, or wounds that inhibit duties and livelihoods.[22] These are the provisions of the Criminal Code which may be proposed as a claim to a physician who conducts malpractice. If a patient or a family of malpractice victims will file a claim or lawsuit, it must have strong evidence of the negligence or misconduct of the doctor or other medical personnel. While at the trial, the judge is in no way aware of the medical world and what happens during the implementation of health care, except the medical judges at the Special Court of the profession. Moreover, the patient or family has also given consent through informed consent stating that the medical action performed according to the law. [23]

If the Doctor is excusable, trying, endeavoring to the fullest according to Law on the medical practices, but the patient can not recover even death, then the doctor can not blame. This is further strengthened by the witnesses presented during the *Persiandangan* that could be derived from medical circles and is a member of the same professional organization as the doctor or medical personnel demanded of it. The existence of a code of conduct requires all members to respect and respect its associates so that the witnesses will be less likely to testify honestly and say that the colleague made mistakes or omissions. Therefore, the patient's informed consent does not contain justice and legal protection for him, as the way the patient's efforts demand and sue the physician for the malpractice he does, the doctor remains untouched by the law. Informed consent should be informed and provided to patients, containing the balanced rights and obligations for patients and physicians. If the doctor commits a mistake or omission that leads to malpractice, then the doctor can be held accountable for his actions that have been detrimental to the patient. It is expected that the Government is to establish rules of law as a guideline on medical malpractice, including provisions on informed consent which provide a position as fair as for doctors and patients.

III. CONCLUSION

The practice of medicine is generally based on the therapeutic transactions of *inspanning Verbentenis* i.e. doctors must make maximum effort/effort/endeavor to achieve a result and according to professional standards or operational standards of the procedure. The patient is informed of the medical action to be performed and the

impact of the action. If the patient agrees, the patient signs informed consent. Doctors are considered malpractice when violating law on the medical practices are detrimental to the patient. However, it is difficult to prove a doctor's mistake or omission, the patient already stated agree with all the possibilities that occur. Therefore, if there is a claim or claim, then the doctor will take shelter behind the informed consent. Informed consent still does not uphold the principle of justice for patients with malpractice victims, because the agreement is made unilaterally by doctors and health facilities, so that patients have only two options, accept or reject health services that will be given. If it turns out that bad happens to the patient, doctors who care for it can be prosecuted, civil or criminal. However, the fact that the patient's legal efforts to protect his rights is not that easy since the patient has consented to informed consent and the consequences that will be received during the healthcare service.

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