

Mediation as a Medical Dispute Settlement Tool at the Hospital

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Abstract--*This study aims to determine the mediation efforts in resolving medical disputes in hospitals and to find out the legal protection of doctors in the occurrence of medical disputes in hospitals. This research is empirical normative research. Qualified data as primary data and secondary data. Primary data is obtained from respondents / sources related to mediation as a medical dispute resolution tool. The secondary data is obtained by collecting various literature. Then the data is analyzed qualitatively. The results of this study indicate that: (1) mediation has the role of preserving living traditions among Indonesian people. Indonesian culture prioritizes deliberation to reach an agreement (consensus) in order to resolve peacefully, even though it must sacrifice personal rights and interests. (2) In any legal relationship between health workers and patients they contain the rights and obligations of each party, the form from law to rights and obligations occur by mediating the events, circumstances or actions of people who are legally connected with the consequences. The rights and obligations of health workers in health law in article 53, namely health workers are entitled to obtain legal protection in carrying out their duties in accordance with their profession and health workers in carrying out their duties are obliged to meet professional standards and respect the rights of patients.*

Key words--*Mediation, Medical Dispute*

I. INTRODUCTION

Ideally, the hospital as a health services provider could do the excellent services. It showed that the hospital could support the patient's satisfaction, and it will be felt if they reach the needs. But if not, they will be disappointed. The needs and expectation toward fast services, low fees, expert and friendly health staffs and communicative are their wishes, but a few the hospital only could perform it. In Indonesian Big Dictionary mentioned that hospital is the place or building that providing the health care and services. So, hospital is the place that doing the health activities such as health services. Health is human right and one of prosperity that should be performed based on Pancasila And Undang Undang Dasar 1945 and Policy number 36/ 2009 regarding health. According to health policy, health is healthy condition as a physical, mental, spiritual, and social in productive life.

The relationship between doctor/hospital and patient is medical services relationship or medical activities between health provider and health receiver. In past, the relationship is that the patient only as a object and doctor who know well about the patient (father know best) and it called vertical pattern. And nowadays, that relationship become balance because both of them have each right and obligation that should fulfilled.

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The Law no 29/2004 regarding medical practices mentioned that medical lawsuit is the lawsuit that happen due to ignored of patient needs by doctor, dentist who have practicing responsible. Otherhands, medical lawsuit is lawsuit between user of health services and provider (patient and doctor/hospital). Most problem happen such as patient's complaint about miscommunication (medical lawsuit).

Medical lawsuit solution between patient and doctor/hospital is mentioned in Law number 29/2004 section 66 about medical practices is" the person who know or ignored by doctor or dentist in medical services could write complaint toward Indonesia Physicians Associaton Board". But, in Law number 36/2009 about health mentioned that medical lawsuit solution by mediation first according gto section 29 in Law number 36/2009 about health mentioned " The health worker who suspected ignore in their profession and it should hadled by mediation first".

II. METHODOLOGY

This research is empirical law research that done in DR. Wahidin Sudirohusodo hospital. And analysis done by descriptive qualitative method such as descript, explain the things that have correlation with it. Based on interview and referrences study found, processing and qualitative analysed, have descriptive data.

Mediation in Medical Lawsuit Solution

Besed on research that done on March,29 2019 found data of patient's complaint during 2018 about 46 cases which in soon rponce by hospital side. By interview with chief of community law DR. Wahidin Sudirohusodo said " during 2018, about 46 cases of patient's complaint toward services procedures of doctors, nurses, medical/non medical instruments, medicines and bed availability".

Mediator have no authority to solve the lawsuit, but only try to help them solve the problems. In lawsuit show that one side have more power than others, and mediator only balancing it. The agreement could reach only by mediation, if both side understanding each other and have real solution by mediator guidance.

Mediator try to over the problems to them even regarding the compensation type or special solution to guarantee that it will not be happen anymore. The benefit by mediation way is simple procedures, effective, cheep, and the solution still in controlling by both sides. But, mediation is not panacea to solve distortion of litigation paradigm and not suitable for all or certain lawsuit.

Lawsuit solving will be functioning well by mediation if;

- a. Both sides have balance bergaining power.
- b. Both sides have concern for next relationship
- c. There are many problems for trade off
- d. Need short time or urgently to solve
- e. Both sides have no deep and long conflict
- f. If both sides have many supporter, but they do not have much hoping
- g. Maintaining of the right not more important than to solve the urgent problems.

- h. If both sides in litigation process, the other's impotence such as lawyer and guarantor will not be more better than mediation.

If using mediation to solve the medical lawsuit between patient and doctor, that will be good process unless pure criminal process such as sexual abuse, medical confidentiality reporting, abortion and severe ignorance, false report, deception, etc. Those are because of based principle of mediation in lawsuit solving, Fatahillah Syukur said;

- a. Voluntary principle called mediation is personel based of voluntary method of them to discuss without any force, threat or pressure from anyone.
- b. Self Determination Principle, is about voluntary principle. It means everyone have wishes freely. Everyone could do selfdecline from mediation process eventhough it must be done, but lawyer or mediator could not force everyone to keep mediation process or force them in peace agreement.
- c. Confidentiality Principle is confidential mediation process which all information become confidential unless for both sides and mediator. Those information could not be used and mediator have no right become a witness in court session.
- d. Good Faith Principle is willingness of both sides in mediation process without extend time or got own benefit to solve in win-win solution.
- e. Ground Rules Principle by mediator involving, everyone should have agreement, and have to obey the rules before mediation process on.
- f. Private Meetings Principle/Procedure, mediator and everyone have right to discuss separately with one of them (kaukus) when in certain situation such as have no solution, to keep calm, etc. This is a specific mediation that could not find in other method,

Solving the problem with litigation way in medical lawsuit, both side will be lose. Especially if the medical malpractice criteria to be found by negligence or no expert.

According to Bambang Purnomo, that general specification of malpractice of medical negligence have 4 criteria;

- a. Duty is obigation of doctor or health worker in implementation of their knowledge and skills to perform health services such as treatment based on profession standarization to reduce the blaming if all procedures based on it.
- b. Dereliction of the Duty is which dereliction must be widely definition, because have many opinion regarding it but all are correct. It need other approval arguments between colleague based on update medical knowledge.
- c. Damage is the damage is not only one side but both should pay the cost. If prevention cost more lower than damage cost, it means have negligence.
- d. Direct Causal Relationship (Causal or Direct Causation) between dereliction and obigation toward lose, it means each case should have direct relationship as a causal toward caused, which causal relationship and direct causal could not suitable in all health intervention.

There are some elements in malpractice of health profession must be measured;

1. Availability of health profession standarization based on health knowledge.
2. Availability of health risk that need specialist
3. Availability of informed consent based on national and international standarization.
4. Availability of complete medical record and must keep medical confidential.
5. Availability of negligence in duty with 4D- Negligence such as Duty, Dereliction of Duty, Direct Causation, Damage.
6. Availability of apologise reason or correction by the action.

If doing comparison with other alternative of lawsuit solving, mediation have integrative way which low cost process, have more time, not focussing who the winner or the loser, who correct or false, but with win-win solution.

Otherhands, mediation only focussing for the family or patient's aims as the main agreement. And other important thing in mediation is mediator itself.

Medical lawsuit is unique lawsuit that need special skill of mediator. Experience mediator in bussiness conflict may be not expert mediator in medical lawsuit.

III. RESULT

A mediator in medical lawsuit should not a doctor or experience man in law, but the person who not only have experience about medical and law, have knowledge about it. One of mediator function is as a educator. For this function, mediator should understand about aspiration, wiliness, work procedures, barrier of them and the problems itself. As a translator, mediator could interpret the solving problem in language that understant by them. So, if mediator do not have knowledge, law and understanding in medical terms, they will difficult to interpret the doctor's explanation to patient or family. Lastly, mediator sholud understanding well all the steps and mediation process. Mediator must have capability to arrange the aims, willingness and needs of the people who have conflict to reach the agreement by detail, simple, short and clear words toward law and written it in agreement paper. Improving of human resource toward mediator to be done comprehensive, continously and consistant. We need perform the successful of Japan and Singapore in mediation process, and formulated it according to type and community culture.

Increasing of community respect toward law, lawyer, or court to be improved. The excellent instruments or tools is called condition sine quo non could available for fast court, simple and low cost during court process according to Law.

Mediation process in maedical lawsuit consist of;

1. Pre mediation

In this phase, they need mediator to arrange the mediation. When conflict happen between patient/family and health worker, actually health worker begging mediation first but sometimes from patient/family first. Before mediation, patient/family asked for general law solution.

This phase, mediator take initiative to offer or conduct one of them whether patient/family or health worker to approach them without court while conflict going on. It based on law number 36/2014 section 29 about health and law number 30/1999 about arbitrase and alternative of lawsuit solving.

Solving of medical lawsuit to be solved by personel approaching first and socialisation of mediation as a one of solution. So, the aims is to make familiar a mediation toward community in solving way. If both sides are agree for mediation way, a mediator must be free from anything especially lawsuit itself.

The mediator should understand about them and try to find out the first information regarding the main causes of lawsuit, the solving pattern to make them more understand how to solve it. Need more explanation about mediation, the steps of process, the benefit of mediation. In this phase, a mediator should arrange some question to stimulate them for thinking about the future and should not think about what the causing of conflict. He should make them to commit for better future, arrange some question regarding the effect of conflict, how to solve it, and what will be happen if the conflict not solved well for family, relatives, or others and entire community.

In arranging the meeting, mediator should explain who people will attend it. It is very important that they know each other who will be in. Sometimes one of them wants to meet the mediator before meeting to convey some complaints. If it is happen, mediator should tell about it to others, but not the matters and ask them whether have something to be explained to make mediation easier.

2. Mediation Phase

In this phase have 6 stpes to be done by mediator;

1. Mediator opening
2. Explanation of matter by them
3. Collecting of information
4. Problem identification
5. Discussion type and results
6. Agreements

3. Implementation

This step which all of them only perform what the agreements written. And they should commit all the matters mention during mediation.

4. Mediation Fault

Mediator must explain the mediation is fault if;

1. One of or both of them or representative person did not attend the meeting in twice based on schedule.
2. Do not attend the meeting in twice without reason after receiving invitation letter. After 40 days working day, all of them enable to solve, the conflict will extend to court.
3. Doctor Law Protection toward medical lawsuit in Hospital

Human social relationship is collaboration and various of conflict inside. It also happen in health field especially medical treatment that given by doctor/dentist toward patient. Nowadays so many conflict happen between doctor and patient that need fair solution toward them. Based on interview toward Cheaf of Law and Community of DR. Wahidin Sudirohusodo regarding the hospital's response toward patient's complaints' "We always response all the patient's complaints based on procedures while doing the services.

According to Indonesian Dictionary, Lawsuit is the matter that caused different opinion, fighting, arguing, or even conflict as well. (Pusat Bahasa Departemen Pendidikan Nasional, Jakarta; Balai Pustaka 2005). The causes of medical lawsuit due to unsatisfy of patient toward medical treatment that given by doctors. And it will be more because of have suspected of negligence and patient have some health problems.

Various of problems in health field need law aspect to arrange and solve it, such as;

1. Conflict between doctor and patient
2. Conflict object is curing treatment that given by doctor
3. Lose person in medical conflict is patient even having harm like difable/ wound or death.
4. Harm of patient due to negligence or fault by doctor.

According to section 29, law number 36/2014 regarding health worker, which health worker having negligence and it should solved by mediation. Besides, mediation also done by MKDKI (Majelis Kehormatan Disiplin Dokter Indonesia) as a organization that protect the dentist/doctor's dignity in performing the medical profession. This organization is autonom council of KKI (Konsil Kedokteran Indonesia) based on section 1, line 14 of law number 29/2004 about doctor's parctice. The responsible of MKDKI is arranging the rules and policies in practicing of medical knowledge while providing medical treatment by dentist/doctors. Thus, MKDKI is recommended organization by KKI to handle all the dentidt/doctor's diciplin problems and such as punishment by mediation solving way.

Dicipline infraction is infraction toward rules or konwledge performances policies that divided into;

1. Uncompotent doctor practicing implementation.
2. Unproper performance of professional job and responsibility toward patient
3. Bad attitude that influence to medical profesional dignity.

MKDKI could handle the infraction suspect case of doctor/dentist dicipline based on Konsil Kedokteran Indonesia decision No.17/KKI/KEP/VIII/2006 about maintenance of Medical Profession Diciplines, and it also written regarding implementation of medical practicing even in Indonesia based on Policy of KKI No. 18/KKI/KEP/2006.

Mediation could be pre phase in solving the medical lawsuit because of;

1. Curing process that done by doctor is maximum treatment (inspanningverbintenis)
2. Health field as a prove of medical malpractice is not easy but need to learn and analysed first (adverse event)
3. Not all adverse event same with medical malpractice.

Correlation of mediation with safety treatment toward patient such as;

1. Patient safety is the effort to prevent of adverse event due to health services and quality improvement. It is not only person focussing, tools or department only, but interaction of system and components.
2. Adverse event is not automatically as a prove of medical malpractice with consist of;
 - a. Duty
 - b. Dereliction of duty
 - c. Damage
 - d. Direct causation between damage and dereliction of duty
 - e. Wrong diagnose is not medical malpractice as long as dentist/doctor decide the diagnose that mention in law No 29/2004 about medical practice.

Based on explanation above, medical lawsuit is specific law categories and solved in special way too. Mediation become first step in solving medical lawsuit even for arbitrase, MKDKI and IDI as a main medical profession organisation that have authority be mediator to solve medical lawsuit in health services.

In Law, Medical lawsuit same meaning with malpractice. Actually malpractice is not only for health profesion, but for all. Thus, generally it use in abroad and associated in health profesion. Malpractice is any prfessional misconduct or unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice or illegal or immoral conduct.

Malpractice meaning have no same till now, due to unproper management of malpractice in law, solving way of it also unclear and still have no standarization of health profesion services. All because of complicated health problems regarding differentiate of services toward each person, technology tools in each department, and capability of doctor and other health workers.

Unproper legal standarization of health profesion services, different policies in many hospital, make difficult in determining between malpractice and negligence, acident and failed. And also hardly to aprove the malpractice if patient always changes for hospital admission. So, Hospital Medical Commitee is the one who have right to determine the denial of health profesion standarisation services. Medical Commitee know well about doctor community and other health workers and technology availability. In real,each health corps have sentimental to protect their own profesion that could hard in objectivity assessment, thus the conflict will be kept in freezer and no solving anymore. This condition will support patient's opinion that health worker have law insusceptible and always seek refuge in health worker etic to release the responsible.

In other hands, health colleague said that patient have strong position to complain the health worker about wrong treatment and failed patient's demanding. Actually, that complaint become character assassination toward health worker itself, because not all negative result due to mistaken or negligence of health worker. Mostly patient with their lawyer have published all the matter as a maplpractice, but actually that need approval and process before going to court. It concluded that determining the case as a malpractice or not, need special approaching of proportional medical or health and law knowledge. In this situation, have negative defensive professional practice that reducing the dinamic and creativity of professional.

In solving problem/lawsuit could be used two ways such as litigation (court) and non litigation. We know that court process will spend time and high cost because conventional court system against, always only one side as a winner and other loser.

Besides it, have hard critics toward court institution in doing their overload job, slow motion, wasting time, costly, and low response toward public sense and have complicated technical. So, rechecking of case and effectiveness of court system, and opinion "civil procedures was neither efficient nor fair become more problem for court institution itself.

Based on facts above, have idea to solve the lawsuit/conflict about suspect of malpractice need win-win solution by mediation way. Mediation process is one of Alternative Dispute Resolution (ADR), it is solving way by meeting discussion to achieve the deal agreements in both sides by mediator intervention. Mediation could be done court or neither with certified mediator. Mediator is neutral person who help them in meeting discussion method to solve the problem without forcing, disconnected of solving.

There are 12 steps following for better mediation process;

1. Good relationship with both sides people
2. Choose good strategic in guidance of mediation process
3. Collecting and analyses the information of lawsuit/conflict background
4. Arranging the mediation planning
5. Built the trust and collaboration between them
6. Starting mediation meeting
7. Formulating the problem and arranging the agenda
8. Exposing the hiding information/needs
9. Stimulating chosen of conflict solving
10. Analysing chosen of conflict solving
11. The end bargaining process
12. Achieve formal agreements

There are two types of meeting in mediation process; positional based bargaining and interest based bargaining. Positional based bargaining always started by solution. Both sides people propose the solution and bargaining each other till they achieve good solution and accepted. Otherwise, the meeting based on interest started by built the good relationship. Both of them learning and teaching each other to solve their conflict based on the interest each. In this strategic, both of them is solution maker. The aim is to achieve the agreement based on their interest, determined between people and problems, be softly to people and be strongly to problems, built the trust in condition and situation, focussing to interest not position, prevent from bottom line, take a maximum choice, intensive discussion of choice, agreements should focus in both interest, used the argumentation, reason and open mind toward the the reason of opposite mediator.

Mediation in medical lawsuit/conflict of medical profession as a oldest profession in the world have taken words to provide humanitarian services. Actually doctor and patient relationship based on trust even need more special analyses. Untrust toward doctor signed by questioning for their knowledge, capability, attitude, and how to manage the patient. Study in USA shown that mostly doctor demanded by patient with some unrelated case to quality services had given. Terminology changed from patient to consumer or client have transformed the concept of relationship between doctor and patient to “services” relationship concept. And sometimes that relationship could not placed the best interest for patient as a main interest due to imbalance of power and knowledge among them. Information from any media could influences the decision that taken by doctor.

Otherwise, medical knowledge is not promise the result but maximum effort have done. And because of intellectual influences deconstruction roots that meaning of ‘good’ in patient perspective could influence profession autonom. In past, ‘good’ or benefit is a domain of doctor in paternalistic situation. Nowadays, the meaning of ‘good’ is “good action”, in Medical context become patient’s benefit by considered wishes of patient itself. Based on written above, actually mediation process is exact effort in solving the conflict/lawsuit between doctor and patient unless pure criminal case such as sexual abuse, expose of medical confidential, abortion and severe negligence, false statement, deception, etc. Problem solving by litigation way will make lose for both sides. And having difficulties to fulfil medical malpractice criteria, such as:

1. Duty have to be done
2. Dereliction/breach of that duty
3. Have damage
4. Have direct causal relationship between breach of that duty and damage.

Medical mishap/ misadventure/accident is the things that could be understood and apologized, unfault and punishment. Accident is opposite of mistake, accident have unfault and unpreventable, unpredictable before. Criminal case is about the act against law without differentiate whether private law, public law, including criminal itself. Definition of “starbaarfet” use criminal terminology. Criminal is prohibited action by law and followed by certain punishment. Law responsibility toward malpractice in Hospital taken by organisation that established by (government, private, company, factory, association). One of principal each organisation is authority, so it need leader who have high responsible and authority. Another positive aspect of mediation way is have a good doctor and patient relationship. Because both of them have same interest, but in each context and responsibility. Otherwise, mediation have weakness such as limited of juridical support toward process and results, including implementation of peace agreement that achieved. Process and result that achieved could not be forced. Besides that, Perma (according to Indonesian Law) is uncompulsory, tied and it will be directive only. So, need law to organize the mediation for law assurance.

IV. CONCLUSION

Eventhough the Medical lawsuit/conflict solving by mediation have some strengthness, but it is not the exact effort to solve the all conflict type. Thus, need special method of mediation based on Indonesian culture, because the mediation could preservation it directly. Indonesian culture keep priority for meeting discussion to achieve the

agreement for peace, even it will be sacrificed for their own rights and interest. In every law relationship between health worker and patient have each rights and responsible. The fact of law become rights and responsibility by accident, situation, or action that have correlation with results.

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