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## CIVIL LIABILITY OF A DOCTOR IN MALPRACTICE CASES

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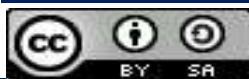
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### ABSTRACT

*The right to health is part of human rights guaranteed in the constitution. The state is obliged to strive for the fulfillment of these rights through the provision of health services. Concerning health services, the existence of doctors plays an important role. Juridically the medical profession has been regulated in “Law Number 29 of 2004 concerning the Medical Profession”. Based on the law, the relationship between doctor and patient is based on trust. In carrying out their duties, of course, doctors must hold fast to prioritizing the health of patients. However, there are malpractice actions that occur, causing harm to the patient. Juridically this is certainly a problem regarding the responsibility of doctors to patients. Therefore, in this paper, the author discusses how doctors are responsible for malpractice actions from the perspective of civil law. The method used in this paper is normative juridical with a statutory and conceptual approach.*

### KEYWORDS

*Doctor, Malpractice, Liability*



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## INTRODUCTION

Healthy life is the dream of every human being without exception. Health is one of the basic needs and is the right of everyone. From a legal perspective, the right to health is part of human rights. The recognition of these rights is contained in the "Article 25 of the Universal Declaration of Human Rights" which reads:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food, clothing, shelter and health care and social service needs, and the right to be protected in circumstances of unemployment, illness, disability, widowhood, old age or lack of livelihood. in a state beyond his control (Assembly, 1948).”

The existence of provisions in the declaration of human rights in 1948 has shown that there is international recognition of the right of every human being to

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health and life. The embodiment of the declaration is then regulated in the "International Covenant on Economic, Social, and Cultural Rights in Article 12 paragraph (1)". Of course, this raises obligations for every country bound by the Covenant, including Indonesia. The government has ratified the Covenant through "Law No. 11 of 2005 concerning Amendment to the International Covenant on Economic, Social, and Cultural Rights".

However, when examined in national law, in essence "the 1945 Constitution of the Republic of Indonesia" ("1945 Constitution of the Republic of Indonesia") in "Article 28H paragraph (1)". The constitution as *staatsfundamentalnorm* certainly provides a logical consequence of the emergence of the state's responsibility to guarantee the fulfillment of these rights. When examined further, in the concept of a welfare state and democracy, the government has an obligation to guarantee the fulfillment of the rights of every citizen, including regarding health (Indriati et al., 2022).

Before discussing further, it is necessary to examine the definition of health itself. Referring to "Article 1 point 1 of Law Number 36 of 2009 concerning Health" the definition of health is:

“Health is a healthy state, both physically, mentally, spiritually and socially which enables everyone to live productively socially and economically (No, 36 C.E.)”

Based on this definition, it is known that health is a state of prime not only physically, but also mentally, spiritually and socially so that everyone can have the ability to live productively. Paul Hunt argued that the right to health is a fundamental right which obliges the state to take a series of actions to realize the fulfillment of this right. A concrete step for the state to fulfill this right is to provide health services for everyone without exception (Mardiansyah, 2018).

Talking about health services certainly cannot be separated from doctors as one of the professions that is closely related to health services. Bahder John stated that doctors in carrying out their profession are based on the principle of being serious, not hurting, injuring, harming, and respecting the rights of every person as a patient. The position of doctors in providing health services is certainly the main guard to ensure the availability of proper and qualified health services for everyone's health.

As a profession that provides health services to the community as a patient, it certainly creates a legal relationship between the two. Theoretically, the relationship between doctor and patient is known as relationship therapeutic. The therapeutic relationship is the relationship between the patient and the doctor concerned with health services provided by doctors and accepted by the patient (Mannas, 2018). The initial concept of the doctor-patient relationship started from the paternalistic pattern of parent-child relationships. This gives the doctor a higher position than the patient (Supriyatin, 2018).

This imbalance in position between doctor and patient only applies in a socio-psychological perspective. However, from a legal perspective, the relationship between the two is equal as a legal subject. The basis for the emergence of this relationship is the trust of the patient to help treat the medical problems he is suffering from. When the patient has given his trust and there is approval from

the doctor to take a series of actions in accordance with his competence, a legal relationship immediately appears (Nuraeni et al., 2020).

“Article 39 of Law Number 29 of 2004 concerning the Medical Profession” has been stated regarding the relationship between patient and doctor as follows:

“Medical practice is organized based on an agreement between a doctor or dentist and a patient in an effort to maintain health, prevent disease, improve health, treat disease and restore health”

Although a doctor in carrying out his duties and obligations must prioritize the health of the patient, in practice there are several cases of malpractice that have occurred in Indonesia. In October 2015 a toddler died due to an injection by a doctor (Fikri, 10 C.E.). One of the malpractice cases that has been decided by the "Indonesian Medical Disciplinary Council" ("MDKI") and the Central Jakarta District Court is the case of Siti Chomsatun for the malpractice act of "dr. Tantiyo Setiyowati, M.H., Kes" and "dr. Fredy Melke Komalig, M.K.M." and Kramat Hospital 128. The Central Jakarta District Court through "decision number 287/Pdt.G/2017/PN.Jkt.Pst" has decided the defendant to pay compensation in the amount of Rp.17,620,933.00 ("seventeen million six hundred and two twenty thousand nine hundred and thirty three") (Subarsyah, n.d.).

This paper will discuss about civil liability for malpractice acts committed by doctors. The discussion regarding this responsibility is of course preceded by an analysis of the legal relationship between doctors and patients based on civil law both theoretically and the "Civil Code" (KUHPperdata). Then the writer analyze accountability in the event of malpractice by doctors.

The method used in this research is normative juridical by analyzing secondary data. Normative juridical research is known as doctrinal legal research because it is based on legal principles, principles and theories. The approach in this paper is the legislation by examining the laws and regulations relating to the civil liability of doctors for malpractice acts and the conceptual approach by examining the concept of civil liability (Marzuki, 2017).

## **RESEARCH METHOD**

In this study, the writing method will be described so that it can be known what technical writing is used in the research that the writer did. The method is a series of activities regarding procedures for collecting, processing, analyzing and constructing data. This research writing method is a normative method. Normative legal writing, also called library research (Library Research), is research conducted by means of Civil Liability of a Doctor in Medical Malpractice Cases *Lex Jurnalica* Volume 12 Number 2, August 2015 144 tracing or analyzing and analyzing library materials or ready-to-use document materials. In legal research, this form is known as Legal Research, often also called doctrinal legal research, and library research or document studies, such as laws, books related to the problem.

## RESULT AND DISCUSSION

Before discussing further about the civil liability of doctors for an act of malpractice, it is necessary to examine the legal relationship between lecturers and patients in a civil law perspective. It aims to determine the accountability that applies if the malpractice occurs.

Referring to Book III of the Civil Code in civil law, the terms engagement and agreement are known, both of which provide a legal relationship between parties. Engagement in Dutch refers to the term *verbintenis* which is then interpreted variously by legal experts in Indonesia. Subekti and Sudikno define *verbintennis* as an engagement in which there is an attachment to achievement between 2 (two) parties. Sri Soedewi and Kusumadi define *verbintenis* as a contract in which the relationship between the parties is based on accounts payable. On the other hand, Wirjono Projodikoro defines it as an agreement, although there is another term which is then interpreted as an agreement, namely *overeenkomst*. R. Setiawan interprets the engagement as a legal relationship in the field of assets that gives rights to one party and obligations to the other party (Joko et al., 2020).

Based on "Article 1233 of the Civil Code" it is stated that an engagement can arise due to an agreement or law. In this case, it is necessary to describe in advance the engagement arising from the agreement and the law as follows:

1. Engagement by agreement. The provisions of "Article 1313 of the Civil Code" state that an agreement is an act between two or more people who bind themselves to each other. According to Subekti, because the agreement is an act that binds itself, then immediately an engagement arises for the relationship of the parties.
2. Engagement due to law. Referring to "Article 1352 of the Civil Code" agreements due to law are divided into agreements that occur only because of laws and arise from laws due to human actions.
3. 3. Engagement due to good deeds according to or against the law. This is in accordance with the provisions of "Article 1353 of the Civil Code".

Etymologically, if the agreement is connected with the term in Dutch, it refers to *overeenkomst* which means to agree or agree. In the context of an agreement, of course, the word agreement is the basis for the emergence of promises between one person and another. Referring to the provisions of "Article 1313 of the Civil Code" an agreement is defined as an act of binding oneself between one person or more with another person. The elements of the agreement as stipulated in the article namely: (Zakiyah, 2022)

1. Deeds. This element means that there is an act committed between 2 (two) or more people and the said act has legal consequences.
2. Bind itself between one or more people with other people. This means that between the two parties there is conformity of the will to bind themselves to the actions committed. The implication of this self-binding is the emergence of rights and obligations that must be carried out as achievements by both parties.

If it is extended again, there are at least 5 (five) elements in an agreement namely: (Santoso, 2021)

1. Legal rules. The point of this is that in an agreement, especially in Indonesia, due to the existence of legal pluralism, it creates a variety of legal norms. First, the rule of contract law based on positive law which must be done in writing. Both based on customary law and customary agreements can be made orally based on applicable customary law.
2. persons. In the sense that people are of course divided into 2 (two) namely humans as *natuurlijke* persons and legal entities as *rechtspersoon*. The person in an agreement must be a legal subject. If a human being, he must be competent (*bekwaamheid*) and in a legal entity then the representative must be authorized (*bevoegheid*).
3. Agreed. The word agreement can be interpreted as a conformity of will between one party and another.
4. Achievements. The emergence of achievements is a consequence of the agreement between the two parties so as to give birth to rights and obligations for each party. Achievements can be in the form of giving something, doing something, or not doing something.
5. Legal consequences. An agreement made by the parties certainly has legal consequences and if the achievement is not fulfilled then one party can sue the party that does not fulfill its achievements.

Arrangements regarding agreements have been regulated as in "Book III of the Civil Code". In the Civil Code, there are several agreements that have been regulated, namely buying and selling, leasing, exchanging goods, safekeeping, lending, borrowing, granting of power of attorney, debt guarantees, and peace. Agreements that have been regulated in the Civil Code are known as named agreements (*nominaat*). On the other hand, as a result of legal developments and because "Book III of the Civil Code" adheres to an open legal system in line with the principle of freedom of contract in "Article 1338 of the Civil Code", it is possible for the existence of other agreements outside the provisions of the Civil Code. Various agreements that exist outside of the "Perdata Code" namely lease, lease purchase, franchise, credit, agency, joint venture, and various other agreements which are categorized as anonymous agreements (*innominaat*) (Sonatra & Pratama, 2020)

Whereas as previously stated that the therapeutic relationship is a term of lecturer and patient attachment. The elements of this relationship are: (Roihanah, 2019)

1. Agreement between doctor and patient. As previously explained, the basis for an agreement between patient and doctor is based on trust. When a patient has chosen a doctor at a hospital or private practice, in this act he has shown his trust and agrees to entrust his health services.
2. Informed consent. This means that after an explanation from the doctor regarding a series of medical actions to be carried out and the patient agrees to these actions.

Thus, when looking at the therapeutic relationship, it can be seen that there is a contractual relationship between the doctor and the patient. In practice, it can be exemplified, for example, there are patients who want to do plastic surgery and between the patient and the doctor have mutually agreed on the plastic surgery

procedure. This agreement has become the basis of a contractual relationship as long as it is based on "Article 1320 of the Civil Code". Regarding the form of the contract in the "Code of Civil Code" does not absolutely determine the form of the agreement. This is in line with the principle of freedom of contract that applies in contract law.

If as a result of the operation there is a loss suffered by the patient, for example the discrepancy between the results of the operation and what was promised by the doctor, then in this case a default has occurred. With regard to defaults, according to Subekti, there are 4 (four) categories, namely not fulfilling achievements at all, fulfilling achievements but being late, fulfilling achievements but are wrong, or doing something that was agreed in the agreement which was prohibited. If there is a discrepancy between agreed performance and practice, then in this case a default has occurred.

On the other hand, the legal relationship between doctors and patients can occur without being preceded by an agreement. For example, if a patient has an accident and suffers from an emergency, in this case the doctor is obliged to take a series of actions because of his profession. This obligation arises on the basis of voluntary and statutory orders. In the "Civil Code" this act is known as *zaakwarneming*. If the doctor does not take a series of actions to save the patient then an unlawful act (PMH) has occurred. Another example, for example, in carrying out an operation is that medical equipment is left in the patient's body due to negligence, in this case there is negligence.

If there is negligence or denial of obligations carried out by a doctor, it can be said that PMH has occurred. The definition of PMH can be classified into two, namely in a simple and broad sense. In simple terms, PMH is an act that violates the rights of other people and their legal obligations or, more simply, an act that violates the provisions of laws and regulations. In a broader sense PMH is not only an act that violates laws and regulations, but also an active and/or passive act that violates the rights of others on the basis of prudence in the social life of society.

That in order to analyze whether an act can be called PMH, it is necessary to first examine the elements that form the construction of the unlawful act itself. The elements are namely: (Yuniarlin, 2012)

1. There is an act. The meaning of action is not only related to active actions but also passive actions.
2. The act is against the law. Regarding against the law, it is not only interpreted as an act contrary to positive legal norms, but also if the act violates other people's rights, decency, and/or the principle of prudence.
3. There is an error. That an act that violates the law is due to an error. The error was either intentional or negligent and there is no reason to deny the error.
4. There is a loss. That as a result of the act of resistance, namely the loss suffered by another person.
5. The existence of causality. This fifth element emphasizes that there must be a correlation between actions and losses to postulate whether someone has committed an unlawful act.

With regard to liability if a malpractice action occurs based on a prior agreement so that there is a contractual relationship, the patient who suffers a loss

can file a default lawsuit. Patients can claim compensation for losses suffered as a result of malpractice actions committed by the doctor. Then refer to "Article 1371 of the Civil Code" if due to carelessness, you can also be asked for compensation for the default (Sinaga, 2018).

In the concept of responsibility for unlawful acts, of course the first thing that must be fulfilled is the five elements as explained earlier. The "Perdata Code" has regulated the model of accountability for PMH, namely liability on the basis of mistakes namely in "Article 1365 of the Civil Code", responsibility on the basis of negligence as "Article 1366 of the Civil Code", and absolute responsibility refers to "Article 1367 of the Civil Code" (Asvatham & Purwani, 2020).

### CONCLUSION

Based on the author's explanation, it can be concluded that the relationship between doctor and patient is a therapeutic relationship that can arise either because of approval or because of a doctor's obligation to his profession. A contractual relationship can arise if the action taken by a doctor is based on an agreement with the patient. Meanwhile, engagements that arise when doctors perform their obligations to treat emergency patients are due to their legal obligations based on statutory orders. The two models of relationship will certainly have different consequences when there is malpractice. In a relationship that arises because of an agreement between a doctor and a patient, if a loss occurs, a lawsuit can be filed in default. On the other hand, if a doctor does not carry out his legal obligations and causes harm to the patient, an unlawful act has occurred. Therefore, in the case of malpractice, the doctor is responsible for the losses suffered by the patient. However, it is necessary to examine the basis of the relationship that becomes the engagement for doctors and patients.

### REFERENCES

- Assembly, U. N. G. (1948). Universal Declaration Of Human Rights. *Un General Assembly*, 302(2), 14–25.
- Asvatham, N. K. H. P. D., & Purwani, S. P. M. E. (2020). Pertanggungjawaban Perdata Tenaga Medis apabila Melakukan Malapraktik Medis. *Kertha Semaya: Journal Ilmu Hukum*, 8(4), 510–519.
- Fikri, D. A. (10 C.E.). *Makanan Yang Kerap Mengandung Formalin Dan Boraks*.
- Indriati, N., Yuliantiningsih, A., & Wismaningsih, W. (2022). The International Health Regulation 2005 And Indonesia's Actions In Handling The Covid-19 Outbreak As The State's Responsibility. *Fiat Justisia: Jurnal Ilmu Hukum*, 16(4), 331–346.
- Joko, D., Joko Sriwidodo, S. H., Kristiawanto, D., & Kristiawanto, S. H. (2020). *Memahami Hukum Perikatan*. Kepel Press.
- Mannas, Y. A. (2018). Hubungan Hukum Dokter Dan Pasien Serta Tanggung Jawab Dokter Dalam Penyelenggaraan Pelayanan Kesehatan. *Jurnal Cita Hukum*, 6(1), 163–182.
- Mardiansyah, R. (2018). Dinamika Politik Hukum Dalam Pemenuhan Hak Atas Kesehatan Di Indonesia. *Veritas Et Justitia*, 4(1), 227–251.
- Marzuki, M. (2017). *Penelitian Hukum: Edisi Revisi*. Prenada Media.

- No, U.-U. (36 C.E.). *Tahun 2009 Tentang Kesehatan*.
- Nuraeni, Y., Sihombing, L. A., & Triyunarti, W. (2020). Hubungan Hukum Antara Dokter Dan Pasien. *Jurnal Pemuliaan Hukum*, 3(1), 53–58.
- Roihanah, R. (2019). Hubungan Hukum Dokter Dan Pasien: Perspektif Undang-Undang No 8 Tahun 1999 Tentang Perlindungan Konsumen. *Justicia Islamica*, 16(1), 151–174.
- Santoso, L. (2021). *Taktis Pendampingan Hukum Dari Layanan Administrasi Hingga*. Q Media.
- Sinaga, N. A. (2018). Pemungutan Pajak Dan Permasalahannya Di Indonesia. *Jurnal Ilmiah Hukum Dirgantara*, 7(1).
- Sonatra, A. I. K. P. N., & Pratama, N. (2020). Hukum Kontrak Dalam Perspektif Komparatif (Menyorot Perjanjian Bernama Dengan Perjanjian Tidak Bernama). *Serambi Hukum*, 8(02), 23085.
- Subarsyah, T. (N.D.). Menyoal Pertanggungjawaban Hukum Pidana Terhadap Tindakan Malapraktik Kedokteran Di Tengah Pandemi Covid-19 Di Indonesia. *Mimbar Hukum*, 34(1), 32–57.
- Supriyatin, U. (2018). Hubungan Hukum Antara Pasien Dengan Tenaga Medis (Dokter) Dalam Pelayanan Kesehatan. *Jurnal Ilmiah Galuh Justisi*, 6(2), 184–194.
- Yuniarlin, P. (2012). Penerapan Unsur-Unsur Perbuatan Melawan Hukum Terhadap Kreditur Yang Tidak Mendaftarkan Jaminan Fiducia. *Jurnal Media Hukum*, 19(1).
- Zakiyah, M. (2022). Perspektif Maqashidus Syari'ah Menyikapi Dinamika Hukum Ketatanegaraan Islam. *Jurnal Hukum Ius Quia Iustum*, 29(2), 415–438.