MEDICAL MALPRACTICE IN CRIMINAL LAW PERSPECTIVE

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ABSTRACT

Malpractice is commonly related to the accountability of criminal law. The country have *a duty to make medical service free from doctor falsity without asking the responsibility from victim. Because of this malpractice, it can be proposed to the judiciary and the doctor is sentenced to get criminal sanction according to the law of KUHP and UU number. 29 years 2004 about medical mal practice. The problem of this research is how the accountability from the doctor which is proven to be doing mal practice in medical field according to criminal law perspective. The purpose of this research is to analyze and find the form of doctor accountability in criminal law perspective. This research is a normative law research, by using the constitutional approach and conceptual approach. The result and discussion from this research is commonly for making the doctor to be criminalized which must fulfill the offensive element determined in constitution. The doctor which is proven to be wrong constitutionally and ensure the mistake element must be punished. It is meant for the doctor to prioritize the careful deeds in giving the medical service toward patients. Besides it gives the lesson toward the doctorwhich is proven to be doing mal practice, the decision to sentence criminallaw toward the doctor must give the other doctor to improve their capability so it can avoid the mistakes in making the medical effort. The conclusion is that there is no doctor mal practice without mistakes, law infringement and medically professional standard. Every mistake must be accounted for so there is not any people immuned toward law.*

Keywords: Malpractice, Medical Field, Criminal Law

INTRODUCTION

Health is a human rights and must be the one of prosperity which must be achieved in the form of medical effort gift toward all societies through medical qualitative established enforcementand reached by societies according to the aspiration of Indonesia lies in Pancasila andthe constitution ofIndonesia Republic country years 1945.The establishment in medical field is lead to make the awareness, wanting and capability to live healthily for every society, so it can make optimal health for society with particular characteristic affected by medical knowledge development, techonlogy advancement and society's social and economy living which must be capable to improve the quality service and afford by the society in order to make highly medical status in reaching the aspiration of indonesian.

According to article 28 H (1) Indonesian Republic constitution which state "every people deserve to live prosper both physically or spiritually, have occupation and get a living and healthy", according toArticle 28 H (2) states " Every people deserve to get an easy life and special treatment to get a chance and same usage toget equality. Basically human is social creature which cannot live alone. Human needs other people to get interaction and communication. Human as*zoon politicon* is not far from living together with the other human. This gathering musr inflict the conflict between one individual right and the others. In order to synchronize between the right of indvidual, it needs law order to enforce society living which is obedient and in order, so this rule then can get legitimation from other societies and

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acknowledged as law. Law is an accumulate of some rules which arrange the order in society living, so it has sanction made by relevant institution. According to the meaning of this law, up to now there is no deal between some law expert. As a restriction, law meaning is needed. Society, human although they are simple, they need an arrangement of moral compass between societies, which the obedience and its enforcement cannot be given to their free will. In our societies, because they have been living together in the long time, so it can born some social control system toward the act of sociey's people. This can be synergized with the existence of law in every aspect of living which can be expected to do some functions as the place and overcoming issue, for social control, *engineering*, sarana societal empancipation, legitimation and control toward the change or as spreading justice.This can be related to the culture or accustomization in the related societies. The invention of government is very needed to enforce the law for achieving the order in societies . There are 3 main purpose of law namely to get law certainty, to get the justice and to get the benefit from its society. To create any law purpose, it needs good cooperation between government and societies. To achieve order in this society, it is necessary to have legal certainty and public order embodied by him, humans cannot develop the talents and abilities that God gives him optimally in the communities where he lives because there is certainty in realizing that order, so that he is able to realize justice in community life. This is closely related to the culture or habits that exist in the community concerned. Government intervention is very necessary to enforce the law in order to achieve order in society.

There are three main objectives of the law, namely to obtain legal certainty, to obtain justice and to benefit the community itself. To create legal objectives, good cooperation between the government and the community is needed. To achieve order in this society, it is necessary to have legal certainty and public order embodied by him, humans cannot develop the talents and abilities that God gives him optimally in the communities where he lives, there is certainty in realizing that order, so that he is able to realize justice in community life. Indonesia is a state of law, as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states: The State of Indonesia is a state of law. Indonesia is a state of law, as stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states: The State of Indonesia is a state of law.

Specifically regarding health issues in Indonesia is still one of the crucial problems and needs rapid handling by the government. A set of rules on health has been made to fulfill the mandate of the 1945 Constitution of the Republic of Indonesia. Since independence until now, Indonesia has three times experienced a change in the Law on Health. This means that until now, in Indonesia there have been three times the enactment of the Health Law, namely: Basic Health Act Number 9 of 1960, Law Number 23 of 1992 concerning Health, and Law Number 36 of 2009 concerning Health. In the development of law in Indonesia health law is a field of study of legal specialization that is relatively new (Sri Pratianingsih: 2006). Health services here are part of health efforts carried out by health workers. According to Article 1 number 1 of Law Number 36 of 2014 concerning Health Workers, the purpose of health workers is any person who devotes himself to the health sector and possesses knowledge and skills through education in the health sector which requires certain types of authority to carry out health efforts. In carrying out his profession must pay attention to the rights of patients based on noble values, nobility and glory in the interests of patients. Professional carriers in the medical field always carry out moral and intellectual orders (Veronica Komalawati: 2002). Problem regarding medical malpractice that is occur or are experienced by patients without a settlement process that usually creates a sense of injustice for patients who feel disadvantaged.

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Gaps or negligence in carrying out professional obligations originated from the dissatisfaction of patients and families of patients with the services of doctors, because their hopes were not met by doctors. In other words there is a gap between patient expectations and reality obtained by the patient. According to (Ari Yunanto, Cs: 2009) mentioning the term malpractice with malpractice which is interpreted as "medical practice that is wrong, incorrect, violates laws or codes of ethics." This term is generally used for the attitudes of doctors, lawyers, and accountants. Failure to provide professional services and do so at a level of skill level and reasonable intelligence by average colleagues from the profession within the community, resulting in injury, loss, or loss to service recipients who trust them, including acting.

Wrongful profession, lack of unnatural skills, violating professional or legal obligations is very bad practices including illegal or immoral acts. Malpractice in the opinion of Jusuf Hanafiah is "the negligence of a doctor to use the level of skill and knowledge commonly used in treating patients or injured people according to the size of the same environment (M. Yusuf Hanafiah and Amri Amir: 1999) Criminal action in the medical field or malpractice is a term that is very general in nature and does not always have juridical connotations. Literally "mall" means "wrong" while "practice" means "implementation" or "action", so that malpractice means "wrong implementation or action". Although this is assumed as true literal meaning, but most of these terms are used to express the existence of wrong actions in the context of implementing a profession. While the definition of health promotion malpractice is "negligence of a doctor or nurse to use the level of intelligence and knowledge in treating and treating patients, which is commonly used against patients or injured people according to the size of the same environment. According to Hoekema, malpractice is every mistake made by doctors because doing medical work below the actual standard on an average and reasonable basis, can be done by every doctor in the same situation or place. The problem in this study is how is the responsibility of the doctor proven to do malpractice in the field of medicine in the perspective of criminal law?

RESEARCH METHOD

The purpose of this study is to analyze and find a form of physician accountability in the perspective of criminal law. This research is a normative legal research using a statutory approach and conceptual approach. Legal analysis is carried out analytically and systematically. In analyzing this problem the author uses the theory of legal protection.

RESULTS AND DISCUSSION

Criminal liability in foreign terms is referred to as the theorem Baardheid or criminal responsibility which leads to the conviction of the perpetrator by entering to determine whether a defendant or suspect is responsible for a criminal act that occurs or not. To be criminalized the perpetrator is required to fulfill the elements element of offense determined by the Act. According to Pompe the ability to be responsible for criminals must fulfill the following elements:

1. The ability to think (psychisch) maker (leader) that allows him to master his mind, which allows him to determine his actions.
2. And therefore, he can determine the consequences of his actions.
3. And therefore he can determine his will according to his opinion.

Responsible ability is based on the condition and ability of the "soul" (geestelijke vermogens), and not on the state and ability to "think" (verstanddelijke vermogens), from

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someone, although in terms that are officially used in Article 44 of the Criminal Code it is verstanddelijke vermogens. The translations of verstanddelijke vermogens, the term "state and ability of one's soul" is intentionally used. Criminal liability leads to criminal prosecution if it has committed a criminal act and fulfills its elements that have been determined in the law. It is said that someone is capable of being responsible when in general (Roeslan Soleh: 1999):

a. The state of his soul:
    1. Not disturbed by continuous or temporary illness.
    2. Not disabled in growth.
    3. Not disturbed by surprise, anger that overflows, unconscious influence, in other words he is in a conscious state.
b. Soul skills:
    1. Can understand the nature of his actions.
    2. Can determine his will over these actions whether they will be implemented or not.
    3. Can know from the disappointment of these actions.

Criminal liability against doctors who are suspected of having committed malpractice can be asked if a criminal act has occurred that the event contains one of three elements, namely (1) behavior or attitude that violates written criminal law norms, (2) the behavior violates the law, (3) the behavior is based on errors (Soerjono Soekanto: 1989). The subject of criminal liability is the subject of criminal acts, because based on the descriptions above it has been discussed that those who will be accountable for a criminal act are the perpetrators of the crime themselves so that of course the subject must be the same between the perpetrators and those who will be responsible for their crimes.

In the opinion of Ninik Mariyanti that malpractice has a broad understanding that can be described as follows:

a. In the general sense a bad practice which does not meet the standards determined by the profession.
b. In a special sense (seen from the patient's point of view) malpractice can occur in determining the diagnosis, carrying out operations, during the treatment, and after treatment (Ninik Mariyanti: 1998).

Soedjatmiko distinguishes juridical malpractice into three forms, namely civil malpractice, criminal malpractice and administrative malpractice (Anny Isfandyarie: 2005).

a. Civil Malpractice

    Civil malpractice occurs when there are things that cause the fulfillment of the contents of the agreement (default) in therapeutic transactions by health workers, or the occurrence of illegal acts (*onrechtmatige daad*), causing harm to patients. In civil malpractice that is used as a measure in melpractics caused by negligence is mild negligence (culpa levis). What happened in gross negligence (culpa lata) then the act should be included in criminal malpractice. For example, from civil malpractice, for example, a doctor who performs surgery turns out to leave the rest of the bandage in the patient's body. After it was discovered that there was a bandage left behind then a second operation was carried out to take the remaining bandage. In this case the mistakes made by the doctor can be corrected and do not cause prolonged negative consequences for the patient.

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b. Criminal malpractice

Criminal malpractice occurs when a patient dies or has a disability due to health workers being inadvertent. Or not careful in carrying out treatment efforts for patients who die or are disabled. Criminal malpractice has three forms, namely:

1) Criminal malpractice due to the intentions of medical personnel not to help in serious cases even though it is known that no one else can help, and give an incorrect statement. Example: having an abortion without medical action.
2) Criminal malpractice due to carelessness, for example taking actions that are not artistically or not in accordance with professional standards and taking action without medical approval. Example: Carefully the nurse attaches an IV to cause the patient's hands to swell due to infection.
3) Criminal malpractice due to negligence for example a patient's disability or death as a result of the actions of health workers who are inadvertent. Example: a 3-month-old baby whose fingers are cut off when the nurse will remove the splint used to fix the infusion.

c. Administrative Malpractice

Administrative malpractice occurs when health personnel violate the applicable state administrative law, for example running a midwife's practice without a license or practice permit, taking actions that are not in accordance with her license or permit, practicing with expired permits, and practicing without making medical records.

The negligence that caused the source of the action categorized in this malpractice must be proven, besides the negligence referred to must be included in the category of severe negligence. To prove this is certainly not an easy task for law enforcement officials. Besides being known for several theories about the source of malpractice, which in terms of the usefulness of these theories is of course very useful for patients and law enforcement officials, because with these theories patients can use it as a basis for a lawsuit and for law enforcement officials can used as a basis for prosecution.

According to Ey Kanter and SR. Sianturi, which is considered the subject of Criminal Acts, Human (natuurlijke-persoonen), animals and legal entities (rechtspersonen) are not considered subjects. The basic difference between ordinary or general criminal acts with medical criminal acts lies in the focus of the criminal act. In ordinary or general crimes generally lies the consequences of the existence of criminal act, while medical criminal acts on the main focus are on causes or causes from that crime.

The imposition of sanctions on criminal law must fulfill the elements of criminal acts, namely the elements of actions carried out by the subject of law and elements of error. In criminal law the determination of a person's fault is based on the physical condition of people who are both consciously and unknowingly prohibited by law . There is a spiritual relationship between the perpetrator and the action he did.

The measure of errors in health services is, in the form of negligence in criminal law in the form of major negligence, not minor negligence. Determination of negligence must be done normatively and not physically or psychologically, because it is difficult to know the actual state of one's heart Determination of the presence or absence of negligence in health services must be followed by actions carried out by doctors or health facilities in the same situations and conditions with the same medical negligence and accuracy. The medical profession is just like any other profession has a specialty, where law enforcement officials must not immediately arrest the doctor or dentist who has been sued or reported by patients or families

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of patients who feel disadvantaged. Based on the provisions of the Medical Practice Law there is an independent institution that will resolve suspected ethical or malpractice violations committed by doctors and dentists. Professional organizations are the legal umbrella to provide protection for doctors and dentists. The independent institution is the Indonesian Medical Discipline Honorary Council.

The wrongdoer is assumed to be responsible. The wrongdoer must be a people who can be accounted for according to the criminal law and the meaning and the deed, the deed which is assumed to be appropriate when the will in doing the deed. There is no reason for abolishing the criminal. Criminal abolishing law which can be used according to the Criminal Law Constitutional Guidance namely: have mental disorder (Article 44) overmatchor insisting capability (Article 48), Self defense because of forced (Article 49), enforce the constitutional rule (Article 50) and does office order (Article 51). The proof is that the enforcer is done by them. The medical infringement existence or medical issue Proving is not easy, which is the law rule which has basic good guidance in Criminal KUH both the KUHP and KUHAP cannot be applied in the medical mal practice case

CONCLUSION

The doctor is just human event, even their job is virtuous. It can inflict the doctor to be wrong in doing the profession. Eventhough it is a possibility that there is a chance to make a mistake and can inflict disadvantage toward the patients. The doctor's error in running a medical profession is not in accordance with professional standards. medical in carrying out his profession is known as malpractice. As a result, there are not a few malpractices that eventually end in court and against the doctor are subjected to criminal sanctions based on applicable legal sanctions. by the patient's family. A doctor or dentist who is found guilty of malpractice based on a decision issued by the Indonesian Medical Disciplinary Council (MKDKI) in the form of a recommendation can proceed to the court process. While doctors or dentists who are currently processing their cases by MKDKI continue to carry out their duties. A doctor who is proven to do malpractice still gets protection from medical profession organizations. Law enforcement agencies should not immediately arrest the doctor. Instead they must go through certain stages. The Indonesian Medical Disciplinary Board (MKDKI) as an autonomous institution has the authority to determine whether or not disciplinary violations performed by doctors and dentists. Based on recommendations from MKDKI, the legal process will proceed to the court.

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