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The Application of the IPSA Loquitur Principle in the Regulation of Medical Malpractice Resolution

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This study aims to analyse the application of the doctrine of res ipsa loquitur (negligence) in solving medical malpractice cases. Based on the results of research and discussion about the problem being studied, it can be concluded that the benefits of implementing the ipsa loquitur doctrine are as follows: -support the victim in cases where it is difficult for the victim to access evidence containing material, -it is not convoluted and -prove beyond denial the truth that there has been an element of error (negligence) committed by the defendant. The recommendation is that, in view of the doctrine of res ipsa loquitur facilitating a system of proving the existence of errors, especially cases that are not easily accessible to victims of medical malpractice, the res ipsa loquitur doctrine should be used as a proof system in court trials.

Key words: *Res Ipsa Loquitur, Medical, Malpractice.*

Introduction

Doctors and other health workers are human beings, who can make mistakes in carrying out their profession; whether done intentionally (dolus) or accidentally (negligent, culpa). Sometimes the intention to help and cure a patient's illness can incidentally result in disability and even death of the patient in the course of regular medical practice. When that happens, complaints can be made by people who have a high level of intelligence so that they are more critical, or because of the person's ignorance. The services provided by doctors are then generally misconceived and any failure of medical practice is seen as a result of doctor actions which can be categorised as medical malpractice or as a result medical negligence; consequently patients who are dissatisfied can complain and/or report the case through legal means. (P.B. Murdi, Supanto & W.T. Novianto, 2019)

The doctor patient relationship is a civil law relationship, but it does not rule out the possibility of medical services outside of professional standards that can be categorized and/or included in the realm of criminal law and administrative law. Until now, the community still views the presence and presence of the judiciary executing judicial power as needed in the rule of law because of its role as a pressure valve for all violations of law and public order. The judiciary is still expected to play the role of last resort, as the last place to seek truth and justice, and is relied upon as a body that functions to uphold truth and justice. (P.M. Putri, P.B. Murdi, 2019)

Events that have been identified in allegations of medical malpractice have, so far, not all ended with a court decision and have even been left "floating" without a good settlement process. On the other hand, people in the community still think that the incident they experienced was fate, they did not know that malpractice could be reported and that victims could receive compensation or damage repairs. Unfortunately, medical records in hospitals or doctor's offices are often incomplete, and as a result it is difficult to track the treatment procedures performed by doctors. However, the above cases may not all be considered as Medical Malpractice because, keeping in mind that a doctor's mistake is a professional mistake, it is not easy for anyone (including law enforcement) who does not understand this profession to prove the malpractice in court, even though it does not mean that the doctor's mistake is not proven. (Winarsih, 2018)

Medical malpractice occurs when a doctor, or a person who is under their command, intentionally or because of negligence commit an act (active or passive) against any of their patients in their medical practice that violates professional standards, procedural standards, or medical principles, or violates the law without authority, which as a result (causal relation) causes harm to the body, the physical or mental health, and/or the lives of patients. And this therefore establishes legal liability for doctors. Professional mistakes made by doctors include errors due to unreasonable acts and mistakes due to their skills lacking the ability to carry out the obligations or professional trust they have. Therefore, the so-called professional error in the medical field ie. medical malpractice is a mistake in carrying out the medical profession in accordance with the standards of the medical profession and/or of not performing medical measures according to a certain quality level based on medical science. This generally involves a doctor, depending on the situations and conditions in which the medical act was carried out. (A. Suprianto, D. Mutiarin, 2017)

In short, doctor malpractice is negligence or professional negligence either by a doctor doing or not doing something. The doctor's actions are considered below the standard of practice accepted by the medical community, with resulting loss or injury to the patient.

In cases that result in death, law enforcement officials will, on the basis of the patient's family report, sue the team of doctors because they are considered negligent, or displayed relatively severe carelessness, which caused death. According to Article 359 of the Criminal Code it's not impossible such claims can also be filed against other involved health providers such as Nurses, Hospitals and Clinics. Reduced public trust in doctors and the rise of lawsuits filed by the public are often identified with the failure of healing efforts undertaken by doctors. In addition to this there is no real protection for the service users, ie. the patients, in the construction of legislation applicable to the health sector and in the completion of medical malpractice reporting. The settlement of medical malpractice that has happened so far has mostly been through the court system, even though, if there is resolution in court, it is very ineffective because the process takes a long time. There is sharp criticism of the judiciary in carrying out its functions which are considered too complicated, slow, time-consuming, expensive and lack responsivity to the public interest and are considered too formalistic and too technical (B. Santoso, J. Hendrartini, B.U. D. Rianto, L.Trisnantoro, 2018).

In the aspect of criminal law, for medical malpractice to be seen as a criminal offense (criminal malpractice) it must be in the form of resulting consequences that are in accordance with those stipulated in the Criminal Law Act (KUHP). This is because in criminal malpractice can only occur in material criminal acts, and emerge during the completion of the crime (death, serious injury, and others). In practice in criminal charges against suspected cases of malpractice, the provisions of Article 359 of the Criminal Code and 360 of the Criminal Code that are most often indicted for errors/negligence of doctors who cause death and / or injuries, as they can accommodate all carried out actions that result in death or injury, even though death/injury is not intended. There is a significant difference in the acts when it come to the application of the element of negligence, namely the ordinary criminal act (KUHP) has as it's focus the result, whereas in the medical criminal act, the focus is the cause. Proof of the presence or absence of violations committed by doctors, whether they are in the form of errors or negligence, is the main requirement for accountability for medical services. However, proving the existence of medical violations is not an easy thing to do, considering the applicable legal regulations, both in Civil Law and Criminal Law (KUHP and KUHAP), as these cannot necessarily be applied to medical malpractice cases. (Elizabeth Siregar & Arrie Budhiarti, 2008)

In proving malpractice it is very difficult for victims of a doctor's medical negligence to demand legal responsibility. If negligence is of a certain level and ignores the object or safety of a person then the nature of neglect can be turned into a criminal act, for example, a scissor or gauze left in the patient's stomach after surgery even though such an error or negligence is not expected to be done by the doctor or the medical person, but when the facts clearly show that the incident is within their responsibility and is not a patient's contribution, then it implies a medical negligence. For this to be proof an understanding of the doctrine of res ipsa

loquitur is needed, to proove of the medical action, in a way that cannot be denied, that it is a medical malpractice. This is done through the application of the doctrine of res ipsa loquitur, which in English means 'the thing breaks for itself' and in Indonesian translates as 'the object speaks', and only applies to cases of illegal acts in the form of negligence. This doctrine aims to achieve justice, when for victims of unlawful acts in certain cases it can be very difficult to prove the existence of an element of negligence, especially if the evidence is accessable by the perpetrators, but difficult to be accessed by the victim. Therefore, it is not fair if the victim must bear the consequences of the act themselves while it is actually due to the negligence of the other party. (H. Djasri, P.A. Rahma & E.T. Hasri, 2016)

Results and Discussion

Position of the Principle of Res Ipsa Loquitur as Evidence in the System Case of Medical Malpractice

The Principle of Res Ipsa Loquitur is a kind of circumstantial evidence that is proves a fact or a number of facts from evidence whereby a reasonable conclusion can be drawn. Res ipsa loquitur is nothing but a rebuttable presumption that states this as proof unless the perpetrator can prove otherwise. Although the true purpose of res ipsa loquitor is not to reverse the burden of proof and not to change the responsibility criteria as there is strict liability, but only to assist the victim in terms of proving who is guilty by showing circumstantial evidence. The application of this doctrine is mostly carried out towards the parties of certain acts which demand a high level of caution. (Jaelani A.K, Handayani I.G.A.K.R, Karjoko L, 2019)

Generally, in criminal and civil law cases, there are differences in the burden of proof before there is a court hearing. In criminal cases, the burden of proof is in the hands of the public prosecutor, because Criminal Law aims to provide security and public order, and prohibitions and sanctions are repressive. In the Civil Code the principle of whoever harms others must provide compensation so that the position of each party is equal again. Here, indirectly the public interest is involved. In Civil Code a valid prosecutor must then present the evidence. With Res Ipsa Loquitur doctrine in the case of medical malpractice, the evidence/facts are made so clear that all parties know the event will not occur if there is no element of error/negligence by the doctor/medical personnel. Actually, for that reason no further proof is needed, but nevertheless the burden of proof is borne by doctors or health workers to prove that there is no error/omission of procedures in carrying out their duties and authority that resulted in the incident occuring. In such circumstances, the judge can divert the burden of proof from other doctors/medical personnel, based on the doctrine. (P.B. Murdi, Supanto & W.T. Novianto, 2019)

Even so in order to apply the doctrine, so that conclusions can be drawn from the element of error/negligence of the perpetrators (doctors/ medical personnel) the following conditions are required: (1) it must be demonstrated that the incident usually does not occur without negligence/intentionality of the perpetrators; (2) it must be shown that the loss did not occur due to the actions of the victim/patient or other parties; (3) that at the time of the occurrence of events that caused losses were in exclusive control of the accused; (4) the cause of the negligence is within the scope of the obligations that exist by the perpetrator towards the victim; (5) not the victim's fault/the victim had no contributory negligence. (Nurhidayatuloh, Febrian, Apriandi, M., Annalisa, Y., Sulistyaningrum, H.P., Handayani, I., Zuhro, F., Jaelani, A.K., Tedjomurti, K., 2020)

The Application of the Ipsa Loquitur Principle in the Regulation of Medical Malpractice Resolution

The judges' basic considerations in the application of the Res Ipsa Loquitur doctrine by the Judge in case Number 455 K / PID / 2010 are indeed not directly mentioned as evidence in the evidence system before the court hearing. This is due to the fact that the Judge places more emphasis on the fulfillment of the elements of error/negligence as charged by the public prosecutor. On the basis of considerations it is stated that the form of negligence committed by the defendant is that the defendant operator did not order instruments that help carry out medical/operational actions to check/count the instruments that will be used before and after the medical action. The element of negligence by the defendant is to have not carefully checked the number of items before sewing back the abdominal cavity. The next element of negligence was that the defendant only gave an ointment to the victim without carefully examining the cause of the victim's complaint, even though the results of the USG carried out the Defendant could see all foreign objects contained in the victim's stomach, and only suggested for another surgery without the defendant immediately carrying out that surgery. (P.M. Putri, P.B. Murdi, 2019)

In addition, in legal considerations in the Supreme Court's decision No. 455 K / Pid / 2010 explained that the duties of the Indonesian Medical Disciplinary Honorary Council include: Receiving complaints, examining and deciding submitted cases of violation of the doctor and dentist disciplines, compiling guidelines and the procedures for handling cases of violations of the doctor and dentist discipline. This means that the presence of the Indonesian Medical Disciplinary Board is limited only to examining and deciding on cases of violations of the the doctor and dentist disciplines and is not given the task or authority to examine and decide upon criminal cases.

The Indonesian Medical Disciplinary Board (MKDKI), based on Law Number 29 of 2004 concerning Medical Practice, has the task of examining and deciding on cases of disciplinary

violations of the codes of conduct for doctors or dentists and has absolutely no authority to examine and decide upon criminal cases, but in carrying out their duties the aforementioned does not release anyone of the obligation to report suspected criminal acts to the authorities and/or sue in a civil loss in court (Article 66 paragraph (3) of the Medical Practice Law). Based on this, the authority granted to the Indonesian Medical Disciplinary Board is not in the sense of the authority to adjudicate or decide on competence, either in the form of absolute authority or relative authority, as regulated in Article 156 paragraph (1) of the Criminal Procedure Code. The Indonesian Medical Disciplinary Honorary Board / MKDKI was formed by Law No. 29/2004 on Medical Practice, is independent and only has the authority to examine, try and decide whether there is a violation by the doctor/medical professional of the doctor and dentist discipline in carrying out their profession. Disciplinary action once a decision is made can only be in the form of administrative decisions and recommendations to the Indonesian Medical Council. (P.B. Murdi, Supanto & W.T. Novianto, 2019)

Provisions of Article 44 of Law Number 29 Year 2004 concerning Medical Practices state that doctors or dentists in conducting medical practices are required to follow medical or dental service standards. Medical or dental service standards are distinguished according to the type and strata of health service facilities. The intended professional standard is the average ability of medical expertise adapted to the place, facilities and infrastructure of health services. A Standard Operating Procedure (SOP) is a set of instructions or standardized steps for completing a particular routine work process. An act stipulated in the provisions of Article 360 paragraph (2) of the Criminal Code. (J. Guwandi, 2005) is an act by the doctor/medical professional who, in carrying out their profession/work as a doctor, makes a mistake due to negligence that causes a person injury such that disease and/or obstruction arise for the person to do their work, and is not an act committed by the defendant that is not a violation of the professional standards and standard operational procedures as regulated in Law Number 29 of 2004, but

Some understand and interpret malpractice problems by equating the term medical malpractice with medical negligence so that a ill medical action can be referred to as malpractice as well as a violation of professional ethics. There are also those who argue that the existence of risk in treatment and error of judgment cannot be referred to as medical malpractice or medical negligence. To understand medical malpractice the law practitioner must understand from a legal perspective, the meaning, content and legal consequences of the contents and conditions that are present in the three main aspects of medical malpractice. Actions in medical services that can be medical malpractice can occur at the time of the examination, because of the way the examination is done or the tools that are used in the examination, or during drawing a diagnosis out of the results of the examination, during

therapeutic treatment and during treatment to avoid losses from misdiagnosis and wrong therapy (J. Guwandi, 2006).

Determination of errors in carrying out the duties of the health profession the errors must be distinguished into medical errors (mistakes in carrying out professional duties on the basis of professional medical professional provisions) and juridical errors (mistakes in carrying out professional duties on the basis of statutory provisions or laws). If a professional act does not meet the scope of the elements of professional standards, then the next phase will be determinating the existence of medical malpractice which is divided into ethical malpractice (errors based on values or moral rules) and legal malpractice (errors based on values or legal methods). Errors in the legal sense of malpractice should not be confused with other common forms of error, namely the unlawful actions set out in general laws and regulations. In medical malpractice, mistakes in carrying out the duties of the health profession are carried out with negligence, whereas in unlawful actions the mistakes are made intentionally so that it is a crime or violation (offenses against standard medical treatment). (Harimurti F, Jaelani A.K., 2019)

Conclusions

The application of the principle of res ipsa loquitur in the settlement of cases of medical malpractice must be supported by the fulfillment of the requirements, namely the presence of a physician's inner attitude (that is, an attitude that is in the person’s mind before they are carrying out medical treatment), the existence of medical treatment including: the form and procedure as well as tools used in examinations to obtain medical data, using medical data in diagnosing, ways or procedures and forms as well as therapeutic tools, even including actions in post-treatment treatment. The consequences of which may be entered into the field of medical malpractice must have adverse effects in parties that have legal relations with the doctor.

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