

# Dispute Resolution of the Consequences of or Errors Done by Health Care Through Penal Mediation

Juhari<sup>1</sup>

<sup>1</sup> Faculty of Law University August 17, 1945 (UNTAN) Semarang  
E-mail: juharish.mhumn@gmail.com

**ABSTRACT**--Dispute resolution which is considered ideal for the parties is a settlement that involves the parties directly so as to allow open dialogue, thus a joint decision is most likely to be reached. One of the efforts that can be done in solving malpractice in the field of health services is through mediation, this is stated in Article 29, Law of the Republic of Indonesia Number 36 of 2009 concerning Health, which states that the parties mediate first if an error or negligence occurs conducted by health workers. Mediation efforts as regulated in Article 29 of the Republic of Indonesia Law No. 36/2009 are carried out if a dispute arises between health workers as health service providers and health recipients to resolve disputes outside the court by a mediator agreed by the parties.

**Keywords:** dispute resolution, health workers, penal mediation

## I. INTRODUCTION

Health is a human right, that is, everyone has the same right in obtaining access to health services. The quality of safe, quality and affordable health services is also the right of all Indonesian people. With the development of science and technology, in the context of carrying out health efforts, it is necessary to be supported with adequate health resources, especially Health Workers, both in terms of quality, quantity, and distribution.

The health professional is a profession that has risks as any other profession. The vulnerable risk faced by health workers in conducting health services is the alleged malpractice. In fact, not a few cases that are suspected as malpractice lead to lawsuits, both criminal, civil and administrative.[6] Even though health services which have implications for disability or death of patients may not necessarily be categorized as malpractice.

Although the alleged malpractice in the field of health services is an inseparable part of health services in Indonesia. The alleged malpractice ever happened in the case of doctor Setyaningrum which occurred in Pati Regency, Central Java in 1979, then the case of doctor Ayu in Dr. Kandau Manado, North Sulawesi in April 2010, In addition to these cases, there were several suspected cases of malpractice in the 2009-2015 timeframe,[7] including the Prita Mulyasari case at Tangerang Omi International Hospital in 2009, the Jared and Jayden case at Tangerang Omni International Hospital in 2009, the case of Ny. X in Bandung in 2010,

the Ghulam Asjad case in Jakarta in 2013, and the Ny. X at Siloam Hospital Tangerang in 2015.

Professional from the above description, the alleged malpractice that occurs between health workers as health service providers and the community as health service recipients is a case that arises due to a relationship in the context of carrying out healing efforts. Malpractice can occur due to patient dissatisfaction which is generally caused due to alleged errors (neglect) in carrying out professional obligations.[3]

For doctors or health care facilities, medical dispute resolution through court / litigation means risking the reputation he has achieved with difficulty, and can cause loss of good name. Even though the guilty verdict has not yet been made or even the final verdict has been found not guilty, the good name of the doctor or health service facility has been seen as ugly because it has been publicly reported in the media that it is suspected of making a mistake and will be a bad stigma in society which in turn causes the level of public trust in the doctor or health care facility will go down.[4]

Dispute resolution which is considered ideal for the parties is a settlement that involves the parties directly so as to allow open dialogue, thus a joint decision is most likely to be reached. In addition, because the meetings of the parties are closed it will provide a feeling of comfort, security to the parties involved so that the fear of disclosure of secrets and good names that are needed by doctors and health care facilities can be avoided..

One of the efforts that can be done in solving malpractice in the field of health services is through mediation, this is stated in Article 29, Law of the Republic of Indonesia Number 36 of 2009 concerning Health, which states that the parties mediate first if an error or negligence occurs conducted by health workers. Mediation efforts as regulated in Article 29 of the Republic of Indonesia Law No. 36/2009 are carried out if a dispute arises between health workers as health service providers and health recipients to resolve disputes outside the court by a mediator agreed by the parties.

How to resolve disputes over the occurrence of errors or omissions committed by health workers through mediation of the penalty?

## II. FINDINGS AND DISCUSSION

Health workers have an important role to improve the quality of maximum health services to the community so that the community is able to increase awareness, willingness, and ability to live healthy so that the highest degree of health will be realized as an investment for the development of human resources that are socially and economically productive and as one of the elements of general welfare as referred to in the Preamble to the 1945 Constitution of the Republic of Indonesia.

That the implementation of health efforts must be carried out by responsible health workers, who have high ethical and moral, expertise, and authority that must be continuously improved in quality through continuing education and training, certification, registration, licensing, as well as guidance, supervision, and monitoring so that the implementation of health efforts meets a sense of justice and humanity and is in accordance with the development of health science and technology, to meet the health rights and needs of each individual and community, to equalize health services to the whole community, and to provide legal protection and certainty to health workers and recipient communities of health service efforts, it is necessary to regulate health workers related to the needs planning, procurement, utilization, guidance, and quality control of health workers.

Causes of Disputes Between Patients and Health Service Providers (health disputes), Basically the relationship between health services (doctors and hospitals) with patients is a relationship based on trust. Patients believe in the ability of doctors who will make maximum efforts to cure the disease they suffer. One thing that is forgotten by the patient is that health services are based on medical science, and medical science is not a passive science like mathematics whose results can be predicted at the beginning of a calculation. The amount of trust that is built is what often results in disappointment, health problems do not materialize after receiving medical services, instead the disease develops to become severe, or there are side effects from treatment or medical actions undertaken, for example, patients become disabled or death support, this can have an impact on the disharmony of the doctor's relationship with the patient, because the patient and his family consider that medical negligence or medical malpractice has occurred. In fact, patients tend to dispute the results of health services by ignoring the process, while the health law emphasizes that in providing services, health workers are only responsible for the work done (*Inspanning Verbintennis*) and do not guarantee the final results (*Resultalte Verbintennis*).

Initially, the great dependence on doctors has placed patients and the public in an unbalanced bargaining position. However, referring to the Law of the Republic of Indonesia Number 36 of 2009 concerning Health and the Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practices, it can be stated that the relationship between doctors and patients is no longer paternalistic, but is positioned parallel. In these two laws,

it is stated that doctors and patients have rights and obligations that must be respected. Doctors have the right to obtain legal protection in carrying out duties in accordance with their profession, while the obligation is to comply with professional standards and respect the rights of patients. Patients have fundamental rights, including rights.[2]

- a. Get information.
- b. Give consent for medical action or informed consent.
- c. Top medical secrets, as well
- d. To obtain a second opinion or second opinion.

Conflicts between doctors and patients can be prevented if doctors heed their obligations and accommodate patient rights. Conflict is a situation in which two or more parties are faced with different interests. A conflict changes or develops into a dispute if the person who feels wronged has expressed his dissatisfaction or concern either directly to the party deemed as the cause of the loss or to another party. So conflicts can change or continue into disputes, which also means that a conflict between a patient and a doctor or an unresolved hospital will turn into a health dispute. This is relevant to the provisions of Article 66 paragraph (1) of the Law of the Republic of Indonesia Number 29 Year 2004 concerning Health Practices, which implies that health disputes are disputes that occur because the patient's interests are harmed by the actions of a doctor or dentist who is practicing medicine. Thus a health dispute is a dispute that occurs between users of medical services and medical service practitioners in this case between patients and doctors and health facilities.

A health dispute cannot be resolved if the cause is unknown. It is undeniable that the current medical process is like a microscope cup, because it is the center of attention and much criticized by the public and the mass media. Some things that often become the cause of health disputes, among others, because patients and the public have an incorrect perception of health services.

The legal dimensions of medical disputes in the dimensions of health services, speaking of medical disputes in health services, there are two things that need serious attention because both provide legal consequences that require the responsibility of doctors as health workers and / or hospitals / clinics as health facilities.[4]

### 1. Medical Negligence..

Medical negligence is an attitude or action taken by a doctor / dentist or other health workers that is detrimental to the patient. According to the literature there are several views on medical negligence. In general, medical negligence is defined as doing something that is not supposed to be done or not doing something that should be done. Another opinion also says that negligence is not doing something that a reasonable person who is based on ordinary considerations that generally regulate human events, will do, or has done something reasonable and cautious it will not do. Another view states negligence is a failure to be cautious which is reasonably practiced on a general scale.

### 2. Medical Broadcasting.

Medical omission in general has not been widely known in the community both the legal profession, medical omission is one of the medical actions where in providing health services not in accordance with applicable procedures, as for it can be said medical omission is an act of doctors not really or does not provide health services to patients for various reasons related to the health care system.

Medical omission often occurs in hospitals especially specifically for the community or poor patients on the grounds that they must meet several administrative requirements, medical omission also often occurs in the Emergency Installation (IGD) or Emergency Unit (ER) of each patient who enters the unit often not given adequate services so that negligence can occur, in this case, doctors or health workers who work in the unit must be responsible, in that responsibility also cannot be separated from the role of hospitals that carry out health services.

Advances in technology and biotechnology in the field of medicine provide positive expectations for improving the quality of health services in Indonesia. With diagnostic technology, it can be detected as early as possible with maximum precision, as well as the technology of treatment results that can be achieved optimally with minimal risk or negative impact. But technology and biotechnology in health services are only limited to providing maximum efforts and minimizing negative impacts cannot reach the level of certainty of results ". The foregoing should be understood by both the doctor and the patient. But doctors, moreover patients are sometimes easily trapped in the nuances of promotion of the superiority of a technology in health services offered so that there is hope that with medical technology everything can be ascertained, can be cured, which is concerning, sometimes for the sake of promotion, not infrequently the institutions health service providers (doctors or hospitals) inform the technological advantages of being used excessively without information about any loss or impact that may arise from its use. This unequal distribution of information often leads to dissatisfaction or disappointment among patients and their families, disappointment and dissatisfaction of the patient is not accompanied by effective communication, and patients do not get clear information from the health service provider, the Based on the stage, health dispute can appear in the pre-treatment stage, during treatment and post-treatment. In the pre-treatment stage, dissatisfaction can be identified, for example at the initial admission to the Hospital (during registration, Emergency Emergency and so on), due to the services provided unfriendly, not fast, waiting time is long so patients and their families feel neglected.

While at the stage of care, patient dissatisfaction that led to the dispute can be identified from the number of complaints and family members entering the public area, including:

- (1) The excessive use of technology or sophisticated medical devices in a hospital where the urgency is not clear,

- (2) Death / disability of the patient due to failure of medical treatment,
- (3) Treatment is perfunctory (under treatment substandard) in patients unable to,
- (3) Length of stay for VIP patients to increase Hospital income,
- (4) Examination or excessive treatment that is not in accordance with the needs of the patient,
- (5) Implementation of medical futilization (medical futility) for diseases that cannot be cured anymore.

Post-treatment disputes can arise because of large funding, or the results of treatments that are not in line with expectations, because the patient does not go away. The emergence of side effects from medical procedures, so that patients become disabled even until death occurs and the doctor's actions are suspected as the cause. From that dissatisfaction then developed into a health dispute.

The dispute resolution should be carried out in stages, bearing in mind the health profession and the institution that houses it (the Hospital) is vulnerable to character assassination by the mass media or vulnerable to extortion by irresponsible elements. In the first stage, the initial symptoms of dissatisfaction emerge marked by the patient sending a complaint in writing to the Hospital. At this stage the hospital should through the public relations department immediately respond to the complaint by providing clarification of the problem, so that the complainants feel satisfied and resolved the problem. In the second stage, if the dispute has spread, which can be suspected from the existence of dissatisfaction complaints directed to the hospital, it is forwarded to the mass media, to NGOs or to the Ombudsman, as well as involving third parties, such as legal counsel. At this stage a mediator is deemed to be neutral to help resolve the dispute. In the third stage, if a health dispute report is submitted to the authorities (the police, or the court) then if a closed dispute resolution is still desired by the doctor or hospital, then the presence of a certified mediator is very necessary. If this process fails, dispute resolution through litigation or court cannot be avoided.

For doctors and hospitals, the settlement of health disputes through the courts means risking the reparations he has achieved with difficulty, and can cause loss of good name. Even though no court verdict has convicted him, the good name of the doctor or hospital has been impressed because it has been publicly published in the mass media, and has been reported to have made a medical error or medical malpractice. The impact is the level of public confidence in doctors or hospitals will go down. Settlement of health disputes through mediation is considered the most ideal because the settlement process is closed and unpublished, so that it will provide a comfortable, safe feeling to the parties, and fears of disclosure of secrets and good names that are needed by doctors and health care facilities can be avoided. In addition, the parties to the dispute are brought directly together to enable open dialogue, so that a meeting point that benefits the parties is likely to be reached.

Medical Dispute is a dispute that occurs between a patient or the patient's family with a health worker or between a patient and a hospital / health facility. Usually

the dispute is the result or the final result of health services without paying attention or ignoring the process. Whereas in the health law it is recognized that health workers or health service providers when providing services are only responsible for the process or effort made (Inspanning Verbintennis) and do not guarantee / guarantee the final results (Resultalte Verbintennis). Usually complaints are made by the patient or the patient's family to the police agency and also to the mass media. As a result, it can be expected that the press sentenced health workers before the court and made health workers monthly, which often infrequently damaged the reputation of the health worker's name and career. Meanwhile complaints to the police at both the police, police and regional police levels were received and processed like a criminal case. Shifting civil cases to the criminal sphere, inconsistent use of articles, difficulties in proving legal facts and limiting understanding of medical ins and outs by law enforcers at almost every level puts medical disputes at risk of criminal disparity.

Health disputes have a different character from civil disputes in general, such as consumer disputes, land disputes, industrial relations disputes and so on. This is because health disputes not only have an impact on the doctor as a person, but can also have an impact on professional organizations and on institutions that shelter them (Hospitals). If the process of resolving health disputes is carried out through a litigation process that is open to the public, it will provide an opportunity for character assassination that harms the reputation of the health service provider. Considering the distinctive character of the medical profession, it is necessary to find alternatives to settling health disputes outside the court.

Mediation is a non-litigation approach in dispute resolution that is recognized by positive law in Indonesia, which is pursued through a familial approach, promoting the principles of humanity and justice in order to maintain good relations to end existing disputes. Mediation is appropriate because it is mutually beneficial (mutual winning). In addition, the closed process has been able to protect the confidentiality of the parties to the dispute, and the deliberation process for joint decision making, able to place an equal bargaining position between the patient and the doctor or hospital that stumbled over the dispute. Collective agreements obtained through mediation to end the health dispute, will be set forth in a peace memorandum or a peace deed that is final and binding.

That mediation is one of the process of resolving disputes that is faster and cheaper, and can provide greater access for the parties to find a solution that is satisfying and fulfills a sense of justice. the integration of mediation into the court proceedings can be an effective instrument in overcoming the problem of case stock in the court as well as strengthening and maximizing the function of court institutions in dispute resolution in addition to adjudicative judicial processes.

With the enactment of the Republic of Indonesia Supreme Court Regulation (Perma) Number 01 of 2016 concerning mediation procedures in court, there has been a fundamental change in the practice of justice in

Indonesia. The court does not only have the duty and authority to examine, hear and settle the cases it receives, but also has the obligation to seek peace between the parties that are litigants. The court, which has been memorable as an institution of law enforcement and justice, now appears as an institution that seeks a peaceful solution between the warring parties.

There are twelve steps so that the mediation process works well, namely:[1]

1. Establish relationships with parties to the dispute
2. Choosing a strategy to guide the mediation process
3. Collect and analyze background information on disputes
4. Develop a mediation plan
5. Build trust and cooperation between the parties
6. Start a mediation hearing
7. Formulate the problem and set the agenda
8. Reveal hidden interests
9. Generating dispute resolution options
10. Analyze dispute resolution options
11. Final bargaining process
12. Reach a formal agreement

Republic of Indonesia Supreme Court Regulation Number 1 Year 2016 Regarding Mediation Procedures in the Court. The underlying consideration for the enactment of Perma Number 01 Year 2016 is:

- a. That mediation is a way to resolve disputes in a peaceful manner that is appropriate, effective, and can open wider access to the Parties to obtain satisfactory and fair resolution.
- b. That within the framework of bureaucratic reform of the Supreme Court of the Republic of Indonesia which is oriented to the vision of the realization of the great Indonesian judicial body, one of the supporting elements is Mediation as an instrument to increase public access to justice as well as the implementation of the principle of administering justice that is simple, fast, and low cost.

In the dispute resolution process, two paths can be used, namely litigation (court) and non-litigation / consensual / non-adjudication. We can all understand that the proceedings in a court of law are processes that are costly and time consuming. Because the conventional court system is naturally antithetical, it often results in one party winning and the other party losing. Meanwhile, sharp criticism of the judiciary in carrying out its functions that are considered too dense, slow and time-consuming, expensive and less responsive to the public interest and considered to be too formalistic and too technical. That is why the problem of reviewing the improvement of the justice system in an effective and efficient direction is everywhere. Critics even say that the civil process is considered inefficient and unfair (*civil procedure was neither efficient no fair*).[5]

Based on the things above, an idea arises to resolve the alleged malpractice dispute with a win-win solution, one of which is mediation.

### III. CONCLUSION

Whereas the parties mediate first if an error or negligence is carried out by health personnel with allegations related to criminal matters, mediation is the main effort in resolving medical dispute cases, with the mediation process it is expected that the patient doctor's relationship will be maintained and reach a peace agreement that is of a nature win-win solution.

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