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Application of Res Ipsa Loquitur to the Medical Negligence Case in Patient Protection Perspective

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ABSTRACT--The doctrine of res ipsa loquitur (the things speak for itself) facts that speak for themselves can be applied in cases of medical negligence in court, although this doctrine does not guarantee victory in every case for patients. The formulation of this research problem is: why is the doctrine of res ipsa loquitur applied to doctors and hospitals that commit medical negligence in medical disputes in court?

This study uses a normative juridical approach that is qualitative in nature. From the research results obtained: (1) res ipsa loquitur must apply to medical cases, because the patient is treated unfairly, if he is deprived of his right to use the doctrine; (2) res ipsa loquitur will help the injured patient because he has no medical knowledge about what is happening. If a patient is prohibited from using this doctrine it must be seen as unfair discrimination; and (3) res ipsa loquitur can be broadly translated into the highest health standards that can be achieved with reference to the process and results. The Ministry of Health of the Republic of Indonesia in issuing public health policies can implement Freies Ermessen (freedom to act on its own initiative) which is realized through the establishment of the Ministry of Health Regulation of the Republic of Indonesia in an effort to achieve substantive justice in cases of medical negligence by applying res ipsa loquitur to provide legal protection for the patient.

Keywords: res ipsa loquitur, medical negligence, Freies Ermessen, substantive justice, legal protection for patients

I. INTRODUCTION

A. Background

The title of this article is actually not pretending to make the image of a doctor fade in the eyes of the public, given that the doctor's profession is a very noble and respectable profession of official (officium nobile), as mandated in the provisions of article 1 paragraph (11) of Law Number 29 Year 2004 concerning Practice Medicine that reads:

"The profession of medicine or dentistry is a medical or dental work carried out based on a science, competencies obtained through tiered education, and a code of ethics that is serving the community".

From the formulation contained in the Law on Medical Practice, it is clear that the doctor is the bearer of the medical profession which of course also has the characteristics of the profession as the bearer of the profession in general.

Veronica Komalawati concluded that the nature of the profession is a vocation to devote oneself to humanity based on education that must be carried out with sincerity of intention and full responsibility, so that the medical profession has the following characteristics of the profession:

1) It is a high-level occupation from experts who are skilled and skilled at applying knowledge systematically.
2) Have competence exclusively for certain knowledge and skills and skills.
3) Based on intensive education and certain disciplines.
4) Has the responsibility to develop his knowledge, skills, skills and maintain honor.
5) Has its own ethics as a guide for assessing work.
6) Tend to ignore the control of society or individuals.
7) Its implementation is influenced by the community, certain interest groups, and other professional organizations, especially in terms of recognition of its independence.[1]

Furthermore Parsons, as quoted by Veronica Komalawati, stated some special characteristics of the profession as follows:

1) *Disinterestedness*, meaning that it does not refer to strings attached. This value must be used as a normative benchmark for the profession.
2) Rationality, which means making an effort to look for the best based on considerations that can be scientifically justified. The realization of the system of professional work is carried out based on rationality which is one of the dominant features of science.
3) Functional specificity, that is, professionals have authority (authority) in a society with a distinctive sociological structure that relies on superior technical competence that is only possessed by the relevant professional. Therefore, a professional is considered as someone who has authority only in his field.
4) Universality, which is the basis of decision making not on "who", or the personal benefits that can be obtained by decision makers, but based on "what is the problem" .[2]

From the description above, it can be concluded that as a profession bearer, a doctor is a person who has expertise and expertise as well as skills in medical science who are independently able to meet the needs of the people who need their services. In addition, doctors must also be able to decide for themselves the actions that must be carried out in carrying out his profession, and personally responsible for the quality of services provided.

When seen from the authority that relies on the competency of expertise and the skills and skills possessed by doctors who rely on superior technical competence, it is clear that the position of the patient in this expertise competency is inferior position. Patients cannot make an objective assessment of the

professionalism of services performed by doctors, whether professional doctors do or not. However, patients are free to determine who they can give the trust to get quality professional services and dignity. On the other hand, doctors also believe in patients who come to them that they need professional services that must be carried out with the sincerity of intention and responsibility to address the patient's complaints. In order to achieve optimal results, both doctors and patients must be able to work together.

From the freedom to determine the will, although the socio-psychological relationship between the patient and the doctor is not balanced as explained above, but formally the relationship between the two parties has the same position. In other words, personal relationships that are horizontal (personal horizontal), so that when there is a suspicion of medical negligence (medical negligence) in this medical practice, often makes the doctor deal with the law that is a lawsuit based on default (articles 1239 and 1243 Civil Code) and also can base on acts against the law (articles 1365, 1366, and 1367 Civil Code).

Furthermore S. Soetrisno stated:

"In the current era of globalization, the medical profession is one of the professions that has received much public scrutiny, because of the nature of its service and service to the community is quite complex. The increase in public spotlight is caused by many factors of change, including advances in the field of medical science and technology, social / cultural changes and outlook on life including the characteristics of the human resources community involved in the field of medicine and health as public service providers. And vice versa there is a change in the community of service users in the field of health whose intelligence is increasing causing more awareness of their rights, so it is quite critical in accepting the provision of services provided by service providers in the medical field. [3]

The reduced public trust in doctors due to the still occurring cases of medical negligence makes the arrangement of the health system that prioritizes patient safety needs to be done immediately. Medical negligence can be triggered by a lack of communication, low competency of health workers, poor management of health service facilities, and weak supervision.

With medical negligence discussed in this study are:

1) The first case, occurred at Pondok Indah Hospital (RSPI) as Defendant I along with several doctors and the RSPI Medical Committee as the Defendant. Defendant I and Defendants and Co-Defendants were found guilty by the South Jakarta District Court and jointly had to pay material and immaterial compensation of Rp. 2 billion. The lawsuit was filed by the heirs of patients namely Pitra Azmirla and Damitra Almira who are considered Defendants have committed acts against the law, resulting in the loss of one's life. The plaintiff felt disadvantaged because he did not know the results of the medical record that the tumor suffered by the patient was a malignant tumor, resulting in the death of the patient. The judge's consideration stated that the delay in submission of medical record results was a medical negligence that was not in accordance with the provisions of the law.[4]
2) The second case, originating from a patient named Shanti Marina, in March 2003 had a headache accompanied by high body temperature, then the patient brought his illness to Puri Cinere Hospital which was handled by Dr. Wardhani, Sp.THT, from the doctor's diagnosis, stated dizziness caused by enlarged tonsils / swell and advised to be removed (surgery). Then the operation was carried out on March 31, 2003. However, after the tonsillectomy removal operation, the patient actually experienced: sound became nasal / bindeng, so it could not communicate smoothly. The lawsuit of the patient or victim against Defendant I namely Dr. Wardhani, Sp.THT and Defendant II of Puri Cinere Hospital were submitted to the Cibinong District Court with losses suffered by patients or victims of Rp. 1,020,825,375.00, in which the Cibinong District Court Panel of Judges granted requests from patients or victims with the demands of Dr. Wardhani, Sp.THT has committed acts against the law.[5]
3) The third case, befalling Iwan Setiawan (24 years) who will soon be graduating, died while undergoing a small operation handled by a surgeon at Santa Maria Hospital, Pemalang, Central Java, Monday, June 30, 2011. It was allegedly a malpractice and cannot be accepted by the victim's family. The victim intends to remove a small bump on the left cheek under the eye through surgery. At that time a surgeon was met Kun Sri Wibowo who he said could be carried out with a small operation local anesthesia. Then surgery at Santa Maria Pemalang Hospital was carried out because it was faster, whereas at the RSUD it could not be handled immediately. At the private hospital the victim entered the operating room at 14.30 WIB. At that time the condition of the victim was in good condition, after entering the operating room and undergoing surgery, the victim went into a coma, the body was swollen blue after being sedated and finally died. The incident shocked the victim Rustiatin's mother, because initially she wanted to be anesthetized locally but in fact was totally sedated. The doctor was judged to have committed medical negligence which resulted in the loss of his child's life. The lawsuit of the victim's parents (the Plaintiffs) namely Suwarno and Rustiatin against the surgeons and anesthetists as well as the Santa Maria Pemalang Hospital (Defendants) were submitted to the Pemalang District Court with losses suffered by patients or victims worth Rp. 3,042,242,950.00, in which the Panel of Judges at the Pemalang District Court rejected the lawsuit from the patient or the victim's parents.[6]
4) The fourth case, on November 28, 2005 the Plaintiff Abuyani bin Abdul Roni went to the hospital Dr.

Mohammad Hoesin (RSMH) Palembang to examine his left eye, and after an examination by a doctor of RSMH, named dr. Kiki, the left eye of the Plaintiff suffers from cataracts and can be operated on. On the following day, November 29, 2005, the Plaintiff underwent cataract eye surgery (left) at Palembang RSMH with funding assistance from Pertamina, but the doctor who operated on the Plaintiff was different from the doctor who performed the initial examination and the Plaintiff did not know the name of the doctor. After the operation, the Plaintiff controlled his eyes back to Palembang RSMH, but it turned out that beyond the Plaintiff's estimates, the Plaintiff's left eye operated on had to be removed, and on 7 December 2005 the appointment was carried out at RSMH. Since then the Plaintiff's left eye has gone blind. The Plaintiff could not accept blindness of the left eye for granted, to this the Plaintiff suspected medical malpractice or medical negligence. The Plaintiff questioned the name of the doctor who performed the operation that the Plaintiff did not know to the Defendant as the leader of Palembang RSMH, but the Defendant did not want to give the name of the doctor who performed the operation.[7]

5) The fifth case, the incident that happened to Dr. Dewa Ayu Sasiary Prawani took place in April 2010, at that time Dr. Ayu with her partner, Dr. Hendry Simanjuntak and Dr. Hendy Siagian is handling a Puskesmas referral patient in the Manado area, because of the urgency of Dr. Ayu performed the operation of Cito Sectio Caesaria, but the action failed to save the patient's life. After some time after the incident, dr. Ayu et al. instead got an invitation from the police. He was reported by the patient's family for operating without permission. During the trial at the Manado District Court, dr. Ayu et al. required 10 months in prison, but dr. Ayu et al. was acquitted because it was not proven to do medical malpractice (medical malpractice) or medical negligence (medical negligence). The Public Prosecutor handling the case submitted an appeal and was granted by the Supreme Court in a decision issued on 18 November 2012. This Cassation Decree ordered dr. Ayu et al. to be jailed for 10 months. The verdict of Artidjo Alkostar et al, apparently made the world of medicine turbulent. Evidently doctors all over the country took to the streets to ask for Dr. Ayu et al. freed up. Even the doctors carried out strikes in almost all provinces because of grieving for the punishment of dr. Ayu et al. The actions of the doctors bore fruit. In February 2014 Dr. Ayu et al were released through a decision at the Review (PK) level. The basis of the Judicial Review Board granted PK is that the convicted persons did not violate the SOP (Standard Operating Procedure) in handling Cito Sectio Caesaria operations, so that judex facti considerations at the Manado District Court were correct and correct.[8]

From various examples of medical negligence cases above, it was revealed that generally involved patients from upper middle economic groups. Poor patients are more resigned. However, if there is a suspicion of medical negligence, the patient can actually complain to the Indonesian Medical Disciplinary Board (MKDKI) - Indonesian Medical Council (KKI) or to the Medical Ethics Honorary Council (MKEK) - Indonesian Doctors Association (IDI). Violations handled by MKDKI involve discipline. Sanctions in the form of written warnings to the revocation of the Registration Certificate (STR) while making doctors unable to practice.

Violations handled by MKEK are related to ethics. In addition to MKDKI and MKEK, patients who are victims of medical negligence can complain to the police / court on a criminal and / or civil basis. The three processes can run simultaneously in the three institutions.

Based on the description above, the authors intend to analyze the problem in this study with the title: "Application of Res Ipsa Loquitur for Medical Negligence Cases in the Patient Protection Perspective".

II. FORMULATION OF THE PROBLEM

Based on the background described above, the following problems can be formulated:

a. Can the application of the doctrine of res ipsa loquitur provide legal protection for patients from material or immaterial losses as a result of medical negligence by doctors and hospitals in medical disputes in court?
b. How is the application of the doctrine of res ipsa loquitur if there is a medical negligence by doctors and hospitals in a medical dispute in court?
c. Why is the doctrine of res ipsa loquitur applied to doctors and hospitals that commit medical negligence in medical disputes in court?

III. RESEARCH METHODS

A. Method of Approachment

The approach can be interpreted as an effort in the context of research activities to establish relationships with people under study or methods to reach an understanding of the research problem. According to S. Suryono, the approach method is a way of working done by researchers using standard rules namely systems and methods of each used.[9]

In this article the author uses normative juridical research with qualitative data analysis, namely research that uses the argumentation method as the main method to draw research conclusions. Normative legal research methods that are qualitative are often referred to as naturalistic research methods, because the research is conducted in natural conditions, where the researcher is a key instrument, data collection techniques are carried out by triangulation (combined), data analysis is inductive, and qualitative research results emphasize more meaning than generalization.[10]

Qualitative research uses the following assumptions: (a) Ontological, this research is unique

because the nature of reality is subjective and more than one (multiple, multiple); (b) Epistemology, researchers interact with the object of research; (c) Axiology, researchers are full of values and do not consider the problem of bias; and (d) Methodological, inductive, mutually influencing each other, continuously and the design develops during the study.[11]

In this qualitative normative juridical study, the author uses a case approach carried out by:

(a) Conducting studies on medical dispute cases relating to the application of the Res Ipsa Loquitur doctrine to doctors and hospitals that commit medical negligence that has been decided in a court that has permanent legal force (inkracht van gewijsde).

(b) Medical dispute cases can be in the form of cases that occur in Indonesia or outside other countries.

The main object of study in this case approach is ratio decidendi or reasoning, namely the court's consideration to arrive at a decision concerning medical dispute cases related to the Res Ipsa Loquitur doctrine.

B. Research Specification

This type of normative juridical research is analytical descriptive, that is, describing the applicable laws and regulations that are associated with legal theories or legal doctrines that are relevant to the problem under study. According to Soerjono Soekanto, descriptive research is intended to provide as detailed data as possible about humans, circumstances, or other symptoms.[12]

This research is expected to know how the application of Res Ipsa Loquitur doctrine in a court that decides medical dispute cases in relation to the actions of doctors and hospitals that commit medical negligence, so that it can be expected that the Doctrine Res Ipsa Loquitur (The things speak for itself) or the facts speak for themselves are used by judges in the District Court who examine, hear, and decide on cases of illegal acts in medical malpractice and medical negligence, because the Res Ipsa Loquitur doctrine is a way easy verification for patients by submitting facts suffered by him as a result of doctor and hospital care services.

C. Data Collection Technique

In normative juridical research that allows this qualitative, secondary data sources that will be used consist of primary legal materials, secondary legal materials and tertiary legal materials:

(a) Primary legal material that is legal material consisting of laws and regulations related to this research include:

a. Law of the Republic of Indonesia Number: 29 of 2004 concerning Medical Practices (State Gazette of the Republic of Indonesia of 2004 Number 116. Supplement to the State Gazette of the Republic of Indonesia Number 4431).
b. Law of the Republic of Indonesia Number: 36 of 2009 concerning Health (State Gazette of the Republic of Indonesia of 2009 Number 144. Supplement to the State Gazette of the Republic of Indonesia Number 5063).
c. Law of the Republic of Indonesia Number: 44 of 2009 concerning Hospitals (State Gazette of the Republic of Indonesia of 2009 Number 153. Supplement to the State Gazette of the Republic of Indonesia Number 5072).
d. Law of the Republic of Indonesia Number: 36 of 2014 concerning Health Workers (State Gazette of the Republic of Indonesia of 2014 Number 298. Supplement to the State Gazette of the Republic of Indonesia Number 5607).
e. Government Regulation Number 32 of 1996 concerning Health Workers (State Gazette of the Republic of Indonesia of 1996 Number 39. Supplement to the State Gazette of the Republic of Indonesia Number 3637).
f. Regulation of the Minister of Health Number 920 / Menkes / Per / XII / 1986 concerning Private Health Service Efforts in the Medical Field.
g. Minister of Health Regulation Number 1595 / Menkes / Per / II / 1988 concerning Hospitals as last amended by Minister of Health and Social Welfare Decree Number 191 / Menkes-Kesos / SK / II / 2001 concerning Amendment to Decree of Minister of Health Number 157 / Menkes / SK / IV / 1999 concerning the Second Amendment to the Regulation of the Minister of Health Number 159b / Meskes / Per / II / 1988 concerning Hospitals.
h. Regulation of the Minister of Health of the Republic of Indonesia Number: 290 / Menkes / Per / III / 2008 concerning Approval of Medical Measures.
i. Regulation of the Minister of Health of the Republic of Indonesia Number: 749a / Menkes / Per / XII / 1989 concerning Medical Records / Medical Records.
j. Regulation of the Minister of Health of the Republic of Indonesia Number 2052 / Menkes / Per / X / 2011 concerning Practice License and Implementation of Medical Practices.
k. Decree of the Minister of Health of the Republic of Indonesia Number: 496 / Menkes / SK / IV / 2005 concerning Guidelines for Medical Audit in Hospitals.
l. General Standards of Anesthesiology and Reanimation Services in Hospitals, 1999.
m. Indonesian Medical Council Regulation Number 1 of 2005 concerning Registration of Doctors and Dentists.

(b) Secondary legal material that is legal material consisting of books, legal journals, judges' opinions, court decisions, jurisprudence of the Supreme Court of the Republic of Indonesia and the results of symposiums, seminars relating to the topic of this study, decisions the decision of

the South Jakarta District Court, Cibinong District Court, Pemalang District Court, Palembang District Court, and Manado District Court in relation to medical dispute cases concerning the application of the Res Ipsa Loquitur doctrine.

(c) Tertiary legal materials, namely legal materials that provide instructions or explanations for primary legal materials and secondary legal materials such as: dictionaries, encyclopedias, dictionaries used in this study, including the Large Indonesian Dictionary, English Dictionary and Black's Law Dictionary, media print (newspapers, magazines), and websites / internet.

The data collection method according to Sunaryati Hartono collects legal materials in normative legal research, namely by distinguishing primary legal materials, secondary legal materials, and tertiary legal materials.[13] In this normative legal research, secondary data sources that will be used consist of primary legal materials, secondary legal materials and tertiary legal materials, using documentary studies. Documentary studies are studies that examine various documents both relating to the legislation and documents that already exist.[14] The secondary data collection technique in this study is to collect all the laws and regulations related to the problem being studied. Furthermore, an inventory is carried out by collecting and organizing legal materials into an information system so that it is easy to trace the legal materials. Legal materials are collected by studying documents, namely by recording primary, secondary and tertiary legal sources.

In this paper, the data analysis method is done by classifying secondary data sources, namely legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials. Legal materials that have been processed and collected above, then analyzed in a qualitative analysis and then the results are described and arranged in the form of papers. Qualitative analysis is an analysis of data that does not use numbers, but rather provides a description (description) in words of the findings and therefore this qualitative analysis prioritizes the quality / quality of the data, and not the quantity

IV. RESEARCH AND DISCUSSION

A. Res Ipsa Loquitur Can Provide Legal Protection for Patients

This study uses a normative juridical approach with descriptive analytical research specifications and qualitative data analysis of medical aspects and interpretations in the context of the use of resilience data on medical negligence in court.

Medical negligence occurs in an inexplicable way, but it carries a high chance of negligence and although there is no direct evidence of the behavior of doctors and hospitals that allows the court to draw a conclusion on the negligence by applying the doctrine of *res ipsa loquitur*.

Res ipsa loquitur means the facts speak for themselves (the thing speaks for itself) and are considered as a method, when the patient presents an argument for the purpose of affirming the prima facie case (dominant facts) for the effect under certain conditions only facts when an accident occurred, raising the presumption that prima facie is actually a doctor and the hospital is in a negligent state. How awkward the facts speak for themselves, depending on the specific conditions of each case.

This study uses the practical reality of medicine to show established treatments / services that have become standard care / services for doctors and hospitals. The principles underlying the evidentiary laws governing the resilience of lawyers are analyzed in the case of medical negligence. To summarize briefly, in the law of medical negligence, that it was intentional or negligent to cause damage to another body without legitimate justification is a wrong action. Even mistakes in the context of violating legal obligations are one important element to show accountability. It is also acceptable that the legal obligations of care / service paid to patients can arise independently of the medical contract. This is implicitly related to the fact that the patient has surrendered himself to the doctor's care / service, due to his professional skills and knowledge. This is the author's argument that any adverse event in a medical context, at most, can only be considered as fulfilling an element of error. Based on the duties of doctors and hospitals not to cause and / or cause danger by assuming judicial investigations of errors are determined by weighing competing norms and interests, to focus on whether it will "make sense" to impose responsibility. In this case the author explores aspects that can refute a presumption of error in criminal acts in the health sector. In health law consent is given by the plaintiff (patient) who justifies the actions of the defendant (doctor and hospital) and the law then accepts it as legal. Inadequate disclosure of the absence of informed consent (consent to medical treatment) is part of the element of error. If proper and adequate informed consent has not been given the court will find the defendant (doctors and hospitals) responsible for violations of their duties and only relates to the element of error, but other elements in the offense still have to wait. It should be noted that without the patient's consent, doctors and hospitals cannot justify his actions. It is also questionable, if a doctor will succeed with a defense based on "volenti non fit" - iniuria which translates as for people who are willing to be injured not done - as a defendant - doctors are needed to show that the culprit if he has knowledge about risk, the plaintiff (patient) appreciate the nature and extent of the risk, even though the risk is free and voluntary to bear it.[15]

As explained earlier, when the plaintiff (patient) depends exclusively on the legal status, it will have the effect that the interpretation of medical facts is limited to how the plaintiff (patient) understands the facts. The accused (doctors and hospitals) in refuting the presumption of facts - res ipsa loquitur - may now provide an explanation, not always making sense, causing the

court not in a position to decide the real problem as a cause or omission (culpa). For example, if the defendant (doctor and hospital) offers a reasonable explanation, that the operation was stopped due to equipment failure, this would justify leaving the swab (gauze) behind. Such an explanation would explain the defendants (doctors and hospitals) not acting in accordance with their duties, but would not clean the hospital, because they should have predicted such an event and had to take precautionary measures to prevent equipment failure. What if the defendant (doctor and hospital) shows meticulous attention in counting swabs (gauze) and one of them is still left behind? Will he still be responsible?[16] This research argues that according to South African criminal law, the court will look at circumstances to resolve questions of cause and effect and negligence. Is there a reason or justification for losing gauze? This will effectively render the use of the ipsa loquitur unsuitable. The use of res ipsa loquitur is accepted in the UK, because the design is that defendants (doctors and hospitals) can be called to answer. On the other hand, the plaintiff (patient) has experienced a misguided use of the resilient loquitur, its application often results in patients going to court, due to insufficient medical evidence leaving the court without benchmarks to determine worse liability, that the plaintiff (patient) is not can show a causal relationship between the actions of the defendant (doctor and hospital) and injury. Besides placing the defendant (doctor and hospital) in the main position to direct the trial, as the defendant (doctor and hospital) in refuting the doctrine of res ipsa loquitur, only need to offer an explanation that shows that he is not negligent, for example an unexpected allergic reaction causes danger. That does not even have to be the most likely cause of injury as long as it is an explanation that shows no negligence. The plaintiff (patient) will not be caught by an unexpected explanation from the defendant (doctor and hospital) that cannot be tested against acceptable standards of care / service in terms of the delictive principle elements. That will not help the country in its truth-seeking mission. In fact, the only medical evidence before a trial is that offered in a defense and the plaintiff's case (patient) will fail.[17]

The latter was investigated regarding the burden of further proof being in the hands of the plaintiff (patient) to overcome them, from the results of the research by Catherina Elizabeth Pienaar in South Africa, several discrepancies have been found in the application of resa loquitur.[18] The requirements of res ipsa loquitur which states that besides the fact there are ways in which the accident occurred must be unknown. There must be a high probability of negligent behavior that can be implied from sufficiently known facts, the application of the res ipsa loquitur doctrine is reflected in the Shanti Marina lawsuit case against Dr. Wardhani, Sp. ENT., Which was won by Shanti Marina reached the Cassation level of the Supreme Court of the Republic of Indonesia and compensation was received.[19]

In contrast to the results of the research by Catherina Elizabeth Pienaar who argues in her research, that in medical cases the resilience requirements are not met, because from the point of view of the adherents, the plaintiff (patient) will rarely know what will happen without medical expert evidence the results are undesirable. The plaintiff (patient) in South Africa followed the example in England, unaware of the different legal principles, it would have the effect that the plaintiff (patient) would "blindly" go to court on unclear and general grounds for negligent behavior. the. This does not strengthen criminal cases where the defendant (doctor and hospital) has no obligation to refute such a case or if the court allows the doctrine of res ipsa loquitur, that will place the defendant (doctor and hospital) in "superior position" to defend his case with bring up alternative explanations that are not negligent to avoid responsibility. However, if direct evidence is not available, negligence can be deduced from the facts, because there is no court that can eliminate every possibility that could have occurred in medical negligence (medical negligence). However, without the other facts before the court completes the full picture of the legal complaint, the plaintiff (the patient) will certainly not be ready. The facts of a case from which the resilience can be concluded, if it is a reasonable deduction, it may have validity of legal evidence contrary to conjecture. Such a conclusion must be clear from the facts namely the loss caused by the defendant's negligence (doctor and hospital).

Furthermore, Catherina E. Pienaar's thesis which states that it is not possible in the case of medical negligence as opposed to reasoning by law, medical negligence will be summed up in too broad a sense and in general terms or in an unspecified manner. As stated earlier, if all the facts are known, the legality of the report is incorrect and the case must be based on prima facie evidence (dominant facts). One of the legal requirements for law enforcement is that the cause must be unknown but sufficient with medical information and other facts available to conclude the occurrence of unlawful acts.[20]

From the results of the author's research, it appears clearly that in cases of more complicated medical negligence, despite the undesirable events, unspecified general conclusions from negligence (liability) cannot be supported by simple factual assumptions in the application of social security.[21]

B. Application of the Doctrine of Res Ipsa Loquitur in Medical Negligence

In English law there are basic requirements that must be fulfilled before the doctrine of res ipsa loquitur can be included, ie :

a. Events must be natural, so they don't always happen without negligence.
b. Equipment must be under the control of doctors and hospitals or medical personnel under the responsibility of doctors and hospitals.
c. The real cause of the accident must be unknown.[22]

An accident must be an event that will not occur in a normal process without negligence. The question that must be decided is whether the accident itself can

invalidate the conclusion of negligence, and in this case everything must be fixed based on experience and ordinary knowledge. The application of the above principle means the panel of judges is concerned with general human experience. Patients are also free to choose to do research on accidents that occur without negligence. In further efforts to avoid challenges, where the patient is unable to get the necessary proof because the judge does not need to draw adequate conclusions.

The results of research conducted by the author shows from the legal considerations used by the judges in deciding the Shanti Marina case against Dr. Wardhani, Sp. ENT. and Puri Cinere Hospital (RSPC) has rejected the arguments of Dr. Wardhani, Sp. ENT. and RSPC that everything that has been done is in accordance with medical procedures. Usually in this case, the plaintiff's position (patient) must be weak, because it is unable to prove the hospital (RSPC) is wrong, that's why the judge chose evidence that is difficult to refute, and the evidence he saw himself in court. During the trial where Shanti Marina was present alone, Shanti Marina's voice did sound nasally and unclear when answering the judge's question. The judge could not help concluding that in this case, the most appropriate thing to do was res ipsa loquitur, all the facts speak for themselves.[22]

Equipment that causes accidents must be under the control of doctors and hospitals or other medical personnel for whose actions doctors and hospitals must take responsibility. A free contractor used by doctors and hospitals can have control as long as conditions permit, so that doctors and hospitals are responsible for the free contractor's negligence or condition, so he must supervise the contractor.[23]

It is not necessary that all events and conditions surrounding this accident are under the control of a doctor and the hospital. If the conditions that lead to an accident are under the control of another person beside the doctor and the hospital, the incident alone is not sufficient evidence against the doctor and the hospital.

If this medical equipment is controlled by several employees of the same employer and the patient cannot find a special employee who controls it, the principle can still be applied and used to make the employer responsible as a representative.[24]

From the results of the author's research in the case of Abuyani bin Abdul Roni against the Managing Director of the General Hospital Dr. Mohammad Hoesin Palembang showed the actions of the defendant (Director of RSU Dr. Mohammad Hoesin Palembang) who did not reveal the name of the doctor who performed the plaintiff's left eye surgery (Abuyani patient) which ended with blindness, so the plaintiff could not sue the doctor who was suspected of conducting medical malpractice (medical malpractice) and / or medical negligence (medical negligence) is an act against the law (onrechtmatigedaad). In addition, the problem of the responsibilities of doctors who perform cataract eye surgery conducted at the RSU Dr. Mohammad Hoesin Palembang is an internal problem between RSU Dr. Mohammad Hoesin with the Indonesian Ophthalmologist Association (PERDAMI) which is irrelevant to the plaintiff. In my opinion, the actions of the Director of the General Hospital Dr. Mohammad Hoesin Palembang unwilling to tell the name of the doctor who performed the plaintiff's left eye surgery which ended with blindness has fulfilled the elements of res ipsa loquitur, namely: (1) facts may not exist / occur if doctors and hospitals are not negligent (negligence)); (2) that fact happens to be under the responsibility of doctors and hospitals; and (3) that fact occurs without any contribution from the patient.

If the cause of the accident is known, this case cannot exist if the facts speak for themselves, and the patient must confirm that the doctor and the hospital are negligent with respect to the cause. A patient who can only submit a partial explanation of how an accident occurred cannot be postponed to depend on the resilience report for further conclusions to submit his case.[25] According to Foster, in connection with the above stated:: ”That the third criterion is also very important and is often forgotten. If there is evidence, although small, regarding how the incident occurred, the patient must rely entirely on the case of evidence, and the proposition can never help him.”[26]

From the research results the author shows that the case of Dr. Dewa Ayu Sasiary Prawani et al. as a doctor at Prof. Hospital Dr. R.D. Kandaow Manado conducted a Cito Sectio Caesaria operation against the victim Siska Makatey who had fulfilled the elements of res ipsa loquitur or the facts had spoken for themselves, in this case there was no explanation as to the requirement for the inclusion of res ipsa loquitur, namely the absence of contributions from Siska Makatey patients in relation to cito sectio caesaria surgery process which resulted in the death of the patient.[27]

C. Res Ipsa Loquitur Can be Applied in Case of Medical Negligence

1. Medical Paradigm and Legal Paradigm Significantly Different Against the Doctrine of Res Ipsa Loquitur

Catherina E. Pienaar's research found that according to South African law, the remaining gauze (Van Wyk v. Lewis case) is only subjective evidence of neglect in the mind that does not know, that courts in South Africa must be presented with sufficient evidence to balance the actions of the accused (doctors and hospitals) against globally accepted medical standards determined by the medical profession itself. This study argues that the court's refusal in South Africa for the magical proverb res ipsa loquitur in medical law is defensible. In the case of medical negligence, the elements of factual causes, legal causation and negligence can only be determined after medical principles are explained. The elements of medical offense are neglected when a legal complaint is requested resulting in the plaintiff (patient) being insufficiently prepared in a medical case.[28]

Furthermore Catherina E. Pienaar's research argues that it shows the court needs to understand medical reality to enable prima facie testing.[29] The legal system determines that defendants (doctors and hospitals) must adhere to the standards of care expected and those determined by general law, society and the medical profession. The evidence of the defendant (doctors and hospitals) is weighed against the reasonable behavior of doctors and hospitals from the same branch of the profession that performs skills, and cares in following the standard of care received, a standard of care that satisfies more than just skills and care. This illustrates safe methods or practices that must be followed to avoid risks and complications in medical interventions, trials by medical experts in the context of medical principles.[30]

It is noteworthy to find that the legal jurisprudence governing tort law in the United Kingdom and offense law in South Africa has developed along different lines, clearly seen from the general law that changes gradually in both countries. The aim of the courts in the UK was to move to a more inquisitorial system in 1998 and changes in practice directives certainly enabled the court to participate in the medical fact-finding task, even if it remained dominant over hostility in the world of legal paradigms.

As it is known that the South African court does not accept res ipsa loquitur applications in res ipsa loquitur cases.[31] This is different from the court in Indonesia which has accepted and utilized the res ipsa loquitur doctrine for the first time in the Shanti Marina case against Dr. Wardhani, Sp. ENT., And Puri Cinere Cibinong Hospital based on Cibinong District Court Decision Number: 126 / Pdt. G / 2003 / PN. Cbn, dated July 20, 2004 in conjunction with the Decision of the Bandung High Court Number: 511 / Pdt / 2004 / PT. On August 18, 2005. At the Cassation level, the Shanti Marina Lawsuit was granted by the Supreme Court of the Republic of Indonesia, which has permanent legal force (*inkracht van gewijsde*).[32] Usually in this case, the plaintiff's position (patient) must be weak, because it is unable to prove the hospital (RSPC) is wrong, that's why the judge chose evidence that is difficult to refute, and the evidence he saw himself in court. During the trial where Shanti Marina was present alone, Shanti Marina's voice was indeed sounded nasal and unclear when answering the judge's question. The judge could not help concluding that in this case, the most appropriate thing to do is res ipsa loquitur, all the facts speak for themselves.

In this study the authors argue, with respect to the application of the doctrine of res ipsa loquitur for the first time in 2004 in the Shanti Marina case against Dr. Wardhani, Sp. ENT., And Puri Cinere Cibinong Hospital are as follows: (1) courts in Indonesia allow the doctrine of res ipsa loquitur to prevent doctors and hospitals from knowing what has happened to avoid responsibility just by choosing doctors and hospitals not to provide medical evidence; (2) the doctrine of res ipsa loquitur is only allowed for a lawsuit due to lack of care, skills and truth of the lawsuit can be determined only after considering all the facts; (3) the court must be placed as close as possible to the position of doctors and hospitals to test negligent behavior; (4) adequate medical information is required by the court to consider all the evidence on the balance of probabilities; and (5) if the court does not have enough evidence of the fact of injury to put himself in a position to ascertain whether the doctor and the hospital are delivering the required medical service standards, the court can ask the doctor and the hospital to acknowledge the fact of the injury as a cause of action without medical evidence which is enough to support this conjecture, because the facts speak for themselves (the things speak for itself).

2. *Equality of Doctors, Hospital and Patients In Health Services*

Catherina E. Pienaar's research considers that the application of the doctrine of res ipsa loquitur can balance the imbalance in the doctor, hospital and patient relationship resulting from the fact that patients sometimes or even do not know what happens under the influence of anesthesia and are therefore harmed . Furthermore, the study found that there was a relaxation of the South African court over legal principles, causation and causality in circumstances where the element of negligence was proven and related to the injury suffered by the plaintiff (patient) in South Africa. This shows that the court respects and recognizes a patient's constitutional right to be treated with bodily integrity in a dignified and fair manner. The South African Constitution is the country's first law and is the legal basis for the rights and obligations of citizens (implicit patient rights and obligations). It also defines the obligations of the government towards its citizens, so that the constitution clearly has relevance to medical law.

It has been argued throughout the study, that the magical proverb res ipsa loquitur is rejected, because the magical proverb does not fulfill all elements of the offense of obligation. Given the general law that develops about constitutional restrictions on the rights of poor patients, it is clear that res ipsa loquitur is a term that is too simple to even cover the extent of the element of error. Public policy considerations have been redefined and no longer support the "feeling" of public customs, because the expected rights to health care / services have been limited to those that qualify for available resources. Information in this context must be given to the court, which cannot be excluded from the application of the magical sayings of res ipsa loquitur.[33]

There is something interesting from the arguments of Van den Heever and Carstens that deserves to be considered in this study. They argue that: (1) the magical proverb res ipsa loquitur must apply to medical cases, because the plaintiff (patient) is treated unfairly, if he is deprived of his right to use the magical proverb; (2) the magical proverb res ipsa loquitur will help the plaintiff (patient) who is harmed because he has no medical knowledge about what happened; (3) the magical saying res ipsa loquitur does not harm the defendant (doctors and hospitals), because it only asks for mere explanation; (4) if the plaintiff (patient) is prohibited from using this magical saying, it must be seen as unfair discrimination; and (5) the magical proverb res ipsa loquitur can be broadly translated into the highest health standards that can be achieved with reference to process and results.

The right to equality is guaranteed in the constitution of South Africa, where everyone has the right to protection and legal benefits. Equality includes full and equal enjoyment of all rights and freedoms for its people. The South African court now considers the broader context of patient rights, and where the danger is caused by a strong group (doctors and hospitals) in relation to vulnerable vulnerable groups (patients), the constitutional rights of both parties must be considered and the fact that in practice a poor and uneducated patient rarely has a say in determining the course of his medical treatment / services. By importing other measures such as reforming South African civil procedures by introducing inquisitorial elements in court procedures, allowing greater levels of judicial questions or using medical court assessors must be able to help by correcting possible imbalances. In a more flexible approach by South African law that is a system of rules of causation or negligence relating to material inequalities as seen in the Oppelt v. Head: Health, Department of Health Provincial Administration: Western Cape; potentially following the example of the English court in the Chesters case v. Afshar is a possibility that results in patients being compensated properly in the future, if they have suffered a loss.[34]

3. *Regulation of Res Ipsa Loquitur Policy on Medical Negligence Cases : "Sacred Spell" Patient*

From the results of this study it was revealed that there are similarities with the situation in South Africa regarding the right to equality of doctors, hospitals and patients in medical services guaranteed in the South African constitution, where everyone (the cursive of the patient's author) has the right to protection and benefit (doelmatigheid) rather than legal validity (rechtmatigheid). Equality includes full and equal enjoyment of all rights and freedoms for its people. This is reflected in Catherina E. Pienaar's research related to the magical mantra res ipsa loquitur, that the South African court has now considered the broader context of the patient's rights, as seen in the Oppelt case v. Head: Health, Department of Health Provincial Administration: Western Cape; potentially following the example of the British court in the Chesters case v. Afshar is a patient who is really well compensated for his future, if they suffer losses from medical negligence as a result of the application of res ipsa loquitur due to material inequality.[35]

For the situation in Indonesia, inspired by the thesis of Catherina E. Pienaar, in fact we are all waiting for the authority of the Ministry of Health of the Republic of Indonesia to issue public policies by applying the principle of Freies Ermessen (freedom of action on one's own initiative) in the form of regulations on cases of medical negligence with the application of the doctrine of res ipsa loquitur which proved effective in providing legal protection for patients in court, in achieving substantive justice.

It is still fresh in our memories, all cases of malnutrition and measles which claimed the lives of 63 children in Asmat Regency, Papua. It is heartbreaking to see that humanitarian tragedy still repeats itself. The case of malnourished children in this country is reported on the media almost every year, even after the reform era. In the last ten years, cases of malnutrition have not only occurred in hard-to-reach areas, such as in Papua, but also in various regions throughout the archipelago.

As in 2005, cases of starvation in Yahukimo District, Papua, have spread in the media. Although the government at that time tried to minimize the problem, in reality 55 people died and 112 people were in poor nutritional conditions, some were children. We know that many remote areas in Indonesia have difficult access, even on the island of Java. In the Pongkor area, Bogor Regency, West Java, for example, there are still residents who have to walk more than one hour to reach the puskesmas. Especially in Papua, to Lolat Village, Yahukimo, at that time from Wamena people had to walk seven days up and down the hill. When the weather is good, a new helicopter can land. Likewise, the villages that are now suffering from famine and measles. From Agats, the capital of Asmat Regency takes three hours down the river by speedboat. However, infrastructure difficulties should not be a reason to fall victim, because malnutrition is not a sudden natural disaster. The process of lack of food to the status of malnutrition lasts a long time and actually can still be predicted. Moreover, every year the government (Ministry of Health) monitors its condition. Nutrition Status Monitoring Results 2016 shows, 17.8 percent of children under five suffer from malnutrition. Of that amount, 12.1 percent is classified as short children under five who can lead to stunting, if there is no intervention. From monitoring in 34 provinces and 514 districts / cities, no province is free from acute nutrition problems, with the biggest problem in Eastern Indonesia.

Likewise, immunization coverage. Data from the Ministry of Health said that basic immunization coverage reached 86.8 percent in 2015-2016. What we understand is that babies and children who escape immunization have the potential to become infected and infect. They are known as missing out, so they must be dealt with immediately. In this case, the government (Ministry of Health) actually has a database of malnourished areas and areas with low immunization coverage. The question then is, is homework done to overcome all the problems done? Not only malnutrition and measles, in fact extraordinary outbreaks of diphtheria also occur almost every year. Although it is true that there is already a division of authority in regional autonomy including education, health, and food. However, it is the duty of the central government (the Ministry of Education and Culture, the Ministry of Health, and the Ministry of Agriculture) to monitor, check, and if necessary give sanctions to local governments who are ignorant of the welfare of their people. Want in Asmat, Aceh, Serang, all Indonesian people have the same rights.[36]

But in reality the government does not want to work alone, but delegates the authority to the community through laws, such as education, health, food, and others. The tasks that must be carried out by the government and human prosperity are unlimited, so that the tasks of the government are dynamic, covering all matters relating to the welfare of the people. His enthusiasm was only limited to what was stated in the constitution of the Preamble of the 1945 Constitution of the Republic of Indonesia, which had an impact on the government (Ministry of Health) which did not encourage optimally in realizing the degree of public health. The impact can be seen from the lack of provision of funds for health in the 2016 State Budget and Revenue which only reaches around 5 percent. Yet if we compare it with other countries' health funding in Southeast Asia, for example Singapore is 14 percent, Thailand 13 percent and Vietnam 13 percent. To increase the ideal health budget, it takes 15-20 percent of budget income and expenditure.[37]

Judging from the budget approach, it can be stated that if only 5 percent is provided for health development in Indonesia, the country has not been able to improve its health status. Even though health status is the main factor to realize welfare (cursive from the writer of Welfare State). Conditions like this, make the government (Ministry of Health) criticized as those who do not understand or as if they really do not know, that the health sector is an investment for human development.[38]

However, it must be questioned and endeavored, whether the concept of the welfare state that has been applied has given impetus to the government (Ministry of Health) to prioritize the welfare of its people. This question becomes important when compiling development priorities are emphasized more in infrastructure programs, but the Human Development Index (HDI) is low. Based on this question, answers that can encourage the government (Ministry of Health) to be able to optimally improve health status, among others, need to be considered (priority scale) in the following matters: (a) the political budget is prioritized for health development; (B) the right of every citizen to obtain health insurance; (c) the right of every citizen to obtain optimal health services; and (d) improve the government (Ministry of Health) to improve public health status.

By using a budget approach study, the level of public health that has not been met due to lack of health budget, which is only 5 percent, according to WHO standards should range between 15-20 percent. Therefore, it is necessary for budget politics to prioritize development in the health sector, so that the fulfillment of the needs for health status can be realized. With reference to the provisions of article 66 of Law Number 36 Year 2009 concerning Health, the political budget for the health sector is determined as follows :

(a) the total government health budget is allocated at least 5 percent of the State Revenue and Expenditure Budget, excluding salaries;

(b) the amount of the provincial, district / city government health budget allocated 10 percent of the revenue and expenditure budget, excluding salaries; and

(c) the amount of the health budget mentioned above is prioritized for the benefit of public services at least 2/3 of the State Revenue and Expenditure Budget (APBN) and the Regional Revenue and Expenditure Budget (APBD).

The political budget mentioned above, if it can not be maintained anymore because it is not in accordance with needs, even though the percentage of the health budget must be increased, taking into account UNESCO standards and comparisons with other countries that have succeeded in realizing public health status. Meanwhile, there must be an amendment to the health law to meet public health and also implement the objectives of the welfare state (Welfare State).[39]

Budget policies that do not focus on handling social problems and / or service basic needs in remote areas (cases of malnutrition and measles). The basis of Indonesia's health budget allocation has always been detrimental to residents in remote areas. Because the allocation calculation is always based on the population. Remote areas in Papua are not included in the calculation of an ideal budget political policy for proper services for the community. Politics and budget policies in this country tend to be discriminatory, in the form of neglect of residents in remote areas that are far remote. To ensure a touch of service to decent and excellent communities in remote areas, the

calculation is not just one sector, such as education or health. Remote areas must be built in an integrated manner (integrated development for remote areas), so that they require an adequate budget. The allocation calculation must be affirmative.[40]

In the case of the doctrine of res ipsa loquitur which can be applied to cases of medical negligence in court, the government (Ministry of Health) must actually conduct its own investigation without waiting for amendments to Health Law Number 36 Year 2009 regarding Health with statutory regulations (beleidsregel), which are approved by Patients which has not been protected by law in the application of the combination of ipsa loquitur for cases of medical negligence (medical negligence). If the government (Ministry of Health) does not immediately start making regulations, on the basis of the principle of social justice, then moral development in this case must clearly be sued. The state must consider that it must protect every patient who is harmed due to medical negligence, so that most of the patients already have differences in the field of health development without accepting the state. Imagine, this case of medical negligence occurs in a country that has changed social ideals as the ultimate goal of the state. If this medical negligence shows one thing, then the basic political philosophy of the state, namely the realization of social justice for all people, has been damaged. The state (central and local government) neglects to care for the classes of patients they care for.

The series of events clearly raises the question of a lawsuit: Are the policies taken by the state, legislative and executive (Government and Ministry of Health), always ignorant in touching the realm of poor patient communities? This fundamental question is important so that development projects that are always exalted do not lose their social essence and instead create gaps.

It is time for a policy taken by the state to be formulated to fill the legal vacuum, as Thomas J. Aaron said: ".... is the power or authority given by law to act on the basis of judgment or conscience, and moral ideas rather than law. "It is understood that existing laws and regulations will not be able to reach the lives of all people.[41] Therefore, the government through the state administrative officer (Ministry of Health) who carries out the task of bringing about the welfare of the people, is given policy authority, namely the authority to regulate based on its own initiative (freies ermessen) for urgent needs in providing services to the public, which have not been regulated in law.[42]

In connection with the legal vacuum in the health law, which has not yet regulated the doctrine of res ipsa loquitur on medical negligence in providing legal protection for patients, the government (Ministry of Health) must base its commitment to realize the equal rights of doctors, hospitals and patients. This policy regulation in written form is known in the Netherlands as "Pseudowetgeving" or "Pseudo-legislation". Called as pseudo legislation considering its form does not resemble the law, because it is not a law, but has the force of law as a law. Regulatory policy as a form of using discretionary authority has the following characteristics :

(a) policy rules are not laws; (b) the principles of restriction and testing of laws and regulations cannot be upheld in policy rules; (c) the policy clause cannot be tested "Wetmatigheid", because there is no basis for legislation to promulgate decisions of policy regulations; (d) regulatory policies based on "Freies Ermessen" and the absence of relevant administrative authority to make regulations in making regulations; (e) testing more policy rules left to "doelmatigheid", so the basis for testing is the principles of good governance (good governance); and (f) in practice, formats are given in various forms and types of rules, namely: decisions, instructions, circulars, announcements, etc., are not even found in the form of rules.[43] What stands out here is that the consideration focuses more on "doelmatigheid" (benefits) rather than "rechtmatigheid" legal validity).

The policy regulations that will be issued also cannot conflict with existing laws, namely Law Number 36 of 2009 concerning Health and Law Number 44 of 2009 concerning Hospitals and Law Number 36 of 2014 concerning Health Workers, but that is only merely complementary. But it is not impossible that policy regulation will be the forerunner of legal changes in the future. Using authority to issue regulatory policies and responsive legal perspectives, the formulation must provide space to engage the public from the planning process to publication.[44] In this case, it is also possible for the emergence of authorities who have uncontrolled control from state administrators in implementing their authority, as opposed to laws and regulations, abuse of authority and arbitrary actions will not occur. Opportunities will be smaller, because responsive policy regulation has qualities that meet the principles of transparency, participation and accountability are the essence of the realization of good governance.[45]

Responding to these conditions in connection with the regulation of res ipsa loquitur policy on cases of medical negligence can be a "sacred mantra" for patients, there are urgent steps that must be taken immediately by all stakeholders of the Ministry of Health, namely strengthening the capacity of the government (Ministry of Health), especially in the field of services health. This capacity building must cover all lines, starting from the perspective of budgeting, the capacity of human resources throughout the health bureaucracy

apparatus, and the quality of public services in the health sector.[46]

The health service public paradigm which only emphasizes the Minimum Service Standards (SPM) must be shifted to the New Public of Health Service (NPHS) paradigm which places public health services as an embodiment of patient rights and is the responsibility of the government (Ministry of Health) to fulfill them. The main principle is the patient's "sacred mantra" (cursive author res ipsa loquitur) as the owner of sovereignty must enjoy his basic rights and the task of the government (Ministry of Health) is to ensure optimal realization.

V. CONCLUSION AND RECOMMENDATIONS

A. Conclusion

1. The doctrine of res ipsa loquitur (the things speak for itself / the facts speak for themselves) has proven to be a standard jurisprudence in the Supreme Court of the Republic of Indonesia for cases in medical negligence, which is an easy way of proving for patients, namely by submitting the facts suffered by him as a result of the care or treatment services of doctors and hospitals, where the doctrine of res ipsa loquitur can actually be applied by the judge who examines, hears, and decides this medical dispute, because the patient has found facts that there meet the following criteria: (a) facts may not exist / occur if doctors and hospitals are not negligent; (b) that fact happens to be under the responsibility of doctors and hospitals; and (c) that fact occurs without any contribution from the patient.
2. Medical reality will become clear only when the desired standard of care / service has been submitted to the court using expert medical evidence that is recognized and analyzed in detail about the causes and consequences of medical injuries. A proper and accurate understanding of medical information clarifies elements in unlawful acts to determine: (1) whether negligent behavior (culpa) can be proven; (2) is there a real risk that the application of the doctrine of res ipsa loquitur to cases of medical negligence can cause misperceptions of medical information provided by doctors or hospitals to patients; (3) based on the medical information, the court can draw legal conclusions from negligence to mere factual assumptions (whether or not there are legal cases in cases handled by the court); and (4) if the wrong belief is answered by the doctor and the hospital with an explanation of medical negligence that does not occur, even unrealistic or unrelated to the conclusion of the fact, the patient will lose the case, with the real risk that the doctor and hospital's explanation is convincing the court.
3. The Constitutional Court of the Republic of Indonesia continues to develop public law, in which the court has a central role in developing public law also to promote the values enshrined in the constitution, such as: (1) everyone has the right to have access to: (a) care services health including reproductive health care; (b) adequate food and water; and (c) social security, including if they cannot support themselves and their dependents, and appropriate social assistance; (2) the state must take legislative and other responsible actions, within available resources, to achieve progressive realization of each of these rights; and (3) no one may be refused medical treatment.

B. Recommendation

1. The Ministry of Health of the Republic of Indonesia is obliged to socialize so that doctors provide enough time for patients to explain everything related to medical information. Doctors need to improve communication with patients. This can prevent most medical disputes in court due to doctor and patient communication still being a problem in medical practice, given the number of patient complaints related to communication with doctors ranks third after medical service standards and competence.
2. The Ministry of Health of the Republic of Indonesia is obliged to socialize that the procedures for examining professional standards that must be decided through the Medical Ethics Honorary Council (MKEK) are out of line with and contradictory to the decision of the Constitutional Court Number: 49 / PUU-X / 2012, dated May 28, 2013, which intends to eliminate or eliminate all forms of protection or protection for members of the profession in carrying out their duties, due to: (a) That protection of the profession is very contradictory and injurious to the legal principles upheld in the Indonesian Law State namely the principle of Equality Before The Law or the principle of equality in advance law; (b) That the MKEK cannot be used as a professional organization that has the authority to determine whether a doctor is guilty or innocent in carrying out his profession; and (c) The existence of MKEK can only be used to assist law enforcement officers by presenting as expert witnesses in uncovering criminal acts that occur in the medical field.
3. The Ministry of Health of the Republic of Indonesia in issuing public health policies can implement Freies Ermessen (freedom to act on its own initiative) which is realized through the establishment of the Ministry of Health Regulation of the Republic of Indonesia in an effort to achieve substantive justice in cases of medical negligence by applying res ipsa loquitur for provide legal protection for patients in Indonesia.

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[20] Catherina Elizabeth Pienaar, *Loc. Cit*., p. 50
[21] See Patrick van den Heever & Carstens in the case of the Christmas Administrator v. Stanley Motor Ltd, for example, is not known how other vehicles end up on the wrong side of the road. There is a difference between the absence of facts and insufficient evidence of an accident. Ntsele v. MEC for Health Gauteng Provincial Government, 2013, plaintiffs failed to present appropriate information in supporting their cases and relied on the mistaken belief that the doctrine of res ipsa loquitur could arrive in a vacuum. See also Barkway v. South Wales Transport Co. Ltd. (1950). Ogilvie Thompson JA states that where the facts are sufficiently known the questions cease to be one, where facts speak for themselves and the solution can be found by determining whether facts are established, negligence must be concluded or not.
[22] Patrick van den Heever, 2002, *The Application of the Doctrine of Res Ipsa Loquitur to Medical Negligence Cases; A Comparative Survey*, Doctor Legum in Department of Public Law, Faculty of Law, University of Pretoria in South Africa, p. 91
[23] See Cibinong District Court Decision Number: 126 / Pdt. G / 2003 / PN. Cbn, dated July 20, 2004 juncto Decision of the Bandung High Court Number: 511 / Pdt / 2004 / PT. On August 18, 2005. At the Cassation level, the Shanti Marina Lawsuit was granted by the Supreme Court of the Republic of Indonesia, which has permanent legal force (inkracht van gewijsde). See also Tempo Magazine, Special Edition August 17, 2004.
[24] See Article 1367 of the Civil Code
[25] Patrick van den Heever, *Op. Cit*., p. 93
[26] See Palembang District Court Decision Number: 18 / Pdt. G / 2006 / PN. Plg dated July 4, 2006 juncto Palembang High Court Decision Number: 62 / Pdt / 2006 / PT. Plg dated 13 April 2007 juncto Decision of the Supreme Court of the Republic of Indonesia Number: 1752 K / Pdt / 2007 dated 20 February 2008 juncto Decision of the Supreme Court of the Republic of Indonesia Number: 352 PK / Pdt / 2010 dated 1 November 2010 which has permanent legal force (inkracht van gewijsde).

[27] Patrick van den Heever, *Op. Cit*., p. 93-94.
[28] Foster, 1996, *Res Ipsa Loquitur: The Defendant's Friend*, SJ. 824.
[29] See Manado District Court Decision Number: 90 / Pid.B / 2011 / PN. Mdo dated 22 September 2011 juncto Decision of the Supreme Court of the Republic of Indonesia Number: 365 K / Pid / 2012 dated 18 September 2012 juncto Decision of the Supreme Court of the Republic of Indonesia Number: 79 PK / Pid / 2013 dated 7 February 2014 which has permanent legal force (inkracht van gewijsde).
[30] Catherina E. Pienaar, *Op. Cit*., p. 257
[31] See the case of Ratcliffe v. Plymouth & Torbey Health Authority, 1998 where J. Brook said that in a simple case resa loquitur might speak at the end of layman's evidence, and the judge would decide the case at the conclusion drawn from all the evidence. J. Hobhouse said that the prosecutor (patient) may depend on a number of broad-based parts of negligence inference, but must add some medical expert evidence to pass prima facie testing.
[32] Catherina E. Pienaar, *Op. Cit*., p. 257
[33] Catherina E. Pienaar, *Ibid*, p. 258
[34] See Cibinong District Court Decision Number: 126 / Pdt. G / 2003 / PN. Cbn, dated July 20, 2004 juncto Decision of the Bandung High Court Number: 511 / Pdt / 2004 / PT. On August 18, 2005. At the Cassation level, the Shanti Marina Lawsuit was granted by the Supreme Court of the Republic of Indonesia, which has permanent legal force (inkracht van gewijsde). See also Tempo Magazine, Special Edition August 17, 2004.
[35] Catherina E. Pienaar, *Ibid*., p. 272-273
[36] Catherina E. Pienaar, *Ibid*., p. 281-282
[37] See Catherina Elizabeth Pienaar, 2016, The incommensurability of the archaic perceptions of the maxim resilience in medical negligence litigation, Doctor of Philosophy in Law, Faculty of Law at the University of Cape Town in South Africa, p. 281-282. See also Prosser in the topic Law of Torts 346 (1953) commented by Lambert, Comments on Recent Important Personnal Injury (Tort) Cases, 24 NACCA L.J. 46, 76 (1959): "The court did not hesitate to use the law of the victim as an intentional policy instrument even to balance against a conspiracy of silence ..."
[38] Kompas Daily Editorial, 17 January 2018
[39] Look at WHO (*World Health Organization*), 2014, *Global Health Expenditure Atlas*.
[40] Look at Wijaya (2018), *Government Duty in Fulfilling Health Status At Welfare State Of Indonesia*. Faculty of Law, 17 August 1945 University Semarang.
[41] Wijaya (2018), *Government Duty in Fulfilling Health Status At Welfare State Of Indonesia*. Faculty of Law, 17 August 1945 University Semarang, p. 4-5.
[42] Laode Ida, Poor Portrait of Public Services, Kompas Daily, 17 January 2018
[43] Look Thomas J.Aaron, 1964, *The Control of Policy Discreation*, Charles C. Thomas, Co., Springfield.
[44] Wijaya, *Op. Cit*., p. 5.
[45] Look William N. Dunn, 2016, *Public Policy Analysis*.
[46] Wijaya, 2016, *Research Report of Law Instrumen in One Door Service Implementation*, Faculty of Law, Universitas 17 Agustus 1945.