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Health Services Controversy in Emergency Conditions Seen Through the Zaakwaarneming Approach

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ABSTRACT

Health is a human right to get an increase in the degree of public health through the provision of medical services in accordance with professional code of ethics standards and the patient's medical needs after obtaining prior approval from the patient. However, in an emergency situation with the aim of saving the patient from disability, health services can be carried out without going through the patient's consent, which is known as *zaakwaarneming*. *Zaakwaarneming* as a form of health service raises pros and cons so that it is interesting to study through identification, namely First, How is the legal relationship between doctors and patients in health services based on *zaakwaarneming,* and Second, what issues arise from the relationship between doctors and patients based on *zaakwaarneming.* Normative juridical research methods, descriptive analysis research specifications, types, and sources of data consist of secondary legal materials through the support of primary legal materials, secondary legal materials, and tertiary legal materials, qualitative data analysis. The results of the study are First, in an emergency situation, doctors can provide health services to patients without a therapeutic agreement being preceded, but based on *zaakwaarneming* as an engagement based on law; and Second, the existence of the patient's actions to avoid the responsibility for fulfilling payments for actions that doctors have taken on the grounds of the absence of patient consent, as well as claims for disability that occur in health services, is a problem *zaakwaarneming* in the doctor-patient relationship.

Keywords: *Doctor, Patient, Health Service, Zaakwaarneming.*

1. INTRODUCTION

Health is a human right that is mandated by the Government to be realized through the provision of various health services to the entire community so that the highest degree of health can be realized in an effort to implement the ideals of the Indonesian nation as referred to in Pancasila and the Constitution of the Republic of Indonesia. 1945 paragraph-4. Health workers must carry out the implementation of health efforts in a responsible, ethical, high moral manner, as well as expertise to fulfill the health rights and needs of each individual and community, as well as to provide legal protection and certainty both to health workers themselves and to the community receiving health service efforts. Health services will involve many parties, namely hospitals, health workers/doctors, and patients. The relationship between patients, as recipients of health services, and doctors, as health workers, usually begins with a therapeutic relationship or therapeutic transaction that creates rights and obligations for the parties [1].

There are distinctive characteristics that distinguish between therapeutic agreements and agreements in general as regulated in Book III of the Civil Code on Engagement (*Van Verbintenissen).* Referring to Article 1233 of the Civil Code, for agreements in general, the acceptance of achievements is measured in the

form of giving something, doing something, or not doing a certain thing. In contrast to the therapeutic agreement, its achievements are in the form of "healing efforts", so that includes *inspanningsverbintenis*, where there is no guarantee of certainty from doctors in curing patients' illnessesbut with their scientific capacity, the doctor will try his best to help the patient's recovery [2].

In line with the provisions of Article 2 and Article 3 of the Regulation of the Minister of Health of the Republic of Indonesia Number 290/MENKES/PER/ III/2008, all medical actions to be carried out on patients must obtain approval, both in writing and orally. However, deviating from the provisions of Article 2 and Article 3 above, according to Article 4, it is stated that in an emergency and aims to save a patient from disability, a doctor can take health care actions without having to obtain prior approval from the patient, so that the relationship between doctors and the patient is no longer based on a therapeutic agreement, but is based on a legal relationship of voluntary management of the interests of others known in the concept of civil law with the term *"zaakwaarneming*." This study provides a more general and comprehensive picture of research conducted by previous researchers, which applied the concept of *zaakwaarneming* to underage patients, patients due to old age, or patients who were mentally disturbed due to illness, and unconscious patients. [3]

Zaakwaarneming as a form of health service for patients in an emergency, it is interesting to conduct a study, especially with regard to the identification of the following: First, how is the legal relationship between doctors and patients in health services arising from *zaakwaarneming*; and Second, what problems arise in connection with doctor's services to patients based on *zaakwaarneming* and how the legal settlement is.

2. RESEARCH METHOD

The approach method used is normative juridical, namely studying and reviewing doctrines or principles in legal science, as well as provisions of laws and regulations related to the problem that is the object of research [4] [5].

The research specifications are descriptive analysis with the aim of providing an overview of health service problems, supported by the type of data sourced from secondary data, which consists of primary legal materials, namely the provisions of laws and regulations originating from health law and general provisions sourced from The Civil Code, secondary legal materials in the form of textbooks, as well as tertiary legal materials such as legal dictionaries, encyclopedias, and the internet [6]. Finally, qualitative data analysis was carried out.

3. FINDINGS AND DISCUSSION

3.1. Legal Relations Between Doctors And Patients In Health Services That Arise From Zaakwaarneming

Health as a human right is realized through the provision of various health efforts to the entire community through the community's implementation of quality and affordable health development, whose rights are protected by Article 34, paragraph (3) of the Fourth Amendment to the 1945 Constitution. [7]

In order to provide legal protection and certainty both to patients as recipients of health services and to doctors in providing health services, according to Article 45 of Law no. 29 of 2004 concerning Medical Practice which is further elaborated in Article 2 and Article 3 of the Regulation of the Minister of Health of the Republic of Indonesia Number 290/MENKES/PER/III/2008 which requires that every medical action to be carried out by a doctor must obtain approval from the patient, both physically and mentally, verbally, or in writing after the patient has previously received a complete explanation, including regarding: (a) diagnosis and procedures for medical action; (b) the purpose of the medical action taken; (c) alternative courses of action and their risks; (d) possible risks and complications; and (e) the prognosis of the action taken.

Under normal conditions when the patient comes to the doctor, the provisions required in Article 54 of Law no. 29 of 2004 concerning Medical Practices can be quite easily carried out by doctors with the realization of a therapeutic agreement as also required in Article 1320 of the Civil Code concerning

Conditions for Validity of Agreements, namely the existence of an agreement between the parties, the ability to do something, having a certain object, and based on a lawful cause. However, under certain conditions, such as a patient experiencing a traffic accident and the hospital getting a patient in an emergency, where the patient cannot be asked for approval, including the closest family members who do not accompany him and are only delivered by those who help the patient [8], the action medicine can be done without the patient's consent, the legal relationship between doctor and patient is no longer based on a therapeutic,agreement but on *Zaakwaarneming.*

Management of other people's interests (*Zakwaarneming)* is a civil law concept that arises from an engagement originating from the law as regulated in Article 1354 of the Civil Code, as an act where a person voluntarily takes care of the interests of another person either with the knowledge of that person or without his knowledge. the risks and responsibilities of the person [9] [10]

In connection with the provisions on medical practice that do not specifically regulate *Zaakwaarneming* in health services, in line with the application of the *principle of lex specialis derogat legi generali,* the general provisions of applied *Zaakwaarneming* in the concept of civil law areas regulated in Book III of the Civil Code on Engagement (*Van Verbintenissen)* Article 1354.

Actions carried out by a doctor can be categorized as *Zaakwaarneming* if they meet the following requirements: (1) The doctor as a managed (represented) by the *zaakwaarnemer* interests of others, not his own interests; (2) The act of managing the interests of others, in this case, the patient must be carried *out zaakwaarnemer* by voluntarily because of his own awareness, without expecting any reward/reward; (3) Not because of obligations arising from laws or agreements; (4) The act of managing the interests of others must be carried out by *zaakwaarnemer* without any order (power) but because of his own initiative; and (5) there must be a situation that justifies a person's initiative to act as a *zaakwaarnemer,* thus urging the *zaakwaarnemer* to act.

Thus, health services provided by doctors, as *carrying zaakwaarnemer,* creates a legal relationship between patients and doctors, which is sourced from the law regardless of whether the patient agrees or not and places an obligation on doctors to carry out their medical services responsibly. Therefore, the doctor's obligations as *zaakwaarnemer* are: (1) carrying out the patient's interests as *Dominus* until the patient can take care of their own interests; (2) *Zaakwaarnemer* must manage *the Dominus'* interests as well as possible; (3) *Zaakwaarnemer* must be responsible like an ordinary power holder, namely to provide reports on what has been done in the interests of the *Dominus* and the person in charge of finance, as well as paying interest on the money which is used for his own interests.

Then, the rights of the doctor as *Zaakwaarnemer* are as follows: (1) If the *zaakwaarnemer* has done their job well, they are entitled to reimbursement of the costs they have incurred, which are essential and beneficial for the interests of the *Dominus*; (2) According to *"Arrest Hoge Raad* December 19, 1948," *zaakwaarnemer* has Retention Rights, which hold the goods *belonging to the Dominus* to the expenditure-spending paid back by Dominus.

3.2. Zaakwaarneming Issues in Doctor-Patient Relations

Health services provided by doctors to patients that arise based on *Zaakwaarneming*, can become a problem when one party, especially the patient and the patient's family, does not accept unilateral actions by the doctor, one example relates to the rejection of the total costs that the patient is obliged to pay for the actions taken, carried out by doctors based on the reasons for the absence of consent from the patient, as well as demands for the doctor's responsibility for the patient's disability.

In response to this problem, the legal relationship between a doctor and a patient originating from *Zaakwaarneming*, is not an engagement that originates from an agreement but is based on law, namely an engagement that occurs automatically due to a situation or event, which imposes an obligation on the person to accept it regardless of whether the person's consent. Therefore, by taking care of the patient's interests in a condition of emergency, and the conditions for managing the interests of the patient have been fulfilled. The condition of "legally/by law" as stipulated in Article 1353 of the Civil Code has been a bond between the doctor and

the patient giving the parties obligations to carry out their responsibilities properly. Negligence of one party, in this case, the patient, in fulfilling their obligations, can be categorized as "default/broken promise," which gives the doctor the right to take legal action known as *actio contrario.*

However, both patients and doctors have equal rights and obligations. Doctors also have an obligation to be responsible for providing health services according to service standards, professional standards, and standard operating procedures to patients, both requested and unsolicited, as regulated in Article 51 of the Law. Medical practice, that: (1) Doctors have provided medical services in accordance with professional standards and standard operating procedures as well as the patient's medical needs; (2) will refer the patient to another doctor who has better expertise or ability, if unable to carry out an examination or treatment; and (3) Performing emergency assistance on a humanitarian basis [11].

Then, another issue is related to the doctor's responsibility for the disability suffered by the patient, so that it becomes a legal issue regarding the responsibility of a doctor to the patient. According to the law on services in the health sector, a doctor has the proper authority and permission to carry out health services, especially in examining and treating diseases [12] [13]. Then, according to Article 1, point 10 of the Medical Practice Act, a patient is anyone who consults on his health problems to obtain the necessary health services, either directly or indirectly, to a doctor or dentist.

There are two legal relationships between doctors as service providers and patients as service recipients, first based on a therapeutic agreement as stated in Article 45 of Law 29 of 2004 concerning Medical Practice which is further elaborated in Articles 2 and 3 of the Regulation of the Minister of Health of the Republic of Indonesia Number 290/ MENKES/PER/III/2008 that every medical action that will be carried out by a doctor on a patient must obtain approval, meaning that there must be a conformity of will between one party, in this case, the doctor and the other party, in this case, the patient regarding a certain object. However, referring to Article 4 of the Regulation of the Minister of Health of the Republic of Indonesia Number 290/MENKES/PER/III/2008 that in an emergency situation to save the patient's life or to prevent disability, doctors can perform health service actions without the need for prior approval from the patient. . In such conditions the legal relationship between the patient and the doctor is not based on a therapeutic agreement but is based on a law known in civil law as voluntary management of the interests of others (*zaakwaarneming)* Article 1345 of the Civil Code.

Regardless of whether the legal relationship between doctors and patients is based on therapeutic or *zaakwaarneming agreements,* both have the same characteristics that the object is to make efforts or therapy to cure patients, where doctors, based on their scientific competence, try their best to cure the patient's illness. Therefore, juridically, the object in the therapeutic agreement, including *zaakwaarneming,* is not the patient's recovery or outcome (*Resultaatsverbintenis*), but rather an effort (*inspanings verbintenis or perikatan*/ikhtiar), namely the doctor does not guarantee certainty in curing the disease. However, with the doctor's efforts and expertise, they are expected to help to the best of their abilities [14][15].

If then the results of the health services provided by the doctor are not in accordance with what the patient expects, it cannot automatically be called a *"malpractice,"* because first it must be proven that there are errors and negligence of doctors in carrying out their profession, in meeting professional standards, standard procedures, and principles of medicine in the handling of patients, so as to cause *losses (causaal verband)* in bodily harm to the patients' physical and mental health, and/or life. If can be proven that there has been negligence by the doctor, then the doctor will have the burden of payment as responsibility for the loss [16].

In addition, it must also be understood that every health service cannot be separated from a medical risk (*untoward result*) or accident (*medical mishap/misadventure/accident)* as a condition that occurs after the doctor provides services to the patient where the condition of the patient is beyond the ability of doctors as ordinary human beings, despite services to patients having been carried out competently, based on medical ethics and morals, as well as respect for human dignity. In the concept of civil law, the medical risk is included in the scope of *Force Majeure* [17], a legal concept derived from Roman law (*vis motor cui resisti non potest),* which is often translated as "a state of," is a condition where a

person is prevented from carrying out his obligations, due to unforeseen circumstances or events at the time of the legal relationship, while the person (doctor) is not in a state of bad faith, so that the person (doctor) cannot be held accountable for the situation or event and cannot be required to pay compensation [18].

The release of responsibility due to *Force Majeure is* based on two theories, namely: (1) The theory of elimination or elimination of errors, wherewith the existence of *Force Majeure*, the doctor's mistakes are erased, and the doctor is not accountable for their mistakes; and (2) the theory of the impossibility of implementation both subjectively and objectively. Subjective impossibility, namely the impossibility of carrying out obligations that are only known by the subjective debtor, here does not relieve the debtor from fulfilling achievements, and if the debtor is negligent, the debtor is obliged to pay compensation. Then, objective impossibility is the impossibility of carrying out obligations that can be known by everyone so as to free the debtor to fulfill their obligations [19][20].

However, in practice, the two theories of impossibility have not been able to resolve the issue of releasing a person from their obligation due to *force majeure* because the parties have different interests. For example, the doctor will use the argument of objective impossibility, as an effort to relieve them from responsibility to the patient, that the doctor has provided medical services in accordance with professional standards and standard operating procedures as well as the patient's medical needs, and the patient's loss is not caused by their fault but is caused by factors outside the ability of doctors as ordinary people. It is different for patients, in order to get the doctor's responsibility for their loss, the patient will use the theory of subjective impossibility, that the loss experienced by the patient is caused by negligence and unprofessionalism of the doctor in handling the patient, comparing the success of other doctors in carrying out the same treatment.

There is a shift in the pattern of the doctor-patient relationship that is vertically paternalistic to a horizontal contractual relationship pattern [21], providing an equal position between the two, so that patients who are dissatisfied with the doctor's services can ask for accountability for their services through the legal instrument of Lawsuits for Unlawful Acts (*onrechtmatigedaad*) as regulated in Article 1365 of the Civil Code, namely: "Every act that violates the law that brings harm to another person, obliges the person who because of his fault published the loss, replaces the loss." The success of the patient in making a claim based on an unlawful act must be able to prove 4 (four) things as follows: (1) The existence of an unlawful act; (2) There is an error; (3) There is a loss; and (4) There must be a cause and effect relationship between the act and the loss [22].

Liability due to an unlawful act is a responsibility due to an error from a legal subject that causes harm to other parties. From the error that harms the other party, then According to Article 1239 of the Civil Code, liability arises from the legal subject concerned for their mistake, so they must compensate for the losses caused by their actions.

In response to the above, a doctor who is required to commit an unlawful act due to a patient's disability can make a defense based on the provisions of Article 1244 and Article 1245 of the Civil Code, where a doctor who has been charged with negligence in providing health services to a patient resulting in a patient's disability will not be obliged to pay compensation if they can prove that the disability occurred outside of their fault, but due to *Force Majeure.*

4. CONCLUSION

In general, the legal relationship between a doctor and a patient is based on a therapeutic agreement in which every medical action to be carried out by a doctor must obtain approval from the patient, both verbally and in writing, after the patient has previously received a complete explanation of both the diagnosis and procedures for medical action, the purpose of the medical action taken, other alternative actions and risks, complications that may occur; and prognosis of the action taken. However, in certain conditions where the patient is in an emergency, and no representative can be asked for approval, the doctor can take action without the patient's consent so that the legal relationship between the doctor and the patient is no longer based on a therapeutic agreement, but is based on *Zaakwaarneming*.

Zaakwaarneming is used as one of the loopholes for patients to avoid the responsibility of fulfilling payments for actions taken by doctors on the grounds that there is no consent from the patient. Responding to these problems, doctors can make a lawsuit of *actio contrario* on the basis of *Zaakwaarneming* as an engagement that originates from the law occurring automatically due to a situation or event, which imposes an obligation on the patient to fulfill his obligations regardless of the patient's consent. Then, regarding Medical Risk (*Untoward Result*) or Medical Accident (*medical mishap/misadventure/accident)* occurring in health services, the responsibility for the losses cannot be borne by the doctor because it is included in the scope of *Force Majeure.* Therefore, this research can be redeveloped as a form of legal protection for doctors who provide health services based on *zaakwaarneming.*

AUTHORS' CONTRIBUTIONS

The author's contribution is together starting from determining the title, looking for references, and working on this paper to completion.

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