The Position Of Medical Risks In The Study Of Civil Health Law Is Related To The Losses Suffered By Patients

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Abstract. In the medical field, it is also known as Medical Risk. Medical risk is a condition that is not desired by both the doctor and the patient, after the doctor has made the best possible efforts in accordance with the standards, but the unwanted thing still occurs. In Indonesia, the definition of medical risk is not definitively formulated in legislation. However, it is implied that medical risk is mentioned in Informed consent or approval of medical action, which is a written document signed by the patient authorizing a certain action on him. This research is a normative legal research. The results showed that Medical Risk in the Study of Health Civil Law is associated with Volenti Non-Fit Injuria, if a person has agreed to carry out certain actions, in the sense that he has known what risks will occur if the action is carried out and accepts the risk, then if the person is injured or suffers loss because of it, he cannot hold the defendant liable, so the medical risk of medical action is the existence of informed consent as evidence that can defend the doctor when there are patients who ask for liability.

Keywords: Informed Consent, Doctor, Medical risk, Civil Law

1. Introduction

In determining malpractice, there are several things that must be proven in court, if it enters the civil realm, it can be classified as Unlawful Acts. To be said to be a tort itself there are also several conditions that must be met. If the malpractice case has gone through the legal process and the doctor is found guilty, then he is obliged to provide compensation as determined by the judge. The compensation can be material and immaterial. In the medical field, it is also known as Medical Risk. Medical risk is a condition that is not desired by both the doctor and the patient, after the doctor has made the best possible effort in accordance with the standard, but the unwanted thing still occurs. In Indonesia, the definition of medical risk is not definitively formulated in legislation[1]. However, it is implied that medical risk is mentioned in Informed consent or consent to medical action, which is a written document signed by the patient authorizing a certain action on him. Consent to medical treatment only has legal meaning after the doctor informs the form of action and the risks that will occur. In addition to being a protection to the patient against the doctor's actions, the medical action approval document is also needed for the doctor as the legality of the doctor's medical actions to the patient. One of the contents of the agreement is that the patient is fully aware of the risks of medical action carried out by the doctor, and if in the medical action things happen that are not desirable, then the patient will not prosecute later. The inclusion of such a statement is to avoid the demands of patients who sometimes do not understand the nature of medical efforts that are effort or treatment.The World Medical Association Statement on Medical Malpractice, which has been adopted from the World Medical Assembly Marbela Spain, September 1992, cited by Herkutanto, states that medical risk or commonly referred to as untoward results is an incident of injury or risk that occurs as a result of medical action due to something that cannot be predicted in advance and not as a result of incompetence and ignorance. Therefore, the doctor cannot legally be held liable. Every medical action always contains risk, no matter how small the action is, it still contains risk.[2]

In relation to medical risks, Guwandi was the first scholar to examine the existence of risks behind medical actions. He even separates medical risks into those that can be expected or predicted in advance, and those that cannot be predicted in advance. Therefore, there are medical risks that can be held liable and medical risks that cannot also be held legally liable. Thus, medical risk is an uncertain medical event or condition that neither the patient nor the doctor expects. However, the prediction of risk has been conveyed by the doctor to the patient before a doctor performs the action. Regarding the liability, there are two, namely risks that can be held liable and

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medical risks that cannot also be held legally liable.Basically, when talking about medical law or medical law, it is inseparable from discussions about civil law, as well as criminal law and administrative law.[3] In other words, these three types of law are part of medical law. The legal relationship between doctors and patients is a therapeutic agreement as emphasized in Article 39 of the GCPL in conjunction with the preamble of the Kodeki Regulation. A therapeutic agreement is an agreement that is only a maximum effort to perform medical actions on patients based on the GCPL. Furthermore, a doctor's risky action against a patient is basically an invasion of a person's body. In such cases, a written consent from the patient is required for the action to be valid. When the requirement of information is not given to the patient, or the action results in injury or death, the doctor is criminally liable for the consequences. The focus of this research is the principle set out in civil law that whoever causes harm to another person must compensate for the harm caused. The doctor is considered responsible in the field of civil law when the doctor does not carry out his obligations or does not perform the performance. Based on Article 39 of the GCPL, the legal relationship between doctors and patients is a relationship based on agreement. The agreement in question is a therapeutic agreement regarding a treatment effort, or commonly recognized as an inspaningverbintenis agreement.Related to the comparison of Medical Risk with Negligence.[4]

2. Method

This research is normative juridical research, which is legal research conducted by examining library materials or secondary data as the basis for research analysis, by conducting a study of various regulations and literature related to the problems studied.[7]Data collection tools are carried out by means of literature study. Literature study is the collection of data and information from books, journals, the internet, which are related to the research. through document studies.[5] Document studies are used to obtain secondary data which includes data obtained from library materials consisting of: Primary legal materials in the form of laws and regulations related to the research issues discussed, secondary legal materials, namely materials that provide information or matters relating to the content of primary sources and their implementation.

3. Results and Discussion

Medical Risks in Health Civil Law Studies are associated with Volenti Non-Fit Injuria

In journals or books on health law, the doctrine of volenti non fit injuria/assumption of risk is often used as an example of a defense that can be used to defend doctors in cases of alleged malpractice in therapeutic relationships. In the journal, the doctrine of volenti non fit injuria/assumption of risk, is explained that doctors cannot be held responsible for the risks arising from an action, if the doctor has fully explained the big risks to the patient or the patient's family really knows about them and is voluntarily willing to bear them.[6] This doctrine is based on the view that if a person knows that a risk exists and is voluntarily willing to bear that risk, if the risk actually occurs then he can no longer sue. Real examples of this doctrine are: in sports that have high risks such as boxing, football, martial arts; and in the medical world [10].

The doctrine of Volenti Non-Fit Injuria/Assumption of Risk explains that when someone agrees to the danger or risk that will be imposed on them, that person cannot ask for compensation in tort law. This means that if someone has agreed to do a certain act, and if that person is injured or suffers loss because of it, he cannot claim compensation.[7]

To more easily interpret the doctrine of volenti non fit injuria, it is that anything suffered voluntarily cannot be said to be an 'injury'; or an 'injury' cannot arise from voluntary actions carried out by the party who feels disadvantaged. This defense frees the 'perpetrator' from any form of liability if it is proven that the 'tort' arose after the party who felt aggrieved had been informed and voluntarily agreed. Thus, the consent of the injured party is the essence of this defense.[2]

Giving an agreement (consent) or accepting a risk can be done expressly or impliedly, such as when buying a ticket to a baseball game, it is considered that you have accepted the risks that will occur in the match. Giving consent or accepting risks must come from free will; voluntarily, there is no coercion factor, no undue influence, no mistakes, and so on. The injured party must have the freedom to make a choice before this defense can be used against him.[1]

In practice, giving consent is a subjective matter. There are factors that can influence the granting of consent itself, such as the relationship between the parties or the legality of the action. It should also be remembered that losses incurred as a result of risks occurring cannot exceed the losses that have been agreed, unless losses that exceed this can be foreseen. Losses resulting from negligence cannot be said to have been agreed upon in advance.[3]

In addition, to be able to use the defense of volenti non fit injuria, the action carried out by the 'tort-feasor' is not an illegal act or an act that violates the law. If X kills Y with Y's consent, where Y is a healthy adult and fully aware of the consequences, X will still be responsible for the murder. Because murder cannot be justified in law.[8]

That the application of volenti non fit injuria in medical procedures is in accordance with the development of the relationship between doctors and patients. Previously, the doctor decided for himself what medical action he would carry out and the patient just accepted it (paternalism). Now, the doctor and patient work together to determine what medical action will be carried out on the patient (partnership).[7] This relationship pattern emphasizes the patient's right to his own body (autonomy). That the patient has the right to know and determine what will be done to his body. Therefore, the patient has the right to give consent to medical procedures that will be carried out on him with the consequence that he is responsible for the consent he has given. This doctrine can also be applied to protect hospitals and doctors against patients or their families who are popularly said to be 'forced to return home'. This doctrine can be applied by asking for the signature of a statement that he will bear all risks that may arise himself. That he had been given complete information by his doctor, so that the hospital and doctor could not be blamed in the future.

The concrete form of the patient's statement is called informed consent. Informed consent is a form of patient autonomy, where the person who has the right to determine what action to take on a patient is the patient himself. Informed consent literally consists of two words, namely informed and consent. Informed means that you have received an explanation/information/information. Meanwhile, consent means giving approval or allowing. Thus, informed consent means an agreement given after receiving information. According to Veronica Komalawati, informed consent is as follows: A patient's agreement/agreement to the medical efforts that the doctor will carry out on him, after the patient has received information from the doctor regarding the medical efforts that can be taken to help him, accompanied by information about all risks that may occur.

The definition of informed consent is stated in the Minister of Health Regulation concerning Approval of Medical Procedures, Minister of Health Regulation No. 290/MENKES/III/2008 Article 1 number 1, namely: Consent to medical procedures is approval given by the patient or closest family after receiving a complete explanation regarding the medical or dental procedures that will be carried out on the patient.

So, it can be said that informed consent is proof of the application of the doctrine of volenti non fit injuria/assumption of risk in medical procedures. However, it is important to remember that having informed consent or approval for medical procedures or approval for medical procedures does not mean providing legal immunity for all doctor's actions. As regulated in Article 6 of the Minister of Health Regulation no. 290/Menkes/Per/III/2008 concerning Approval of Medical Procedures which states, "Granting medical approval does not eliminate legal liability in the event that there is proven negligence in carrying out medical procedures which results in harm to the patient".[9]

Health Civil Law Study of Medical Risk Positions Associated with Losses Suffered by Patients

As previously explained, medical negligence is part of medical malpractice. So, medical negligence is definitely malpractice but malpractice is not necessarily negligence. Malpractice consists of intentional malpractice and malpractice due to negligence. Intentional malpractice means that the doctor consciously and deliberately carries out a medical action whose consequences he desires, where the action is an unlawful act. An example is a doctor who practices abortions that are not in accordance with applicable law. For these unlawful acts, doctors can be held responsible. In contrast to medical negligence, it is still difficult for people to identify it and differentiate it from medical risk.[6]

To understand the difference between the two, it will be easier to give an example in a case. For example, there is a case where the doctor will perform a surgical operation which has the possibility (risk) of bleeding. If to prevent this possibility from happening, the doctor has made preparations in the form of preparing surgical tools properly, storing blood to deal with if the patient lacks blood, asking for help from other medical personnel,

etc. in accordance with standard procedures. However, in the end undesirable things still happen due to the course of the patient's illness. So, this is what is called a medical risk where the doctor cannot be held responsible because the doctor has carried out the best possible precautions and preparations in accordance with existing standard procedures.[8]

The consequences caused by this medical risk are called medical accidents, namely when the risk occurs. However, if in the same case, the doctor does not take preparation and precautions according to standard procedures, such as not preparing blood reserves for the patient in case bleeding occurs, and this risk actually occurs, resulting in injury or loss to the patient.[10] So, the doctor is considered to have committed negligence by not doing what he should or not following standard procedures. In this case, the doctor can be held responsible. So, it can be concluded, the key to distinguishing between risk and medical negligence is:

a. Has the doctor taken preparations, precautions and anticipatory steps related to risks;
b. Did the losses arise due to the doctor's violation of standard procedures?

Medical risk is something that has been predicted (predictable) by a doctor or medical personnel regarding the course of a patient's illness. When carrying out medical procedures on patients, doctors should inform patients about the risks that may occur in carrying out the procedures.[11] To deal with these risks, doctors must take precautionary measures to prevent these risks from occurring by following standard procedures. If the doctor has taken preventive measures and anticipated these risks, but medical accidents still occur and cannot be dealt with, then the doctor cannot be held responsible. The benchmarks used in determining medical risk are as follows:

a. Has the doctor taken preparations, precautions and anticipatory steps related to risks;
b. Did the losses arise due to the doctor's violation of standard procedures?

Medical risks cannot be held accountable to the doctor who has caused the risk as long as the doctor has taken preventive measures and/or anticipatory steps for the risk in accordance with standard procedures. And, have provided information about these risks to patients.[12]

Regarding whether the patient understands the risks or not, in health law, in accordance with Article 45 of Law Number 29 of 2004 concerning Medical Practice and Article 8 of the Minister of Health Regulation No. 290/Menkes/Per/III/2008 concerning Approval of Medical Procedures, it has become an obligation for doctors to provide an explanation to their patients, before carrying out medical procedures, which at least includes the following:

a. Diagnosis and procedures for medical procedures;
b. The purpose of the medical action performed;
c. Other alternative actions for the risks;
d. Possible risks and complications; And
e. Prognosis of possible actions.

Also, in accordance with Article 52 of Law Number 29 of 2004 concerning Medical Practice, the Indonesian Medical Code of Ethics (KODEKI), and literature, it is the patient's right to receive an explanation regarding medical procedures, diagnosis, therapy, etc. from the doctor who treated him.[10]

Based on the explanation above, the Health Civil Law Study of the Status of Medical Risks is linked to the Losses Suffered by Patients is closely related to the relationship between the doctor and the patient as stated in the therapeutic agreement, a therapeutic agreement or therapeutic transaction is an agreement between the doctor and the patient which gives the doctor the authority to carry out activities to provide health services to patients based on the expertise and skills possessed by the doctor.[13]

Therapeutic agreements apply the contract law regulated in book III of the Civil Code, as stated in Article 1320 of the Civil Code which reads: "All agreements, whether they have a specific name or are not known by a specific name, are subject to the general regulations, which are contained in This chapter and the previous chapter." However, therapeutic agreements are different from agreements in general because they have a different agreement object from agreements in general. Therapeutic agreements or therapeutic transactions are included in inspanning verbintenis or effort agreements, because doctors cannot possibly promise healing to patients, what doctors do is provide health services as an effort to cure patients.[13]

Therapeutic agreements are binding like law for both doctors and patients. As regulated in Article 1338 of the Civil Code which reads: "All agreements made legally apply as law for those who make them".[14]

From the description above, a therapeutic contract or transaction is included in an inspanningsverbitenis where the medical action does not require results, but the action must be in accordance with standard operating procedures and patient needs and can also be in the form of efforts to treat or prevent disease, maintain or restore health. does not demand results, but his efforts must comply with health service standards. Even though inspanningsverbitenis has emphasized that this engagement is an engagement based on efforts, in this case the doctor or health worker, to carry out maximum efforts in carrying out medical procedures, the patient can still ask for legal responsibility if there is a loss that arises because the doctor or health worker did not carry out the action. medicine according to approved medical procedures, does not provide comprehensive information, and could also due to negligence cause harm to the patient or malpractice.[15]

In filing a lawsuit related to a medical dispute, the patient can also submit informed consent as the basis and evidence for the trial, where the informed consent can prove the existence of a relationship containing the rights and obligations of both the patient and the doctor in carrying out the approved therapeutic transaction.[16]

4. Conclusion

The conclusion in this research is that medical risks in the Health Civil Law Study are associated with Volenti Non-Fit Injuria, so if a person has agreed to carry out a certain act, in the sense that he or she knows what risks will occur if the act is carried out and accepts the risk, then if the person If the person is injured or suffers harm because of it, he cannot hold the other party responsible, so the medical risk of medical action is the presence of informed consent as evidence that can defend the doctor when a patient asks for responsibility. However, even though there has been informed consent or approval for medical procedures or approval for medical procedures, the doctor can still be held responsible if the doctor is proven to have committed negligence which resulted in harm to the patient, as regulated in Republic of Indonesia Law on Health No.17 of 2023 and Article 6 of the Minister of Health Regulation No. 290/Menkes/Per/III/2008 concerning Approval of Medical Procedures

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