Application of Restorative Justice Values in Settling Medical Malpractice Cases

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Abstract: Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia. This research is a qualitative research using normative legal research and uses a statute approach and a conceptual approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. The conclusion showed that the restorative justice emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Hence, restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Keywords: Restorative Justice, Legal Settling, Medical Malpractice Restorative Justice, Legal Settling, Medical Malpractice.

INTRODUCTION

Lawsuits submitted by patients or their families to the hospital and/or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence law (Raveesh *et al*., 2016; Traina, 2009; Mello, 2001). The behavior demanded is medical malpractice which is the designation "genus" (collection) of medical professional behavior groups that deviate and cause injury, death, or harm to patients. Basically, the hospital functions as a place to heal illnesses and restore health and the intended function has a meaning of responsibility which should be the responsibility of the government in improving the level of community welfare. Malpractice victims in Indonesia often find it difficult to seek justice, the current legal system has not yet sided with patients (Iswanty *et al*., 2017; Sasanthi, 2018; Purwadi & Enggarsasi, 2019). Health sector reform that includes a variety of substances, including malpractice, is urgently needed to prevent further casualties. Health reforms that cover a variety of substances, especially malpractice victims are increasingly widespread. If counted annually from Jakarta, it tends to increase, not to mention those in the regions. The Jakarta Legal Aid Institute (LBH) revealed, Reports of malpractice cases and the absence of the right to health are likely to increase. In 2009, LBH Jakarta recorded at least 7 complaints reports from the public. In 2010 the number increased to 10 complaints. In the last eight years, the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia*/ MKDKI) received 193 complaints of alleged malpractice. Of that number, 34 doctors were given written sanctions, 6 were required to participate in the re-education program, and, the worst part, 27 doctors had their registration certificates revoked which automatically made their license to practice invalid (Tempo.co, 2013).

The current law governing health and hospital matters does not favor the patient because it places evidence on the victim. In this case the patient must prove the occurrence of malpractice. In addition, there is a gap (distance) of knowledge and information between the victim and the doctor, if this is aligned with the usual evidentiary law that is related to the criminal law, it certainly will not be met, and even tends to lose the patient, because all the evidence held by the doctor. Based on observations of LBH Jakarta, reports from the community in the police regarding malpractice have been relatively deadlocked, and many have even stopped, this is because the police always base their investigations on expert statements. What was said by the expert was recorded by the police, in this case the expert who gave objective information or not. On the other hand the patient (victim) who asks the expert of a doctor is reluctant to give testimony of this matter there

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E-ISSN: 1929-4409/21

is a kind of conspiracy in the world of medicine, to cover up so that for example the doctor is protected from his mistakes. This fact is not surprising if many people prefer to remain silent rather than have to report events that have befallen them due to poor health services, even patients often consider this as a fate that must be accepted. The practice of settling criminal cases outside the court so far has no formal legal basis, so there are often cases where informally there has been a peaceful settlement (though through a customary law mechanism), the judicial process is still processed according to the applicable law (Sohn & Bal, 2012; Liebman, 2013; Morreim, 2012; Bielen *et al*., 2020; Arief, 2008). LThis paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia?

RESEARCH METHODOLOGY

This research is a qualitative research using normative legal research. Normative legal research is a scientific research procedure to find the truth based on legal scientific logic from the normative side (Ibrahim, 2006). In an effort to achieve the stated research objectives, this study uses a statute aproach and a conceptual aproach.

In this study, the statutory approach was used. It is a research that prioritizes legal materials in the form of statutory regulations as a basic reference for conducting research about medical malpractice. The statutory approach is used to examine statutory regulations which in normalizing there are still deficiencies or even foster deviant practices both at the technical level or in their implementation in the field. To examine statutory regulations, this study used some Indonesian laws about medical practice such as Law No. 23 of 1992 about health. More specifically, Article 55 paragraph (1) of Law No. 23 of 1992 on Health stated that every person has the right to compensation due to mistakes or negligence committed by health workers.

Moreover, the conceptual approach is used in this study. It is a type of approach in legal research that provides an analysis point of view of problem solving in legal research seen from the aspects of the legal concepts behind it, or can even be seen from the values contained in normalizing a regulation in relation to the concept used about malpractice in medical service.

RESULT AND DISCUSSION

Black's Law Dictionary mentions malpractice is any attitude of wrong action, lacking skills in an unnatural measure. This term is generally used towards the attitude of actions of doctors, lawyers, and accountants. Failure to provide professional services and do so at a reasonable level of skill and intelligence by the average colleague of his profession in society, resulting in injury, loss or loss in service recipients who trust them, including wrong professional acts, lack of improper skills, violating professional or legal obligations, very bad practices, illegal, or immoral behavior. Herkutanto (2011) quoted from the Word Medical Association Statement on Medical Malpractice adapted from the 44th World Medical Assembly Marbela Spain, September 1992 states tha: "medical malpractice is the failure of doctors to meet the standard procedures in handling their patients, the inability or negligence, causing a direct cause of harm to the patient.Komalawati (1989) states that the term malpractice comes from "malpractice" which in essence is a mistake in carrying out the profession that arises as a result of obligations that must be done by doctors. According to Chazawi (2007), medical malpractice is a doctor or a person who under his command intentionally or negligently performs acts (active or passive) in the practice of medicine to his patients at all levels that violate professional standards, standard procedures or medical principles, or by violating law without authority; by causing a result (causaal verband) loss of body, physical and mental health and or life of the patient, and therefore establishes legal liability for doctors.

According to Hanafiah & Amir (1999), medical malpractice is the negligence of a doctor to use the level of skills and knowledge that is commonly used in treating patients or injured people according to the size of the same environment. Meanwhile, according to Ninik Mariyanti (1988), malpractice actually has a broad understanding, which can be described as follows:

1. In a general sense: a bad practice, which does not meet the standards set by the profession;

2. In a special sense (seen from the patient's point of view) malpractice can occur in determining the diagnosis, carrying out operations, during treatment, and after treatment.

Based on some understanding of medical malpractice above scholars agree to interpret medical

malpractice as the fault of health workers who for not using knowledge and skill levels in accordance with professional standards which ultimately results in injured or disabled patients or even death. According to Yunanto and Helmi (2010) in medical disputes, there are two basic things. First, on the part of the patient or the patient's family who do not understand about medical actions or procedures that sometimes can cause risks. Second, from the doctor who is less communicative, does not provide a strong explanation of the disease or medical action he is taking. Malpractice according to Lestari (2001) and Isfandyarie (2005) can be distinguished in two forms, namely ethical malpractice and juridical malpractice. Every juridical malpractice is definitely an ethical malpractice, but not all ethical malpractice is a legal malpractice. Ethical malpractice occurs when doctors perform actions that are contrary to the medical code of ethics which is a set of ethical standards, principles, rules and norms that apply to doctors in carrying out their profession (Purwadi *et al*., 2019). Soedjatmiko (2001) distinguishes juridical malpractice in three categories, namely:

1. Civil malpractice

   Civil malpractice will occur if the doctor or the hospital does not fulfill the obligation or does not provide the rights of the patient based on the agreement to provide health services, so that the doctor and or the hospital have defaulted on the agreement. Civil malpractice can also occur if the doctor or patient does an action that causes harm to the patient so that it can be said to have committed an illegal act.

2. Criminal malpractice.

   Criminal malpractice occurs if there is a doctor's mistake in taking a careless action that causes the patient to die or become disabled. Criminal malpractice can occur due to three things, namely: (i). for example, in cases of leaking medical secrets, abortions without medical indication or omitting a patient for any reason; (ii). due to carelessness that occurs because the doctor or health worker acts not in accordance with medical standards or without asking for patient consent; and (iii). due to negligence that occurs due to inadvertence of the doctor causing death or disability in the patient. Criminal malpractice also occurs if there is an incident in the form of omission and/or rejection of patients who come, citing the patient's inability to pay for hospital, medical and/or nursing services, both inpatient and outpatient. This type of malpractice occurs because there is no fulfillment of obligations prescribed by law by the hospital in the form of providing assistance to patients who should be helped, resulting in death or disability in these patients as a result of lack of help.

3. Administrative malpractice.

   Administrative malpractice occurs if doctors, health workers or hospitals practice violating state administrative laws such as carrying out practices without permission, carrying out practices or actions that are not in accordance with their permits, or having their licenses expired and or carrying out practices without making medical records clear.

There are three theories that mention the source of malpractice, namely (Mariyanti, 1988):

1. Contract Violation Theory.

   The first theory is that the source of malpractice is due to breach of contract. This is based on the principle that legally a health worker has no obligation to care for someone if between the two there is no contractual relationship between the health worker and the patient. The relationship between health workers and patients only occurs when a contract has occurred between the two parties.

   In relation to the relationship between the patient's contract with the health worker, it does not mean that the relationship between the health worker and the patient always occurs with mutual agreement. In cases where the patient is not self-conscious or in an emergency situation, for example, a person may not give their consent.

   If this situation occurs, then the approval or contract of the patient's health worker can be requested from a third party, namely the patient's family acting on behalf of and representing the patient's interests. If this is also not possible, for example because the emergency patient comes without family and is only escorted by other people who happen to have helped him, then in the interest of the sufferer, according to applicable laws, a health worker is required to

provide assistance as well as possible. This action has been legally considered as an embodiment of the medical-patient contract.

2. Theory of Deliberate Acts.

The second theory that can be used by patients as a basis for suing health workers for malpractice is intentional tort, which results in someone physically injured (asssult and battery).

3. Theory of Negligence.

The third theory states that the source of malpractice is negligence. Negligence that causes the source of actions that are categorized in this malpractice must be proven to exist, besides the negligence in question must be included in the category of gross negligence (culpa lata). To prove this is certainly not an easy task for law enforcement officers.

The concept of solving medical malpractice cases both contained in Act Number 29 of 2004 concerning Medical Practices, Act Number 36 of 2009 concerning Health, and Act Number 44 of 2009 concerning Hospitals only regulates the settlement of cases in the realm of civil law. For medical malpractice cases that contain elements of criminal law directly submitted to the police for an investigation process as referred to in Article 186 of Law Number 36 Year 2009, it reads: supervisory staff must report to investigators in accordance with the provisions of the legislation".

Arrangement of medical malpractice case/dispute settlement through civil law can be seen in Article 29 of Law Number 36 Year 2009 which states that: "In the case of health personnel suspected of negligence in carrying out their profession, negligence must be resolved first through mediation".

Further in the Elucidation of the article states that"mediation is conducted if a dispute arises between the health service provider and the patient as the recipient of health services. Mediation is carried out aimed at resolving disputes outside the court by mediators agreed by the parties".Likewise Article 60 letter f of Law Number 44 Year 2009, states that"the Provincial Hospital Supervisory Agency is in charge of receiving complaints and making efforts to resolve disputes by means of mediation".

Claims for medical malpractice often fail in the middle of the road because of the difficulty of proof. In this case the doctor needs to defend himself and defend his rights by stating the reasons for his actions. Both in the case patients and doctors, judges and prosecutors have difficulty in dealing with this medical malpractice problem, especially from the legal technical point of view or legal formulation that is appropriate to use. The problem lies in the absence of specific legal studies on medical malpractice that can used as a guideline in determining and overcoming the existence of medical malpractice in Indonesia. For this reason, it is necessary to review the criminal law formulation policy regarding mediation of penalties which can be linked to medical negligence or malpractice, especially in providing legal protection to victims of malpractice in this case patients.

If the lawsuit is filed through a criminal legal process, then the patient is sufficient to report it to the investigator by showing preliminary evidence or reasons. Furthermore, investigators will conduct investigations by conducting police actions, such as examining witnesses and suspects, examining documents and requesting expert handling. Visum et repertum may be needed by investigators, the investigation result file is submitted to the public prosecutor to be able to compile its claims, in the event that the investigator does not find sufficient evidence then it will be considered for the issuance of termination of the investigation, so that most patients do lose on court.

For the public, especially victims, the question of concern is why it is so difficult to bring malpractice cases from the operating table to the court. Whether the existing legal instruments and legislation are not enough to bring the issue of medical malpractice into the realm of law, especially criminal law, it is necessary to review the current formulation policy (laws relating to medical malpractice) and formulation policies that are will come in overcoming the crime of medical malpractice by emphasizing uniformity and consistency in terms of the formulation of criminal acts, criminal liability and the most appropriate punishment in order to provide a sense of justice for victims and perpetrators as well as the use of mediating penal as one form of settlement in the medical field ius constituendum in an effort to provide a sense of justice for victims. This is related to the development of criminal law in various countries today, namely the use of mediation of penalties as an alternative to solving problems in the field of criminal law.

The development of the theory of punishment always experiences ups and downs in its development.

Criminal theories aimed at rehabilitation have been criticized because they are based on the belief that rehabilitation goals cannot work. In the 1970s there were pressures that treatment of rehabilitation was unsuccessful and indeterminate sentences were not given appropriately without guidelines.

Against the pressures on rehabilitation goals the "Justice Model" was born as a modern justification for punishment proposed by Sue Titus Reid (1987). This justice model is also known as the justice approach or just reward model (Just Desert Model). This model is based on 2 (two) theories about the purpose of punishment, namely prevention and retribution. The basis of retribution in the just desert model assumes that violators will be judged by the sanctions that should be received by violators in view of the crimes they have committed, proper sanctions will prevent criminals from committing more criminal acts and prevent others from committing crimes.

Under this just desert model scheme, perpetrators with the same crime will receive the same punishment and the more serious perpetrators of the crime will receive a harsher sentence than the lighter offenders. There are 2 things that become critics of this just desert theory, namely: First, because desert theories place primarily by emphasizing the relationship between proper punishment and crime rates, so that with the interest of treating such cases, this theory ignores differences other relevant differences between the perpetrators such as the personal background of the offender and the impact of punishment on the offender and his family. This theory also often treats cases that are not the same in the same way. Second, overall the emphasis is on guidelines for distinguishing crime and criminal records that affect the psychology of punishment and those who punish (Tonry, 1996).The Restorative Justice Model which is often confronted with the Retributive Justice Model and is a development of the Restitutive Justice Model.

Restorative justice is a paradigm that can be used as a frame for a strategy for handling criminal cases that aims to answer dissatisfaction with the functioning of the current criminal justice system. Tonny Marshal stated that Restorative Justice is, "a process in which the parties involved in crime jointly resolve problems related to how to deal with post-crime problems and their consequences in the future" (Mansyur, 2010). Van Ness & Daniel (1980) states that the foundation of restorative justice theory can be summarized in the following characteristics (Abidin, 2005) :

1. Crime is primarily a conflict between individuals resulting in injuries to victims, communities and the offenders themselves, only secondary is it lawbreaking. (free translation: Crimes by their very nature are primary conflicts between individuals resulting in injury to victims, the community and the perpetrators themselves, while the definition of crime as something that is illegal is only secondary)

2. The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.

3. The overall goal of the criminal justice process must be to reconcile the parties to the conflict/dispute, as well as repair the injuries caused by the crime)

4. The criminal justice process should facilitate active participation by victims, offenders and their communities. A should not be dominated by government to the exclusion of others.

5. The criminal justice process must facilitate the active participation of victims, perpetrators and the community. This should not be dominated by the government by putting aside other people or other matters).

The restorative justice model is proposed by abolitionists who reject coercive means in the form of litigative facilities and are replaced by reparative (non-litigation) facilities. Abolitionists consider the criminal justice system to contain problems or structural flaws so that it must realistically change the structural basis of the system (Bentham, 1996; Van Apeldoorn & Leyten, 1972; Radbruch, 2004). In the context of a criminal sanction system, the values underlying abolitionist understanding still make sense to look for alternative sanctions that are more feasible and effective than institutions such as prisons.The restorative justice model to be built by abolitionists can be seen in detail the comparison of the current system (which abolitionists call retributive justice) and the system proposed by abolitionists under the name restorative justice, as follows (Muladi, 1995).

Restorative justice according to Zulfa (2011a; 2011b) contains the following ideas and principles:

a. Building joint participation between perpetrators, victims and community groups in resolving an incident or criminal act. Placing perpetrators,

Table 1: Comparison between Retributive and Restorative Justice

Retributive Justice	Restorative Justice
1. Crimes are formulated as violations of the State	1. A crime is formulated as someone's violation of another person
2. Attention is directed towards determining mistakes in the past	2. The point of attention on problem solving, responsibility and obligations in the future
3. Relations of parties that are resistant, through an orderly and normative process	3. Normative nature is built on the basis of dialogue and negotiation
4. Application of suffering for digestion and prevention	4. Restitution as a means of improving the parties, reconciliation and restoration as the main objective
5. Justice is formulated with deliberate and process	5. Justice is formulated as rights relations, assessed on the basis of results
6. The nature of the conflict from evil is obscured and suppressed	6. Crimes are recognized as conflicts
7. One social loss is replaced by another	7. Target attention on repairing social losses
8. Society is on the sidelines displayed abstractly by the state	8. The community is a facilitator in the restorative process
9. Promoting competitive and individualistic values	9. Promote mutual assistance
10. Action is directed from the state to perpetrators of crime: passive victims	10. The role of victims and perpetrators of crime is recognized, both in the problem and in the settlement of the rights and needs of victims, perpetrators of criminal acts are encouraged to take responsibility
11. The responsibility of the perpetrators of criminal acts is formulated in the context of criminal prosecution	11. The perpetrator's responsibility is formulated as the impact of the request on the action and to help decide the best
12. Crimes are formulated in legal terminology which are theoretical and pure, without having moral, social and economic dimensions	12. Crimes are understood in a holistic, moral, social and economic context
13. Sin or debt is given to the State and society abstractly	13. Sin or debt and liability to the victim are recognized
14. The reactions and responses are focused on the perpetrators of the crimes that have occurred	14. The reactions and responses are focused on the consequences of the actions of the perpetrators of the crime
15. The stigma of crime cannot be eliminated	15. Stigma can be removed through restorative action
16. There is no encouragement to repent and forgive	16. There are possibilities that are helpful
17. Attention is directed at the debate between free will and social psychological determinism in the power of evil	17. Attention is directed to accountability for the consequences of actions

victims, and the community as "stakeholders" who work together and immediately try to find a solution that is considered fair for all parties (win-win solution).

b. Pushing perpetrators to be held accountable to victims for events or criminal acts that have caused injury or loss to the victim. Furthermore, building responsibility does not repeat the criminal act he has committed.

c. Placing a criminal event or act not primarily as a form of violation of the law, but as a violation by a person (group of people) against someone (a group of people). Because of that, the perpetrator should be directed towards being accountable to the victim, not prioritizing legal accountability.

d. Encourage resolving an event or criminal action in more informal and personal ways, rather than resolving it in formal (rigid) and impersonal ways.

Settlement of medical maalpratek cases using a restorative justice approach is basically focused on efforts to transform mistakes made by doctors with corrective efforts. Included in this effort is improving the relationship between doctors and patients / their families. This is implemented in the presence of actions which represent changes in the attitudes of the parties in an effort to achieve a common goal, namely improvement.

Restorative justice places a higher value in the direct involvement of the parties. It is also suggested in the malpractice case (Bornstein *et al*., 2002; Herlianto, 2014; McMichael, 2018). The victim is able to restore the element of control, while the perpetrator is encouraged to assume responsibility as a step in correcting the mistakes caused by crime and in establishing his social value system. Community involvement actively strengthens the community itself and binds the community to values to respect and love one another. The role of the government is

substantially reduced in monopolizing the current judicial process. Restorative justice requires cooperative efforts from the community and government to create a condition where victims and perpetrators can reconcile conflict between the two parties and repair the wounds of both parties (Zehr, 2015; Van Ness & Strong, 2014). This consensus agreement as putlined in Pancasila has a philosophical and theological foundation that leads to the restoration of the dignity and dignity of all parties involved, replacing the atmosphere of conflict with peace (the principle of friendship), eliminating blasphemous blasphemy with forgiveness, stopping demands for blame and blame (the principle of mutual forgiveness and asking for forgiveness) to God). Desired clarification is not through the court table, but through the table of peace and negotiation (the principle of deliberation).

CONCLUSION

Settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

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Received on 22-12-2020 Accepted on 12-01-2021 Published on 18-01-2021

DOI: https://doi.org/10.6000/1929-4409.2021.10.14