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Illegal and Unauthorized Medical Treatment In Therapeutic Transactions

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Abstract: In this era and age, doctors and patients are mostly bound by transactional relationship which generally written down under a therapeutic contract. The contract acts as mutual agreement between both the practitioner and patient that ensures the medical procedure will be performed professionally and highlights responsibilities of the practitioner towards patient. It becomes problematic when medical professionals performs beyond their responsibilities of what has been written under the contract which would cause of what should have been a legal procedure to become an unlawful act. Most common people wouldn't understand and comprehend what is actually written under the contract so it becomes difficult to determine whether the medical procedure is legal or not.

Keyword: Medical Procedure, Medical Professionals, Patient, Therapeutic Contract, Unlawful Act

INTRODUCTION

Humans during their journey throughout their lives are often faced with conditions where their health is not always in their prime. The are moments when body weakens even to the point of being unable to carry out activities optimally. In such situation, some choose to visit a medical professional to get a proper medical treatment, while others may prefer to seek alternatives. It is human rights to have proper access to health services and appropriate treatment according to ailing health whenever and wherever possible.

Law concerning health is all legal provisions that are directly related to medical procedure and their application to Civil Law, administrative law and criminal law. The scope of this law is the legal rules and regular behaviour that regulate the health sector. As a science, health science or public health science aims to prevent the emergence of disease, prolong life span, and increase the value of health. All legal aspects in health legal regulations become legal instruments that specifically determine regular behaviour or mandatory orders or prohibitions on actions that apply to parties related to health business as determined in statutory regulations.

One of the fundamental rights in society is the Right to Health Care, which is expressly recognized in Article 4 of Law Number (No.) 17 of 2023 concerning Health. This right confirms that every individual has the right to obtain adequate access to quality health services that suit their needs. This means that everyone has the right to receive adequate medical care, including proper diagnosis, treatment and care for the various health problems. Thus, the Right to Health Care is not just a concept, but is a solid foundation for a just and equitable health system, ensuring that every individual has an equal opportunity to enjoy optimal health. As a result of the existence of this right, other subsequent rights have emerged which are obtained by individuals as part of human rights, namely the right to appropriate medical services, which is based on the provisions of Article 28 H paragraph (1) of the 1945 Constitution. The right to medical services confirms that everyone has the right to receive necessary health services according to their needs and health conditions. Thus, this right is not only a formal legal discourse, but also a basis for society to obtain fair and equitable access to quality health services. This reflects the country's commitment to protecting and fulfilling the health rights of its people, so that they can live prosperously and fitly.

In practice, the role of medical professionals in providing health services involves risks that cannot always be predicted with certainty in advance. The process of determining a diagnosis is a complex task and is often influenced by the development of medical science which continues to change and develop rapidly. Apart from that, the influence of factors such as the patient's psychological condition and health, as well as the possibility of unexpected complications, also influences the provided therapy process. In this context, it cannot always be guaranteed that medical procedures will always achieve the expected results, and risks will always exist in every step taken by professionals. Thus, it is important to recognize that errors can occur in medical procedure, and this is an interesting subject to discuss in a legal context. Assessing mistakes made by medical professionals especially doctors, from a legal standpoint, is an interesting aspect to explore further. Of course, sometimes it is unavoidable at all.

In implementing every person's right to healthcare, there are 4 (four) very prominent factors which are interrelated (Ameln, 2004), namely:

1. Infrastructures that should operate optimally and sustainably, such as hospitals, clinics, health centers and posyandu, are important keys in ensuring quality health services for the community. For example, the development of hospitals today, especially in urban area such as Jakarta, reflects a significant transformation. Hospitals are no longer associated with strong medicinal odors, dark rooms, or a tense atmosphere with authoritarian medical professionals. In contrast, nowadays hospitals tend to have a more comfortable atmosphere, with better lighting and friendly employees. This aims to provide a more enjoyable experience for patients and support their healing process.
2. Accessibility to health facilities. Having health facilities that are easily accessible and geographically nearby is important to ensure that people can quickly and easily access the healthcare whenever they need. Factors such as the strategic location of hospitals, clinics, health centers and posyandu, relatively short travel distances, and adequate transportations are important considerations in designing health infrastructure that meets community needs. Thus, geographical factors not only influence the availability of health facilities, but also play an important role in ensuring the accessibility and affordability of health services for all levels of society.
3. Financial factors are an important consideration in ensuring that health services can be accessed by all members of the community without experiencing obstacles. This includes medical or health care costs which must be affordable for all levels of society. The availability of a financially affordable health system is the key to ensuring that every individual can obtain the right to health care without significant economic obstacles.

Therefore, it is important to pay attention to financial fairness in the provision of health services, by providing payment options that suit each individual's economic capabilities. Thus, financial factors play a crucial role in ensuring that the accessibility and availability of health services can be enjoyed equally by all members of society.

The last factor consists of two categories where the quality of health facilities and personnel is the last important point. An example is the renewal of the Health Law in order to maintain the quality of medical professionals and health facilities such as hospitals to be better and develop over time according to the situation and conditions needed in society at that time.

As it is generally known, in cases where a doctor has carried out medical procedures in accordance to the standards of the medical profession, the patient has no legal basis to claim for liability. However, when the action is not in accordance to the standards of the medical profession, the patient can file a liability against the doctor. However, it is important to remember that mistakes made by a doctor that have the potential to harm patients not only have legal consequences, but can also have wider impacts. These errors can damage the reputation and trust in the medical practitioners and related professional groups (Mariyanti, 1988). Therefore, it is important to maintain high standards of professionalism in medical practice to maintain public trust and the integrity of the profession (Smith, 1983).

Such standards refer to a set of guidelines that regulate the behaviour expected of a professional in a particular situation. This standard covers the attitudes and actions that a doctor or medical professional acting reasonably should take under the circumstances. This concept often refers to the degree of caution and discretion that an ordinary doctor or rational person would have in a similar situation. In other words, medical standards provide guidance on how a doctor should act and behave in carrying out their duties. This includes choosing the right diagnosis, providing appropriate therapy, and appropriate attitudes and communication towards patients. Therefore, the level of reasonableness of a doctor in his medical practice is assessed based on established medical professional standards.

Negligence can occur when someone performs an act that they should not do, or does not do something that they should do, according to standards that an ordinary person would consider reasonable and prudent. The term negligence conveys the meaning of reckless or careless behaviour, which violates the standards generally expected of every member of society. A member of society who acts reasonably always tries to avoid actions that could cause injury or danger to fellow humans. Negligence can also occur even if a doctor has considered the consequences of his actions as best as possible, but he is negligent or fails to take the necessary precautions against risks that could harm the patient. Thus, negligence can occur both because of actions taken and because of actions not taken, but in both cases, a lack of care and awareness of risks can lead to detrimental impacts for the individuals involved (Guwandi, 2006).

Medical mistakes or negligence are often known by the lay public as malpractice, which is something that is commonly discussed. Reporting on this issue could have a negative impact on the image and reputation of the health sector. Therefore, doctors are expected to carry out their duties and obligations with great care and responsibility. However, as humans, doctors are also prone to making mistakes, whether intentional or not trust. This opens up space for malpractice cases, which in the general sense refers to poor practice or failure to comply with the standards set by the profession. From the perspective of the injured patient, a malpractice case can cover a range of events from diagnosis, to surgical procedures, to post-operative care (Carnahan, 1955).

As we all know, before a patient undergoes a medical treatment, the healthcare provider would ask for their consent. This consent is mostly known as informed consent on treatment, which explains to the patient what would be done, the treatment they get, the cost, and of course the patient's consent to it. All of it will be written under a contract known as

therapeutic contract which binds the medical professional to the patient. The medical professional is expected to provide healthcare according to what is written there, actions to take should force majeure happens, and their responsibilities.

Problem occurs when healthcare provider performs beyond their responsibilities of what has been written under the contract. What should have been a legal procedure becomes unlawful. It is hard to prove, especially for common folk as they mostly could not understand nor comprehend the procedure itself. Such is the case of this study of what happened, for example, in Court Decree Number (No.) 120/Pdt.G/2019/PN.Ckr.

METHOD

The approach taken in this study is to review and obtain information on the concurrent issue namely unlawful medical procedure by medical professionals beyond what is written under therapeutic contract, which is carried out by studying the relevant laws and regulations. This study is of judicial-normative nature and is conducted through library research, featuring literature assessment by studying materials in the form of secondary data (Marzuki, 2019).

RESULT AND DISCUSSION

From a legal perspective, especially in the context of statutory regulations and basic rights inherent in humans from birth, medical law relies on two main human rights, namely the right to healthcare and the right to self-determination (Ohoiwatun, 2008). In the context of legislation of health sector, the legal relationship formed by a therapeutic agreement can be explained as follows: The legal object of a therapeutic agreement is the obligation what a doctor must fulfill towards a patient who has the right to receive medical treatment. The legal subject of therapeutic agreements involves patients, doctors, and health facilities, which are defined as tools or places used to provide health services. The legal cause of a therapeutic agreement is a health effort carried out to achieve an optimal level of health for the community, through promotive, preventive and disease healing approaches.

Therapeutic transactions, in contrast to ordinary transactions in society, have special characteristics that differentiate them from agreements in general. The specialty lies in the object of the agreement, which in this case is an effort or therapy to cure the patient. The object of this agreement is not the patient's immediate recovery, but rather the doctor's efforts to find the most appropriate therapy for the patient. Thus, a therapeutic agreement or transaction is an agreement to determine or seek optimal therapy for the patient's recovery, which is carried out by a doctor (Nasution, 2005).

According to a legal perspective, this agreement or transaction between a doctor and a patient falls into the category of an agreement to perform work, where the patient asks the doctor to perform certain services to achieve certain goals, in exchange for an agreed honorarium. Patients trust doctors to determine the actions needed to achieve healing, so doctors have a big professional responsibility in carrying out this agreement (Subekti, Aneka Perjanjian, 1995).

Malpractice is an act of professional error committed by a doctor, which occurs when the doctor fails to carry out assessments, actions, or examinations that are in accordance with standards generally accepted by doctors in similar situations and conditions. It also includes situations where a doctor performs medical work below the required standard, and this can be done by any doctor in a similar situation. In addition, malpractice also includes errors caused by unreasonable actions or due to deficiencies in the doctor's professional skills or commitment in fulfilling his professional obligations or trust.

Medical malpractice can also be seen from the perspective of obligations violated by doctors, which are related to the duties entrusted to them. Medical malpractice can be linked to a breach of a doctor's obligations. For example, mistakes made by doctors because they do not have a valid practice permit or registration can be considered an act of medical

malpractice, as regulated in Article 29 paragraph 1 and Article 36 of Law no. 29 of 2004 concerning Medical Practice, which threatens criminal sanctions as regulated in Article 76 of the Law.

Hans Kelsen (Somardi, 2007) defines obligation as a form of legal responsibility imposed on individuals for certain actions that are contrary to applicable law, which then results in the individual being subject to sanctions. Kelsen emphasized that the individual has a legal obligation to bear the consequences of his unlawful actions. In his view, failure to carry out careful actions or negligence (negligence) is also considered a form of legal negligence (*culpa*). Thus, every individual is considered to have legal responsibility for their actions, whether intentional or unintentional, which are contrary to applicable law.

In civil law, responsibility refers to a person's obligation for actions that are contrary to the law. Acts that are contrary to the law have a broader scope than criminal violations. Apart from including violations of criminal law, unlawful acts also include actions that conflict to other legal regulations and even unwritten legal principles. The legal provisions governing unlawful acts aim to provide protection to the injured party and stipulate the obligation for the perpetrator to provide appropriate compensation (Komariah, 2001).

Liability based on fault is the principle of responsibility based on the element of fault, a principle that is generally applied in criminal and civil law. In Civil Code, especially in Articles 1365, 1366 and 1367, this principle is a strong basis. This principle states that a person can only be held legally responsible if it is proven that there was an element of error in his actions (Shidarta, 2000).

Presumption of liability is a principle confirms that the defendant is automatically considered responsible for an act or deed, until he is proven that he is innocent. Therefore, the burden of proof is on the defendant (Shidarta, 2000). This concept reflects a reversal of the burden of proof, where a person is assumed to be guilty until he can prove otherwise that he is innocent. Thus, in this context, the defendant has the responsibility to prove that he was not involved in the conduct that is the basis of the claim.

Presumption of non-liability is a principle the opposite of the previous principle. This principle indicates that business actors are not always responsible for everything, especially in the context of consumer transactions which tend to be limited. These limitations of liability are usually generally acceptable and reasonable (Shidarta, 2000). For example, in transport law, loss or damage to cabin baggage or hand baggage which is usually borne by passengers (consumers) is their own responsibility. In this situation, the carrier (business actor) will not be held responsible.

Strict liability is the principle of absolute responsibility. However, there are differences made by some experts in the two terms. Strict liability refers to the principle of responsibility where fault is not the determining factor. There are certain exceptions that allow exemption from liability, such as in the case of force majeure circumstances. On the other hand, strict liability is the principle of responsibility without fault and without exception (Shidarta, 2000).

Legal certainty is the key for the state in implementing laws and regulations in all aspects of life. Therefore, the government is expected not to make decisions or regulations without considering aspects of legal certainty. The existence of legal certainty provides guarantees for the implementation of the law to legal subjects, with the aim of protecting individual rights in society. This also provides benefits for anyone, anywhere, and in any context, so that the law can be used as a guide for people's behavior. In forming laws, it is important to ensure that there are no conflicts with existing laws, so that there is no overlap between rules, and provide explanations and understanding that can be understood by the general public. The principle of legal certainty also acts as a hope for the public to continue to trust law enforcement institutions, especially the government, in making legal products to protect individual rights and provide the necessary legal certainty.

Legal certainty is an important prerequisite for realizing the principles of equality before the law without discrimination. The concept of legal certainty is closely related to the principle of truth, which indicates that legal certainty must be based on clear and firm principles of truth. In this context, legal certainty refers to a condition where legal rules are applied consistently and can be generally understood by all parties. In other words, legal certainty requires firmness and regularity in legal regulations, so that they can be interpreted appropriately in accordance with applicable norms.

With legal certainty, a person can carry out behaviour in accordance with the applicable provisions of the law and vice versa. Legal certainty provides assurance that individuals have clear guidelines in carrying out actions or making decisions, because they know the consequences of the actions taken. Without legal certainty, individuals will have difficulty determining the boundaries that regulate their behaviour, so this can result in uncertainty and confusion in living their daily lives. In line with this view, Gustav Radbruch (Raharjo, 2012) stated that legal certainty is one of the goals underlying the existence of law itself. Thus, legal certainty is not only an important instrument for regulating people's behaviour, but also a necessary foundation for achieving justice and the sustainability of the legal system.

As we can deduce, legal certainty provides the legal standards of medical professionals, ethics, and actions, as well as provides security for patients seeking medical treatment. Informed consent is a process that requires medical personnel, such as doctors, to provide a comprehensive explanation to the patient regarding the medical treatment to be carried out, including the risks that may arise and the available options. This process ensures that the patient has an adequate understanding of the action to be taken and the possible consequences. Providing complete and clear information to patients is an ethical and legal obligation for medical personnel, and began in the early 2000s, where adherence to the practice of informed consent has become a standard required in every medical procedure. Thus, informed consent is an important step in ensuring that patients have full control and awareness of the medical care they receive.

Providing information in the form of informed consent is the responsibility of a medical practitioner. However, in certain circumstances, the practitioner can delegate his authority to other health professionals, but legal responsibility remains with him. Juridically, a nurse is not actually authorized to carry out the "informed consent" process. This is the practitioner's job, and if there is a delegation of authority, the practitioner must be absolutely sure that the nurse assigned to the task really masters the problem and is able to provide an explanation that the patient understands. Therefore, from a legal perspective, the responsibility regarding "informed consent" remains with the practitioner (Soekanto, 1989).

The right to information and the right to determine one's own fate are two types of human rights as basic human rights are supported by informed consent which is a subjective requirement for a therapeutic transaction to occur. A surgeon who performs surgery without the permission of the patient or his family is considered to have violated the law, and the surgeon must be responsible for all risks that arise (Guwandi, Hukum Medik (Medical Law), 2004).

Informed consent is not only intended to protect patients from potential abuse of power by doctors, but also to protect doctors from possible actions by patients that could arise due to dissatisfaction with the services received or alleged violations of laws and regulations. The presence of informed consent is considered very important because it prohibits any form of coercion in medical procedures and provides clarity about the final results of the health care that the patient will receive. Thus, informed consent serves as a powerful tool to maintain the balance of power between doctors and patients and ensures that decisions regarding health care are based on complete understanding and absolute awareness of both parties.

The consent can be given either verbally or in writing. Written consent is mandatory, especially for medical procedures that have a high risk, while verbal consent is more

commonly used for medical procedures that are considered to have a lower risk. The information required in informed consent also includes the estimated cost of the service or action to be performed. In situations where the patient cannot give consent himself due to incapacity, responsibility for giving consent may be delegated to a family member or party responsible for the patient. This is especially true if the patient is incompetent to make medical decisions. However, in emergency or critical situations where immediate medical action is required to save a life, proxy consent is not required. Informed consent is legally valid if the patient has been given adequate information, the patient or legal guardian has the ability to make a decision, and consent is given voluntarily without any coercion.

When medical professionals carried out a certain medical treatment beyond what is informed and written under therapeutic agreement and informed consent, such action becomes unlawful act. And as we know it, an agreement is a law that binds both parties.

Unlawful acts, in accordance with Article 1365 of the Civil Code, refer to actions carried out by someone that are contrary to the law and result in harm to other people. In legal science, there are three categories of unlawful acts, namely:

1. An unlawful act committed intentionally, where someone deliberately acts contrary to applicable legal provisions.
2. An unlawful act without an element of fault, which means that the act was carried out without any intention or negligence on the part of the perpetrator.
3. An unlawful act that occurs due to negligence, where the perpetrator carries out an action that is contrary to the law because of his negligence or inaccuracy in carrying out his obligations. Thus, the definition of unlawful acts includes various types of actions that can be intentional, unintentional, or occur due to negligence (Fuady, 2002).

Therefore, every act that violates the law, whether done intentionally or unintentionally, means that it fulfills the element of intent or negligence. In the context of this Article, "law" refers to all applicable provisions, regulations, or principles, whether written or unwritten, as well as everything that is considered a legal norm. This means that what is violated in this context are legal rules and principles, such as laws, binding customs, court decisions, and so on. Thus, any action that is contrary to legal provisions, whatever its form, can be considered a violation of the law which can give rise to legal consequences for the perpetrator.

Furthermore, to be categorized as an unlawful act, the consequences of the violation must result in losses for other parties. However, it is important to remember that not all violations of the law necessarily result in harm to others. Therefore, in this context, the concepts of "any unlawful act" and "bringing harm to another party" must be interrelated and complementary in the understanding of unlawful acts (Djojodirjo, 1982). This is in line with what is regulated in Article 1365 of the Civil Code which was mentioned previously. Thus, only by understanding and following the principles stated in the article, we can fully understand what is meant by unlawful acts in the context of civil law.

The concept of unlawful acts in a broad sense refers to actions that not only ignore the rights of other individuals or violate established legal obligations, but also violate the moral norms, ethics and social values that apply in society. These actions include anything that is contrary to the principles that should be upheld in social interactions, including customary norms and unwritten customs. In this context, unlawful acts are not only viewed from a legal perspective, but also from a moral and social perspective, which is important for creating harmony and order society.

In smaller scale, unlawful acts refer to the actions of a person who commits a violation against another person or goes against his or her own legal obligations (Volmar, 2004). In this context, unlawful acts specifically refer to actions that directly or indirectly harm another party or violate the obligations that the individual must comply with in accordance with applicable law.

The elements that must be met for someone to be said to have committed an unlawful act include:

1. Against the Law: The action must be contrary to applicable law, whether written or unwritten.
2. Causing Loss: The action must result in loss to the other person or other party concerned, both materially and immaterially.
3. Committed by Mistake (Negligence): The perpetrator of the act must be responsible for his actions, whether because he carried out an action intentionally or because of negligence that can be accounted for.
4. Causality: There is a clear cause-and-effect relationship between the actions carried out by the perpetrator and the losses experienced by the other party. This means that the loss can be withdrawn as a direct consequence of the actions carried out.

Articles 1365-1369 of the Civil Code provide provisions regarding liability for unlawful acts. The formulation to the amount of compensation to be given is assessed based on the position and wealth of both parties and according to the circumstances that occurred. This means that not all unlawful acts that cause harm to someone will result in the same compensation, because this depends on these factors. This article also limits who has the right to file a lawsuit to obtain compensation, namely the victim's husband or wife, children or parents who have been abandoned by the victim. One of the additional conditions that must be fulfilled is that throughout their lives, the previously mentioned groups depend on the support provided by the victim. Thus, the aim of providing compensation as regulated in this Article is to restore the situation to the way it was before the unlawful act occurred.

Article 1371 of the Civil Code stipulates that if a body part is injured or disabled due to an intentional act or negligence, the victim has the right to request compensation apart from the medical costs incurred for the injuries. This article gives the victim the right to claim compensation for losses caused by the injury or disability, which can include compensation for loss of income during recovery from the injury, or if the disability is permanent and hinders the victim's ability to work. The amount of compensation given will be determined based on the position and economic capabilities of both the victim and perpetrator, as well as the circumstances that occurred.

Patients as receiving end of medical treatment have self-protection from any possible irresponsible medical services such as neglect. Patients also have the right to safety, security and comfort in the medical services they receive. With this right, patients as consumers will be protected from professional practices that threaten safety or health.

Therefore, if there is a medical professional who is negligent in his practice and causes a patient's condition to become disabled, then the hospital as part of the his employer must also be responsible for the actions they have committed, whether in the form of compensation for material losses or other things.

Apart from the right to compensation which is contained in Article 58 of Law Number 36 of 2009 concerning Health, civil claims, especially the right to obtain compensation, can be seen in detail in Article 4 letter h of Law Number 8 of 1999 concerning Consumer Protection which states the right to obtain compensation and/or replacement, if the goods and/services received are not in accordance with the agreement or are not as they should be. The compensation can be in the form of a refund or health care and/or providing appropriate compensation with the provisions of applicable laws and regulations (Article 19 paragraph (2)). The right to receive compensation is a right that can be obtained if in providing health services, health workers make negligence, mistakes or breaches of contract. Compensation is provided within a grace period of 7 (seven) days after the date of the transaction, the existence of this compensation does not eliminate the possibility of criminal prosecution based on further evidence regarding the existence of an element of error (Article 19 paragraphs 3 and 4).

KESIMPULAN

The legal regulation of therapeutic agreements between doctors and patients is based on the provisions in Law Number 36 of 2009 concerning Health, the relationship between doctors and patients in therapeutic agreements can occur because of an agreement that refers to the provisions of Article 1320 of the Civil Code, namely regarding the conditions for the validity of the agreement. In this case, informed consent plays a very important role as the basis for a therapeutic agreement because informed consent explains information about the disease suffered by the patient.

Medical professionals must provide a comprehensive explanation to the patient regarding the medical treatment to be carried out, including the risks that may arise and the available options in informed consent which is not only intended to protect patients from potential abuse of power by doctors, but also to protect doctors from possible actions by patients that could arise due to dissatisfaction with the services received or alleged violations of laws and regulations. The presence of informed consent is considered very important because it prohibits any form of coercion in medical procedures and provides clarity about the final results of the health care that the patient will receive. Thus, informed consent serves as a powerful tool to maintain the balance of power between doctors and patients and ensures that decisions regarding health care are based on complete understanding and absolute awareness of both parties.

Inability to do so would result in unlawful act according to law. The legal provisions governing unlawful acts aim to provide protection to the injured party (patients) and stipulate the obligation for the perpetrator (medical professionals) to provide appropriate compensation. Well, as we all know, it is not outside the realm of possibility they sometimes go behind the bars.

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