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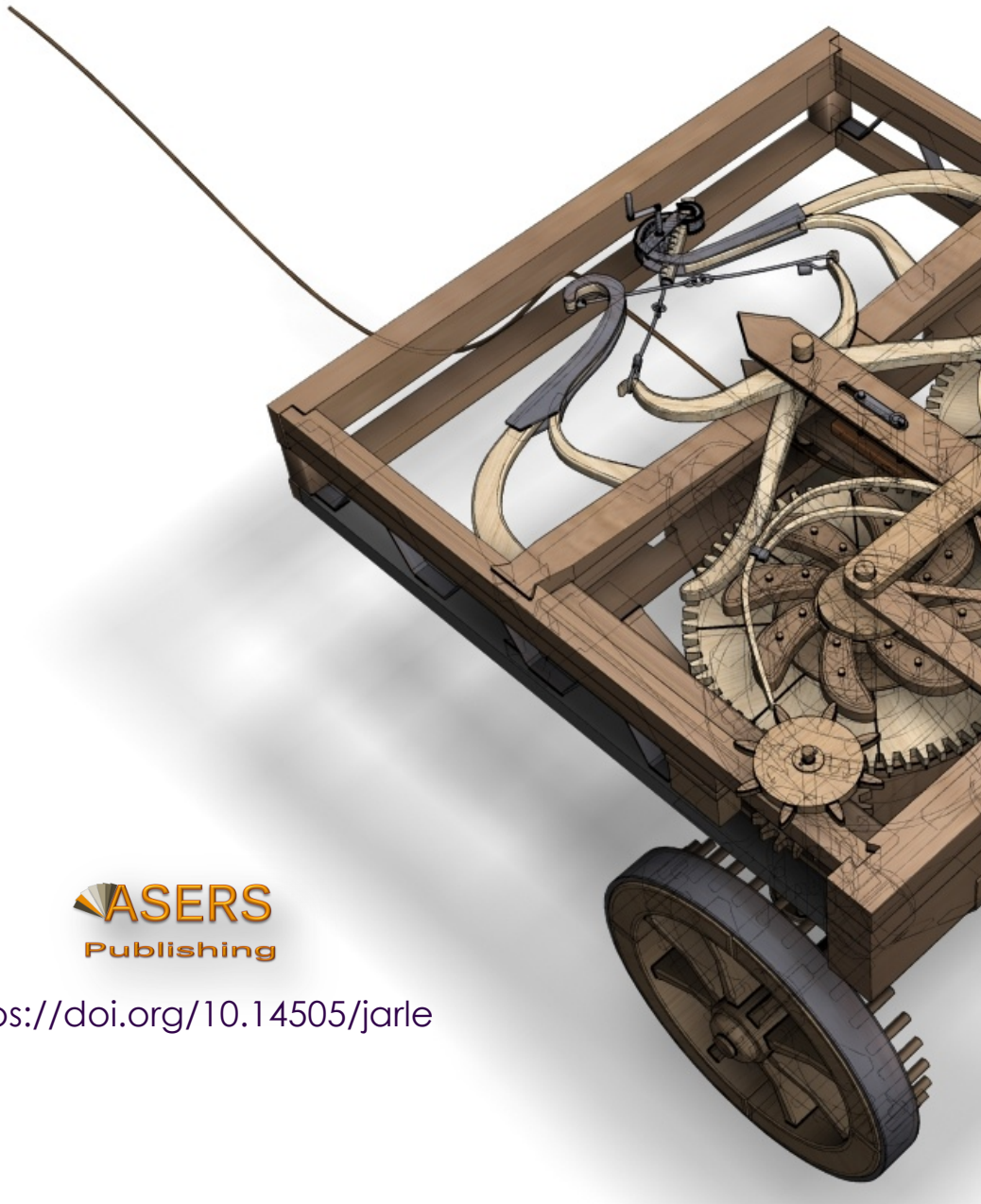

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From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes

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Abstract:

Professional mistakes made by a doctor when doing patient care and causing the patient to become injured or die, then the actions of doctors are said to have committed malpractice. The Medical Practice Law provides the right to claim a civil suit to the court. In general, compensation claims are based on civil liability using Article 1365 BW. Article 1365 BW contains liability based on errors and it is not easy to determine when professional errors occur. Article 66 paragraph (3) of the Medical Practice Law stipulates that if there is a malpractice event, there is a possibility that the patient has the right to claim a civil suit to the court. The plaintiff (patient) will get compensation if he succeeds in proving the defendant's (doctor's) mistake, which is difficult for the patient to prove the doctor's fault. To provide objective and balanced legal protection for patients and doctors, the use of the presumption principle is always liable because it is difficult to prove the errors of the doctors. The use of the principle of presumption of being always liable will not burden the doctor because it is possible to use the principle of reverse proof. Doctors can use the principle of reversed evidence if the doctor is not guilty of malpractice by arguing that the doctor has done a good and proper job working professionally, and using the prudential principle.

Keywords: fault principle; medical disputes; liability presumptions.

JEL Classification: K41.

Introduction

Health care is a basic national interest, because it deals with the realization of people's welfare. Health care needs are getting better along with the progress of a nation. Referring to Article 7 of the Health Law expressly states that the government must implement equitable and affordable health efforts, and be responsible for increasing the level of public health. The meaning of Article 27 paragraph 2 of the 1945 Constitution, namely 'everyone has the right to have a decent job and life or human being' implies the need for a decent life in obtaining health services. As a national interest, especially related to achieving public welfare, it is imperative that the function of law has an important role in protecting national interests and in creating public welfare (Indar, 2013). In order to realize legal functions as 'social integration', it is expected that the provision of health services can be guaranteed by the patient's

interests and without harming the interests of other parties. The doctor's profession is a noble profession, so doctors serve by prioritizing the interests of others and society. Therefore, the noble profession is only entrusted to people who are polite, respectable, and have a paternalistic spirit (Trisnadi 2017). Conboy *et.al.* (2010), and in He and Jiwei Qian (2016), stated that *'the doctor-patient relationship is central to the practice of medicine and vital for the delivery of health services. Many studies have found that healthy interactions between physicians and patients can greatly enhance the quality of care and patients' well-being'*. Kaba and Sooriakumaran (2007), cited in He and Jiwei Qian (2016), stated that '*with the remarkable transformation of the doctor–a patient relationship from benevolent paternalism to one characterized by contractual consumerism, recent decades have witnessed a surge of medical disputes worldwide*'. The relationship between law and medicine is not all negative, but the law has contributed significantly to patient rights and medical practice (Rabinovich-Ein 2011). After a doctor has a license to practice, there is a legal relationship for the implementation of medical practices that each party (patient and doctor) has autonomy (freedom, rights and obligations) in having two ways of communication and interaction. The law provides protection for both parties through a legal instrument called informed consent. According to the Minister of Health Regulation Number 290/MENKES/PER/III/2008 that medical approval is an agreement given by a patient or close family after getting a full explanation of the action of medicine or dentistry to be performed on the patient. Informed consent (or medical approval) is an agreement given by the patient or their family based on an explanation of the medical action to be performed on the patient. The object in legal relations is health services to patients (Iswandari 2006). In contrast to the legal relationship in general, the legal relationship between patients and doctors (and dentists) is a maximum effort for the recovery of patients who are carried out carefully (meeting with a doctor), so that the legal relationship is called a business or raises business engagement.

In the concept of civil law, compensation can be submitted because there is default or because of an unlawful act. Therefore, the form of responsibility in civil law can be classified into two, namely first, contractual responsibilities, and second, responsibility for unlawful actions. The difference between contractual responsibility and the responsibility for illegal actions is whether or not there is an agreement in legal relations. If there is agreement, responsibility is contractual responsibility (Agustina *et al.* 2012; Hernoko 2016). Whereas if there is no agreement, there are parties who harm other parties with the principle of illegal acts. Examples of unlawful actions are if a surgeon for negligence has left gauze or tools in the patient's body so that the patient has an infection which results in the patient suffering even because the complications that occur cause the patient to die (Astuti 2017).

In a contractual legal perspective, it is said that '*Contract agreement obligation is the primary means for the parties to create their legal norms that will rule the behavior of their own. Rights and obligations arising from the contract are determined by what is mutually agreed (exchanged) by the parties through their statements*' (Hernoko *et al.* 2017). The relationship between doctors and patients in the implementation of medical practice is known as legal relations. Legal relations in the context of engagement law constitute an agreement that occurs from the agreement. Therefore, the legal relationship between doctors and patients occurs from a therapeutic agreement. The agreement known in the field of health services is a therapeutic agreement (transaction). Therapeutic agreements are agreements between doctors and patients, in the form of legal relationships that cause rights and obligations for both parties. Objects in this agreement are therapeutic efforts for patient recovery (Nasution 2005). In the therapeutic agreement, both doctors and patients have the rights and obligations that must be fulfilled. The rights and obligations of doctors and patients are regulated in Articles 50 to 53 of Law Number 29 of 2004 (Nuryanto 2012). Thus, if the therapeutic agreement is not met by a doctor, the patient will claim on the legal basis that there is an omission or error.

In agreement legal theory, there are 2 (two) types of agreements, namely: 1. Business engagement, it is an agreement where each party gives maximum effort to reach the intended agreement. In this case, the priority is business, and 2. Engagement of results, it is an agreement based on agreed results, meaning that each party gives the best effort to achieve what has been agreed. In this case, the priority is results.

In such contractual relationships, there may be achievements provided by service providers that cannot be measured but there are also benefits provided by service providers that can be measured (some of which are generated by businesses). In line with Sidharta, which states that the types of services provided in the relationship between professional service providers and users of professional services can be divided into two types of services: promised services to produce something and services that are committed to striving for something (Shidarta 2009). If the two types of agreements above are linked to a therapeutic agreement, then the therapeutic agreement can be categorized in the business agreement, because the doctor will be difficult or impossible to be required to be able to cure his patients. So, what is demanded from a doctor is maximum effort and earnest in doing healing based on good medical science standards. Likewise, for patients, they are required to try to carry out recommendations and doctor's orders so that the pain can be cured. Both parties, namely doctors and patients are required to try as

much as possible to cure an illness. Although the legal relationship between the patient and the doctor is not based on the results but rather on the effort that must be made, it is implied that the effort that must be made is an effort that is in accordance with the applicable standards. Even though the legal relationship between doctors and patients is a maximum effort, it is possible for compensation claims to be based on violating the law that the doctor must account for from the aspect of civil law.

Whereas the lawsuit filed under the law violates the law based on Article 1365 BW, generally addressed to doctors who perform medical malpractice. According to Munir Fuady, as quoted by Bambang Heryanto, that malpractice has an understanding that every medical action is carried out by doctors for patients, both in terms of diagnosis, therapy and management of diseases carried out in violation of law, propriety, decency, and professional principles intentional or not intentional or misdirected which causes pain, disability, bodily injury, death and other damage that causes the doctor to be responsible for administrative, civil or criminal responsibility, generally carried out in cases of medical malpractice. Hermien Hadiati Koeswadji quoted the opinion of John D. Blum as saying that medical malpractice is one form of professional negligence that patients can be asked to compensate for in the event of an injury or disability caused directly by the doctor in performing measurable professional actions (Heryanto 2010). In fact, it is not easy to establish the existence of malpractice that there is professional negligence carried out by the doctor at the time of the treatment and there are others who are harmed by the actions of the doctor.

The law does not impose restrictions on illegal acts, which must be interpreted by the court. Initially it was intended that anything that was against the law would be illegal. However, since 1919, a court ruling that has given an understanding that an act or negligence with one of: (1) violates the rights of others; (2) contrary to the legal obligations of the perpetrator; (3) violating morals is generally adopted from good habits; (4) not in accordance with propriety in social life. A doctor can be wrong. To determine the offender must pay compensation, there must be a close relationship between errors and losses that occur. That in order to be able to claim losses (compensation) due to negligence of the doctor, the patient must be able to prove the following four elements: (1) there is an obligation for doctors to service their patients; (2) doctors have violated the usual medical service standards; (3) plaintiffs (patients) suffer losses that can be requested for compensation from pain, disability, bodily injury, death and other damage; (4) the fact that pain, disability, bodily injury, death and other damage is caused by sub-standard actions. To prove the existence of an action below the standard of health services by the patient (plaintiff) is an effort that is not easy because the patient has no knowledge of it. The case involving Dr. Yenny Wiyarni Abbas, Spa who was sued by Ibrahim Blegur for the death of his son named Ananda Falya Rafani Blegur based on illegal acts for medical treatment. By Dr. Yenny Wiyarni Abbas, Spa was appealed with a lawsuit Number 462/Pdt/2016/PT.BDG and was decided by the Bandung High Court, that Dr. Yenny Wiyarni Abbas, Spa found no errors, because there was no substantial medical evidence.

Based on the description above, legal issues are formulated as follows:

(1) What are the elements of liability based on faults in medical disputes?
(2) What is the urgency to use the principle of presumption of liability principle to medical disputes?

1. Elements Liability Based on Fault on Medical Dispute

Implicitly Article 66 paragraph (1) of Law No. 29 of 2004 concerning Medical Practice explains that medical disputes are disputes that occur because the interests of patients are harmed by the actions of doctors who carry out these medical practices. Medical disputes in health services provide legal consequences that require the responsibility of the doctor. The legal responsibility of a doctor arises when medical negligence occurs with a doctor. The attitude or action can be interpreted as doing something that is not supposed to be done or not doing something that should be done or not doing something that is a reasonable person based on ordinary considerations that generally regulates human events, will do, or have done something natural and heart careful it just won't do. In fact, in handling patients, there is often a different perspective between patients and doctors with lawsuits or claims to doctors who have committed medical negligence (Nasser 2011).

The aspect of civil law regarding a patient's claim to a doctor who handles it is almost a matter of compensation claims. Article 1365 BW states that every act that violates the law, which brings harm to another person, requires that the person who caused the wrongdoing to issue the loss compensates for the loss. Unlawful acts in its development have developed into 4 (four) criteria, first, violating the rights of others; or second, contrary to the legal obligations of the perpetrator; or third, violating the rules of moral conduct; or fourth, which contradicts courtesy, carefulness and caution that a person must have in relation to fellow citizens or with other people's property.

If a patient who feels aggrieved wants to file a lawsuit based on an unlawful act against the doctor, then he must prove that there has been an unlawful act with the criteria mentioned above. In addition, patients also have to

prove that there is a causal relationship between violating the law and the loss suffered. A claim that is based on an unlawful act can be directed against the perpetrator of the act itself, because he made a mistake, negligence, was not careful which caused harm to others. Claims can also be directed against people responsible for their dependents or their items under their control.

Therefore, the reason for the lawsuit is not appropriate if it is only based on Article 1365 Burgerlijk Wetboek (Indonesian Civil Code), but also based on Article 1366 Burgerlijk Wetboek. This is caused by theory or doctrine, medical malpractice by doctors, consists of three things (Wahyudi 2011). First, Intentional Professional Misconducts, who are found guilty/bad practice if the doctor practices violations of standards and is done intentionally. Doctors practice by ignoring standards and intentional. Practice doctors by ignoring standards in existing rules and there is no element of negligence. Secondly, Negligence or unintentional negligence, namely a doctor who is due to negligence resulting in a patient's disability or death. A doctor fails to do something that must be done in accordance with medical science. This category of malpractice can be prosecuted, or punished if proven in court. Third, Lack of Skill, i.e. doctors take medical action but are incompetent or less competent.

The definition of the element of error referred to in Article 1365 BW based on the concept of civil law about this error can be distinguished between the definition of errors in the broadest sense and understanding errors in the narrow sense. The meaning of error in the broadest sense is to enter intentions and neglect. The meaning of intention is that the action taken is known and desired by the perpetrator. Whereas negligent understanding is an action in which the perpetrator knows the possible consequences that harm others (Setiawan 2008).

Negligence is a form of accidental error, but it is also not something that happens by accident. In this omission, there is no malice from the perpetrator. Negligence in carrying out medical actions causes patient dissatisfaction with doctors in making treatment efforts in accordance with the medical profession. Such negligence causes loss on the part of the patient. Thus, a doctor other than being the subject of civil liability on the basis of default and violating the law can also be prosecuted on the basis of negligence, which results in a loss. The claim on the basis of this negligence is provided in Article 1366 BW, which reads as follows: 'A person is responsible, not only for damage caused by his actions but also for those caused by negligence or carelessness.'

Law Number 36 of 2009 concerning Health regulates matters relating to the issue of negligence of health personnel in Article 29 and Article 58. Article 29 of Law Number 36 of 2009 stipulates that in the case of health workers suspected of committing negligence in carrying out their profession. Such negligence must be resolved before mediation. Article 58 of Law Number 36 Year 2009 regulates the right of every person to claim compensation to someone, health worker, and/or health service provider who experiences loss due to intentional or negligent health services received. Based on this provision, it appears that prosecution is directed at a person, health worker or health provider (hospital). In the context of violating the law, the hospital can be said to be a 'participating (guilty)' party. Unlawful acts committed by two or more people because there are parties who are referred to as participating (participating) guilty. When there are parties declared guilty, then the determination of liability is based on: (1) how much each joint actor must compensate for the loss suffered by the injured party (patient); and (2) determination of the joint actors dividing the burden of losses among them. Regarding the first thing, each actor is liable for the loss for all losses, with the understanding that if one of them has paid, the other is free from the obligation to pay, while in terms of the two obligations each actor is determined by the weight of each mistake (Nieuwenhuis 1985).

Meanwhile, based on Law Number 44 of 2009 concerning Hospitals, compensation claims are only addressed to hospitals, which are caused by negligence of health workers in the hospital. If the losses incurred by intentional health workers at the hospital, compensation claims cannot be made to the hospital. The hospital will not be responsible if the loss is caused by an error in the meaning of an intentional health worker in the hospital (Wahyudi 2011). The patient will file a lawsuit to the hospital if the patient knows and feels aggrieved by the actions of the health worker in the hospital. It is not easy for patients to state that the loss is caused by the actions of health workers. It can be unfortunate to happen to patients who occur unexpectedly by health workers. Health workers have made appropriate and appropriate efforts, and permanent losses to patients, this does not include negligence of health workers. Therefore, the patient must know the medical record so that the form of action taken by the health worker can be known to him. The liability charged to the hospital for the mistakes of doctors who work in hospitals is known as the principle of vicarious liability/corporate liability. The principle of vicarious liability means that the employer is liable for the loss of another party caused by the people/employees who are under his supervision. Meanwhile, the principle of corporate liability is defined as a corporation that houses a group of workers who have responsibility for the workers employed. In determining the existence of vicarious liability/corporate liability according to Paula Giliker it is needed 'a relationship by which one may be liable for the harmful acts of others; the commission of wrongdoing by the employee or subordinate; and that liability is confined to a specific set of circumstances, be it within the course of employment (Giliker 2011).

The burden of proof when applying Article 1365 BW is given to patients or families of patients so that they will have difficulty in proving an element of error with the doctor. Thus, it is necessary to think about the use of other concepts of responsibility, meaning that they are not based on the element of error.

2. The Presumption of Liability Principle in Medical Disputes

The use of Article 1365 BW gives the position of 2 parties, namely the perpetrator and the victim. The system of proof of the concept of liability based on errors incriminates victims as plaintiffs. The new plaintiff will receive compensation if he succeeds in proving the defendant's wrongdoing. In addition, proof of the element of causality between the act and the loss of the victim is borne by the victim as the plaintiff. This is in accordance with the evidentiary load system regulated in BW, namely Article 1865 BW. The proof system as stipulated in Article 1865 BW is also regulated equally in the Civil Procedure Law, namely Article 163 Herziene Inlandsch Reglement (HIR) or Article 283 Rechtreglement voor de Buitengewesten (RBg).

Filing a claim using Article 1365 BW for civil cases or civil disputes faces juridical weaknesses, namely the burden of proof of the element of error and the causal relationship made by the plaintiff. In a civil case, it is very difficult for the victim when he has to explain scientifically or technically the causal relationship between the defendant's actions (which contain elements of error Article 1365 BW or negligence Article 1366 BW) and the loss of the victim.

Basically, legal protection for doctors and patients is placed in an objective and balanced position. If you use the concept of liability based on errors (Article 1365 BW) it will be very difficult for the position of the patient (victim) to be able to prove the doctor's fault when the doctor does malpractice. According to Peter Mahmud Marzuki, liability is a certain form of responsibility. The definition of liability refers to the position of a person or legal entity that is considered to have to pay compensation after a legal event or legal action. For example, a person or other legal entity for committing an illegal act so that it can endanger the person or other legal entity. The term liability lies in the scope of private law (Marzuki 2008). Therefore, in order to face difficulties in proving errors (including proof of negligence based on Article 1366 BW), then the principle of presumption by liability principle is carried out using the principle of presumption. The principle of presumption of liability principle states that the defendant is always liable, until he can prove that he is innocent. Thus, the burden of proof is with the defendant (Sidharta 2009).

The use of the presumption principle is always liable because it is difficult to prove medical errors or medical negligence to the doctor or hospital. The relationship between the doctor and the hospital is based on the implementation of the task. Thus, patients can also be protected by the burden of liability to the hospital based on the principle of vicarious liability/corporate liability. It is fair and reasonable to impose vicarious liability on employers, because employers are more likely to have the means to compensate victims than employees, a claim has been made as a result of activities carried out by employees on behalf of the employer. Employee activity tends to be part of the business activity of the employer, the employer by hiring employees to carry out activities will create illegal acts based on the risks carried out by the employee, the employee will, to a greater or lesser extent, be under the control of the employer.

The difficulty in proving the existence of malpractice requires complex and complex medical knowledge, and difficulties in obtaining the patient's medical records. The use of the principle of presumption of being always liable will not burden doctors and/or hospitals because it is possible to use the principle of reversing the burden of proof. Thus, doctors and/or hospitals can use the principle of reversing the burden of proof if the doctor and/or hospital do not feel guilty or negligent of malpractice, on the grounds that the doctor and/or hospital have done the job correctly.

The European Group on Tort Law (EGTL) publishes the Principles of European Tort Law (PETL). PETL as a starting point for the future discussion about the possibility of harmonization or even the unification of law violating the law (tort law) in Europe. The PETL text about proof load is described in the provisions set out in Part 2 of Chapter 4 PETL which reads as follows:

Article 4: 201 Reversal of the burden of proving fault in general

(1) the burden of proving fault may be reversed in the light of the gravity of the danger presented by the activity;
(2) the gravity of the danger is determined according to the seriousness of possible damage in such cases as well as the likelihood that such damage might actually occur.

Provisions relating to Article 4: 201 PELT are provisions concerning 'evidence' in Article 2: 105 PETL which states: ‘Damage must be proved according to normal procedural standards. ‘The damage is too difficult or too costly’ (Giesen 2010).

Ivo Giesen (2010) states that the reason for including the principle of the burden of reverse proof in PETL is First, trying to improve the plaintiff's position due to unreasonable difficulties for the plaintiff because of the technical complexity of the defendant's activities and difficult facts to prove. Furthermore, it is said that the reversal of the burden of proof leads to tightening of responsibility and this must be able to be normatively justified. Second, that the burden of this reverse proof implies that the court was given discretionary power. In this case, the Dutch legal regulations are full of discretionary authority with the principle of fairness and justice mentioned in Article 150 of the Civil Procedure Code (Wetboek van Burgerlijke Rechtsvordering), which allows Dutch courts to use their discretionary powers, but provides little guidance on the application of provisions intended.

Ivo Giesen (2010) acknowledged that the Dutch Supreme Court was not possible to use discretion to use the principle of the burden of reversed proof, so the hope was that legislators would amend their legal regulations. Reluctance not to use the principle of burden of reverse proof is easy to understand, because the rationale for proof reversal theory is that someone is considered guilty, until the person concerned can prove otherwise. This is certainly considered to be contrary to the presumption of innocence principle. However, the principle of reverse proof that will be used by doctors and/or hospitals in medical disputes is very relevant. This is to provide legal protection between doctors and patients proportionally and balanced. Proportional and balanced legal protection creates a distribution based on the principle of proportionality. According to Hans Kelsen, if the actions of an individual have caused a harmful effect on someone else, basically he can be free from civil sanctions by proving that he does not expect or does not want the harmful consequences of his actions and has fulfilled the legal obligation to take action under normal circumstances, it can avoid these harmful consequences (Kelsen 1961). Proportional and balanced legal protection creates distributive justice. John Rawls tries to formulate two principles of distributive justice, as follows: First, the principle of greatest equality, that everyone must have equal rights to basic freedom to the greatest extent, the same width of freedom for all. This is the most basic (human rights) that everyone must have. In other words, only with the guarantee of the same freedom for all people will justice be realized (the principle of rights). The principle of greatest equality, is none other than the principle of equality of rights, is the principle that gives equality of rights and is of course inversely proportional to the burden of obligations that each person hasTaufik 2013). This is according to what John Rawls (1961) stated that ‘First, each person is to have the same right to the most extensive compatible with a similar liberty for others. This is as stated by John Rawls that ‘First: each person has equal right to the most extensive liberty compatible with a similar liberty for others’. Second, social inequality, the economy must be arranged in such a way. By John Rawls (1961) it is said that ‘Second: social and economic inequalities are to be arranged so that they are both: (a) which is expected to be everyone's advantage; and (b) attached to positions and offices open to all’. Thus, the following two principles need to be considered, namely the principle of difference and the principle of equal and fair opportunities. Both are expected to provide the greatest benefits for the less fortunate. The principle of equal and equitable difference and principle of opportunity is the principle of objective difference, meaning that the second principle ensures the realization of proportionality of the exchange of rights and obligations of the parties, so that (objective) differences of exchange can be accepted as long as they meet the requirements of good and fair faith. Thus, the first principle and the second principle cannot be separated from the others. In accordance with the principle of proportionality, Rawls justice will be realized if both conditions are applied comprehensively. Medical disputes require respect for patient autonomy and treat patients as equal partners in managing patient health. Provide opportunities for disputing individuals to present their narratives in a non-confrontational environment (Kumaralingam 2017). Barnes (2010) stated that ‘facility liability for failure to take relatively inexpensive recommended precautions is warranted’.

If the principle of the burden of reverse proof is used in medical disputes, the obligation to prove the element of medical error or medical negligence is carried out by the doctor and/or hospital as the defendant. The defendant must show proof that he is innocent or innocent. This manifests distributive justice by using the principle of difference and the principle of equal and fair opportunities, and fulfilling the requirements of good and reasonable intention.

Medical disputes are unpleasant events for doctors. Medical disputes are the occurrence of clinical risks in patients, such as adverse clinical events or medical errors. The Indonesian Medical Council has provided guidelines in the form of Medical Practice Guidelines, Doctors and Dentists in Indonesia, which prevent clinical risk by applying the precautionary principle. The principle of prudence includes: (1) trying to remain a good doctor; (2) trying to always practice good medicine; (3) coupled with implementing special programs, such as: Patient Safety, Quality Assurance, Continuous Medical Education, Development Continuing Professionals, Sustainable Clinical Risk Management, Medical/Clinical Audit, Performance Audit, Learning from one's own mistakes and those of others.

Conclusion

The use of responsibility based on the principle of error will make it difficult for patients to prove a doctor's or hospital's fault or negligence in the event of malpractice. The use of the presumption principle is always liable for asking for civil liability for doctors and/or hospitals if malpractice occurs will provide legal protection between doctors and or hospitals with patients in proportion and balance. Doctors and/or hospitals are given the means to prove that they are innocent of malpractice with the principle of the burden of reversed proof. Indeed, the use of the principle of the burden of reversing proof will conflict with the principle of presumption of innocence. However, to protect patients due to unreasonable difficulties for patients due to the technical complexity of doctor's activities and difficult facts to prove, then the courage of judges to use the principle of the burden of reverse proof based on discretion and freedom of judges. For doctors in conducting medical practice, they must pay attention to the principle of caution by applying guidelines issued by the Indonesian Medical Council.

References

[1] Agustina, R. 2012. *Acts against the Law, in Law of Obligations,* Denpasar Laras Library in collaboration between the University of Indonesia. Leiden University and the University of Groningen.

[2] Amirthalingam, K. 2017. Medical dispute resolution, patient safety and the doctor-patient relationship. *Singapore medical journal*, 58(12), 681.

[3] Astuti, E.K. 2011. Tanggung Gugat Dokter dan Rumah Sakit Kepada Pasien pada Kegagalan Pelayanan Medis di Rumah Sakit [Responsibility of Doctors and Hospitals to Patients in the Failure of Medical Services at the Hospital]. *Masalah-Masalah Hukum,* 40(2), 164-171.

[4] Barnes, B.A. 2010. Negligence, Medical Malpractice, Vicarious Liability, or Patient Responsibility: Who Should Pay When a Patient Contracts MRSA from a Healthcare Facility. *Ind. Health L. Rev.,* 7, 335.

[5] Burgerlijk Wetbook (Indonesian Code Civil).

[6] Conboy, L.A., *et al.* 2010. Which patients improve: Characteristics increasing sensitivity to a supportive patient–practitioner relationship. *Social Science and Medicine*, 70(3), 479-484.

[7] Giesen, I. 2010. The Reversal of the Burden of Proof in the Principles of European Tort Law-A Comparison with Dutch Tort Law and Civil Procedure Rules. *Utrecht L. Rev.,* 6, 22.

[8] Giliker, P. 2011. Vicarious liability or liability for the acts of others in tort: A comparative perspective. *Journal of European Tort Law,* 2(1), 31-56.

[9] He, A.J., and Qian, J. 2016. Explaining medical disputes in Chinese public hospitals: the doctor–patient relationship and its implications for health policy reforms. *Health Economics, Policy and Law,* 11(4), 359-378.

[10] Hernoko, A.Y., Anand, G., and Roro, F.S.R. 2017. Method Determining the Contents of the Contract. *Hasanuddin Law Review,* 3(1), 91-103.

[11] Hernoko, A.Y. 2016. Asas Proporsionalitas Sebagai Landasan Pertukaran Hak dan Kewajiban Para Pihak dalam Kontrak Komersial. *Jurnal Hukum Dan Peradilan*, *5*(3), 447-466.

[12] Heryanto, B. 2010. Malpraktik Dokter dalam Perspektif Hukum [Malpractice Doctors in Legal Perspectives]. *Jurnal Dinamika Hukum*, 10(2), 183-191.

[13] Herziene Inlandsch Reglement (HIR) Concerning Civil Procedure (applicable in Java and Madura).

[14] Indar, I. 2013. Legal Function in Organizing Health Services. *Indonesian Journal of Administration and Health Policy*, 2(01).

[15] Iswandari, H.D. 2006. Legal aspects of administering medical practice: a review based on law No. 9/2004 concerning medical practice. *Health Services Management Journal,* 9 (02).

[16] Kaba, R., and Sooriakumaran, P. 2007. The evolution of the doctor-patient relationship. *International Journal of Surgery*, 5(1), 57-65.

[17] Kelsen, H. 1961. *General Theory of Law and State.* Russell & Russel.

[18] Law No.29 of 2004 Concerning Medical Practice.

[19] Marzuki, P.M. 2008. *Pengantar Ilmu Hukum [Introduction to Legal Studies].* Kencana.

[20] Nasution, B.J. 2005. *Hukum Kesehatan: Pertanggungjawaban Dokter [Health Law: Doctor's Liability]*. Rineka Cipta

[21] Nieuwenhuis, J.H. 1985. *Principles of Engagement Law.* Faculty of Law, Airlangga University.

[22] Nuryanto, A. 2012. Model of Professional Doctor Legal Protection.

[23] Rabinovich-Einy, O. 2011. Escaping the shadow of malpractice law. *Law and Contemp. Probs.,* 74, 241.

[24] Rawls, J. 1971. *A Theory of Justice.* The Belknap Press of Harvard University Press

[25] Rechtreglement voor de Buitengewesten (RBg) Concerning Civil Procedure (applicable in outer Java and Madura).

[26] Setiawan, R. 2008. *Principles of Engagement Law*. Binacipta.

[27] Shidarta. 2009. *Indonesian Consumer Protection Law.* Grasindo.

[28] Taufik, M. 2013. John Rawls's philosophy of the Theory of Justice. *Mukaddimah: Jurnal Studi Islam,* 19(1).

[29] Trisnadi, S. 2016. Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis [Legal Protection of Professional Doctors in Settlement of Medical Disputes]. *Masalah-Masalah Hukum*, 45(2), 150-156.

[30] Wahyudi, S. 2011. Tanggung Jawab Rumah Sakit terhadap Kerugian Akibat Kelalaian Tenaga Kesehatan dan Implikasinya [Hospital Responsibility for Losses Due to Negligence of Health Workers and Their Implications]. *Jurnal Dinamika Hukum,* 11(3), 505-521.

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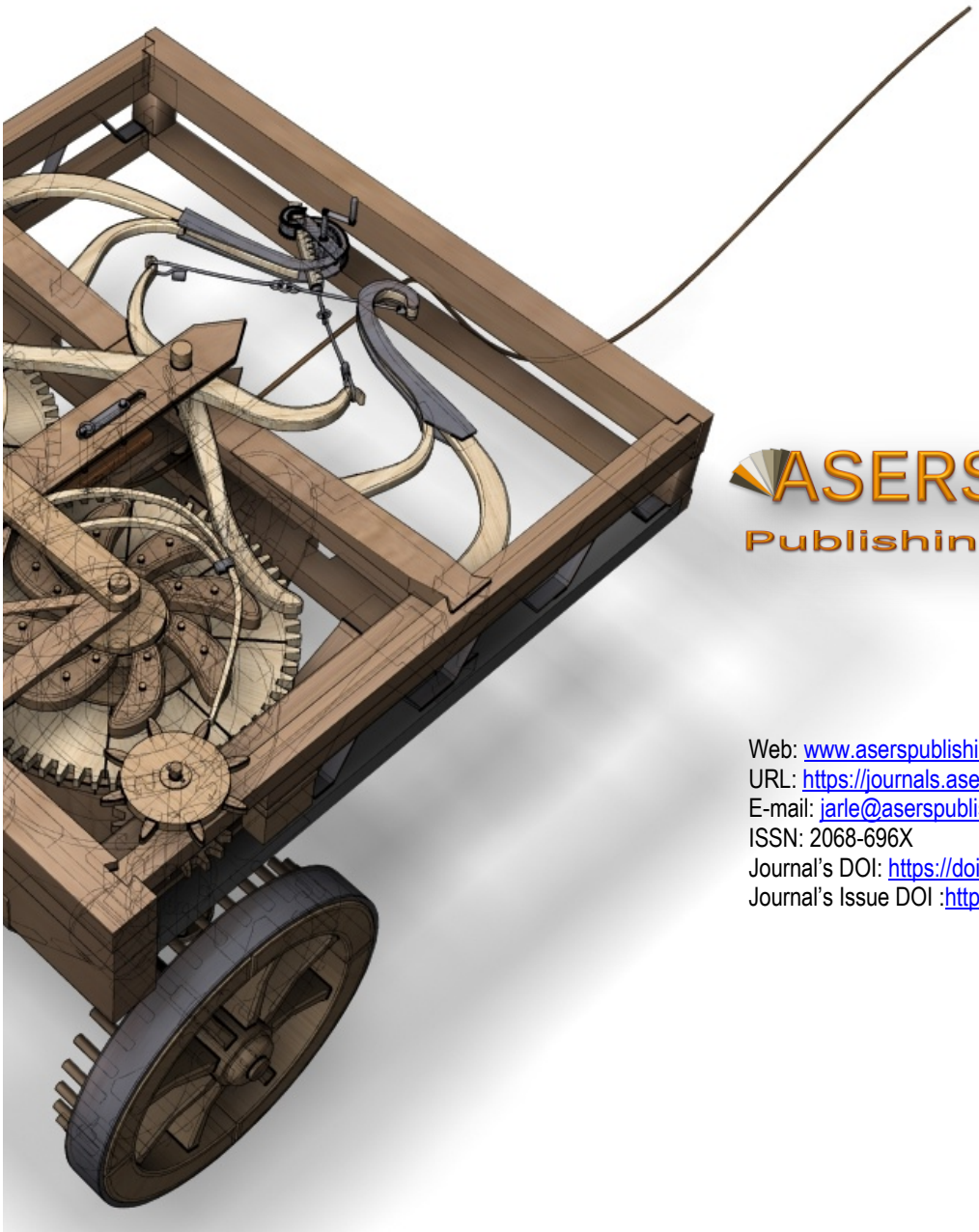

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