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Doctor's Liability to Patient Due to Default in Therapeutic Agreement (Case Study of Ma RI Decision Number 2811 K/Pdt/2012)

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Abstract
The legal relationship that occurs between a doctor and a patient is called a Therapeutic Agreement/Transaction. Risks that can cause harm to patients can occur in even the smallest medical procedures. A doctor can be held liable if he has made a mistake or negligence and caused harm, although basically no doctor intentionally makes a mistake as happened in the Indonesian Supreme Court Decision Number 2811K/Pdt/2012. The type of research used by the author is normative juridical, namely legal research carried out by examining library materials or often also referred to as library legal research. The results of the research carried out were obtained by the judge's consideration in the Indonesian Supreme Court Decision Number 2811K/Pdt/2012 which was inaccurate, because according to the Supreme Court judge, the cassation respondent's actions were correct and did not violate any legal provisions. In fact, after a description of the facts in the series of events in this case, it was clearly found that the doctor and hospital had done things that violated the provisions of the Health Law, including violating the Medical Code of Ethics. The actions of the cassation respondent, especially doctor E and including doctor J as the recipient of the delegation, have been proven to be in breach of contract. This is because the actions of the two doctors violated the provisions of the Medical Practice Law, namely that the actions they took were not in accordance with standard procedures and violated the provisions of the law.

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Abstrak
Hubungan hukum yang terjadi antara dokter dan pasien disebut Perjanjian/TransaksiTerapeutik. Risiko yang dapat menimbulkan kerugian terhadap pasien dapat terjadi pada tindakan medis sekecil apapun. Seorang dokter dapat dimintakan tanggung gugatnya jika telah berbuat kesalahan atau kelalaian serta *menyebabkan* kerugian, walaupun pada dasarnya tidak ada dokter yang dengan sengaja berbuat kesalahan seperti yang terjadi dalam Putusan Mahkamah Agung RI Nomor 2811K/Pdt/2012. Jenis penelitian yang dipergunakan oleh penulis adalah yuridis normatif yaitu penelitian hukum yang dilakukan dengan cara meneliti bahan pustaka atau sering juga disebut sebagai penelitian hukum kepustakaan. Hasil dari penelitian yang dilakukan ini diperoleh Pertimbangan hakim dalam Putusan Mahkamah Agung RI Nomor 2811K/Pdt/2012 adalah kurang tepat, karena menurut hakim Mahkamah Agung, perbuatan termohon kasasi adalah benar dan tidak melanggar ketentuan hukum manapun. Padahal setelah dilakukan uraian mengenai fakta-fakta dalam rangkaian peristiwa dalam perkara ini, jelas ditemukan bahwa pihak dokter maupun rumah sakit telah melakukan hal yang melanggar ketentuan dalam Undang-Undang Kesehatan termasuk pula melanggar Kode Etik Kedokteran. Perbuatan termohon kasasi, khususnya dokter E dan termasuk pula dokter J selaku penerima delegasi, telah terbukti melakukan wanprestasi. Hal ini disebabkan tindakan kedua dokter tersebut melanggar ketentuan dalam Undang-Undang Praktik Kedokteran bahwa tindakan yang dilakukannya tidak sesuai dengan standar prosedur dan melanggar ketentuan undang-undang.

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1. INTRODUCTION

The legal relationship that occurs between a doctor and a patient is called a Therapeutic Agreement/Transaction. Therapeutic Agreement or commonly called inspannings verbintenis is an effort to cure the patient. Inspannings verbintenis is an effort agreement which can be interpreted as meaning that both parties involved in the agreement will make maximum efforts to achieve what is contained in the agreement.(Chazawi, 2007)According to Article 280 paragraph (4) of Law Number 17 of 2023 concerning Health, it is stated that, "The practices of Medical Personnel and Health Personnel are

carried out based on an agreement between Medical Personnel or Health Personnel and Patients based on the principles of equality and transparency." The basis of the relationship between a doctor and a patient is generally an agreement, but there can also be an agreement due to law. However, regardless of the basis that forms the doctor-patient relationship, legally this will still give rise to rights and obligations for each party and must be carried out as agreed.(Nasution, 2015)

Risks that can cause harm to patients can occur in even the smallest medical procedures. A doctor can be held liable if he has made a mistake or negligence and caused harm, even though basically no doctor intentionally makes a mistake. A person can be responsible for his own actions and can be responsible for other people if they make mistakes or negligence in their work. A person's liability can occur if he or she has made a mistake/negligence and this causes loss. A person who experiences loss due to that person's error/negligence has the right to ask for compensation.(Nasution, 2015)Therefore, the doctor does not promise healing for the patient, but promises maximum effort for the patient's recovery, because the patient's recovery is not an achievement of the agreement. In this case, it can be interpreted that the patient cannot sue if he does not recover from the disease he is suffering from.

Terminologically, medical malpractice comes from the English language "Medical Malpractice" which means an act of carelessness by someone in carrying out their profession.(Tutik, 2010)According to The Advanced Learner's Dictionary of Current English by Hornby Cs, 2nd edition, Oxford University, London, malpractice comes from the word malpractice which means "wrongdoing" or neglect of duty". If this understanding is applied in the field of medicine, then a doctor can be said to have committed an act of malpractice, he has done something wrong (wrongdoing) or he has not taken care of the patient's treatment/care adequately (neglect the patient by giving or not enough care to the patient). .(Ameln, Fred, 1991)The third edition of the Big Indonesian Dictionary mentions the term malpractice with malpractice which is defined as: "medical practice that is wrong, inappropriate, violates the law or code of ethics".(Yunanto, 2010)Since ancient times, malpractice has been known and the number and variety of cases has increased along with the flow of globalization in the world. Malpractice cases in Indonesia are increasingly appearing on the surface with the number of formal lawsuits going to court or complaints to police agencies which is causing fear among health workers in providing services to the community. It is not easy to provide understanding to the general public about malpractice. Malpractice, which means deviation in carrying out a profession, whether consciously or not/negligence, can occur not only to doctors or health workers, other professions such as advocates, accountants or journalists can also commit malpractice.(Chazawi, 2007)However, malpractice by other professions occurs less frequently than by doctors/health workers, so if it is called malpractice then what is in people's minds is malpractice by doctors. Because the term malpractice is not only intended for the medical profession, the correct term for malpractice by doctors/health workers is medical malpractice.(Guwandi, 1990)

The legal basis that patients can use in filing a lawsuit against a doctor who made a mistake/negligence is Article 1365,(Supriadi, 2001)1366 and 1367 of the Civil Code, Article 305 paragraph (1), Article 308 paragraph (1) and paragraph (2), Article 310, and Article 440 of Law Number 17 of 2023 concerning Health. Based on the grounds mentioned above, a patient can file a lawsuit if the doctor makes a negligence/mistake, but if it does not cause harm to the patient, then the doctor cannot be held responsible. So as long as the patient can still be cured or does not suffer from permanent disability, he cannot ask for compensation from the doctor. Claims from patients suing for losses for costs spent on treatment due to the doctor's negligence can be filed, but immaterial claims filed by patients

are considered excessive to judges, especially in developed countries, because every medical action definitely has risks and the medical action is not an action that can be calculated accurately. mathematics so it cannot be calculated with certainty.(Supriadi, 2001)

Negligence in this case is a lack of care. Negligence cannot be said to be a violation of law or a crime if it does not cause loss or injury and the person can accept it. This is based on "De minimis non curat lex" which means that the law does not interfere with things that are considered trivial. Another case is that if the negligence reaches a certain level so that it harms or injures other people and even results in the death of other people, then this can constitute gross negligence (culpa lata/gross negligence) and this is often associated with violations in criminal law.(Amir, 1997)A doctor can be declared to have committed malpractice and be obliged to pay compensation if there is a close relationship between the loss and the mistake made by the doctor. For example, in the case of Dr. DAS and his two colleagues performed a caesarean section in April 2010 on a patient with the initials SM who was referred from the community health center. The operation failed to save the patient so the patient later died. After the incident, the three doctors were reported by the patient's family for carrying out surgery without permission. The three doctors were sentenced to 10 months in prison on appeal but were later declared free on review.(Anonymous, 2023)Another example is the case of Dr. UWK, SpOG who helps patients in Aceh. From the start the patient was referred and was suspected of having a birth canal disorder, medical records showed that the patient's condition was normal, both the patient's blood pressure and heart rate. But the patient's baby died during the operation and the patient died 5 hours later. The doctor underwent a medical council ethics trial and was declared not guilty, and the police have issued a letter to stop the investigation (SP3) because he was found not guilty. However, then the patient's heirs sued the doctor civilly, and in 2018 the Supreme Court sentenced the doctor to pay compensation of IDR 500 million.(Juliana, 2023)

Medical actions that cause harm in the form of disability or death cannot be categorized as medical malpractice if the medical action complies with professional standards and standard operational procedures, but is only referred to as medical negligence. In Law Number 17 of 2023 concerning Health, and the Indonesian Medical Code of Ethics, it is not explained that a doctor's negligence can be punished. These regulations only explain the deliberate element of doctors in carrying out medical procedures.

Under these conditions, researchers are of the opinion that these regulations are legal instruments that only provide benefits to doctors, while it is the patients who gain and bear the losses. Some of these laws actually become legal instruments that only provide legal protection to doctors so that they are not punished. Under these conditions, the researchers finally came to understand that several cases of medical malpractice that have occurred in Indonesia so far have often been spared from criminal prosecution because they cannot be separated from the existence of several of these regulations, namely the success in getting doctors away from criminal action and only being subject to compensation (civil) penalties.) even if the action taken has been proven to result in disability or death of the patient. However, in relation to this, the researchers consider that doctors who escape criminal prosecution do not seem to be completely to blame, because it turns out that even in terms of regulations, up to now there are none or have not been specifically regulated by laws and regulations regarding medical malpractice.

In the case that occurred in the Supreme Court Court Decision Number 2811 K/Pdt/2012 regarding the doctor's liability towards the patient due to breach of contract in the therapeutic agreement, it was explained that when carrying out general anesthesia the

Plaintiff was first installed with a device called an Endotracheal Tube (hereinafter referred to as: ETT15) in accordance with Exhibit P-19: Results of Bronchoscopy Examination, Intubation on March 8 2009, furthermore after the Cement Injection was carried out on the Plaintiff and after the Plaintiff experienced awareness from the general anesthesia process, it turned out that the Plaintiff felt that his left leg was completely paralyzed, So at that time the Plaintiff and his family tried to ask for an explanation from Defendant II, but contrary to the law it turned out that Defendant II was not there and could not be found, it was Defendant III who appeared at that time.

Defendant III said at that time that Defendant II was not there because he was out of Defendant I's location and at that time Defendant III admitted that he had carried out the Cement Injection action on the Plaintiff so that at that time the Plaintiff was very surprised and immediately questioning these conditions, namely as follows: Why was the Plaintiff not asked for his consent or even informed in advance that Defendant III was the one who would carry out the Cement Injection? That because the Plaintiff felt total paralysis in his left leg, the Plaintiff at that time really questioned: "Is Defendant III a person who is in his capacity to carry out Cement Injection?" That the actions carried out by Defendant III and Defendant II had fatal consequences for the Plaintiff, moreover, the Cement Injection was carried out by Defendant III without the consent of the Plaintiff or his family, so in fact it had been carried out "against the law".

The provisions of Article 293 paragraphs (1), (2), and (3) of Law Number 17 of 2023 concerning Health, which states:

a. Every individual health service action carried out by medical personnel and health workers must receive approval.
b. Consent as intended in paragraph (1) is given after the patient has received adequate explanation.
c. The explanation as intended in paragraph (2) includes at least:
   1) diagnosis;
   2) Indication;
   3) Health service actions carried out and their risks;
   4) possible risks and complications;
   5) alternative actions and their risks;
   6) risks if action is not taken.

Based on the provisions above, it is clear that there are legal facts that Defendant II has violated the regulations in Law Number 17 of 2023 concerning Health. Approval for medical treatment/informed consent is approval given by the patient or his family on the basis of an explanation regarding the medical action that will be carried out on the patient in point c which states: "Invasive action is a medical action that can directly affect the integrity of body tissue", so Defendant II's action submit "acts against the law" and violate Article 1 number 1 and number 4 of the Republic of Indonesia Minister of Health Regulation Number: 290/Menkes/Per/III/2008 concerning Approval of Medical Procedures.

In addition, the provisions in Article 2 paragraph (1) and paragraph (3) of the Regulation of the Minister of Health of the Republic of Indonesia Number: 290/Menkes/Per/III/2008 concerning Approval of Medical Procedures, states:

a. All medical procedures to be carried out on patients must obtain approval.
b. The consent referred to in paragraph (1) is given after the patient has received the necessary explanation regarding the need for medical action to be carried out.

Apart from the provisions in Law Number 17 of 2023 concerning Health, Defendant II has in fact committed an "act against the law" namely violating Article 1 points (a) and (c) and Article 2 paragraph (1) paragraph (3) of the Regulation of the

Minister of Health of the Republic of Indonesia Number: 290/Menkes/Per/III/2088 concerning Approval of Medical Procedures. As a medical and therapeutic agreement, it is generally inspannings verbintenis, namely an agreement where the achievement is an effort that is carried out seriously without basing it on the results as an achievement, because the achievement is in the form of effort, the results are clearly not certain. However, this does not mean that informed consent can be a shield or excuse for mistakes made by a doctor if in his medical actions it is proven that he did not or did not make enough effort in providing health services or did not comply with professional standards.

Thus, the regulations referred to in law enforcement in the health sector, doctrine as a source of law also provide a strong influence for judges to form law in the form of jurisprudence in the field of health law. In practice, this jurisprudence can resolve casuistry problems. From reading jurisprudence, for example, it will be known that judges often adhere to the views of famous scholars or doctrines that are influential in legal science. To resolve problems in the health sector, judges must know health law and medical law and more or less medical problems. A judge who is not a graduate in the health sector must have knowledge in the field he handles to be able to carry out his duties well and have good reasoning power in the legal field. All legal regulations and doctrines are ultimately needed by a judge to make a good decision to resolve a case. From the perspective of professionalism, the ability of law enforcers to understand the rules and the courage to apply them is very important to enforce the law. However, in reality, in many cases that occur in the health sector, whether they reach court or are resolved amicably, there is a lack of understanding or lack of understanding by law enforcers regarding the health law.(Nasution, 2013)

Based on this explanation, researchers are interested in conducting research on the responsibility of doctors towards patients due to non-performance in therapeutic agreements. The decision in the case that is the object of this research is the decision of the Supreme Court of the Republic of Indonesia Number 2811 K/Pdt/2012. Through this research, the researcher will carry out an analysis of the doctor's responsibility towards the patient due to non-performance in the therapeutic agreement and legal considerations related to the judge's decision in this case.

2. RESEARCH METHOD

The type of research used by the author is normative juridical, namely legal research carried out by examining library materials or often also referred to as library legal research.(Marzuki, 2005)The author's consideration in using this type of research is to find out, analyze and explain the doctor's responsibility towards the patient due to default in the therapeutic agreement and the judge's considerations in deciding the case of the Republic of Indonesia Supreme Court Decision Number 2811K/Pdt/2012.

In this normative juridical legal research, the author uses a statutory approach.(Marzuki, 2005)This research uses a type of legislative approach because the main study material is the statutory regulations regarding default related to the doctor's responsibility towards the patient due to default in the therapeutic agreement. Researchers also use a conceptual approach(Marzuki, 2005)where researchers must understand legal concepts through legal theories and doctrines that are taken into consideration by judges to carry out analyzes of judge decisions as well as the concept of doctors' legal responsibility towards patients due to default in therapeutic agreements. Researchers also use a case approach(Marzuki, 2005)where researchers examine the legal reasons used by judges to arrive at the Republic of Indonesia Supreme Court Decision Number 2811K/Pdt/2012. Apart from the statutory approach, conceptual approach and case approach, researchers

also use a comparative approach.(Marzuki, 2005)by conducting legal comparisons by comparing the law with the laws of other countries and legal considerations from previous problems.

The types of legal materials used consist of primary, secondary and tertiary legal materials. Data collection on primary legal materials in this research was carried out by conducting library research, examining statutory regulations relating to doctors' liability towards patients due to default in therapeutic agreements. Secondary and tertiary legal materials are obtained from literature studies and document studies from written works, books and journals related to the topic to be discussed. The data obtained from searching primary, secondary and tertiary legal materials is then analyzed using a qualitative analysis approach. Then the data is described descriptively to obtain a picture that can be clearly understood to answer the problem being studied.

3. RESEARCH RESULTS AND DISCUSSION

a. Analysis of Judges' Considerations in Determining Doctors' Liability for Patients Due to Default in Therapeutic Agreements in the Republic of Indonesia Supreme Court Decision Number 2811K/Pdt/2012

In carrying out their lives as humans, each community has human rights as basic rights that every person has and at the same time distinguishes humans from other living creatures. In the legal system in Indonesia, the application of human rights is regulated, one of them, in the 1945 Constitution of the Republic of Indonesia. In Article 28 H paragraph (1) of the 1945 Constitution, it is stated that humans have several basic rights such as having a healthy life physically and mentally, having a place live, obtain a good living environment and receive optimal health services. Among several basic human rights, the one that receives more attention is the right to obtain health services.

The basic rules regarding the provision of health services according to Article 28 H paragraph (1) of the 1945 Constitution are part of the implementation of the Declaration of Human Rights concerning the granting of the right to health for the community in Article 25 paragraph (1) of the United Nation Universal Declaration of Human Rights 1948, which contains the following:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or rather lack of livelihood in circumstances beyond his control.(Sutarno, 2019)

This description can be interpreted as meaning that humans have human rights related to fulfilling health for both themselves and their families and also several other rights such as having a place to live, getting decent clothing and healthy food. When someone has adequate health, whether physically, mentally, spiritually or socially, it is possible for that person to improve their welfare and standard of living.

When a human being has good health, both physically and psychologically, of course that person can carry out all his activities well, including doing productive things to earn income that can be used to continue his daily life. One effort to achieve health for the community is to improve the standards of health services both physically and in human resources and the expertise of medical personnel contained in these health services.

One manifestation of providing adequate health services is through services provided by doctors or medical personnel at a hospital, clinic or private doctor's practice. In providing health services, all actions taken by doctors are based on several applicable legal rules, namely:

1) Law Number 36 of 2009 concerning Health as amended by Law Number 17 of 2023 concerning Health and its implementing regulations;
2) Civil Code; And
3) Criminal Code.

Each of these legal provisions has several articles relating to the implementation of health services for the community. For example, Article 293 paragraph (1) of Law Number 17 of 2023 concerning Health states that when carrying out procedures on patients by doctors, it must be preceded by the patient's consent. This consent is carried out after the patient has received all information regarding the action to be carried out starting from information about the diagnosis, the purpose of the action, alternative actions required, the risks of the action, and the prognosis for the action to be carried out.

Regarding agreement to carry out medical procedures, in the world of medicine it is often called a therapeutic agreement. In this agreement there is an agreement between the doctor and the patient regarding the medical action that will be carried out in relation to the patient's health diagnosis. In this therapeutic agreement, the doctor, who has the position of having more and in-depth knowledge plus having special expertise in the field of medicine and at the same time as the party who will carry out the medical action, must provide an explanation to the patient regarding the details of the action that will be carried out. .

Regarding the therapeutic agreement, the patient has the right to accept or reject the action to be carried out, this is regulated in Article 52 of the Medical Practice Law, where the patient has the right to receive an explanation regarding the medical action to be carried out and to refuse the medical action. Doctors only advise and direct patients regarding the actions to be taken, including informing them about the risks and alternative actions that can be taken.

In connection with the existence of the therapeutic agreement, the legal relationship between the doctor and the patient should be a balanced or impersonal relationship, where the doctor and patient both have obligations that must be carried out and rights that must be accepted, but it cannot be denied that in a therapeutic agreement the relationship is often what happens instead is interpersonal relationships, where the doctor's position is more dominant than the patient, as a result there are many cases where patients who only obey the doctor's orders because of this interpersonal relationship often receive unequal treatment that causes both material and immaterial losses.(Octavia, 2020)

The existence of such a relationship often results in many cases regarding the relationship between doctors and patients, as experienced by Brother ABS, who is a patient of RS.SK, and also a patient of one of the doctors at that hospital. Based on the description of the position case in the research results sub-chapter above, it appears that the cassation applicant experienced an abnormal condition after carrying out a series of actions by the cassation respondent as part of health services for the cassation applicant who at that time was suffering from back pain.

The Supreme Court judge in this case has carried out a series of case examinations and in the judge's considerations section there are two types of considerations carried out by the judge, namely factual considerations and legal considerations. As mentioned in the previous sub-chapter, both in considering facts and legal considerations, the panel of judges is of the opinion that the decisions that have been made previously in this case, namely in the North Jakarta District Court and the Jakarta High Court, are in accordance with legal provisions, which means that the Panel The Supreme Court judge was of the opinion that the series of health

service actions carried out by the cassation respondents were in accordance with standard operational procedures that should be carried out on patients and also did not conflict with statutory regulations. Based on the judge's considerations, in the end the Supreme Court decided to reject the cassation application submitted by the applicant.

In connection with the judge's considerations, researchers will analyze the facts in this case one by one, as follows:

1) The first fact ignored by the judge was regarding the patient's Informed consent*Consent*

In the consideration of the facts of the case of Supreme Court Decision Number 2811 K/Pdt/2012, it is stated that the ABS patient has agreed to the actions carried out on him based on the consent stated in the informed*consent*. The Supreme Court panel of judges opined that when the patient has signed the informed*consent*, then this is evidence and a strong basis that the patient agrees to all medical actions carried out by the doctor on the patient.

In the world of medicine and its relation to health services, hospitals and doctors who treat patients cannot provide information*consent*fully. This can especially happen when doctors provide services to patients in polyclinics or in the Emergency Unit (ER). This is because when examining patients in the polyclinic or emergency room there is limited time, so the explanation of the actions taken by the doctor to the patient will not work optimally. The number of patients attending the polyclinic examination is usually quite large, so to shorten the queue time for patients, the consultation time at the polyclinic is also limited, making it difficult to explain actions in an informed manner.*consent*.(Sulistyaningrum, 2021)

This is also difficult to do in the ER, because the majority of patients who enter the ER are very emergency patients, meaning they are in a painful condition or need quick treatment, so it is very impossible to provide an informed explanation.*consent*, plus the level of education of patients and their families varies, including the level of knowledge and absorption of information. Sometimes there are people who are unable to absorb information properly when they are in a panic situation. If providing informed*consent*Still being forced into this situation, of course this is also dangerous if problems arise in the future.(Irfan, 2018)

So it can be interpreted as informed*consent* is a form of therapeutic agreement in which there is a mutually binding legal relationship between the doctor and the patient, only this legal relationship is one-sided, because the majority of patients will directlyagreethe action proposed by the doctor to be carried out on the patient, especially if the patient is in a state of urgency.

This condition then causes doctors to sometimes not continue explaining to the patient. This is what causes many problems in the future related to the actions taken by doctors to patients.(Princess, 2020) This form of imbalance in informed consent has deviated from the initial aim of a therapeutic agreement, where the substance of the therapeutic agreement is the action carried out by the doctor in the form of providing health services based on expertise and thoroughness. So if the information provided to the patient is not provided in as much detail as possible, then the doctor has ignored the principle of accuracy in the therapeutic agreement.(Sutamaya, 2022)

This was ignored by the Supreme Court of Justice in this case, even though the ABS patient had signed the informed consent*consent*However, this does not

necessarily constitute proof of approval for medical treatment because, as explained above, it is informed*consent*is a therapeutic agreement that is one-sided, because the patient, as a party who is unfamiliar with medical terms, has no other choice, which in the end forces the patient to sign the informed consent.*consent*. The Supreme Court of Justice should also examine whether the doctor's actions provided a detailed explanation of the patient's condition before any other action was taken.

The actions of the panel of judges who ignored the facts regarding informed*consent*This is clearly not in line with the theory of justice and legal certainty, where in this theory it is stated that justice is treatment that is fair, impartial, siding with the right, not being biased, not harming someone and giving equal treatment to each party in accordance with the law. the rights he has. However, what the Supreme Court of Justice did was as if it were siding with the defendants by not carrying out research or further investigation into the case regarding the role of doctors in informed*consent*and immediately concluded that the ABS patient agreed to the procedure without examining the background of the ABS signing the informed consent*consent*the.

2) The next fact that was ignored by the Panel of Judges was regardingexiststhe event of changing doctors suddenly and without notification to ABS patients

In the case of the Supreme Court's decision, there is the fact that during the operation process, the doctor who treated the ABS patient was not the Cassation Respondent II/Defendant II as the doctor who knew the history of ABS's illness and was also the doctor who recommended the operation (cement injection), but instead the Cassation Respondent III/Defendant III, even the ABS patient did not recognize the doctor, because during the examination process before the operation, Cassation Respondent III was never present or participated in examining the ABS patient.

The change in doctors treating ABS patients from Cassation Respondent II to Cassation Respondent III gave rise to the statement that between the two Cassation Respondents there had been a delegation of authority or granting of power from Cassation Respondent II to Cassation Respondent III. In the theory of delegation/delegation of authority, it is stated thatDelegation of authority is a delegation of the rights or power of a leader to his subordinates to carry out their tasks while at the same time asking for accountability for completing these tasks. In granting delegation of authority, it cannot be done just like that, several things must be done first, namely:

a) Determine the target first.
b) Determine responsibility and authority.
c) Give motivation to subordinates
d) Should subordinates complete the work.
e) Preach practice
f) Exercise control.

At the stage of granting delegation of authority, there is one point that is of concern, namely providing training. If applied to this case, if Respondent Cassation II delegates authority to Respondent Cassation III to carry out surgery on ABS patients, it should be preceded by several stages, one of which is providing training. In providing this training, the actions of the Cassation Respondent II included providing a history of the disease of the Cassation Respondent III along with other ins and outs which were known to the Cassation Respondent II but were not known to the Cassation Respondent III.

Furthermore, granting delegation of authority is always synonymous with granting power of attorney. According to the theory of granting power of attorney, it is stated that the granting of power between the giver and recipient of the power of attorney must be based on an agreement granting power of attorney in accordance with the rules of the Civil Code. The existence of this power of attorney agreement is proof that there has been a transfer of power between the parties and at the same time makes it easier for the power of attorney to carry out all the authority given by the power of attorney.

Delegation of authority by granting power is an inseparable unit. Delegation of authority must be accompanied by a definite grant of power according to law, so that each party can carry out its rights and obligations according to its portion. This is what is not found in the case of ABS patients. The delegation of authority of Respondent Cassation II to Respondent Cassation III based on the Supreme Court decision was apparently not based on the granting of power of attorney.

This means that Respondent Cassation III is treating patients illegally and not in accordance with legal provisions. The absence of valid authorization in this delegation of authority is also an indication that the Cassation Respondent II in granting authority to the Cassation Respondent III to operate on ABS patients was not carried out in accordance with the stages of delegation of authority and there may also be an indication that the Cassation Respondent II did not provide training or prior information to the Cassation Respondent III regarding the condition of ABS Patients. Seeing these facts, the Supreme Court of Justice did not base these facts on their considerations and seemed to have missed the important fact regarding the delegation of authority, namely that during the ABS patient operation process, the position of the Cassation Respondent II was replaced by the Cassation Respondent III.

3) The third fact is the occurrence of malpractice committed by the Defendants

The incident of delegation of authority carried out by Respondent Cassation II to Respondent Cassation III without any formal grant of power in an agreement, gives indications that the delegation was carried out illegally where one of the main things that was not done was Respondent Cassation II not providing prior information to Cassation Respondent III regarding the condition of ABS Patients. Even though the Cassation Respondent III was not a doctor who had been treating ABS patients, even during the pre-operative examination process, the ABS patient stated that he had never seen the Cassation Respondent III.

This is what could enable malpractice carried out by the defendants on ABS patients, resulting in ABS patients experiencing a decline in their health condition. The incompetence of the Cassation Respondent III in handling ABS patients during the cement injection operation plus the Cassation Respondent II not delegating his authority legally, including not providing training or exchanging information in advance with the Cassation Respondent III, is the main factor that resulted in malpractice against ABS patients.

The malpractice committed by the defendants most likely occurred during the operation process where the defendants mishandled the ABS patient, this malpractice action then caused harm to the patient where ABS's health condition deteriorated and he was unable to carry out normal activities as before the operation was carried out.

In malpractice theory it is mentionedMedical malpractice is divided into two forms, namely, ethical malpractice and juridical malpractice. If we refer to the definition of each type of malpractice, then the actions carried out by the

Cassation Respondents, especially Cassation Respondent II and Cassation Respondent III, are included in these two types of malpractice.

From an ethical malpractice point of view, the actions carried out by the two doctors were contrary to medical ethics. This is proven by the two doctors being given ethical sanctions by the MKDKI because they were proven to have violated point 6 of the Decree of the Indonesian Medical Council Number 17/KKI/Kep/VIII/2006 concerning Guidelines for Enforcement of Discipline in the Medical Profession.

The next type of malpractice is juridical malpractice which consists of civil, criminal and administrative malpractice. The two doctors could be subject to civil malpractice because it is related to the existence of a therapeutic agreement between the doctor and the ABS patient. Respondent Cassation II violated the agreement in that in carrying out cement injection, Respondent Cassation II was not involved in the action, even though the therapeutic agreement was made between Respondent Cassation II and ABS. As a result of breaking the agreement, ABS suffered both material and immaterial losses.

This civil malpractice action is also related to acts of breach of contract, because the Respondent of Cassation II violated the therapeutic agreement where the Respondent did not carry out medical treatment as agreed in the agreement. As a result of this default, malpractice occurs in ABS patients.

For criminal malpractice, it can also be imposed on the two doctors, because as a result of the actions of the two doctors who were negligent in carrying out their duties, ABS patients experienced disability and a quite drastic decline in their health condition. Furthermore, the Cassation Respondents may also be subject to administrative malpractice, because Cassation Respondent II is a neurologist and is the doctor who treated ABS patients from the start, but instead Cassation Respondent II delegated his authority to Cassation Respondent III without going through the proper procedures, even though both of them have competence. the same as a neurosurgeon.

This fact was also overlooked by the Supreme Court of Justice. The Supreme Judge did not look and examine in more depth the relationship between Respondent Cassation II and Respondent Cassation III. In fact, the Supreme Court's decision also stated that the two defendants had received ethical sanctions from the MKDKI where they were proven to have violated point 6 in the Indonesian Medical Council Decree Number 17/KKI/Kep/VIII/2006 concerning Guidelines for Enforcement of Discipline in the Medical Profession. The existence of this ethical sanction proves that the two defendants have violated the provisions of the doctor's professional code of ethics. The Panel of Judges should also consider this ethical sanction.

4) Facts regarding the emergence of liability of the Defendants/Casation Applicants towards the Plaintiff/Casation Applicant in this case

In treating the illness suffered by the cassation applicant, Respondent Cassation II, who acted as a doctor at Respondent I's hospital, recommended that ABS Patients be given Cement Injection to treat their illness. However, in this case, according to ABS Patient's statement, the Cassation Respondent II did not provide further information and explanation regarding Cement Injection. Instead, what was done was that the Cassation Respondent II assured ABS and his family that he had always succeeded in carrying out this procedure on hundreds of other patients.

Based on the analysis, what the Second Cassation Respondent did, violated the provisions of the Medical Practice Law, namely Article 52 letter a, where as a patient he has the right to obtain a medical explanation, but Doctor E did not give this to the cassation applicant even though this is a right for the cassation applicant. the applicant for the cassation as the patient. The actions of Respondent Cassation II also violate Article 45 paragraph (3) of the Medical Practice Law, where as a doctor, Respondent Cassation II should explain in detail about the Cement Injection action carried out to the applicant for cassation, including an explanation of the diagnosis, purpose, and even the risks of carrying it out. This action includes explaining other alternatives so that the patient has the right to choose the best action for him.

The actions taken also violate the provisions of Article 56 paragraph (1) of Law Number 36 of 2009 concerning Health, where the patient has the right to accept or reject the assistance that will be given to the patient after the patient has received complete and clear information. Because from the start the cassation applicant did not receive clear information regarding the Cement Injection procedure plus the doctor did not provide any other alternative treatment, the cassation applicant as a patient does not have the right to refuse or choose which action will be carried out for him. Doctors, as those who are considered to have more ability and expertise in the health sector, only provide one type of action, which means that patients are not given the opportunity to choose which action to take.

Actions carried out by the doctor where on one occasion the doctor stated that so far he had successfully carried out Cement Injection procedures for hundreds of his patients, including actions that praised himself even though he did not directly mention the praise, but the sentence implicitly indicated that there was praise being said by the doctor related to his achievements in treating Cement Injection patients. What was done by Respondent Cassation II violated Article 4 of the KODEKI, where doctors are prohibited from praising themselves, especially when the action was carried out.in front ofpatient.

Apart from several violations mentioned above, Respondent Cassation II also carried out an illegal delegation of authority as described in the previous point. As a result of several violations, the Respondents committed malpractice, especially the Cassation Respondent II and the Cassation Respondent III, which resulted in ABS patients suffering losses, making it necessary for the Respondents to take responsibility for ABS patients and their families.

The responsibility that must be carried out by the Respondents, especially doctors who treat ABS, is a form of responsibility imposed on the Respondents, especially doctors who have committed malpractice which has caused ABS's health condition to change drastically. After knowing the type of malpractice committed by Respondent Cassation II and Respondent Cassation III, both of them are obliged to take responsibility as a consequence of the malpractice actions that have been carried out.

5) Facts relating to not being donerecommendationto another more expert doctor

During a series of examinations, the doctor, who is a neurologist, found that there was bone loss in the spinal cord segments, but the discovery of this fact did not make the doctor recommend that the patient check with a bone specialist for further observation to find the right course of action. What the doctor did was to

continue carrying out the Cement Injection without carrying out an examination for bone loss.

The actions taken by the doctor who knew there was something wrong with the patient's condition but did not provide recommendations or referrals to other doctors violated the provisions in Article 51 letter b of Law Number 29 of 2004 concerning Medical Practice, where doctors are obliged to provide recommendations for examinations. patient to another expert doctor who has expertise in a particular field, in this case a bone specialist who knows about the condition of brittle bones that the patient suffers from. So in this case, the doctor or the second cassation respondent committed deliberate negligence because he knew there was a problem with the patient's condition but did not take action according to the procedure.

6) The fact is that the hospital does not want to hand over medical records to ABS

There was a request from the cassation applicant regarding the contents of the medical record to the hospital but it was not granted for various reasons. This violates the provisions in Article 52 letter e of Law Number 29 of 2004 on Medical Practice, where one of the patient's rights is to obtain the contents of the patient's medical record. So the actions of Respondent Cassation I cannot be justified.

Based on the analysis mentioned above, it can be interpreted that the judge's consideration was not carried out in accordance with the judge's theory of consideration, primarily based on the Ratio Decidendi principle, namely, in deciding a case, the judge is obliged to consider a number of facts in the case, so that the decision pronounced is appropriate. with existing facts and is fair to the parties involved in the case.(Rahmawati, 2021)

The judge's considerations in the Supreme Court Decision were inaccurate because according to the Supreme Court judge, what the cassation respondents had done was correct and did not violate any legal provisions, even though after a description of the facts in the series of events in this case, it was clearly found that the parties doctors and hospitals have done things that violate the provisions of Law Number 36 of 2009 concerning Health, including violating the Medical Code of Ethics.

Regarding the legal events that occurred in this case, what happened can be related to several legal theories contained in this research, as follows:

a) Malpractice Theory

According to these facts, the actions taken by doctor E clearly violated professional and service standards in the medical field, because all the actions taken violated various legal regulations in Law Number 36 of 2009 concerning Jo's Health. Law Number 17 of 2023 concerning Health, where this law is one of the guidelines for medical personnel, especially doctors, in relation to professional standards in providing health services to patients. This violation then became an act of malpractice committed by doctor E on ABS patients.

Another malpractice action carried out by doctor E was related to not confirming the party carrying out the action on the ABS patient and his family. As a doctor who from the start carries out examinations and recommends medical procedures for ABS patients, when carrying out surgery on ABS patients, Doctor E should be the one responsible for carrying out the operation. However, what happened was that the doctor who carried out the procedure was Doctor J, who had never been involved in examining ABS patients from

the start. Another interesting thing was the fact that in the team of doctors who carried out surgery on ABS patients, Doctor E was not involved in the team at all. Therefore, related to malpractice theory, the defendants' actions towards ABS patients can be categorized as malpractice.

b) Legal Responsibility Theory

In connection with this description, it can be ascertained that the actions of the defendants, especially the doctors involved in treating ABS patients, constitute malpractice. So that the actions carried out by the Cassation Respondents, especially Cassation Respondent II and Cassation Respondent III, can be held legally responsible because the consequences of the actions carried out resulted in losses suffered by ABS Patients, both material and immaterial losses, therefore legal liability arose which must be borne by the parties. the party who committed the malpractice.

c) Delegation Theory

Regarding the incident of handling the operation carried out by Doctor J, if it is related to the delegation theory then this cannot be justified, because in the delegation theory it is stated that regarding the delegation of power or authority to another party, the party providing the delegation must guide and supervise the person. who received the delegation. In this case, doctor E, as the party who delegated to doctor J, did not provide guidance or supervision to doctor J, and even doctor E seemed to be hands-off in the surgery for the ABS patient, it seems that doctor E did not participate at all as part of the team of doctors in the operation.

Regarding delegation, according to delegation theory, the responsibility that occurs remains with the party providing the delegation and also includes the person carrying out the delegation's duties. So in this incident malpractice occurred which then resulted in ABS patients experiencing losses where one of the causes of the losses was the delegation carried out by doctor E, so the parties who were responsible were doctor E and at the same time doctor J.

d) Theory of Justice and Legal Certainty

Regarding the legal responsibility imposed on the Cassation Respondents II and III, this is a concrete form of the theory of justice and legal certainty, because the actions carried out by the Cassation Respondents have caused ABS patients to suffer losses.

e) Judge's Reasoning Theory

The judge's considerations in the Supreme Court Decision were inaccurate because according to the Supreme Court judge, the actions of the cassation respondent were correct and did not violate any legal provisions, even though after a description of the facts in the series of events in this case, it was clearly found that the doctor and the house sick has done something that violates the provisions of Law Number 17 of 2023 concerning Health, including violating the Medical Code of Ethics.

The panel of judges at the Supreme Court in carrying out the judge's considerations did not pay attention to the principle of Ratio Decidendi, where it is necessary to observe the facts that occur in connection with a legal event in making the judge's considerations and decisions. In this case the panel of judges did not observe and consider the facts that occurred, because in fact in this incident it was clear that there was a mistake made by the doctor towards the patient, but the panel of judges did not see this and instead decided something different.

b. Doctor's Liability towards Patients Due to Default in Therapeutic Agreements in the Case of Supreme Court Decision of the Republic of Indonesia Number 2811 K/Pdt/2012

After explaining the legal events in this case, a problem emerged that the doctor in this case had breached his therapeutic agreement with the patient. Default in legal sciencerelatedclosely related to civil law, therefore civil breach of contract occurs because the performance that should have been carried out by the parties bound by the agreement was not carried out either due to negligence or compelling circumstances.(Muljadi, 2016)

In the case that occurred between the patient and Dr. E in this Supreme Court decision, there is a legal relationship based on Article 39 of Law Number 29 of 2004 on Medical Practice, where according to this article, medical practice carried out by doctors occurs based on an agreement with the patient as part of an effort to maintain health , preventing disease, and so on. The word agreement here, when related to the legal field, is closely related to the existence of an agreement.

In Article 1320 of the Civil Code, one of the terms of the agreement is an agreement between the parties. So, one of the agreements that occurs is based on a therapeutic agreement which contains the medical actions that the doctor will carry out on the patient. The Health Law states that one of the obligations of doctors is to carry out actions in accordance with operational and professional services. So if a doctor does not provide services according to these criteria, then the doctor has committed a breach of contract.

This is what happened in this case, where Dr. E, who was treating the disease experienced by ABS patients, had made procedural errors that were not in accordance with professional standards. This can be proven from several facts outlined in the Supreme Court decision. Several things that Dr. E is based on the facts of the event that occurred and the action does not reflect conformity with the standardprofessionala doctor is:

1) Doctor E did not explain in detail the medical procedures that would be carried outdonetowards ABS patients, even though doctors are required to do this in accordance with Article 45 paragraph (3) of Law Number 29 of 2004 concerning Medical Practice.
2) Doctor E's action was not to provide alternative examinations to ABS patients, even though during the examination, Doctor E knew that there were indications of spine loss experienced by ABS patients, even though Doctor E here was not a doctor who had expertise in the field of bones. The actions taken by doctor E violated the provisions of Article 51 letter b of Law Number 29 of 2004 concerning Medical Practice.
3) Another fact that was revealed was that when carrying out the operation it was discovered that the Cement Injection procedure which should have been carried out by doctor E was actually carried out by doctor J who never appeared from the start of the examination so here questions arise regarding the capacity of doctor J and the responsibilities of doctor E as the doctor in charge. treat ABS patients from the start and even provide recommendations for these actions.
4) Another action is regarding requests for the contents of medical records, where this is the patient's right to be able to read or know the contents of the medical record, but the hospital and doctor E have not given the patient this right. This clearly violates Article 276 Jo. Article 297 paragraph (2) letter e Law Number 17 of 2023 concerning Health.

Based on this description, it is clear that doctor E and doctor J have committed acts of breach of contract against ABS patients, therefore, for the losses incurred as a result of this breach of contract, doctor E and doctor J are obliged to be legally responsible for their actions. In the event of a breach of contract, liability will arise as a result of the event. The liability that occurs is related to the realm of civil law, because the action behind which liability arises is an incident of default related to violations in the civil sector.

The general form of liability consists of:

1) Compensate for losses incurred and experienced by other parties;
2) Canceling existing agreements;
3) Transferring risks;
4) Paying court costs incurred if the case goes to court;
5) There is coercion to fulfill the contents of the agreement with or without compensation.(Khoidin, 2020)

In relation to the incident experienced by the ABS patient, doctor E, as the main person responsible, can be held liable because as a result of his breach of contract, the ABS patient suffered losses in the form of disability in one of his body parts so that he was unable to carry out normal activities. In this case, Doctor E is obliged to provide compensation for losses both economic and non-economic. For economic compensation, Doctor E must compensate the loss in the form of money and cannot be replaced in other forms. For the nominal amount according to the ABS agreement.

Non-economic compensation can be requested in the form of reimbursement for recovery costs in the form of medical costs and other costs in accordance with the losses experienced by ABS patients due to disability of one of their body parts. Apart from compensation for losses, the form of responsibility given to doctor E can also be seen from an ethical and criminal perspective.

Regarding ethical responsibilities, doctor E and doctor J have received sanctions in the form of a recommendation to revoke their STR for 2 months.PenaltyThis was given to the two doctors as a result of their malpractice actions which caused harm to the patient in the form of material lossespatientABS costs a lot of money for treatment.

For criminal responsibility, the two doctors, especially Doctor E, can be subject to criminal sanctions in accordance with Article 360 paragraph (1) where as a result of mistakes made by Doctor E and Doctor J which result in ABS patients experiencing physical disabilities, these actions can be subject to sanctions. maximum prison sentence of 5 years.

Based onIn this description, the form of liability that can be given to doctor E, including doctor J, is civil in the form of compensation for losses for ABS, including compensation for medical costs incurred and other costs related to the physical disability suffered by ABS. Apart from civil matters, MKDKI can also be held ethically responsible, as it has been decided by the MKDKI that it is recommended that the two doctors have their STR revoked for 2 months. It is also possible to be given a maximum prison sentence of 5 years for actions that violate Article 360 paragraph (1) of the Criminal Code.

The responsibility imposed on Cassation Respondent II (doctor E) and Cassation Respondent III (doctor J) and several other Cassation Respondents is related to the dictum in the Supreme Court Decision, where in the final decision it was decided that ABS Patient's cassation application was rejected, resulting in the Respondents Cassation is not subject to liability as stated above. This decision is also

linked to the analysis of the judge's considerations in the previous sub-chapter, so the decision is felt to be one-sided because it is more beneficial to the doctors/Respondents than to the ABS patient as the Cassation Petitioner. In fact, based on existing facts, ABS patients were the ones who suffered the most in this incident.

In the theory of justice, it is stated that justice is treatment that is fair, impartial, siding with the right, not taking sides, not harming someone and giving equal treatment to each party in accordance with the rights they have. If the Supreme Court's decision is linked to this theory then the decision is not in accordance with the theory of justice, because the substance of the Supreme Court's decision is unfair, based on the presentation of the existing facts, all of which indicate that the Cassation Respondents have committed a violation of the law which caused ABS Patients to suffer losses. However, the Supreme Court judges did not pay attention to this fact and instead released the Respondents from the responsibility that should have been carried out.

This decision is also not in accordance with the theory of legal certainty, because the substance of the decision is not based on clear, consistent, orderly and consequential rules and is free from influence by subjectivity. As explained in the previous sub-chapter, several actions of the Cassation Respondents violated statutory regulations and also the code of medical ethics, but the final decision from the Supreme Court was not based on the code of medical ethics or other laws and regulations such as the Health Law. . So if it is based on the theory of legal certainty, this decision also does not fulfill the elements of legal certainty.

Based on this description, it can be interpreted that both the judge's considerations and the dictum of the Supreme Court's decision as a whole do not fulfill the sense of justice and are not appropriately applied in cases between ABS patients and cassation respondents.

4. CONCLUSION

a.Analysis of Judges' Considerations in Determining Doctors' Liability for Patients Due to Default in Therapeutic Agreements in the Republic of Indonesia Supreme Court Decision Number 2811K/Pdt/2012

PJudges' considerations in Supreme Court DecisionsRepublic of Indonesia Number 2811K/Pdt/2012is inappropriate, because according to the Supreme Court judge, the cassation respondent's actions were correct and did not violate any legal provisions.PHowever, after a description of the facts in the series of events in this case, it was clearly found that the doctor and hospital had done things that violated the provisions of the Health Law, including violating the Medical Code of Ethics.

Apart from that, in this caseiThere has been a breach of contract committed by medical personnel/doctors, namely in the form of carrying out medical procedures that do not comply with procedures, which then causes the patient to suffer losses.mAccording to researchers, the actions of the cassation respondents, especially cassation respondent II, have violated applicable legal provisions and breached the therapeutic agreement. Therefore, the actions carried out by the cassation respondents, especially cassation respondent II, can be held legally accountable.

The panel of judges at the Supreme Court in carrying out the judge's considerations did not pay attention to the principle of Ratio Decidendi, where it is necessary to observe the facts that occurred in relation to a legal event in making the judge's considerations and decisions. In this case the panel of judges did not observe and consider the facts that occurred, because in fact in this incident there was clearly a

mistake made by the doctor towards the patient, but the panel of judges did not see this and instead decided something different.

The actions that have been carried out by the Respondents of the Cassation in this legal incident are related to several legal theories such as the theory of malpractice because the actions carried out are closely related to malpractice, the theory of legal responsibility because the actions taken give rise to legal responsibility for the Respondents of the Cassation, the theory of delegation and the theory of justice, legal certainty, as well as the theory of judge's considerations.

b. Doctor's Liability towards Patients Due to Default in Therapeutic Agreements in the Case of Supreme Court Decision of the Republic of Indonesia Number 2811 K/Pdt/2012

Based on the results of the analysis in the second formulation of the problem, it can be concluded that the actions of the cassation respondent, especially doctor E and including doctor J as the recipient of the delegation, have been proven to have committed a breach of contract. This is because the actions of the two doctors violated the provisions of the Medical Practice Law, namely that the actions they took were not in accordance with standard procedures and violated the provisions of the law. Apart from that, it is said to be a breach of contract, because as a result of this action, losses both material and non-material are suffered by ABS patients.

As a result of these actions, Doctor E and Doctor J can be held liable or civilly liable in the form of compensation for losses for ABS, including compensation for medical costs incurred and other costs related to the physical disability suffered by ABS. Apart from civil matters, MKDKI can also be held ethically responsible, as it has been decided by the MKDKI that it is recommended that the two doctors have their STR revoked for 2 months. It is also possible to be given a maximum prison sentence of 5 years for actions that violate Article 360 paragraph (1) of the Criminal Code.

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