

# The Application of Doctrine of Vicarious Liability to The Hospital in A Event of Medical Personnel Negligence

Penerapan Doktrin Vicarious Liability  
Terhadap Rumah Sakit dalam Hal Terjadi Kelalaian Tenaga Medis

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**Abstract:** The purpose of study were the application of the doctrine of vicarious liability to hospitals in the event of medical personnel negligence. This study used the statute approach and conceptual approach methods. The results of study can be concluded as follows: (1) The basis for the hospital's responsibility for medical personnel negligence can be seen from the aspect of the condition of the therapeutic relationship between the patient and the hospital. If the pattern of therapeutic relationship between the patient and the hospital, then the position of the hospital as the party that provides the achievement, while the doctor only functions as an employee or task executor. With this therapeutic relationship pattern, if there is a patient loss due to medical personnel negligence, then in this case the hospital is responsible. 2) Law Number 17 of 2023 concerning Health regulates the provision of health services in hospitals, including health service facilities and health workers created to provide more certainty in the provision of health services, as well as provide protection for the community and health resources as one component of health care. The hospital will be legally responsible if there is negligence by medical personnel that causes harm to the community or patients.

**Keywords:** health, hospital; liability, vicarious and workers

**Abstrak:** Tujuan penelitian ini yaitu penerapan doktrin vicarious liability terhadap rumah sakit dalam hal terjadi kelalaian tenaga medis. Penelitian ini menggunakan metode pendekatan perundang-undangan (statute approach) dan pendekatan konseptual (conceptual approach). Hasil penelitian dapat disimpulkan sebagai berikut: (1) Dasar pemikiran rumah sakit bertanggung jawab atas kelalaian tenaga medis dapat dilihat dari aspek kondisi hubungan terapeutik antara pasien dengan rumah sakit. Jika pola hubungan terapeutik antara pasien dan rumah sakit, maka kedudukan rumah sakit sebagai pihak yang memberikan prestasi, sementara dokter hanya berfungsi sebagai employee atau pelaksana tugas. Dengan adanya pola hubungan terapeutik ini, maka jika terdapat kerugian pasien karena kelalaian tenaga medis, maka dalam hal ini rumah sakit yang bertanggung jawab. 2) Undang-Undang (UU) Nomor 17 Tahun 2023 tentang Kesehatan mengatur penyelenggaraan pelayanan kesehatan di rumah sakit, termasuk fasilitas pelayanan kesehatan dan tenaga kesehatan dibuat untuk lebih memberikan kepastian dalam penyelenggaraan pelayanan kesehatan, maupun memberikan perlindungan bagi masyarakat dan sumber daya kesehatan sebagai salah satu komponen penyelenggaraan kesehatan. Rumah sakit akan bertanggung jawab secara hukum, jika terjadi kelalaian tenaga medis yang menyebabkan kerugian bagi masyarakat atau pasien.

**Kata Kunci :** rumah sakit; tenaga kesehatan; vicarious liability

## INTRODUCTION

Hospitals are one of the health service institutions that have a role to improve the health of the community. With this service function, hospitals are required to provide good and professional services in the medical field through competent and professional medical personnel in carrying out their duties and authorities. In fact, not all medical services provided by medical personnel in hospitals are as expected by all parties, especially patients. Sometimes there is negligence by medical personnel that causes patients to become disabled, paralyzed and even die. This certainly causes medical disputes that end in demands from patients as a form of compensation request to the hospital.<sup>1</sup>

Negligence of health workers is regulated in the Health Law, specifically in Article 58, which regulates the right of every person to claim compensation against a person, health worker, and/or health provider who causes losses due to errors or negligence in the health services they receive. Meanwhile, based on the Health Law, the claim for losses is only aimed at hospitals, which are specifically caused, namely due to the negligence of health workers in the hospital. The hospital is not responsible if the loss is due to an error in the sense of deliberate action by health workers in the hospital. With the occurrence of this medical dispute, both the patient and the hospital should receive the same legal protection. Based on Article 46 of the Health Law, it is determined that the hospital is legally responsible for all losses arising from the negligence of health workers in the hospital. This can be used as a legal basis for patients who ask for accountability from hospitals that have committed malpractice/negligence in providing medical services. Although in reality it is not easy to file a lawsuit against the hospital because the truth must be proven.

The legal perspective divides health worker malpractice into criminal malpractice, civil malpractice and administrative malpractice. From these various divisions, it is necessary to investigate whether all types of medical personnel negligence will be the responsibility of the hospital as intended in the provisions of Article 46 of the Health Law, which can then be questioned, what are the requirements for medical personnel negligence that is the responsibility of the hospital as required by the Health Law.<sup>2</sup>

Implications for medical personnel, namely medical personnel must of course continue to exercise caution even though the hospital will be responsible for its negligence, but there is negligence of medical personnel that remains the responsibility of the health personnel concerned. Meanwhile, for patients, they must know that there has been negligence of medical personnel that has caused harm to them. If the patient does not know that there has been negligence of medical personnel that has harmed them, then the provisions of Article 46 of the Health Law cannot be realized.

The provision that the hospital is responsible for patient losses due to the negligence of its medical personnel can have further impacts on the hospital, medical personnel and patients (the community). The hospital needs to know the forms of medical personnel negligence that are the responsibility of the hospital and the forms of medical personnel negligence that are not the responsibility of the hospital. The development of corporate liability in Common Law countries such as England, the United States, and Canada has begun since the industrial revolution. A court in England in 1842 imposed a criminal fine on a corporation for its failure

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<sup>1</sup> Eryarifa, Saskia. Asas Strict Liability dalam Pertanggungjawaban Tindak Pidana Korporasi Pada Tindak Pidana Lingkungan Hidup. Jurnal MAHUPAS: Mahasiswa Hukum Unpas, Vol. 1 No. 2, Juni 2022. pp.103-12

<sup>2</sup> Sofwan Dahlan, Health Law: Guidelines for the Medical Profession, Diponegoro University Publishing Agency, Semarang, 2003, p. 17.

to fulfill its legal obligations. One of the theories used as the basis for corporate liability is the Vicarious Liability theory.<sup>3</sup>

The Vicarious Liability Theory is a theory or doctrine where there is a relationship between superiors and subordinates or employers and workers that applies *qui facit per alium facit per se*, which means that someone who acts through another person is considered to be the one who committed the act. In a civil action, an employer is responsible for the mistakes made by his subordinates as long as it occurs in his work environment.<sup>4</sup>

The existence of a subordinate relationship between the employer and the employee or principal and agent is the main requirement in vicarious liability.<sup>5</sup> This relationship then becomes the basis for imposing criminal responsibility on someone for the actions of another person. This is due to the attribution of actions from the employer to the employee.<sup>6</sup> In civil acts, there are regulations regarding the relationship between superiors and subordinates or workers and employers, where employers are responsible for mistakes made by their workers.<sup>7</sup> So, if an error occurs by an employee that results in loss to one of the parties, that party can sue the employer or superior for responsibility.<sup>8</sup> However, this responsibility is limited as long as the actions carried out by the worker or subordinate are still within the scope of his/her work or authority and his/her responsibility can be proven.<sup>9</sup>

In Indonesia, Vicarious Liability is better known as the responsibility carried out by corporations. However, Vicarious Liability in the concept of the Criminal Code has been formulated in Article 38 paragraph (2) of the 2008 Criminal Code Concept which states that "In cases determined by law, everyone can be held responsible for criminal acts committed by others". However, this must be limited to certain incidents that must be strictly regulated by law so that there is no arbitrariness in its application.

*Vicarious Liability* in the concept of the Criminal Code there is no clarity and has not been fully regulated so that research needs to be conducted on what criminal acts and whether the responsibility for medical personnel's negligence can be accounted for vicariously by the hospital or not. In addition, the implications of the realization of this doctrine also need to be studied further.

The objectives of study included 1) analyzing the application of the doctrine of vicarious liability to hospitals if medical personnel are negligent; Analyzing the application of the doctrine of vicarious liability to hospitals as an aspect of legal protection for medical personnel and the community.

## THE RESEARCH PROBLEM

The problem formulation were 1) how was the legal relationship between hospitals and medical personnel in hospitals and 2) how was the application of the doctrine of vicarious liability to hospitals in the context of legal protection for the community?

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<sup>3</sup> Muladi, *Application of Corporate Liability in Criminal Law, Lecture Materials on Corporate Crime*, Diponegoro University, Semarang, 2015, p.2.

<sup>4</sup> Henry Campbell Black, *Black's Law Dictionary*, Eight Edition, United States of America, West, 2004, p. 1566.

<sup>5</sup> Rachma, Diah Ayu dan Triwibowo, Aditya Mochamad. 2023. Penerapan Prinsip Strict Liability Dalam Penegakan Hukum Lingkungan Di Indonesia. Kajian Putusan Nomor 50/PDT/2014/PT.BNA jo. Nomor 12/PDT.G/2012/PN.MBO. Jurnal Yudisial. Vol. 16 No. 1 April. pp.56-62

<sup>6</sup> Sutan Remy Sjahdeini, *Corporate Criminal Responsibility*, Grafiti Pers, Jakarta, 2006, p. 100.

<sup>7</sup> *Ibid.* p. 101

<sup>8</sup> *Ibid.* p.102

<sup>9</sup> *Ibid.* p.103

## METHODS

This study used a normative legal method, where the implementation of this method is a study of legal principles, legal norms, legal systematics, and so on. This study uses a statute approach method, a conceptual approach method, and a case approach method. The case approach is an approach by conducting a study of court decisions that have permanent legal force related to the application of the doctrine of vicarious liability by hospitals due to negligence of health workers.

The legal material collection technique used in this research is library research. Primary (authoritative) legal materials consist of laws and regulations, official records of the making of laws and regulations, and judges' decisions. Meanwhile, secondary legal materials consist of unofficial documents, such as written publications, journals, and comments on court decisions. The analysis method uses a qualitative analysis method, namely an analysis that describes research data into descriptive statements/descriptions. The qualitative analysis method is constructed based on secondary data which is an explanation of legislation.

## DISCUSSION

### The Legal Relationship Between Hospitals and Medical Personnel in Hospitals

Hermien Hadiati Koeswadji said, the relationship between doctors and hospitals in general is a work relationship where doctors carry out their professional duties in the hospital. However, there are medical staff who are specialist doctors who are not workers because their legal relationship with the hospital is based on a contractual relationship to treat/admit patients for treatment. The classification of the legal status of doctors with hospitals is as follows:<sup>10</sup>

a. Doctor as employee

The legal status of doctors towards hospitals as employees is regulated by an employment agreement made between the two parties. This employment agreement contains the rights and obligations of doctors and hospitals. In Health Law Number 17 of 2023, doctors who work in hospitals are included as human resources for hospital health. The hospital is legally responsible for all losses caused by the doctor

b. Doctors as independent contractors

The legal status of doctors as employees can be divided into two types, namely doctors as private employees and doctors as government employees. Doctors who work in private hospitals consist of permanent doctors and contract doctors. While doctors who work in government hospitals consist of doctors as Civil Servants (PNS), doctors as soldiers of the Indonesian National Army (TNI), doctors who are members of the Indonesian National Police (POLRI) and doctors who are Government Employees with Work Agreements (P3K).

Doctors who work in private hospitals, the hospital can be private or public, while government doctors generally work in public bodies owned by the central government, local government, TNI and POLRI. However, it is possible for government doctors to work in private hospitals, or vice versa, because doctors are allowed to practice in three different places. Hermien Hadiati Koeswadji said that doctors work based on an employment contract between the hospital as the employer and the doctor as the recipient of the work. This employment contract is based on the provisions of Article 1601 BW and laws and regulations in the field of employment. So that the position of the doctor is subordinate to the hospital,

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<sup>10</sup> Zamroni, Health Law: Liability of Doctors and Hospitals in Medical Service Practices, 2022, p. 46-48.

or as an agent of the hospital. So that the medical services provided by the doctor are actually to carry out the obligations of the hospital as the principal.

The legal position of doctors as hospital employees will create an obligation for the hospital to be liable for unlawful acts by doctors committed while carrying out their duties. This is based on the legal relationship between employers and workers. According to R. Soetojo Prawirohamidjojo and Marthalena Pohan, employers are liable for legal acts committed by their subordinates while carrying out their work. Even employers cannot be forgiven, even though what their subordinates do is beyond their control. This liability is based not only on the provisions of Article 1367 of the Civil Code but also on the doctrine of vicarious liability.

### **The Application of the Doctrine of Vicarious Liability to Hospitals in the Framework of Legal Protection for the Community**

The legal protection contained in the doctrine of vicarious liability also has the meaning of legal protection for medical personnel. Vicarious Liability also provides legal protection to medical personnel because it is clear that the doctrine of vicarious liability contained in the civil code states that legal protection is given to anyone who receives a work order from another person or from an institution or from a company. So that it is associated with the position of medical personnel, of course if the medical personnel gets a task from the hospital and the task is carried out as well as possible, then with the doctrine of vicarious liability, if the implementation causes a problem, then not only the medical personnel but also the hospital or company or leader or employer are also responsible or liable.

*Vicarious liability* in the perspective of civil law, the assignor or employer can be sued for damages, while in the criminal context, the proof is towards participation. Vicarious liability is a doctrine born from the civil code, so if in more specific regulations there are no regulations that provide legal protection for medical personnel, it can be drawn from the doctrine of vicarious liability in the civil code.

Medical personnel who practice their profession in the territory of the Republic of Indonesia, in addition to being required to always uphold the Indonesian Code of Medical Ethics (KODEKI), are also required to always obey the law. This demand is part of the Indonesian state's efforts to provide legal protection to the community, especially patients. Thus, if there are medical personnel who carry out their profession in a manner that is contrary to the law, then the medical personnel will receive legal sanctions as a consequence.

In relation to legal protection for the community, there is a hospital's responsibility from the aspect of administrative law, where the hospital must meet administrative requirements in terms of employing health workers in the hospital. The Health Law contains provisions including regarding minimum qualifications and the existence of a permit from the government to provide health services. In addition, the Health Law stipulates that health workers must meet the code of ethics, professional standards, fulfill the rights of health service users, and have service standards and operational procedure standards. The criminal liability of hospitals for malpractice in Law Number 17 of 2023 concerning health is in line with the doctrine of Vicarious Liability, which is a doctrine related to the criminal liability of hospitals for malpractice committed by medical personnel. In Law Number 17 of 2023 concerning Health, the criminal liability of hospitals for malpractice is regulated in Article 447. The criminal liability of medical personnel is regulated in Article 440.

Based on civil law, a distinction is made between losses that can be claimed based on breach of contract and those based on unlawful acts. Losses that can be claimed based on breach of contract are only in the form of material or property losses (*vermogensschade*) or losses that

can be valued in money. Meanwhile, claims for losses on the grounds of unlawful acts, in addition to material losses, also include immaterial (ideal) losses that are not property, but whose property value can be estimated based on feasibility.<sup>11</sup>

Law Number 17 of 2023 concerning Health regulates the responsibility of hospitals (RS) towards patients or their families. This responsibility includes losses suffered by patients due to substandard health services. Article 193 of Law Number 17 of 2023 concerning Health states that hospitals are legally responsible for losses caused by the negligence of hospital health human resources. This means that the Health Law states that there must be a causal relationship between the loss and the negligence of health workers in the hospital. In civil law, the existence of a causal relationship is used to determine the cause of the loss as a basis for demanding compensation from the responsible party.<sup>12</sup>

Responsibility according to civil law exists if there is an agreement according to the provisions in Book III of the Civil Code. Most civil law experts are of the opinion that the formulation in Article 1233 of the Civil Code as a source of the existence of an obligation is incomplete, because there are still other things as sources of obligations that are recognized, namely the existence of doctrine, unwritten law and judge's decisions. More firmly, the description in the provisions of Article 1233 of the Civil Code actually contains 4 (four) important elements, namely:

1. The existence of a legal relationship; in a legal relationship, "rights" are attached to one party, and "obligations" to the other party. If one party does not pay attention to or violates the relationship, the law will force the legal relationship to be fulfilled or restored.
2. Wealth; The criteria of a contract are the measures that can have value in a legal relationship, however, legal relationships are not solely assessed in money, but if society and a sense of justice require that a legal relationship be given legal consequences, then the law will also place consequences on the relationship as a contract;
3. Parties; In a legal relationship there must be two or more people, namely the party entitled to the performance and the party obliged to fulfill the performance.
4. Achievement or also known as counter-achievement; is the essence of the implementation of a legal relationship or agreement, because if the performance has been fulfilled by the parties, then that is when the agreement ends.<sup>13</sup>

Article 1233 of the Civil Code also states firmly that an obligation can be formed from an agreement and a law. It is said to originate and be formed from an agreement, because it is desired by the parties who have agreed in the agreement, while it is born based on a law because it is formed based on the will of the legislator and beyond the will of the parties.<sup>14</sup> In relation to liability, it is assumed that the concept of liability itself is a concept that has developed for the purpose of holding someone accountable who, due to their negligence, causes loss to another party, especially liability in the field of civil law. There are two groups of liability in civil law, the first is contractual liability and the second is unlawful liability. The difference is, there is an agreement on contractual liability and there is no agreement on

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<sup>11</sup> Adami Chazawi, *Medical Malpractice: A Review of Legal Norms and Doctrines*, Bayu Media Publishing, Malang, p.69.

<sup>12</sup> JAMSOS Indonesia, *Social Security and Health Legal Insights*, <http://www.jamsikosindonesia.com/cepat/printout/85>, accessed December 21, 2022.

<sup>13</sup> Mariam Darus Badruzaman, *Compilation of Contract Law*, Citra Aditya Bakti, Bandung, 2001, p. 56

<sup>14</sup> Subekti, *Contract Law*, Intermasa, XVIII Printing, Jakarta, 2001, p. 1.

unlawful liability. While if there is no agreement but one party harms another party, the injured party can sue the injured party, responsible on the basis of unlawful acts.<sup>15</sup>

The responsibility is related to the existence of a lawsuit in the field of civil law, where the defendant is asked to bear the lawsuit of another party. The lawsuit is a reaction to the loss suffered by the other party (plaintiff). Thus, it is clear that in responsibility there are two parties in dispute, where one party is obliged to be responsible for the loss he caused to the other party. The term responsibility describes the existence of aansprakelijkheid, namely prioritizing the existence of responsibility towards the perpetrator of an unlawful act, so that the perpetrator must be responsible for his actions, and as a form of this responsibility, the perpetrator must face a lawsuit in court, which is filed by the victim who has suffered a loss.

In civil law, the recognition of responsibility for a person's actions only exists if the person has committed an act prohibited by law and the acts in question are acts that in the Civil Code are referred to as unlawful acts (onrechtmatige daad). Further developments, in civil law, several types of liability are recognized, namely:

**1. Contractual Liability.**

This type of liability arises due to the existence of a breach of promise, namely the failure to carry out an obligation (performance) or the failure to fulfill a right of another party as a result of a contractual relationship. This type of liability is also a liability that is not only based on the existence of a contractual obligation, but also an unlawful act (onrechtmatige daad). Therefore, the definition of unlawful is not only limited to acts that are contrary to the law, either against one's own legal obligations or the legal obligations of others, but also contrary to moral norms and contrary to the care and caution that should be carried out in social relations with other people or towards other people's property (Hoge Raad Decision, January 31, 1919). The concept of liability in tort originates from the Napoleonic Civil Code Art.1382, namely, "Everyone causes damages through his own behavior must provide compensation, if at least the victim can prove a causal relationship between the fault and damages". This concept is in line with Article 1365 of the Civil Code which states: "Every unlawful act that causes loss to another person, requires the person who caused the loss due to his/her fault to compensate for the loss."

**2. Strict liability**

This responsibility is often termed as liability without fault, referring to this term, a person must still be responsible even though he has not made any mistakes, whether intentional, recklessness or negligence. This form of liability generally applies to products sold or articles of commerce, a condition in which the producer must still pay compensation for losses due to the products it produces, unless there has been a warning given by the producer regarding the risk. The further development of strict liability is also known as the principle of absolute liability (no-fault liability or liability without fault) which in the literature is known as the principle of responsibility without the need to prove the element of fault.<sup>16</sup> The further development of strict liability towards responsibility based on fault is influenced by at least several factors:

- a. Moral philosophy or moral reasoning derived from religious teachings at that time. This reason then led to the recognition of moral error as a basis for determining the criteria for the existence of unlawful acts.

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<sup>15</sup> Rossa Agustina, et al., *Law of Obligation, Series of Elements Composing the Building of a Legal State*, Pustaka Larasan, Denpasar Bali, 2012, p. 4.

<sup>16</sup> Muladi and Dwidja Priyatno, *Corporate Criminal Liability*, Revised Edition, Kencana Prenada Media Group, 3rd Printing, Bandung, 2012, p. 111.



- b. Developments in society show that negligence can also be a factor causing losses to other parties, in addition to the element of intent. So here it is implied that strict liability initially only recognized errors in the form of intent.<sup>17</sup>

## CONCLUSION AND RECOMMENDATIONS

The application of the Vicarious Liability doctrine in the perspective of legal certainty towards medical personnel must pay attention to the aspect of the legal relationship between medical personnel and the hospital, where the legal position of doctors as hospital employees will give rise to responsibility to the hospital due to unlawful acts committed by doctors in carrying out their duties. Legal protection for medical personnel means giving orders to everyone who receives work orders from others, so that it is associated with the position of medical personnel, of course medical personnel get assignments from the hospital, while the Health Law has also been determined that the hospital is also legally responsible, if there is negligence of medical personnel that causes harm to the community or patients.

Recommendations that can be submitted in this study include: 1) To further guarantee legal protection for medical personnel and patients, hospital management should implement a binding therapeutic legal relationship for hospital management, patients, including medical personnel and 2) Preventive legal protection must still be carried out through good hospital governance to prevent a decline in the quality of health services and malpractice that is detrimental to patients.

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<sup>17</sup> Ibid. p.112



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