

RECONSTRUCTION OF NURSE'S LEGAL LIABILITY AS A LEGAL SUBJECT IN HOSPITAL HEALTH SERVICES BASED ON JUSTICE VALUES

Dr Anis Mashdurohatus
Faculty of Law Unissula
Email: anism@unissula.ac.id

Wijayono Hadi Sukrisno
Doctoral Program in Law Science, Faculty of Law, Unissula
Email: hadi.s@gmail.com

Professor Dr Teguh Prasetyo
Faculty of Law Pelita Harapan University
Email: teguh.p@gmail.com

ABSTRACT

This study aims to examine and to analyze hospital legal liability due to negligence of nurses as legal subjects in current hospital health services and to reconstruct the legal liability of nurses as legal subjects in hospital health services based on justice value. The approach method in this research is empirical juridical. The data used were primary and secondary data. Analyze data were done through descriptive analytically. The results of the study found that the legal liability of the hospital was due to negligence of nurses as legal subjects in health services to patients in hospitals at this time. Nurses can be asked for civil, criminal and administrative accountability. But all this time there is malpractice due to negligence and mistakes of nurses, in practice in hospitals nurses are always not seated as legal subjects who are obliged to be responsible. Reconstruction of nurses' legal liability as a legal subject based on the value of justice imposes a balanced responsibility whereby the hospital as a health service provider and nurses and doctors as health workers. The provisions of Article 46 of Law Number 44 year 2009 concerning Hospitals state that if all this time every loss caused by a health worker (whether a nurse or a doctor) is a hospital's responsible. Therefore, the legal right reconstruction is the wrong health worker is obliged to be responsible both civil and criminal, while the hospital is still obliged to provide compensation as "Employer"/party that provides health facilities.

Keywords: Persons with disabilities, Malaysia, UK, inclusion, advertising

Introduction

Accountability in health services involves two parties, namely the hospital as a place for organizing health service activities and health workers. Provisions regarding the accountability of hospitals are regulated in Law Number 44 year 2009 concerning Hospitals. Article 46 of Law Number 44 year 2009 concerning Hospitals states that "The Hospital is legally responsible for all losses incurred due to negligence committed by health workers in the Hospital". The provisions of Article 46 can be interpreted that the hospital is responsible for negligence caused by health service measures carried out by health workers working at the hospital.

Nurses are health workers as stated in Article 11 paragraph (4) of Law Number 36 Year 2014 concerning Health Workers which reads: "The types of health workers included in the group of nursing staff as referred to in paragraph (1) letter c consist of various types of nurses. Furthermore, the provisions governing nurses are contained in Law No. 38 year 2014 concerning Nursing. In chapter VI Law Number 38 Year 2014 concerning Nursing regulates the rights and obligations of nurses. However, Law No. 38 year 2014 concerning Nursing does not regulate legal sanctions for nurses, other than administrative sanctions, so that if nurses make mistakes they do actions according to the operational standards of hospital procedures to result in malpractice, accountability remains with the hospital and doctor, unless the error/negligence is carried out by deviating from the standard operating procedure. It is the responsibility of the nurse itself. Thus, hospitals have limitations in providing accountability due to negligence of health personnel. However, Article 46 of Law Number 44 year 2009 concerning Hospitals can have the implication of creating legal uncertainty and injustice for the hospital when being held accountable due to negligence of nurses who violate the hospital's Standard Operating Procedure (SOP).

Related to nurses' responsibilities in health services regulated in Article 32 paragraph (1), namely the implementation of tasks based on delegation of authority as referred to in Article 29 paragraph (1) letter e can only be given in writing by medical personnel to the Nurse to do medical action and evaluate the implementation. Paragraph (2) states that delegation of authority as referred to in paragraph (1) can be delegated or mandated. Paragraph (3) states delegation of authority to do a medical action given by medical personnel to the nurse accompanied by delegation of responsibility. Then paragraph (4) states that delegating authority as referred to in paragraph (3) can only be given to professional nurses or trained vocational nurses who have the necessary competencies. Paragraph (5) states that mandate delegation of authority is given by medical personnel to the nurse to carry out medical actions under supervision. Paragraph (6) that is the responsibility for medical action in the delegation of mandate authority as referred to in paragraph (5) is at the giving of authority delegation. Paragraph (7) states that in carrying out tasks based on the delegation of authority as referred to in paragraph (1), the nurse is authorized to:

- a. take medical action in accordance with its competence to delegate the delegative authority of medical personnel;
- b. take medical action under the supervision of delegation of mandate authority; and
- c. provide health services in accordance with Government programs.

Thus, the nurse is responsible only if the nurse who receives the delegation according to the mandate has been negligent in carrying out the delegation of authority of the medical personnel, but if the implementation of the authority of the mandate of medical personnel has been carried out according to the SOP, then the medical personnel are responsible. Nurses can also be responsible for the implementation of the delegative authority of medical personnel. Nurses in carrying out their duties and authority still adhere to the nurse's code of ethics.

The responsibility of nurses in health services is contained in Article 65 of Law Number 36 year 2014 concerning Health Workers and Article 29 through Article 35 of Law Number 38 year 2014 concerning Nursing. Meanwhile there are provisions in Article 46 of Law Number 44 year 2009 concerning Hospitals that have the potential to cause legal uncertainty and justice for the hospital. As for example the case of a nurse making a mistake when bathing a baby patient that causes an invoice, a case of a nurse's mistake in calculating the amount of round cotton in the operating room after surgery resulting in the loss of cotton in the patient's stomach was not detected by the doctor.

Many possibilities can trigger nurses to malpractice. Caffee in Vestal, K.W, identified 3 areas that allow nurses to risk making mistakes, which include the nursing assessment stage (assessment errors), nursing planning (planning errors), and nursing intervention measures (intervention errors) ¹. Including errors in nursing actions that often occur are errors in reading/messaging/ordering and identifying patients not yet taken actions / procedures, giving drugs and restrictive therapy. Of all these activities, the most dangerous is improper administration of drugs. Therefore, there must be good communication between members of the health team and the patients and their families. ²

Based on the description above, it is interesting to examine in depth the legal liability of the hospital due to negligence of nurses as legal subjects in health services for patients in hospitals at this time and the formulation of nurses' legal liability based on justice value.

Research Method

This study uses the method of socio-legal research approach³. This research is descriptive analytical, which reveals laws and regulations relating to legal theories that are the object of research in this case the legal protection of nurses as legal subjects in providing health services in hospitals. This research uses primary and secondary data types⁴. Methods of collecting data in two ways, namely through field studies and library studies. In field studies through: Observations, Interviews and Questionnaires. The collected data will be analyzed qualitatively Inductively⁵.

Research and Discussion Results

Nurse's Legal Liability as a Legal Subject Due to His Negligence in Hospital Health Services

Nurses are an important aspect in the development of health. Nurses are one of the health workers regulated in PP No. 32 year 1996 concerning Health Workers.

According to the results of the 1983 National Nursing workshop, Nursing is a form of professional service that is an integral part of health services based on nursing knowledge and tips, in the form of comprehensive bio-psycho-socio-spiritual services, aimed at individuals, families, and communities who is sick and healthy which covers the entire life cycle of humans. While the understanding of nurse in Permenkes No. HK.02.02 / MENKES / 148/2010 is someone who has passed nurse education both at home and abroad in accordance with the laws and regulations.

In nursing practice, the nurse's function consists of three, namely independent functions, interdependent functions, and dependent functions. ⁶ Here the nurse acts to help the doctor in providing medical services, providing medical services, and special actions that are the authority of the doctor that should be performed by doctors such as infusion, administration of drugs, injections and so on. The authority in this function is the form of authority obtained due to the mandate. It means that the nurse performs a task because of the mandate from the doctor.

According to Sofwan Dahlan⁷, a health law expert from Unika Soegiyopranoto Semarang said that the actions of nurses working in hospitals could be divided into:

¹ Abdul Aziz. A.H, *Tinjauan Kriminologi Mengenai Malpraktik Medik Yang Dilakukan Oleh Perawat*, Jurnal Ilmu Hukum Legal Opinion, Edisi 2, Volume 2, Tahun 2014, page. 6.

² Mimin Emi Husaeni, *Etika Keperawatan, Aplikasi Pada Praktik*, Jakarta: Buku Kedokteran Egc., 2004, page. 56.

³ Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode dan Dinamika Masalahnya*. Perkumpulan HuMa dan ELSAM, Jakarta, 2002, page. 121.

⁴ Sukardi, *Metodologi Penelitian; Kompetensi dan Praktiknya*, Sinar Grafika Offset, Jakarta, 2012, page. 157

⁵ Noeng Muhajir, *Metodologi Penelitian Kualitatif*, Rake Sarasih, Yogyakarta, 1996, page. 151

⁶ Sri Praptianingsih, *Kedudukan Hukum Perawat dalam Upaya Pelayanan Kesehatan di Rumah Sakit*; PT Raja Grafindo Persada; Jakarta :2006, page. 31-33.

⁷ Jurnal Hukum Kesehatan, Unika Soegiyopranoto Semarang.

1. Caring activities for all nursing actions are indeed the responsibility of the nurse & therefore the nurse concerned is legally responsible for these actions; includes the decision he made and the implementation (execution) of the decision
2. Technical activities are all nursing actions where the nurse is only legally responsible for the execution of a decision made by a doctor.
3. Delegated medical activities are actions that are part of medical authority but have been delegated to nurses. Judging from the role of the nurse, the outline of the nurse has the following roles: (caring role/independent), (coordinative role/interdependent) and (therapeutic role/dependent).

The role of care and coordinative roles is an independent responsibility, while therapeutic responsibility is to assist or assist doctors in carrying out medical tasks, namely diagnosis, therapy, and medical actions.

In the therapeutic role, the arm of van de arts/prolonged arm/extended role doctrine applies (doctrine of the extension of the hands of the doctor). Without delegation or delegation, nurses are not allowed to take their own initiative, which means:

1. Doctors are morally and juridically responsible for nurses' actions carried out according to doctor's orders
2. The doctor must observe the actions taken by the nurse and must ensure that what the nurse does is correct
3. Doctors must be able to provide guidance if the nurse makes a mistake, and
4. The nurse can refuse to carry out the order if it is felt that he or she is not competent to carry out the action.

Authority in implementing nursing practices is regulated in Permenkes No. HK.02.02/MENKES/148/I/2010 concerning

Permit and Implementation of Nurse Practices. Nursing practice is carried out through activities:

1. implementation of nursing care
2. implementation of promotive, preventive, recovery and community empowerment efforts
3. implementation of complementary nursing actions

The responsibility of nurses in administering health services can be seen based on three (3) forms of legal proceedings, namely accountability in civil law, criminal law and administrative law.

a. Accountability of Civil Law

Civil suit against nurses comes from two forms, namely violating the law (*onrechtmatigedaad*) in accordance with the provisions of Article 1365 of the Civil Code and defaults (contractual liability) in accordance with the provisions of Article 1239 of the Civil Code. And the accountability of nurses when viewed from the provisions in the Civil Code can be categorized into 4 (four) principles as follow:

- a) Direct liability (personal liability) based on Article 1365 BW and Article 1366 BW "Every action that causes harm to another person means that the person who does it must pay compensation as a liability for loss and a person must be responsible not only because of the intentional loss, but also because of negligence or lack of caution "

Based on the provisions of the article, a nurse who makes a mistake in carrying out his independent function and results in a loss to the patient, he is obliged to assume his responsibility independently.

Judging from the provisions of Article 1365 of the Civil Code above, the responsibility of the nurse is born if it meets four elements, namely:

- 1) The act violates the law
- 2) There is an error
- 3) Patients must experience a loss
- 4) There is a causal relationship between mistakes and losses

Regarding what is meant by violating the law, the law does not provide its formulation. However, in accordance with

Arrest Hoge jurisprudence on January 31, 1919, there were four criteria for violating the law, namely:

- 1) the act is contrary to the legal obligation of the offender
- 2) the act violates the rights of others
- 3) the act violates the rules of social order
- 4) the act is contrary to the principle of decency, accuracy and caution that should be possessed by someone in association with fellow citizens or against other people's property.

Thus, when viewed from the concept of the law of nursing, violations of respect for the rights of patients which are one of the legal obligations of nurses can be included in illegal acts. Such violations, for example, do not provide patient medical confidentiality. And if the patient or family considers the nurse to have been harmed by the actions of the nurse who violated the law, then the patient/family can file a claim for compensation in accordance with the provisions of Article 58 of Law No. 36 year 2009.

- b) Accountability with respondent superior or vicarious liability or let us the master answer and specifically in the operating room based on the captain of ship through Article 1367 BW which states that "A person must provide accountability not only for the loss arising from his own actions, but also for losses arising from the actions of others who are under his supervision".

When associated with the implementation of the nurse's function, the errors that occur in carrying out the interdependent functions of the nurse will give birth to the form of accountability above. As part of the team and people who work under the doctor's/hospital's orders, the nurse will be jointly accountable for the harm that befalls the patient.

Vicarious liability is a criminal responsibility imposed on someone for the actions of others (the legal responsibility of one person for the wrongful acts of another).⁸ According to Barda Nawawi Arief, vicarious liability is a concept of someone's responsibility for mistakes made by others, such as actions taken which are still within the scope of their work (the legal responsibility of one person for wrong acts of another, as for example, when the acts are done within scope of employment).⁹ Sutan Remy Sjahdeini translates vicarious¹⁰ liability into vicarious accountability or substitute responsibility.

In the dictionary Henry Black vicarious liability is interpreted as follows:¹¹

The liability of the employer for the acts of the employee, the responsibility of the employer for the actions of the worker, or the principal's responsibility for the agent's actions in a contract.

The vicarious liability teaching is taken from civil law which is then used in the practice of criminal law. This provision, for example, can be seen in the law of Article 1367 of the Civil Code which reads: "Everyone is not only responsible for losses caused by his own actions but also for losses caused by the actions of those who are responsible, or caused by items that are under his supervision". In this article it is stated that vicarious liability can arise in the following relationships; (a) the responsibility of a parent or guardian for the deeds of an immature child; (b) employer's liability for losses incurred by the employee's actions; and (c) the accountability of school teachers for the actions of their students.

Quoting Jowitt and Walsh's opinion, Sutan Remy Sjahdeini described vicarious liability originating from superior respondeat doctrine, where in the teachings the relationship between the master and servant or principal with the agent applies *maxim qui facit per alium facit per se*. According to the doctrine, a person who acts through another person is deemed to have committed the act himself.¹² In English law, vicarious liability can arise in several forms of relationships, namely:

- a. principal and agent. If an agent acts within his scope authority, all torts carried out by the agent will be the responsibility of the principle.
- b. partnership. All partners in a partnership are responsible for the actions of one party between them.
- c. master and servant. The master (employer) is responsible for tort actions carried out by servants (employees) in carrying out their work.

When viewed from the concept of criminal liability, vicarious liability teachings are similar to the concept of participation. Both of them require there are (at least) two people, namely the perpetrator who fulfills the offense formula (physical actor) and the offender who does not fulfill the offense formula (not the physical actor) that can be held accountable. According to Surastini, this teaching is an extension of criminal responsibility from the concept of participation. The differences can be seen:

a. *Deelingeming*

Accountability for "not physical actors" (instructor, mobilizer) based on the element of intentions (intention, intention to commit a criminal act)

b. Vicarious liability

Criminal liability against "not physical perpetrators" (superiors, employers) is not based on intentional elements, but on the basis of the existence of certain relationships between those concerned with physical perpetrators.

The expansion can be seen that in participation, "non-physical actors" can be accounted for when there is an element of intent (*mens rea*), whereas even in vicarious liability a person can be held accountable for a criminal offense provided there is a certain relationship.

Case example for vicarious liability as follows:¹³

X, an owner of a place to sell food and beverages, has banned Y (the manager of the meal/drinking house) from allowing or providing prostitution in that place, but Y has violated it. X can still be prosecuted and accounted for. The basic considerations, among others, are constructed as follows: "X has delegated its obligations to Y as manager. He has bestowed the implementation of the policy of actions in the field of trade to the manager, this means that there is only one conclusion, namely that the manager's knowledge is the knowledge of the owner of the restaurant / drink. "

Another case if for example x as a restaurant owner has stated to his servant Y, not to sell liquor to people who do not buy food. In the case of Y, the servant has violated, X cannot be found guilty of violating the Law.

According to Barda Nawawi Arief, in its implementation vicarious liability has several limitations, where a person cannot be held accountable for actions committed by others if¹⁴:

- (1) not within the scope of work or authority;

⁸ Romli Atmasasmita, *Asas-asas Perbandingan Hukum Pidana*, Yayasan lembaga Bantuan Hukum Indonesia, Jakarta, 1989, page. 93.

⁹ Mahrus Ali, *Asas-asas Hukum Pidana Korporasi*, PT RajaGrafindo Persada, Jakarta, 2013, page 118

¹⁰ Sutan Remi Sjahdeini, *Pertanggungjawaban Pidana Korporasi*, Grafiti Pers, Jakarta, 2006,page. 84

¹¹ Mahrus Ali, *Op.Cit*, page. 119.

¹² Sutan Remi Sjahdeini, *Op.Cit*, page. 85.

¹³ Barda Nawawi Arief, *Masalah Pidanaan Sehubungan dengan Perkembangan delik-delik Khusus dalam masyarakat Modern, working paper on the Seminar on the Development of Special Delusions in Communities Experiencing Modernization of BPHN and FH Universitas Airlangga Surabaya*, tanggal 25-27 Februari 1980. cited by Muladi, Dwidja Priyatno, *Pertanggungjawaban Pidana Korporasi*, Kencana, Jakarta, 2010,page.113.

¹⁴ *Ibid.*, page.. 238.

- (2) what an employee does is an act of assistance (aiding and abetting);
- (3) what an employee does is an attempt to commit an offense.

Mahrus Ali argues, there are two important requirements that must be met in order to be able to apply the vicarious liability theory, namely: (1) there must be a relationship, such as employment relations between employers and workers; and (2) criminal acts committed by these workers must be related or still within the scope of their work¹⁵. Romli Atmasmita, emphasized that vicarious liability only applies to certain types of criminal offenses under British criminal law, namely offenses that require quality and offenses that require a relationship between workers and employers. Meanwhile, Scanlan and Ryan, quoted by Sutan Remy Sjahdeini, argued that an employer can only be liable for criminal liability if the actions carried out by his employees are within the framework of the employee's duties. In a contrary, it means that an employer does not have to assume criminal liability for actions committed by the employee if the action is carried out outside or there is no connection with his duties.¹⁶

In Indonesia, until now the Criminal Code (KUHP) has not adhered to the principle of vicarious liability. Nevertheless, lawmakers and academics have indicated that they will impose this doctrine in the coming criminal law. As Mardjono Reksodiputro said, the doctrine of vicarious liability from the Anglo-American legal system needs to be adapted (or grafted) into the Indonesian legal system derived from the European continental legal system.¹⁷

This signal can be seen in the 2012 RKUHP, in article 38 it was formulated:

- (1) For certain criminal acts, the Law can determine that a person can be convicted solely because the elements of the crime have been fulfilled without regard to an error.
- (2) In the event that it is determined by the Act, each person can be accounted for a crime committed by another person.

The doctrine of vicarious liability from the Anglo-American legal system needs to be adopted by the Indonesian criminal law system. First, this teaching is expected to provide deterrence or prevention as well as guidance, so that employers (supervisors) always supervise the performance of their subordinates, because they must be responsible for actions committed by their workers if they commit a crime within the scope of their duties. Second, this teaching is an extension of criminal liability, which during this time the superior or company has always taken refuge from the necessity of carrying out criminal responsibility on the pretext of delegating the activities of companies that have the potential to be illegal to their employees.

The implementation of the vicarious liability doctrine in Indonesia in the future, must be carried out with strict restrictions as expressed by the experts above. Among them are only actions determined by the law which can be held accountable vicariously (article 38 paragraph 2 of the RKUHP of 2012). It aims to continue to respect and protect human rights as a basic right of citizens.

c. Accountability with the principle of *zaakwarneming* based on Article 1354 BW

"If a person is voluntary, by not getting an order for it, representing someone else's business with or without this person's knowledge, then he secretly ties himself to continue and complete the matter, so that the person represented by his interests can work on that matter himself. He carries all the obligations he must bear, if he is authorized by a powerfully stated power of attorney "

- d. In this case the concept of accountability occurs instantly for a nurse who is in a certain condition must carry out emergency help where no other person is competent for it. Legal protection in *zaakwarneming* nurses' actions is stated in Article 10 of Permenkes No. 148 of 2010. Nurses will be asked for legal responsibility if they do not do what should be done in Article 10.

Claims based on default of a nurse will be held accountable if the default elements are fulfilled, namely:

- a. Not doing his obligations at all; in this context if a nurse does not do all the tasks and authorities in accordance with their functions, nursing roles and actions
- b. Doing obligations but late; in this case if the obligation according to the function is carried out late which results in a loss to the patient A case in point is a nurse who does not routinely dispose of a patient's urine bag with a catheter every day. But it is 2 days to wait until full. This action causes patients to experience urinary tract infections from germs originating from urine that is not removed.
- c. Working on obligations but not as they should; a job that is done carelessly. For example, a nurse who shrinks the flow of infusion water at night only because he does not want to disturb his rest.
- d. Doing things that shouldn't be done; in this case if a nurse does a medical action that does not get a delegation from a doctor, such as injecting a patient without an order, doing an infusion even though he has not been trained.

If a nurse is proven to fulfill the element of default, then the responsibility will be borne directly by the nurse in question according to personal liability.

b. Accountability for Criminal Law

¹⁵ Mahrus Ali, *Loc. Cit*

¹⁶ Sutan Remy Sjahdeini, *Op. Cit*, page. 89

¹⁷ Mardjono Reksodiputro, *Kemajuan Perkembangan Ekonomi dan Kejahatan* (First Book Collection), University of Indonesia's Center for Justice and Legal Services, Jakarta, 2007, page. 113.

While from the aspect of criminal legal responsibility a new nurse can be held accountable if there are elements as follows:

- 1) an act that is illegal; in this case if the nurse carries out health services outside the authority contained in Article 8 of the Minister of Health Regulation No. 148/2010. Able to be responsible, in this case a nurse who understands the consequences and risks of each action and in terms of ability, has received training and education for that. This means that a nurse realizes that his actions can harm the patient.
- 2) There is an error (*schuld*) in the form of intentions (*dolus*) or due to negligence (*culpa*). Errors here depend on intentions (intentionally) or just because they are negligent. If the action is carried out because of intention and there is an element of intentions, then the nurse concerned can be charged as a criminal offender. For example, a nurse who consciously and intentionally gives lethal injections to patients who are already terminal. (referred to as active euthanasia)
- 3) There is no justification or forgiving reason; in this case there are no forgiving reasons such as the absence of rules that allow him to take an action, or there is no justification. For example nurses who carry out a therapeutic role or who carry out delegated medical activities by assuming that the command is a right action. This action does not become true, but the reason for the nurse to do this can be forgiven.

The form of accountability in criminal law is principally personal liability and if carried out within the scope of technical activities and in carrying out a coordinating role where the nurse understands that the action is contrary to the law, then the doctor who gives the order can be held to hold criminal responsibility.

If the health service is carried out by nurses in a hospital where status nurses are employees, then based on Article 46 of the Hospital Law, then the Hospital can be held liable for criminal liability with the threat of sanctions in the form of fines.

c. Accountability of Administrative Law

In principle, the accountability of administrative law was born due to a violation of the administrative law provisions on the implementation of nurse practices based on applicable provisions. Permenkes No. 148/2010 has provided administrative provisions that nurses must adhere to, namely:

- 1) Nurse Practice Permit for nurses who practice independently.
- 2) Organizing health services based on the authority stipulated in Article 8 and Article 9 with the exception of Article 10
- 3) Obligation to work according to professional standards

The absence of administrative requirements above will make nurses vulnerable to malpractice claims. The absence of SIPP in implementing health services is an administrative malpractice that can be subject to legal sanctions. But the authors see there are 2 (two) provisions regarding the permit obligations for nurses who work in a hospital. The Health Act and the Hospital Law states that hospitals are prohibited from hiring employees/professional staff who do not have a practice permit. While in Minister of Health Regulation No. 148/2010 SIPP, nurses working in hospitals (mentioned as "non-self-help facilities") are not needed. This confusion of norms will confuse the relevant organizers in carrying out their profession. However, when viewed from the establishment of legislation, the binding power of the law will be stronger than that of the ministerial regulations which in Law No. 10 of 2004 are not included as part of the legislation.

Forms of administrative sanctions threatened with violations of this administrative law are:

- a. verbal reprimand;
- b. written warning;
- c. revocation of permission

In practice, many nurses conduct health service practices which include the treatment and enforcement of diagnoses without SIPP and doctor's supervision.¹⁸

In practice, nurses who are health workers in hospitals, in doing malpractice are always blamed by doctors and hospitals. This happens in several cases, the main cause is nurses, but nurses always take refuge in the theory of respondent superior liability (so that the boss is responsible) or nurses always take refuge in article 1367 BW, so nurses are always not seated as legal subjects who must be responsible. Like for example a baby who lost a few moments after being born at the Semarang Kodya Hospital, due to negligence of nurses while guarding the baby. The patient died at the Banyuwangi Gombong Banyumas Hospital in Central Java because the nurse did not carry out the doctor's orders.

Responsibility for Nurse as a Legal Subject in Hospital Health Services Based on Justice Values

Problems in Case Decision Number 5/Pdt.G/2015/PN.Mad, in that decision nurses as legal subjects were not made as defendants, even though nurses could have been made into a suit in accordance with Article 1365 of the Civil Code, namely:

- 1) The act violates the law
- 2) There is an error
- 3) Patients must experience a loss
- 4) There is a causal relationship between mistakes and losses

¹⁸ Cecep Triwibowo, *Hukum Keperawatan, Panduan Hukum dan Etika Bagi Perawat*, Pustaka Book Publisher, Yogyakarta : 2010, page. 49.

Regarding what is meant by violating the law, the law does not provide its formulation. However, in accordance with Arrest Hoge jurisprudence on January 31, 1919, there were four criteria for violating the law, namely:

- 1) the act is contrary to the legal obligation of the offender
- 2) the act violates the rights of others
- 3) the act violated the rules of social order
- 4) the act is contrary to the principle of decency, accuracy and caution that should be possessed by someone in association with fellow citizens or against another people's property.

Thus, when viewed from the concept of the law of nursing, violations of respect for the rights of patients which are one of the legal obligations of nurses can be included in illegal acts. Such violations, for example, do not provide patient medical confidentiality. And if the patient or family considers the nurse to have been harmed by the actions of the nurse who violated the law, then the patient/family can file a claim for compensation in accordance with the provisions of Article 58 of Law No. 36 of 2009.

In that case, the doctor was not assisted by an expert and was only assisted by 4 nurses. However, only those who are subject to doctor sanctions, while as nurses are not subject to sanctions, as the nurse is already independent and already knows the standard operating procedure (SPO).

To delegate authority as a dependent function, the errors that occur are not directly the responsibility of the nurse. It must be examined in advance whether the error was due to an unclear doctor's order or because the nurse did not heed the order properly. Since a delegation carried out by a doctor to a nurse has several requirements, as stated by Wintari Hariningsih in the Implementation of Nurse Performance at the Hospital, namely:

1. in its implementation based on the doctor's decision; this means the delegation must be definitive.
2. can take certain medical actions if they have been trained; in this case a trained nurse, because he has undergone training in accordance with applicable legislation and not all nurses can be given this abundance of authority.
3. delegation must be written with clear instructions for implementation and instructions for complications; applies how the obligation of a delegate (in this case the doctor) to provide clear information and the nurse has the right to ask questions.
4. there must be guidance and supervision in its implementation; here nurses and doctors become a partner not a subordinate. The doctor guides and oversees the delegated actions.
5. The nurse has the right to refuse if he feels unable to do it

Nurse occupations are at risk of making mistakes, identifying three areas that allow nurses at risk of making mistakes, namely the stage of nursing assessment (assessment errors), nursing planning (planning errors) and nursing intervention measures (intervention errors). For more details described as follows:

- a. Error assessments, including failure to adequately collect data or information about patients or failure to identify necessary information, such as data on laboratory tests, vital signs or complaints from patients requiring immediate action. Failure in data collection will have an impact on the inaccuracy of nursing diagnoses and will further lead to errors or inaccuracies in action. To avoid this error, nurses should be able to collect basic data comprehensively and fundamentally.
- b. Planning errors, including the following things:
 - 1) Failure to record patient problems and neglect to write them down in the nursing plan
 - 2) Failure to communicate effectively the nursing plan that has been made, for example using language in a nursing plan that is not understood by other nurses
 - 3) Failure to provide nursing care on an ongoing basis due to lack of information obtained from the nursing plan
 - 4) Failure to give instructions that can be understood by the patient. To prevent these errors, do not just use estimates in making a nursing plan without considering properly. In writing, it should use clear considerations based on patient problems. If deemed necessary, make modifications to the plan based on the new data collected. Plans must be realistic based on established standards, including considerations given by patients. Communicate clearly both verbally and in writing. Take action based on the plan and do it carefully according to the instructions. Every opinion needs to be carefully validated.
- c. Intervention errors, including failure to interpret and carry out collaborative actions, failure to carry out nursing care carefully, failure to follow or record orders or messages from doctors or providers. Errors in nursing actions that often occur are errors in reading messages or orders, identifying patients in providing drug therapy and even nursing actions.

In the legal protection of nurses as legal subjects in hospital health services, nurses must receive protection in carrying out their practices on the incidence of malpractice and negligence in emergencies, for example: in the United States the law governing nursing law is named Good Samaritan Acts which provides protection for health workers in providing assistance in emergencies. In addition, in Canada there is a traffic law that allows everyone to help victims in any accident situation called Traffic Act.

In the hospital law, explicitly the hospital legal responsibility is formulated in Article 46: "The hospital is legally responsible for all losses incurred due to negligence committed by health workers in the Hospital". The formulation of this law is only in civil

terms. However, in fact if further reviewed the legal responsibility of the Hospital in principle is the responsibility charged to the Hospital as a health service facility in carrying out health efforts. The responsibilities in question include:

- 1) Legal responsibility related to patient rights;
- 2) Legal responsibility relating to obligations stipulated by the government;
- 3) Legal responsibility related to the task of implementing the law

The limits of nursing responsibility include running a doctor's order, implementing independent nursing interventions or being delegated. There are four things that must be considered by nurses to protect them legally, namely:

- a. Ask for orders asked by the patient
 - b. Ask order for each patient's condition to change
 - c. Ask and record verbal messages to prevent communication errors
 - d. Ask standing orders, especially if nurses are inexperienced.
- Nurses must pay attention to several pre-cause in implementing nursing interventions, including:
- a. Know their job description
 - b. Follow the policies and procedures established at work
 - c. Always identify patients, especially before implementing the main intervention
 - d. Make sure that the correct medication is given with the correct route, time and patient dose
 - e. Perform each procedure correctly
 - f. Record all assessments and treatments provided quickly and accurately
 - g. Record all accidents involving patients
 - h. Establish and maintain rapport with patients
 - i. Maintain nursing practice competitions
 - j. Knowing the strengths and weaknesses of nurses
 - k. When delegating nursing responsibilities, make sure that the person given the assignment delegates knows what to do and the person has the knowledge and skills needed
 - l. Always be vigilant when carrying out nursing interventions and pay full attention to each task carried out

Legal functions in nursing practice are:

- a. The law provides a framework for determining which nursing actions are in accordance with the law.
- b. Differentiating nurse responsibilities from other professions.
- c. Helps determine the limits of the authority of independent nursing actions.
- d. Helping in maintaining the standard of nursing practice by putting the position of the nurse has accountability under the law.

Related to the urgency of the reconstruction of nurses' legal liability, there have been malpractices which are always blamed by doctors and hospitals, even though there are some cases, the main cause being nurses, but nurses always take refuge in the respondent superior liability theory (let the boss take responsibility) or the nurse always take refuge in article 1367 BW, so nurses are always not seated as legal subjects who are obliged to be responsible.

In Article 46 of Law Number 44 year 2009 concerning Hospitals, if all the losses incurred by health workers in responsible hospitals are hospitals, the legal reconstruction is the wrong health personnel who must be responsible both civilly and criminal while the hospital is still required to provide compensation as an "employer"/party providing health facilities.

In most cases of medical malpractice, the plaintiff is responsible for proving each element of the case against the defendant. As long as the evidence is incomplete, the court considers that the defendant meets the applicable standards of care. However, when the court applies the rules for resellers, the burden of proof is shifted from the plaintiff to the defendant. The Defendant must prove that the injury was caused by something else, not negligence.

There are three prerequisites that must be fulfilled to apply the rules for rescheduling to nurses:

- a. Actions that cause injury to the plaintiff are in the control of the nurse.
- b. The injury will not occur if the defendant's nurse is not negligent.
- c. The plaintiff did not commit negligence which contributed to his injury.

The most common incident associated with the rule of *res ipsa loquitur* is the case of a foreign object, such as a gauze, jamm, safety pin, or other object, which is left in the patient's body after surgery. Cases of gauze or foreign objects left in surgery are usually resolved without trial or end with the jury imposing a fine of approximately 50,000 to 200,000 US dollars, depending on the length of the foreign body in the patient's body, infection, and the extent of surgery needed to remove objects that is. The court has also demonstrated the intention to implement this rule if the injury involves a body part that is not related to the plaintiff's surgery.

There are also criticisms of the regulation of *res ipsa loquitur*, dubbed "the rules of sympathy," arising because the court is considered too soft in allowing plaintiffs to use it. Health care professionals usually argue that the regulation places them in a position to be taken in the process of advocating malpractice. They felt that by burdening them to find evidence, the court gave them greater liability for neglect cases than for other types of defendants. In addition, the application of these regulations usually eliminates the plaintiff's responsibility to present expert testimony.

In some states, the court cannot apply the rules for *res ipsa loquitur*. However, most states allow the court to apply some form of the regulation. For example, both Michigan and South Carolina do not use the term *rescript*, but both allow the use of indirect evidence for acts of negligence, which is essentially the same concept.

According to the author, the new paradigm is that health development is aimed at increasing awareness, willingness and ability to live healthy for everyone. It is done in order to realize optimal health status as one of the elements of welfare as referred to in the Preamble of the 1945 Constitution and health as a human right manifested in the form of providing various health efforts to the entire community through the implementation of quality and affordable health development.

In this study, the provisions of Article 46 of Law Number 44-year 2009 concerning Hospitals, are nurses if they make a mistake or medical negligence that causes harm to the patient according to the law must provide compensation. Even though in Article 46, those who are obliged to be responsible are hospitals, but with the provisions in the 1945 Constitution and the Judicial Power Law which states that all Indonesian citizens have the same legal status, then naturally if the nurse makes a mistake/negligence the nurse must be responsible. Therefore, there is the legal reconstruction of Article 46 of Law Number 44-year 2009.

When the nurse is clearly asked for accountability in the eyes of the law, of course, the nurse whose job is in the hospital is responsible to the hospital. According to the provisions of Article 1367 BW, the hospital must also be responsible for mistakes made by nurses. For this reason, the provisions of Article 45 paragraph (2) of Law Number 44-year 2009 concerning Hospitals must be interpreted: insofar as there is no particular mistake made by health workers where the health worker is assigned to a hospital. Including in the case of punishment to the hospital, as the responsibility of the hospital, if it is true that a criminal act has been committed by health personnel and based on Article 46 of Law Number 44 year 2009 must be responsible, then the responsibility for such errors can have an impact to criminal penalties and also termination of permission from the hospital.

Conclusion

1. Hospital legal liability is due to negligence of nurses as legal subjects in health services to patients in hospitals at this time. Nurses can be asked for civil, criminal and administrative accountability. But so far every malpractice has always been blamed by doctors and hospitals, even though there are some cases, the main cause is nurses, but nurses always take refuge in the respondent superior liability theory (the boss takes responsible) or the nurse always takes refuge in article 1367 BW, so nurses are always not seated as legal subjects who are responsible.
2. Reconstruction of the legal liability of nurses as legal subjects, in the provisions of Article 46 of Law Number 44 year 2009 concerning Hospitals, if all the losses incurred by health workers (whether nurses or doctors) in responsible hospitals are hospitals. Then the legal reconstruction is the wrong health personnel who are obliged to be responsible both civil and criminal, while the hospital is still required to provide compensation as an "employer"/party that provides health facilities.

References

- Abdul Aziz. A.H. (2014) *Tinjauan Kriminologi Mengenai Malpraktik Medik Yang Dilakukan Oleh Perawat*, Jurnal Ilmu Hukum Legal Opinion, Edisi 2, Volume 2, Tahun 2014
- Mimin Emi Husaeni, (2004) *Etika Keperawatan, Aplikasi Pada Praktik*, Jakarta: Buku Kedokteran Egc..
- Soetandyo Wigjosoebroto, (2002), *Hukum: Paradigma, Metode dan Dinamika Masalahnya*. Perkumpulan HuMa dan ELSAM, Jakarta.
- Sukardi, (2012), *Metodologi Penelitian; Kompetensi dan Praktiknya*, Sinar Grafika Offset, Jakarta.
- Noeng Muhajir, (1996), *Metodologi Penelitian Kualitatif*, Rake Sarasih, Yogyakarta.
- Sri Praptianingsih, (2006), *Kedudukan Hukum Perawat dalam Upaya Pelayanan Kesehatan di Rumah Sakit*; Jakarta : PT Raja Grafindo Persada.
- Jurnal Hukum Kesehatan, Unika Soegiyopranoto Semarang.
- Romli Atmasasmita, (1989), *Asas-asas Perbandingan Hukum Pidana*, Yayasan lembaga Bantuan Hukum Indonesia, Jakarta.
- Mahrus Ali, (2013), *Asas-asas Hukum Pidana Korporasi*, PT Raja Grafindo Persada, Jakarta.
- Sutan Remi Sjahdeini, (2006), *Pertanggungjawaban Pidana Korporasi*, Grafiti Pers, Jakarta.
- Barda Nawawi Arief, *Masalah Pidanaan Sehubungan dengan Perkembangan delik-delik Khusus dalam masyarakat Modern, working paper on the Seminar on the Development of Special Delusions in Communities Experiencing Modernization of BPHN and FH Universitas Airlangga Surabaya*, tanggal 25-27 Februari 1980.
- Muladi, Dwidja Priyatno, (2010), *Pertanggungjawaban Pidana Korporasi*, Kencana, Jakarta.
- Mardjono Reksodiputro, (2007), *Kemajuan Perkembangan Ekonomi dan Kejahatan* (First Book Collection), University of Indonesia's Center for Justice and Legal Services, Jakarta.
- Cecep Triwibowo, (2010), *Hukum Keperawatan, Panduan Hukum dan Etika Bagi Perawat*, Yogyakarta : Pustaka Book Publisher.