

## I. INTRODUCTION

Welfare is one of the human rights, including the right of a person to get health services.<sup>1</sup> Every activity in an effort to maintain and improve the highest degree of public health is carried out based on the principles of non-discrimination, participation, and sustainability in the framework of forming Indonesia's human resources, as well as increasing the resilience and competitiveness of the nation for national development.

Health maintenance is a medical service involving doctors and patients. Like human relations, in the medical service relationship there are always advantages and disadvantages, in the sense that there are advantages and disadvantages during the implementation of medical services. This relationship is related to healing disease and even saving human lives, so it is very unique because there is a patient's dependence on doctors who in this case give confidence in the healing or saving process.

Relationships are influenced by the ethics of the medical profession, as a consequence of the professional obligations that impose limits or signs on the relationship. Obligations are contained in the moral principles of the profession, where the main principles are autonomy (respecting the rights of patients), beneficence (oriented to patient kindness), nonmaleficence (not harming patients), and justice (justice / eliminating discrimination) while the derivative principles are veracity (truth), truhtfull (trust), information, fidality (loyalty), privacy (confidentiality), and confidentiality (maintaining confidentiality).<sup>2</sup>

An agreement or contract is an event where one or one party promises to another person or party or where two people or two parties promise to do something, while therapeutic is defined as something that contains elements or medicinal value. Juridically, a therapeutic agreement is an agreement between a doctor and a patient which authorizes the doctor to carry out activities to provide health services to patients based on the doctor's expertise and skills.<sup>3</sup>

Recently, there have been frequent problems between patients and doctors and also patients with hospitals. The problems cannot be separated from other health workers, such as midwives, nurses, and others as far as the patient is concerned. In recent years the medical profession has faced many lawsuits in health services. Some conflicts involve health facilities, including health centers, medical centers, clinics and hospitals.

There are two things that can occur in everyday life, first is conflict, and second is dispute, the two terms are almost the same and what distinguishes a wider definition conflict and disputes that occur will last long and rarely arise, if disputes to come to the fore, it is said to be disputed. Conflict is usually, certain parties do not know or are aware of the dispute, and only the parties are aware of the dispute. Disputes begin to emerge where one of the parties or parties involved has taken actions that make the parties not involved know or realize there is a problem.<sup>4</sup>

For cases in the health sector, especially medical disputes, demands from patients / families after receiving the results of treatment by doctors that the patient hopes are inappropriate, namely the healing process. In a medical dispute, the action of one or the parties, in this case usually the patient takes a lawsuit to the hospital, makes a complaint to the police, or a lawsuit to the court, this is where it is said that there has been a problem between the doctor and the patient, it is said to be a medical dispute.

The public sees medical disputes as being equated with something bad so that it seems intentional, the community suspects that there is malpractice from this action, from the nature and cases that are often filed by patients is dissatisfaction with the services provided by doctors and / or hospitals which

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<sup>1</sup> Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that every person has the right to live in physical and mental well-being, residing and having a good and healthy living environment and the right to obtain health services. Health efforts are regulated in Article 1 point 2 of Law Number 36 Year 2009 concerning Health which reads: Health efforts are any activities to maintain and improve health carried out by the government and or the community.

<sup>2</sup> Safitri Hariyani, *Sengketa Medik : Alternative Penyelesaian Perselisihan antara Dokter dan Pasien*, Diadit Media, Jakarta, 2002, hlm 3.

<sup>3</sup> Veronica Komalawati, *Peranan Informed Consent Dalam Perjanjian Terapeutik*, Citra Aditya Bakti, Bandung, 2002, hlm 1.

<sup>4</sup> Adami Chazawi, *Malpraktik Kedokteran Tinjauan Norma dan Doktrin Hukum*, Bayumedia Publishing, Malang, 2007, hlm 23.

sometimes raise the suspicion of doctors. and / or the hospital is acting deliberately, therefore it is not yet a verdict from either the professional court, which in this case could be a violation of ethics and the one who will decide is the professional organization of doctors through the Ethics Council of Medicine / Dentistry, while the judiciary for medical disciplines, which currently has existed since the enactment of Law Number 29 of 2004 concerning Medical Practice, is an autonomous body formed by order of this law, namely the Honorary Council of Indonesian Medical Disciplines which will decide slowly. independent of medical discipline decisions.<sup>5</sup>

When a malpractice event comes to the surface, the opinion of the perpetrator must be challenged or punished. This creates a proposition with the concept of being flattened without seeing and investigating the context of the incident in advance that malpractice occurs and doctors should be convicted for the negligence of the patient's death or that proposed by the Public Prosecutor. At least doctors can be prosecuted for violating the law (onrechtmatige daad) according to the civil law system or known as unlawful act in tort law according to the common law system in the civil field because patients suffer losses or even disabilities to be used as a reason to file a lawsuit in court.

This opinion, as expressed by Kerry J. Breen, said that doctors who fail to adequately inform their patients about their conditions, treatment options or material risks of treatment may be sued on the grounds of negligence.<sup>6</sup> Michael G. Faure said the current development of many patients filed a lawsuit in court with the argument of negligence to get compensation or compensation, or also in some cases the responsibility of the insurance company was granted by the court.<sup>7</sup>

Medical disputes are usually characterized by a legal relationship<sup>8</sup> that exists between the doctor and the patient. From this relationship there is an agreement contained in the contractual relationship where the doctor receives counter-achievements from the patient and the doctor gives achievements in the form of health service efforts to the patient.<sup>9</sup> In the field of civil law, this legal relationship creates an agreement to do something or not to do something called default.<sup>10</sup>

Particularly in medical practice, an agreement requires or demands that both parties respect each other's contract based on trust and good faith. Trust demands characterized by honesty where the patient expresses various things that the doctor wants to know regarding the patient's care or treatment, including those related to the patient's personal matters, while the doctor is honest in helping his patient.<sup>11</sup> Good faith as in Article 1338 paragraph (3) of the Civil Code, namely the agreement must be carried out in good faith. good faith is an agreement carried out according to propriety and justice.<sup>12</sup>

The format of the doctor-patient engagement contained in the informed consent is the approval of medical action by the patient or the patient's family by the doctor. In essence, informed consent is done by

<sup>5</sup> Vera Polina Br Ginting, *Penanggulangan Malpraktek yang dilakukan oleh Tenaga Kesehatan*, Jurnal Online FH Unila, 2017, hlm 23

<sup>6</sup> J. K. Breen, *Good Medical Practice Professionalism, Ethics And Law*, Cambridge University Press, New York, 2010, hlm 49.

<sup>7</sup> G. M. Faure, *Accident Compensation*, dalam *Elgar Encyclopedia of Comparative Law*, Edited by Jan M. Smits, Cheltenham, Edward Elgar Publishing Limited, United Kingdom, 2006, hlm 11.

<sup>8</sup> A legal relationship or rechtsbetrekking in this case can be interpreted as a doctor having the position of a debtor and the patient as a creditor which results in an engagement or agreement (verbintenis) such as civil law, see P. J. P. Tak, *Rechtsvorming in Nederland*, Samson H. D. Tjeenk Willink, Aphenaan de Rijn, 1991, hlm 301.

<sup>9</sup> The contract is an agreement (usually between two persons) giving rise to obligations on the part of both persons who are enforced or recognized by law. Max Young, *Understanding Contract Law*, Routledge-Cavendish, New York, 2010, hlm 7.

<sup>10</sup> R. Setiawan, *Pokok-Pokok Hukum Perikatan*, Bina Cipta, Bandung, 2004, hlm 17.

<sup>11</sup> A. Yunanto, dan Helmi, *Hukum Pidana Malpraktek Medik Tinjauan dan Perspektif Medikolegal*, Penerbit Andi, Yogyakarta, 2010, hlm 13.

<sup>12</sup> A. Y. Hernoko, *Hukum Perjanjian Asas Proporsionalitas Dalam Kontrak Komersial*, Kencana Prenada Media Group, Jakarta, 2010, hlm 134. In the legal formulation, the term good faith can be traced through the Hoge Raad decision which provides the formula that: the agreement must be carried out volgens de eisen van redelijkheid en billijkheid. Redelijkheid and billijkheid, include everything that can be felt and can be accepted by reason properly, fairly and fairly, which is measured by written objective norms and does not come from the subjectivity of the parties. Justice borrows from the meaning of justice conceptualized by Ulpianus: *Justitia est perpetua et constans voluntas jus suum cuique tribuendi* (the constant and perpetual wish to give everyone that which they deserve) or justice is a constant and constant desire to give everyone what they receive. (due), see Raymond Wacks, *Philosophy of Law, A Very short Introduction*, Oxford University Press, New York, 2006, hlm 59.

competent and capable patients alone, but if the patient is in a state of ability (onder curatale), his / her family can be represented as well as competent and capable.<sup>13</sup> The basic idea of informed consent comes from ethics, law, and medicine regarding the nature of the doctor-patient relationship and provides an advantage when patients can find out about treatment and care. Ethical justification highlights two important poles in informed consent, namely the rights and obligations, as well as the consequences of actions taken by doctors; so that the difference in the perceptions of doctors and patients can approach the similarity of perceptions.<sup>14</sup>

After there is an agreement stated in the informed consent or even there has been no agreement, the doctor is obliged to examine and help patients who hope that the patient's disease can be cured. This hope is understood as a natural thing when people suffer from a disease, sure in their minds how to recover and people can heal medically is a doctor. On the one hand, a doctor is not a miracle worker ensuring the patient's recovery even though the doctor has a high ability in his duties (a man of the very highest skill in his calling).<sup>15</sup>

Usually if a minor dispute can be resolved in a peaceful manner by both parties without a continuous process, if the dispute starts to get large and difficult to resolve by each party, a process of achieving peace is needed, usually the disputing parties will choose the desired settlement path, for example through alternative dispute resolution.

In fact, efforts to resolve disputes are often a frightening specter for doctors, patients often feel that they cannot be represented if they are carried out through bodies belonging to the medical profession (the Indonesian Medical Discipline Honorary Council or the Medical Ethics Council). Therefore, an ideal dispute resolution method is needed for both parties, in which case mediation can be used as a solution.<sup>16</sup>

If the two parties jointly resolve the negotiation process for a case where the parties are difficult to resolve the dispute, they need the presence of a third party to help the peace process reach an agreement between the parties, the third party is called a mediator. Medical dispute resolution does not only have to be included in the category of a criminal act. However, it should be resolved by mediation or providing appropriate compensation to the victim. For this reason, mediation is the right reason in resolving medical disputes between doctors and patients.

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<sup>13</sup> Adami Chazawi, *Op, Cit*, hlm 36.

<sup>14</sup> Jesica W. Berg, *Informed Consent Legal Theory and Clinical Practice*, Oxford University Press, New York, 2001, hlm 11.

<sup>15</sup> Mason dan McCall Smith, *Law and Medical Ethics*, Butterworths, London, 1993, hlm 131.

<sup>16</sup> Article 29 of Law Number 36 Year 2009 states: In the event that a health worker is suspected of negligence in carrying out his profession, the negligence must be resolved first through mediation.