

# **INSPANNINGSVERBINTENIS, THE NATURE OF THERAPEUTIC CONTRACT BETWEEN DOCTORS TO PATIENTS**

Endang Kusuma A\*

Faculty of Law, University Darul Ulum Islamic Centre Sudirman GUPPI (UNDARIS),  
Tentara Pelajar Street 13, Ungaran, Indonesia.

## **Abstract**

Therapeutic contract between doctors to the patients is a very specific legal relationship, considering the object of the therapeutic contract is an obligation of a doctor trying to cure the patient. This often lead to misunderstandings and disputes between them. Many factors affect the patient's recovery process. Here the information (informed consent) regarding the disease and its cure efforts are required.

The method used in this study is a mix of doctrinal approach methods to obtain secondary data and socio-legal research to obtain primary data.

The results showed that many patients do not understand the nature of the therapeutic contract between doctors to patients in the form of inspanningsverbintenis and not all failures in medical care is malpractice.

**Keywords:** Inspanningsverbintenis, therapeutic contract, doctor, patient

## **Background**

Legal relationship between doctors and patients in medical service lately have become a spotlight in both print and electronic media, even the hospital as one of the health facilities where the doctor devoted himself also sued.

Spotlight toward medical profession are caused by community dissatisfaction toward medical services to patients, specifically because there is a gap between expectations and reality.

Health as one of the elements of the common welfare was in accordance with the ideals of Indonesia as referred to in the Preamble of Constitution through a sustainable national development based on Pancasila and the Constitution.

The human need for help when he is sick is an essential necessity to be able to quickly recover from the disease, so calling doctors who have the ability to treat disease is needed.

With the improvement of public's knowledge towards law, there is a change in public's views in legal relationship between doctors and patients in medical service. The society considers that recovery after treatment done by the doctor is a must and it will be considered as malpractice if the doctor fails. This needs to be clarified because in medical services there are a lot of factors that will determine the success of treatment, while the doctor simply tries to cure the patient's illness.

## **Legal Relationship between Doctor and Patient**

### 1. Relationship Patterns between Doctor and Patient

Relationship between doctors and patients happened very personal since Ancient Greece era. The relationship between doctor and patient originated from such paternalistic pattern of vertical relationships between fathers and children who departed from the principle of "father knows best" which spawned a paternalistic relationship.

The position of the doctor with the patient in this relationship does not equal where the doctor have higher position than the patient because doctors are supposed to know about all things related to the disease and its cure while patients do not know anything about it, therefore the patient committed herself entirely in the hands of the doctor.

Instead, the doctor based on the principle of "father knows best" in paternalistic relationship will act as a 'good father' in trying to cure the patient.

The pattern of vertical relationships that spawned the paternalistic nature of doctors toward patients contains both positive and negative impacts. The positive impact of this pattern will

make this relationship very helpful for the patient, if the patient does not know anything about his illness. This pattern can also create a negative impact if the doctor actions, in the form of steps toward healing the patient, limits the autonomy of the patient, which in the history of culture and basic human rights has been there since birth. Vertical pattern of paternalistic relationship is then shifted to the contractual horizontal pattern.

Solis in Legal Medicine quoted that there are three (3) stages / phases that must be done in the development of the relationship between doctor and patient, namely :

a. Activity – Passivity Relation.

There is no interaction between physician and patient because the patient is unable to contribute activity. This is the characteristic pattern in an emergency situation when the patient is unconscious.

b. Guidance – Cooperation Relation.

Although the patient is ill, he is conscious and has the feeling and aspiration of his own. Since he is suffering from pain, anxiety and other distressing symptoms, he seeks help and is ready and willing to cooperate. The physician considers himself in a position of trust.

c. Mutual Participation Relation.

The patient thinks he is juridically equal to the doctor and that the relationship with the doctor is in the nature of a negotiated agreement between equal parties. The physician usually feels that the patient is uncooperative and difficult, whereas the patient regards the physician as unsympathetic and lacking in understanding of his personality unique needs.

## 2. Time of Occurance of Legal Relationship between Doctors and Patients

Legal relationship between doctors and patients occurs since the doctor expressed willingness, whether by orally (oral statement) or implicit (implied statement) to indicate the attitude or action that concludes willingness; such as accepting applications, provide serial number, provide medical records and notes and so on. In other words the therapeutic relationship also requires the willingness of doctors. This is in accordance with the principle of consensual and contracting.

## 3. Legal Terms of Legal Relationship between Doctors and Patients

Legal Terms of legal relationship between doctors and patients are based on Article 1320 Book of Civil Law, which stated that there are 4 terms for an agreement to occurs, as follows :

a. Agreement of those who bound themselves (toestemming van degene die zich verbinden)

Legally, definition of the existence of an agreement is the absence of mistake, or duress, or fraud (Article 1321 Book of Civil Law). This agreement viewed from the original formulation is approval (toestemming) of those who bound themselves. This means that within an agreement there must be at least two legal subjects that can express his will to bind itself. The agreement happens, if both legal subjects mutually agreed, in the sense of the will of one party fills the will of other party reciprocally. Thus, for the will to meet each other, it must be declared.

As for how to declare conformity of the will, it can be done in various ways, either expressed or tacit. Therefore, agreement is actually conformity of statement of the will. Thus based on the principle of consensus, then for the agreement to happens requires the presence of conformity of statement of the will of both parties.

Time of occurrence of the agreement, related to Article 1320 Code Civil Code, is the time of the agreement between the doctor and patient when the patient stated that his complaint and

responded to by a doctor. Here, doctor and patient mutually bind themselves to an agreement that the object is a therapeutic healing efforts. When healing is a main goal it will be difficult for doctors because of the severity of disease and the body's resistance to any drug the patient is not the same. The same drug can not be sure the same results on each patient.

b. Skills to create engagement (bekwaamheid om eene verbintenis aan te gaan)

Legally, the definition of skills to create engagement is a person ability to bind himself, because it is not prohibited by law. This is based on Article 1329 and 1330 Book of Civil Law.

Article 1329 Book of Civil Law stated that everyone are skilled to create engagement, if not declared otherwise by law. It is explained in Article 1330 Book of Civil Law which stated that those who are declared not skilled are minors, those who are under guardianship, women, stated by law and generally those who are forbidden by law to create certain agreement.

Receiver of medical services consist of adults who are skilled to act, adults who are not skilled to act, those who need approval from their guardian, and children who are under age and need approval from their parents or guardian. There are various regulations in Indonesia that mention maturity age limit, those are:

- 1) Minors are those who have not reached age 21 and not married (Article 330 Book of Civil Law), meaning mature are those who are 21 years old or have been married even if it have not reached age 21 yet. If the marriage is broken while not reached age 21, it will be in immature state.
- 2) Act No. 1 of 1974 on Marriage, article 47 paragraph (1) states that a child who has not reached 18 years of age or have never establish marriage under authority of his parents as long as they are not deprived of his power. Paragraph (2), states that parents represent the

child in all legal actions on and off the court. Then Article 50 paragraph (1), states that a child who has not attained the age of 18 years or have never establish a marriage, which is not under parental authority, under the authority of a guardian. Paragraph (2), states that this guardianship of the child as well as personal possessions.

- 3) Act No. 4 of 1979 on Child Welfare, stating that the child is a person who has not attained the age of 21 years and have never been married, with the explanation that the age limit of 21 years is set for consideration based on the interests of social welfare, social maturity stage, personal maturity and reached mental maturity of a child at that age. However, the age limit does not reduce the age limit provisions in other legislation, and also does not reduce the chances of a child to do anything as far as he has the ability to do so under applicable laws.
- 4) In Chapter XIV Compilation of Islamic Law promulgated by presidential order No. 1 of 1991 dated June 10, 1991 on the Child Maintenance Article 98 stated:
  - a) Age limit for child / adult who is able to stand alone is 21 years old, not physical or mental defect or have establish marriage (paragraph (1)).
  - b) Parents who represents the child in all legal actions on and off the court (paragraph (2)).
  - c) The court may appoint one religion a close relative who is able to fulfill those obligations if both parents can not afford (paragraph (3)).

Of various regulations mentioned above turns out there are some rules that mention the age of 21 years as a mature age limit. Similarly, adult limits specified in Article 8 paragraph (2) of the Regulation of the Minister of Health No. 585 / Men.Kes / Per / IX / 1989, followed the Decrees of Medical Services 21 April 1999 which states that adult patients referred to paragraph (1) is 21 years old or have been married.

Thus, due to one's health problems can not be separated from family responsibilities, while Law No. 1 of 1974 on Marriage until now seen as the basis of family law, the Article 47 and 50 are the age limits under parental authority and guardianship can be used as a legal basis for determining the age limit of 18 years maturity transaction in the therapeutic relationship.

From the research data showed that patients who have not mature, the agreement is done by the parents or those who accompany the patient. However, the results obtained from the data that sometimes occurs disagreement between the patient and his family. Namely that the patient agrees implemented certain actions by a doctor but his family refused for reasons not yet have a cost or worry about something happening. It occurs in patients older than 14 years and is still under 18 years of age. However, in pediatric patients entirely according to the will of his parents.

c. One particular thing (een bepaald onderwerp)

In Article 1333 Book of Civil Law states that an agreement must have as a staple item of at least the specified kind of paragraph (1). It is not an obstacle if the amount of goods are not exact, so long as that number can then be determined or calculated in paragraph (2).

From these provisions it can be concluded that the reference to a particular thing is the object of the agreement. Said goods from objects above agreements are translation from the word zaak. However, the word zaak may be defined as affairs. Thus, the meaning of the object must be determined is the matter must be determined or explained.

Connected with the objects in the therapeutic transaction, then the meaning of the affairs is something that needs to be addressed, namely a healing effort. The recovery effort should be explained because in practice the necessary cooperation based on mutual trust between doctor

and patient. Because healing efforts that will be done should be determined, it is necessary to have a standard of medical care.

d. A valid reason (geoorloofde oorzaak)

It is by law not explicitly described, but can be interpreted contrario according to the provisions of Article 1335 and Article 1337 Book of Civil Law.

Article 1335 Book of Civil Law states that an agreement without cause, or who have been made for a reason that is false or illegal, do not have the strength.

Article 1337 Book of Civil Law states that a cause is illicit, when prohibited by law or if contrary to good morals or public order. Thus, the meaning of valid reason is because that is not prohibited by law, morality or public order, while the meaning of cause is the goal.

Associated with the transaction therapeutic, then the act of abortion for any reason is an agreement with forbidden reason, while the surgical treatment of patients with therapeutic research purposes is an agreement with a valid reason.

### **Inspanningsverbintenis, Objects of Legal Relationship between Doctors and Patients**

The legal relationship between doctor and patient are carried out with a sense of trust from the patient to the doctor termed therapeutic transactions. This transaction is a therapeutic relationship between doctor and patient to bind themselves to each other in good faith and mutual trust. It can be connected with Article 1313 Book of Civil Law that an agreement is an act by which one or more persons bind themselves to one person. In this therapeutic transactions the object is healing efforts, but it is often misinterpreted by the community that the object of therapeutic transaction is the recovery itself.

Engagements arising from therapeutic transaction are referred as inspanningsverbintenis, an engagement based on the obligation of attempting. Here the doctor must try with everything he can, based on his knowledge to cure the patient. Result obtained from the achievement of these efforts can not or should not be guaranteed by the doctor.

In trying to cure the patient, the doctor was provided by the pronunciation of the spoken oath at the beginning of entering the doctor profession as a norm-based ethics, which tied him based on the patient's trust that he can cure the illness. They also need to get the consent of the patient or his family before doing any medical action. It is preceded by the doctor informs patients about the patient's illness and therapy, thus called informed consent

### **Informed Consent**

Informed consent as stated in Regulation of Health Ministry 585/menkes/per/IX/1989 is an approval given by patient or his family based on explanation about medical action that will be done to the patient.

Doctors are suggested to give information to the patient completely about medical action that will be or need to be done and also its risk. Several research shows that problems in providing information to the patient affects quality of the medical services, especially seen from the patient. Leenen gave opinion regarding content of information which should be given in informed consent, those are: 1) diagnosis; 2) therapy and alternative therapy; 3) procedure and doctor's experience 4) risk; 5) chances of patient feels pain or other feelings such as itch; 6) benefits of therapy; 7) prognosis.

Informed consent can be expressed explicit or implicit. Explicitly can be done by spoken or written. Written consent is the most reliable form. However, it is also legal if it is done orally, except if there is certain legal terms which demands written consent for certain procedure.

## **Obstacles in Medical Services**

### 1. Obstacles in Delivery of Information

The first obstacle in the way medical care is the delivery of information, especially in terms of language and medical terms. Many patients are unfamiliar with the language of medicine. However, many languages and medical terms are not easily translated into ordinary language, causing the delivery of information becomes ineffective.

In addition to the obstacles in language and terms, the weights of the information provided is also often lead to gaps. The doctor as the information giver may feels that he already gave enough information, but the patient feels the information obtained are not enough. Perception between the giver and receiver are also often different about the importance of an information, where what is considered important to the patient, but the doctor considered not important.

Often patients have nodded and signed the agreement, but the patient recognizes that the information obtained is not enough and difficult to understand. Patients also often do not ask questions, because the patient does not know what information he needed and which he does not know.

Patient have rights to refuse the provision of information conveyed to the patient's family. In practice, often the information given to the patient's family before. This is contrary to the rule that the delivery of information to the family must obtain permission from the patient.

## 2. Obstacles in Consent

Regulation of the Minister of Health No. 585 / Men.Kes / Per / IX / 1989, followed the Decrees of Medical Services 21 April 1999 has clearly determine that those aged over 21 years or have been married and in a state of conscious and mentally healthy entitled to give consent. In practice, many hospitals are required in addition to the patient, also the presence of a third party (family nearby, including those aged over 21 years or have been married and in a state of the husband / wife) who come to give consent. Sometimes the terms involving a third party caused the problem, ie in the absence of an agreement between the patient and the family about the medical procedures to be carried out. The argument from the hospital is for security. But if there is negligence, even though the family come to give consent, the hospital can not avoid liability under the pretext of family has given consent.

If the patient refuses the information conveyed to the family and according Regulation of the Minister of Health No. 585 / Men.Kes / Per / IX / 1989 are entitled to give consent is the patient's own (having authority to declare the will), then would the hospital or doctor, which requires the signature of the agreement include the family, refused to implement medical treatment to patients?

Medical consent is required in writing in terms of medical treatment has a high risk. When considered high risk, quite simply the real verbal consent or tacit. Indeed, when any medical action requires written consent, you can imagine how troublesome, which is often a problem in case of an accident.

By the time the patient was taken to hospital in a state of decreased consciousness and in a state of pain (not unconscious / fainting), whether hospital or doctor must first inform and seek approval from the patient takes at least five minutes, while the second of valuable for saving

lives of patients? It is not set in Regulation of the Minister of Health No. 585 / Men.Kes / Per / IX / 1989. is set just in case the patient is conscious or unconscious to save lives of patients required no approval. Also sometimes crash victims not only of the two, if there's an accident with mass casualties, the opportunity to provide information and seek approval is also a waste of time.

Concrete examples that are often experienced by a hospital, where a surgeon dissecting accident patients, in emergency situations, it turns out the patient died. Family is disputed by the hospital or doctor because why they do not wait for the arrival of the patient's family and immediately implement medical treatment, while the time patients come to the hospital in an unconscious state. In this case the doctor / hospital is faced with a dilemma, helping the patient or protect themselves with a shield law protection.

In case the patient refused to give consent, after doctors give enough information. Obviously this is the rights of patients to refuse medical treatment to be carried out on him. The question here is whether doctors can carry out medical procedures without the consent of the patient?

If doctors carry out medical procedures without the consent of the patient, then according to criminal law, doctors have done persecution and the doctor can be sued according to civil law in guilty of violating the rights of patients to give consent which can be categorized as an unlawful act.

In case the patient refused to give medical consent, the doctor must respect the patient's right to self-determination, in the sense that doctors should not force the patient to a medical action. Will the doctor tries to get approval through legal channels, because doctors believe the medical treatment to be carried out would make the patient recover? As an example is believers who refused to accept blood transfusions.

### 3. Obstacles in Healing Efforts

Results of healing efforts do not depend only in the seriousness and expertise of doctors in carrying out his professional duties, but many other factors come into play, for example:

- a. Obstacles in healing efforts may be caused by doctor's misdiagnosis, so the therapy given can be inappropriate. This is possibly due to lack of knowledge and skills which can be obtained from congress, short courses and experiences.
- b. Obstacle may come from the patient in the form of body reaction toward certain medication differs from each patients. For example, there are patients who are not recovered from certain medication, but other patients recovered using the same medication. This reaction can also expressed as allergy which are harmful for the patient.
- c. The severity of the illness when the patient came to doctor may alter the recovery of the patient. Patients with mild disease will have a higher chance to recovers than those who have severe disease
- d. Patient's compliance in carrying out doctor's suggestion, especially medication compliance, can affect patient's recovery. Use of medication have certain dosage, time of usage, and duration of usage which doctor will inform and should be followed by the patient to make the treatment works effectively.

## **Closing**

### 1. Conclusion

Legal relationship between doctors and patients, referred as therapeutic transaction, starts from when the doctor expresses willingness to examine the patient. The object of this transaction is doctor's attempt to cure the patient because the result of this attempt can not and should not be

guaranteed by the doctor. Other than accuracy of the doctor's diagnosis of patient's illness, patient's recovery can be affected by other factors such as patient's body reaction toward certain medication, the severity of the patient's illness and patient's compliance in carrying out doctor's suggestion.

## 2. Suggestion

- a. It is suggested for the patient to understand that result of the therapy cannot be guaranteed by doctor because there are other factors that may affects the healing effort.
- b. The community, especially patients, should be able to understand that failure of therapy does not always referred as malpractice.

## References

Hermien Hadiati Koeswadji. 1998. Hukum Kedokteran (Studi tentang Hubungan Hukum dalam Mana Dokter Sebagai Salah Satu Pihak). PT Citra Aditya Bakti.

Talcott Parsons. 1969. Research with Human Subject and The Profesional Complex. Makalah dalam Jurnal Daedalus.

Veronika Komalawati. 1999. Peranan Informed Consent dalam Transaksi Terapeutik. Citra Aditya Bakti, Bandung.

Endang Kusuma Astuti. 2009. Transaksi Terapeutik dalam Upaya Pelayanan Medis di Rumah Sakit. PT Citra Aditya Bakti, Bandung.