

Criminal Responsibility on Rejecting First Aid to Emergency Patient in Indonesia : Based on Health Law Number 17/2023

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Abstract: This paper aims at analyzing patient right in emergency situation based on health law number 17/2023. Based on article 194 (1) of health law, health facility owned by state and private must serve first aid to emergency patient in order to save his life, and health facility is forbidden to ask advanced payment. If health facility refuse to serve emergency patient, it will imply on criminal responsibility. Profession Council is established to monitor implementation of health law. The council has authority to give recommendation on whether medical staff and health staff violate the law or not. It is profession council which determine the case of neglection to emergency patient can be investigated by police or other investigator body or not. Besides that, what is interesting from criminal responsibility is fine from action of criminal committed by health staff or medical staff will be paid to the state not to the patient.

1. INTRODUCTION

Being health is a part of human right and in Indonesia being health is a right of citizens in order to live healthy, wealthy and easy to access health facilities and this is in accordance with Article 25 paragraph 1 of the 1948 *Universal Declaration of Human Rights*.¹ According to article 28 H paragraph 1 of the 1945 Constitution of the Republic of Indonesia², the state provides adequate health facilities. Article 34 paragraph 3 of the 1945 Constitution of the Republic of Indonesia states that The State is responsible for the provision of adequate health care facilities and public service facilities.³ And according to Health Law Number 17 of 2003⁴, the State guarantees every citizens to live healthy and wealthy. The State obligues to make its citizens live healthy which means that the citizens have competitive capability at national and international level which will ultimately bring prosperity.

Article 1 point 24 of the Health Law 17/2023 states that patients in an emergency situation are : 1) Emergency patient means the patient in condition of emergency who need a treatment or help precisely, quickly and carefully in order to save his life and avoid physical defection. 2) Emergency units are obligatory medical service which must be available at every hospital/medical facilities.⁵

Emergency unit is the first door for patient in case of emergency. At this unit, patients that their lives are threaten by death or defection, must get first aid, so the doctors or medical staff or health workers such as nurses and medical facilities staff must not reject the emergency patients and must not ask for down payment as well. They must help the emergency patients for the sake of the oath as officer, for

¹Article 25 of the Universal Declaration of Human Rights covers a wide range of rights, including those to adequate food, water, sanitation, clothing, housing and medical care, as well as social protection covering situations beyond one's control, such as disability, widowhood, unemployment and old age.

²Article 28 H of the 1945 Constitution of the Republic of Indonesia : Every person has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy environment, and to receive health services

³See Article 34 paragraph 3 of the 1945 Constitution of the Republic of Indonesia

⁴Health Law Number 17/2023

⁵Article 1 point 24 of the Health Law Number 17/2023, Emergency is a clinical condition of the patient that require immediate medical and/or psychological measures to save life and prevent disability

the sake of humanity and the law. If hospital/ medical facilities or their apparatus reject emergency patient, although patient will not suffer consequences, this act can be summoned criminal responsibility as stated in Article 438 of Health Law 17/2023. This article formulates alternative sanctions on criminality consisting of imprisonment and fine of an amount of money submitted to the state. This article does not refer to compensation for patient who may be dead or defect because of inadequate help. Based on the above paragraphs, the questions raised in this paper are: How is the process of criminal solution on health service, especially rejection of first aid to emergency patient as offered in the health law? And how is criminal responsibility of rejection for first aid to emergency patient?

2. METHOD

The method used in this research is normative legal approach. This type of research is normative juridical, which is done based on legal material examining theories, concepts, legal principles and laws and regulations related to this research. Ibrahim states that this normative legal method can use empirical finding laws, such as history of law and judge's decision.⁶

3. DISCUSSION

3.1. Criminal Responsibility on Rejection of First Aid Service to Emergency Patients

3.1.1. Criminal Acts and Criminal Responsibility

The term criminal in Criminal Law of KUHP (Law Book of Penal/ Criminal Code) is well known as *strafbaar feit* in Dutch. *Strafbaar* means punishable, while *feit* means a fact. Simons as quoted by Moeljanto states that *strafbaar* is action (*handelling*) that can be threatened by the law, which is committed by a person who is capable of being responsible.⁷ And Van Hamel as quoted by Moeljanto states that *strafbaar feit* is a human action (*menselijke gedraging*) which is written in the law as an unlawful act or wrongful act, and can be sentenced to jail.⁸ In short, *strafbaar feit* means criminal offence.

The term *strafbaar feit* in Dutch consists of three terms, *straf*, *baar* and *feit*. *Straf* means law or penal, *baar* is can or could, and *feit* means part of fact or *een gedeelte van de werkelijkheid*. While *strafbaar* means punishable, so that literally the term *strafbaarfeit* can be translated as "part of a punishable fact". This is very inaccurate because it can be known that what can be punished is actually a human being as a person and not a reality, deed or action.⁹

In English, *strafbaar feit* means delict, a term derived from Latin *delictum*. Delict means action or behavior that can be sentenced to jail because the action violates the law (criminal action).¹⁰ According to A. Zainal Abidin Farid, "Delict is an unlawful act or omission committed intentionally or negligently by someone who can be held accountable".¹¹ Furthermore, Wirjono Prodjodikoro, argues that: "What is meant by a criminal offence or in Dutch *Strafbaar feit* or in foreign languages called *Delict* means an act whose perpetrator can be subject to criminal punishment, and this perpetrator can be said to be the subject of a criminal offence".¹² According to Moeljanto, criminal offences are known as criminal acts which mean "acts prohibited by a rule of law which prohibitions are accompanied by threats (sanctions) in the form of certain punishments."¹³

Criminal action is regulated in Article 12 of Lawbook of Penal Code (KUHP) which states that :¹⁴

⁶ J. Ibrahim, 2010. *Teori dan metodologi Penelitian Hukum Normatif*, Malang : Bayumedia Publishing, p. 300

⁷ Moeljanto, 2000. *Azaz-azazaz Hukum Pidana*, Jakarta : Bina Aksara, p 56

⁸ Moeljanto, 2000, p. 56

⁹ P.A.F. Lamintang, 2014. *Dasar-dasar Hukum Pidana di Indonesia (Basics of Criminal Law in Indonesia)*, Jakarta : Sinar Grafika, p 179.

¹⁰ Sudarsono, 2007, *Kamus Hukum (Dictionary of Law)*, Cetakan Kelima, Jakarta : P.T.Rineka Cipta, p. 92

¹¹ A. Z.A.Farid, 1987, *Asas-asas Hukum Pidana Bagian Pertama*, Bandung: Alumni, p. 33

¹² W. Prodjodikoro, 2003, *Tindak-Tindak Pidana Tertentu Di Indonesia*, Bandung: PT. Refika Aditama, p. 59

¹³ Moeljanto, 2000, p.56

¹⁴Article 12 of the Lawbook of Penal Code (KUHP): 1) Criminal offences are acts that are punishable by criminal sanctions and/or measures. 2) To be declared as a criminal offence, an act punishable with criminal sanction and/or action by laws and regulations must be unlawful or contrary to the law living in the

- a. Principle of legality is applied in criminal action : which behavior can be classified as unlawful action must be stated in law (*Nullum delictum nulla poenasine praevia lege*), as stated by Van Fuerbach, a German criminal law scholar, no punishment without a law or regulations governing it. Principle of legality consist of three different meanings, that is : *first*, there is no forbidden behavior if the behavior has not been previously stated in law. *Second*, there is no analogical method to determine criminal act, and *third*, regulation of penal code can not be retroactive.
- b. Such behavior must be unlawful actions. Law regulates what kind of behavior that can be classified as unlawful actions and violate the law. Unlawful actions or criminal actions consist of subjective or objective elements.¹⁵ Subjective one comprises elements such as:¹⁶ i). Intentional or non intentional acts (*dollus or culpa*) ; ii). Purpose of actions (*voornemen*) as written at Article 52 (1) of the Lawbook of Criminal Code (KUHP) ; iii). Many intentions (*oogmerk*) as found for example in crimes of theft, fraud, extortion, forgery and others ; iv). Planned action (*Voorbedachte raad*) such as in murder as written at Article 340 of the Lawbook of Criminal Code (KUHP) ; v). Feels of fear as as written at Article 308 of the Lawbook of Criminal Code (KUHP).¹⁷ Objectives items of unlawful action comprise : i). Violate the law (*Wederrechtelijckheid*) ; ii). The quality of the perpetrator, for example the condition of being a public servant in the crime of office under Article 415 of the Criminal Code or the condition of being a manager or commissioner of a Limited Liability Company in the crime under Article 398 of the Lawbook of Criminal Code (KUHP) ; iii). Causality that is an unlawful action as a cause and a fact as consequence.¹⁸ For example, according to article 362 of the KUHP, stealing is prohibited, the elements of which must be determined, a) intention, b) taking c) objects belonging to others d) without permission.
- c. here is a justification to eliminate an unlawful action characteristic of behavior although the behavior meets the requirement of the law. For example harming someone is called maltreatment and violating Article 351 of the KUHP¹⁹, but treatment of disease can also make people sick, but in accordance with procedures and health laws, this is not a criminal offence as regulated by Article 50 of the Criminal Code.²⁰ Other examples of justification are self-defense or *noodwer*, acts to execute a statutory order (Article 50 of the KUHP); and acts to execute an official order from a lawful authority (Article 51 paragraph (1) of the KUHP) Article 33 (*force majeure* or *noodtoestand*), Article 34 (*noodwer* or self-defense).

Legal responsibility in Lawbook of Penal Code (KUHP) is known as criminal responsibility. It means that a man commits criminal action is not meant that he should be convicted and sent to jail, but he must be responsible whatever he has done. Taking responsibility of action means to find out that man is guilty or not guilty.²¹ In criminal responsibility, who is accused of unlawful act must be stated, whether he has committed the unlawful act or not. To be convicted and sent to the jail, the unlawful action must be written in Lawbook. If there is an indication that someone commit of unlawful action without right justification, he must accept criminal responsibility. There are many definitions of criminal responsibility as stated by Saleh, Moeljatno, Hamel, and Pompe, but their meanings are similar. Roeslan Saleh states that criminal responsibility is something that is criminally accountable for someone who commits the unlawful action. In order to do responsibility, it must clear who will be responsible, consequently who has committed must be stated clearly.²²

community. (3) Every criminal offence is always unlawful, 3) unless there is a justification. A criminal offence is an act that is punishable by criminal sanctions and/or measures.

¹⁵ A. Hamzah, 2001, *Bunga Rampai Hukum Pidana dan Acara Pidana (Various of Criminal Law and Criminal Procedure)*. Jakarta : Ghalia Indonesia, p. 22

¹⁶ A. Hamzah, 2001, p.22

¹⁷ P.A.F. Lamintang, 1997, p. 193

¹⁸ P.A.F. Lamintang, 1997, p. 194

¹⁹ Article 351 of the Indonesian Penal Code: Maltreatment shall be punished by a maximum imprisonment of two years and eight months or a maximum fine of four thousand five hundred Rupiah.

²⁰ Article 50 of the Lawbook of Penal Code (KUHP) : Any person who commits an act to implement the provisions of a law shall not be punished

²¹ Suhartono RM , 1991, *Hukum Pidana Materil*, Sinar Grafika, Jakarta, p.106

²² R. Saleh, 1986. *Perbuatan Pidana dan Pertanggungjawaban Pidana (Criminal Actions and Criminal*

Moeljatno states criminal responsibility is intended to determine whether or not a defendant or suspect is responsible for a criminal offence that has occurred. In order for the perpetrator to be punished, it is required that the criminal offence he committed fulfills the elements specified in the law. From the point of view of the occurrence of prohibited acts, a person will be accountable for these acts, if they are against the law and there is no reason for justification or elimination of the unlawful nature of the crime committed.²³

Van Hamel as quoted by Hiarij defines criminal responsibility as a normal state of psychology and skills that brings three kinds of abilities, namely first, being able to understand the meaning and real consequences of one's own actions. Second, the ability to realize that the actions are contrary to the public order. Third, the ability to determine the will to act.²⁴

Pompe as quoted by Prasetyo defines criminal responsibility in terms of the elements of the offender's ability to think, which allows him to control his mind and determine his will, the offender can understand the meaning and consequences of his actions, and the perpetrator can determine his or her will in accordance with his or her opinion (about the meaning and consequences of his or her behavior).²⁵

The concept of liability is a central concept that is known as false doctrine (the false teaching). In Latin it is called as *mens rea*. Mens rea doctrine is based on *maxim actus nonfacit reum nisi mens sit rea*, that means an action is not necessary to make someone be guilty unless his mind is wicked.²⁶ In traditional perspective, in addition to the objective conditions of committing a criminal act, subjective conditions or mental conditions must also be fulfilled to be held accountable and punished. This subjective requirement is called "fault". In Continental legal system (*civil law*), this subjective requirement or mental requirement can be divided into two elements, namely the form of fault (intentionality and negligence) and the ability to be responsible. In the Anglo-Saxon legal system (*common law*), these conditions are united in *mens rea*.²⁷

A Person Who Is Criminally Responsible For Has Essentially Three Important Elements:

a. Fact of Fault

Fact of fault has been a fundamental principle in penal code (criminal law) and it is well known as *geen straf zonder Schuld*, or there is no punishment without fact of fault. In Indonesia, *Schuld* is translated into fault (*guilt*), which means neglect in narrow meaning or *culpa* in Latin, and intention or *opzet* in Dutch and *dolus* in Latin. The difference between neglect and intention is that the intention fault refers to the result of his intention act, but neglect stresses on the lack of attention to something that might happen and the negligence causes consequences that were not intended and/or could be avoided by the perpetrator.²⁸

In Criminal Law, neglect means that the accused person does not have intention to break the law, he does not pay attention enough to the prohibition. He does not take care of his action that results in a prohibited condition.

b. Ability to take responsibility

According to Simon, as quoted by Teguh Prasetyo, ability to take responsibility means a psychological state in such a way that condition of person in which a punishment can be applied and justified to him based on general and personal considerations. A perpetrator of a criminal offence is capable of responsibility if he knows/realizes that his action breaks the law, and he can control his behavior and

Responsibility), Jakarta : Aksara Baru.

²³ Moeljatno, 2000, p.6

²⁴ E.O.S. Hiarij, 2014, *Prinsip-prinsip Hukum Pidana (Principles of Criminal Law)*, Yogyakarta : Cahaya Atma Pustaka, Yogyakarta, p. 121

²⁵ T. Prasetyo, 2010, *Hukum Pidana (Criminal Law)*, Jakarta : Raja Grafindo Persada, p.85

²⁶ T. Prasetyo, 2010, p. 23

²⁷ T. Prasetyo, 2010, pp 32-33

²⁸ Mr. R. Tresna, 1994, *Azas-Azas Hukum Pidana Disertai Pembahasan Beberapa Yang Penting (Principles of Criminal Law with Discussion of Some Important Points)*, Jakarta : Pustaka Tinta Mas, pp. 47-64

intention using his logic.²⁹ Van Hamel as quoted by Hiarij states that ability to take responsibility implies a normal psychological condition and maturity of person who has three abilities, namely: understanding of real consequences of his behavior; realize that his act deviates from community order; and ability to determine his intention to do something.³⁰ Meanwhile, Pompe as quoted by Prasetyo says that ability to take responsibility (*toerekeningsvatbaar held*) comprises many items, such as: thinking ability of the perpetrator that make him be able to control his mind and intentions; the perpetrator understands meaning and consequence of his behavior and is able to determine his intention based on his opinion.³¹

How to determine that someone is able to be responsible for his own action? JE Jonker as quoted by Chazawi states that three requirements must be met:³²

- Possibility to determine his will on certain action
- Understand essential purpose of the action
- Realize that the action is prohibited in community

Meanwhile, Satochid Kertanegara as quoted by Chazawi states that a man who has ability to be responsible must meet three requirements :³³

- a. State of his psychology or mental is in good condition (normal) that indicates he is a free man and has ability in determining his will on what he will do
- b. State of his psychology or mental is in such condition that he has ability to understand about meaning of his behavior and its consequence
- c. State of his psychology or mental is in such condition that he has ability to realize, be aware of behavior which he will do is bad behavior, unlawful and violates social values or norms.

In Lawbook of Penal Code (KUHP), there is no strict definition of ability to responsibility. But Article 44 of KUHP states that : “Any person who commits an act for which cannot be held responsible, because of a defect in his body or a mental disorder due to illness, shall not be punished.” Based on this Article, Moeljatno concluded that ability to take responsibility must meet two requirements : ability to distinguish between good deed and bad deed, lawful act and unlawful act, and ability to determine his/her will be based on his consciousness on good and bad.³⁴

c. No Forgiveness Reason

Reason to forgive someone act is included in criminal responsibility that diminish person’s criminal responsibility because special condition and justification reason to remove the punishment for a person because the unlawful nature. These will affect judge decision of free from punishment (*onslag van rechevolging*). As examples of reason to forgive that diminish criminal responsibility are Article 44 of Old Lawbook of Penal Code on insane people, Article 40 on *overmacht* or compulsory power that cannot be avoided, Article 49 (2) on excessed self-defense (*noodwer* excess), Article 51 (2) on order of office that is not authorized but is carried out by subordinates as if it is under his authority.

In new Lawbook of Penal Code (KUHP Baru), Article 40 on children under 12 years old, Article 42 on over match/ or compulsory power that cannot be avoided, Article 43 on excessed self-defense (*noodwer* excess), Article 44 on order of office that is not authorized but is carried out by subordinates as if authorized, Article 39 on acute insane people that need to be rehabilitated, etc.

3.1.2. Emergency Patients Services

There are many definitions of health care. Soekidjo Notoatmojo says that health care is a part of the system of health service system which main aims are preventive and promotive (health improvement)

²⁹ T. Prasetyo, 2010, p. 34

³⁰ E. O.S. Hiarij, 2014, p. 86

³¹ T. Prasetyo, 2010, p. 34

³² A. Chazawi, 2002, *Pelajaran Hukum Pidana (Lesson of Criminal Law)*, Jakarta : Rajagrafindo Persada, p. 144

³³ A. Chazawi, 2002, p. 145

³⁴ Moeljatno, 2000, p. 165

services for public and community. According to Levey and Loomba, health service is a measure to prevent and promote health, maintain and cure of diseases of person, group, family and society. According to the Indonesian Ministry of Health, health services are efforts that are organized individually or together in an organization to prevent and improve health, maintain and cure diseases and also restore the health of individuals, groups, families and or public communities.³⁵

Emergency patients according to Article 1 number 24 of the Health Law 17/2023, is that emergency is a clinical condition of the patient that requires immediate medical and or psychological action to save life and prevent defection. According to Article 174 paragraph 1 of the Health Law, facilities owned by the central or regional government or private are required to provide services to emergency patients to save lives or save from disability.³⁶ Article 174 paragraph 2 states that health facilities are prohibited to refuse first aid to emergency patient, or ask for prior advanced payment and other administrative consideration.³⁷

As mentioned above that emergency patient is clinical situation that needs immediate medical care to save his life, but, Ministry of Health of Republic of Indonesia has criteria to define emergency situation. Article 3 paragraph 2 of Minister of Health Regulation Number 47 of 2018 (Permenkes Number 47/2018) states that emergency criteria include : i). It threatens human life or causes danger to oneself or others/environment ; ii). There is a problem of respiration, respiratory system, and circulation of respiration ; iii). There is a decrease in human consciousness ; iv). There is a problem of hemodynamic ; and v). It needs immediately action. The above situations should be treated by first aid that is a medical care given to emergency patient while waiting for professional aid to handle the patient. This first aid is given to care the patient life and to avoid death probability or the situation gets worst.³⁸

First Aid is the first efforts that can be done in emergency conditions in order to save victims from death, before getting further help by doctors or other health workers. The purposes of first aid are to: a) save the life of the patient to prevent disability and death; b) provide comfort and support the healing process. An emergency patient is a person who is in danger of death and disability who requires immediate medical action. One of the human rights is to receive emergency care. Emergency services include emergency services in disasters and daily emergency services. Emergency services must be improved continuously to meet the expectations of the public who always want high quality of services. To achieve this high quality service, it is necessary to improve the quality of human resources, in addition to improve the facilities and infrastructure of Health Care Facilities with regard of principle of service and affordable expenses.³⁹

Emergency service involves emergency treatment, pre-health facility, intra-health service facility, and inter-health service facility. Although in every city in Indonesia there are many emergency health service facilities, but their services show unsatisfactory performance and still asked to meet requirement and hope of society. There are many complaints about health facility service. It is an indication that health service facility does not show maximum result, and cohesiveness in serving patients has not been systematised.⁴⁰ Pre emergency health care facilities are in the form of quick response of people surrounding area where the event occurred, who participate in saving human from the danger of death and defection, how to make a quick contact with health service facility, how people can give first aid before proper health service arrives, such as giving artificial respiration, preventing bleeding, etc.

³⁵<https://www.pelajaran.co.id/2018/22/pengertian-pelayanan-kesehatan-tujuan-dan-jenis-jenis-pelayanan-kesehatan-masyarakat.html>.

³⁶ Article 174 paragraph 1 of the Health Law 17/2023 : Health Service Facilities owned by the Central Government, Regional Government, and / or the community must provide Health Services for someone who is in an Emergency condition to prioritise saving lives and preventing disability.

³⁷ Article 174 paragraph 2 of the Health Law 17/2023 : In Emergency conditions as referred to paragraph (1), Health Service Facilities owned by the Central Government, Regional Government, and/or the community are prohibited from refusing Patients and/or requesting down payments and are prohibited from prioritising all administrative matters that cause delays in Health Services

³⁸ Annex to the Minister of Health Regulation Number 47/2018 concerning emergency services

³⁹ Annex to the Minister of Health Regulation Number 47/2018 concerning emergency services

⁴⁰ Annex to the Minister of Health Regulation Number 47/2018 concerning emergency services

2. The Legal Subject of Article 438 of the Health Law 17/2023 is the Leader of Health Facility and/or Medical Personnel and/or Health Personnel

a. Leader of Health Facility

Is a leader should take responsibility for his staff action under his authority? Leader responsibility or *vicarious liability* in civil law is common as formulated by Article 1367 *Burgerlijk Wetboek (BW)* or Lawbook of Civil Code, but in criminal law the question arises about the *guilt* of a leader which is one of the conditions for a person to be convicted.⁴¹ *Vicarious liability* is defined by Henry Black as quoted by Mahrus Ali, *as indirect legal responsibility, the responsibility of employer for the acts of an employee, of principle for tort and contract of an agent, vicarious liability* is indirect legal responsibility, employer's responsibility for workers or principal's responsibility for agents in a contract.⁴²

Concept of leader responsibility is derived from military scene based on Roma Statute Article 28 (a) 1998. Military commander is responsible for criminality committed by his subordinate and it is his failure in controlling his subordinates. This is called vicarious liability. In military affairs, a military commander or staff who is act as military commander has responsibility for criminality committed by his subordinate (power under his command) in court jurisdiction and he has an effective control or authority to his subordinate. It means that he fails to control and manage his troops, where : 1). Military commander who knows or because of the moment, should know that his troops are doing or will do crime ; and 2) Military has power to prevent or repress his commission or submit the problem to the authoritative body for investigation and prosecution.⁴³

The leader must be responsible for the implementation of the organization or institution being led, this places a very important position of the leader in an organization or in a particular institution. Meanwhile, Nawawi defines leadership as the ability to move, motivate, and influence people to be willing to take actions that are directed at achieving goals through the courage to make decisions about activities that must be carried out. Likewise, leaders can be held criminally responsible as Article 438 of the Health Law because the law states it explicitly.⁴⁴ Many experts define vicarious liability slightly different. Hikmahanto states that leader responsibility can be divided into two categories : commander responsibility and superior responsibility. Commander responsibility is applied when the accused of criminality is a military officer, and superior responsibility is applied when the accused of criminality is a civilian.⁴⁵ Sutan Remmy Syahdeini as quoted by Mulyadi states that the doctrine of vicarious liability or in Indonesian called the term vicarious responsibility or substitute responsibility, is criminal responsibility committed by another person.⁴⁶

Roeslan Saleh defines vicarious liability is legal responsibility of one person for wrongful act of another. In his opinion, vicarious liability acts as an exception from guilty principle where it is common that a person must be responsible for his act, but in vicarious liability, a person must be responsible for wrongful act of other person. Saleh says that vicarious liability is synonym to vicarious responsibility.⁴⁷

Takdir Rahmadi argues that the application of the doctrine of vicarious liability is growing and eventually also tried to be applied to criminal cases. The development of the doctrine was mainly supported by court decisions which were then followed by subsequent court decisions, which basically adhered to the principle of precedent. The idea of vicarious liability is well developed in the system of

⁴¹ Article 1367 *Burgerlijk Wetboek* : "A person is liable not only for damages caused by his own acts, but also for damages caused by the acts of his dependents or by goods under his supervision".

⁴² M. Ali, 2011, *Dasar-dasar Hukum Pidana (Basic Principles of Criminal Law)*, Sinar Grafika, p 168,

⁴³ Roma Statute Article 28 (a) 1998

⁴⁴ H. Nawawi, 1987, *Administrasi Pendidikan (Educational Administration)*, Jakarta: Haji Mas Agung, p. 81

⁴⁵ H. Juwana, , 2021, Konsep Tanggung Jawab Pimpinan dalam Hukum Pidana Internasional : Kajian atas Penerapan di Indonesia (The Concept of Leader Responsibility in International Law : A Study of Its Application in Indonesia), *Indonesian Journal of International Law*, Volume 1 Number 4, August.

⁴⁶ L. Mulyadi, 2021, *Membangun Model Ideal Pemedanaan korporasi (Building an Ideal Model of Corporate Criminalization)*, Jakarta : Kencana, p.115

⁴⁷ Roeslan Saleh, 1983. *Suatu Reorientasi dalam Hukum Pidana (A Reorientation in Criminal Law)*, Jakarta: Aksara Baru, p. 32

common law, like United Kingdom and United States of America, but countries with civil law systems, such as Indonesia, just begins to adapt the vicarious liability at the court.⁴⁸

Vicarious liability has been broadened to the extent that employer must be responsible for wrongful acts of his employee in their scope of duties (job description). The liability assumed by the employer may be one of the following three:⁴⁹

- The law is explicitly state that the wrongful act is vicarious
- The court has developed doctrine of delegated claim in the case of licensing delegation. The doctrine provides that a person is liable for the acts committed by another person, if he has delegated his statutory authority to that other person. So, there must be a principle of delegation
- The court can interpret words or terms in the law that the acts of employees can be considered as the act of employer.

Furthermore, Rahmadi says that the application of vicarious liability in criminal law must meet at least two requirements:⁵⁰

- It must be a relation, like work relation, between employer and employee
- Criminal act committed by employee is related to or in the scope of his duties According to Stavenburg as quoted by Hartiwiningsih, the things must be considered before making conclusion that factual leader must be responsible in criminal law : 51
- Factual leader or leader of organization is a leader who can stop or prevent wrongful act (his position is quite powerful both de jure and de facto).
- Leader understands that the probability of wrongful acts is possible. It means there is an authority that is not used to prevent and to cut off wrongful acts and as if the acts are seen as customary.

Vicarious liability can be applied because the law has stated it. It is not because of *mens rea* or direct actus reus, but it is because the principle of law (*mala in se mala prohibita*). *Mala in se* means that the act of wrongful deed, and *mala prohibita* means that the act is considered wrongful deed because it is stated in the law. Some laws regarding the responsibility of civilian leaders for the actions of their subordinates can be found in the Article 116 Paragraph 1 (b) of Law Number 32 /2009 on Environmental Protection and Management,⁵² also in Article 190 Law Number 36/2009 on Health (revoked).⁵³

In the Article 438 of Health Law 17/2023, it is stated that leader of health facility can be treated as criminal if he does not help emergency patient, even if it causes serious injury or death or if there are no consequences, simply refusing to do so is wrong.⁵⁴

Health facility as stated in Article 438 Health Law 17/2023 is a place where health service to individual and society with promotive, preventive, curative, rehabilitative and or paliative approaches is carried

⁴⁸ T. Rahmadi, 2013, *Buku Ajar Sertifikasi Hakim Lingkungan (Certification Textbook for Environmental Judges)*, Bogor: Pusdiklat MARI, p 25

⁴⁹ T. Rahmadi, 2013, p. 30

⁵⁰ T. Rahmadi, 2013, p. 52

⁵¹ Hartiwiningsih, 2013, *Tanggungjawab Pemimpin Korporasi pada Hukum Lingkungan (Responsibility of Corporate Leaders in Environmental Law)*, Paper presented at Seminar of MAPAHUKI (*Society of Criminal Law and Criminology*), Sebelas Maret University, September.

⁵² Article 116 Paragraph 1 (b) of the Law Number 32/2009 on *Environmental Protection and Management*. If an environmental criminal offence is committed by, for, or on behalf of a business entity, criminal prosecution and criminal sanctions shall be imposed on b) the person who gives the order to commit the criminal offence or the person who acts as the leader of the activity in the criminal offence.

⁵³ Article 190 of Law No. 36 of 2009 on Health (revoked): The head of a health care facility and/or health worker who practices or works at a health care facility who intentionally does not provide first aid to a patient in an emergency as referred to in Article 32 Paragraph 2 or Article 85 Paragraph 2 shall be punished with a maximum imprisonment of two years and a maximum fine of Rp200,000,000.00 (two hundred million rupiah). (2) In the event that the act as referred to in Paragraph (1) results in disability or death, the head of the health care facility and/or health worker shall be punished with a maximum imprisonment of ten years and a maximum fine Rp1,000,000,000.00 (one billion rupiah).

⁵⁴ Article 438 Health Law 17/2023

out by central or local government as well as private/ individually or community. There are many kinds of health facilities including :

- First level health facilities, such as community health center (Puskesmas), Pratama Clinics, independent practice of health medical personnel.⁵⁵
- Advanced health facilities comprise hospital, main clinic, health center, independent practice of health medical personnel.⁵⁶
- Supporting health facilities which support primary and advanced health facilities. They can be independent and be united to first level health facilities and advanced level health facilities.

b. Article 1 (6) of Health Law 17/ Medical Staff

2023 states that medical staff is anyone who serves in health field and has professionally attitude, knowledge and skill through higher education (university teaching), and for some kinds need authority to do health effort. Article 198 of Health Law 17/2023 states that medical staff consists of physician (doctor) and dentist. Physician (doctor) comprises doctor, specialized doctor and sub-specialized doctor, and dentist include dentist, specialized dentist and sub-specialized dentist.⁵⁷

c. Health Staff

Beside medical staff there are health staffs that comprise clinical psychology staff, nurses, midwifery, pharmacist staff, patho health staff, environmental health staff, physical therapists, and medical technicians.⁵⁸

d. Criminal Responsibility and its Problems

Article 438 of Health Law 17/2023 threatens whoever reject to give first aid to emergency patients, by both formal and material offences. Health services rejection to give first aid is categorized in formal offence because the act of rejection need no consequence for the patient. Article 174 of Health Law 17/2023 states that health facility is obliged to give first aid care to emergency patient even the patient do not give an advance payment. If not doing so, staff of health facility can be threatened with maximum penalty for two years in jail or a maximum fine of Rp 200,000,000 (two hundred million rupiahs).⁵⁹

Article 438 Paragraph 2 of Health Law 17/2023 consists of material offence, when medical or health staffs who have rejected to give first aid to emergency patient and which then causes consequences for patients in the form of disability, physical defect or death. If not doing so, staff of health facility can be threatened with maximum penalty for ten years in jail or a maximum fine of Rp 2.000,000,000 (two billion rupiahs).⁶⁰

In Lawbook of Penal Code (KUHP), especially Article 304 and Article 306, which are still in force today act as a *lex general* about who ignore or refuse to give aid to anyone in misery when he is able to help him. This act is punishable with seven years imprisonment, and is punishable with nine years imprisonment if the act causes death.⁶¹

Punishment based on Article 438 of Health Law 17/2023 is cumulative alternative, about who are responsible as subject of law. Whether head of health facility or medical staff or health staff are subject

⁵⁵ Article 167 Paragraph 2 of Health Law 17/2023

⁵⁶ Article 168 Paragraph 2 of Health Law 17/2023

⁵⁷ See Article 1 (6) and Article 198 of Health Law 17/2023

⁵⁸ See Article 199 (1) of Health Law 17/2023

⁵⁹ See Article 438, Article 174, and Article 275 Paragraph 2 of Health Law 17/2023. Article 174 paragraph 1 of the Health Law: Health Service Facilities owned by the Central Government, Regional Government, and / or the community must provide Health Services for someone who is in an Emergency condition to prioritise saving lives and preventing disability. Article 174 paragraph 2: In Emergency conditions as referred to in paragraph (1), Health Service Facilities owned by the Central Government, Regional Government, and / or the community are prohibited from refusing Patients and / or asking for down payments and are prohibited from prioritizing all administrative matters so as to cause delays in Health Services.

⁶⁰ Article 438 Paragraph 2 of Health Law 17/2023

⁶¹ See Article 304 and Article 306 of Lawbook of Penal Code (KUHP)

for criminal responsibility by collectively or alternatively based on chronology of the case. Criminal responsibility arises if there is a fault intentionally (*dolus*) or carelessly/negligent (*culpa*), an ability to be responsible and the existence of unlawful nature that is excused.

Below is illustration of who is guilty either *dolus* or *culpa* if he is able to be responsible. A patient is sent to emergency unit of a health facility, and doctor at emergency unit recommend the patient to pediatric intensive care unit (PICU), and patient's family must pay an advance payment but the family has no money. Consequently, the family looks for a loan, but when they have got money and want to pay an advance payment, the patient has died. In this case, the doctor at emergency unit has done his duty properly by recommending emergency patient to PICU. He must not be charged criminal responsibility because there is no *dolus* or *culpa*. If doctor at emergency unit does not recommend the patient to PICU, even he knows the patient's illness, his act is unlawful based on Article 275 of Health Law 17/2023.⁶²

If it is proven later that leader of health facility instruct/order to administration unit to ask for advance payment, the leader can be responsible as vicarious liability based on Article 174 of Health Law 17/2023. If there is proven that there is no medical action by doctor at emergency unit and other health staff do the same action, as formulated by the law, namely the involvement of the head of health facilities and medical personnel not to provide assistance or omission, until the patient experiences misery either causing disability or death, the unlawful nature that occurs is against Article 174 of the Health Law and Article 275 of the Health Law. Criminal offences can be committed by the head of the health facility and medical personnel altogether.⁶³ Punishment of health law as a whole is alternative criminal sanctions based on Article 438 Paragraph 1 and Paragraph 2 of Health Law 17/2023. Article 438 Paragraph 2 of the law states that if first aid is not given to emergency patient and the patient is being worse or dead, this action is punishable by ten years imprisonment or fine of Rp. 2.000.000.000 (two billion rupiahs).

If the perpetrator does not want to be sent to prison, he must pay large amount of money to the state. A large amount of money as fine is related to patient's severe physical injuries which may caused lost his work, and if the patient dies, his income is lost and it will have a big impact on his family.

The question is what for the state receive fines from medical or health staffs that are large enough as a result of the suffering of the patient due to health service error. How about compensation for the victim ? Regarding the health of society, the State just has obligations not rights according to Article 28 (1) of 1945 Constitution of the Republic of Indonesia. Article 28 (1) states that every citizen has a right to be wealthy and the right to obtain health service. Article 34 (1) states that the State is obliged to establish adequate health facilities.⁶⁴ Article 9 Paragraph 3 of Law No. 39 of 1999 on Human Rights states the right to a healthy life for every citizen, Letter a of considerant of Health Law 17/2023 indicates that the State guarantees every citizen a healthy life.⁶⁵

There is also a crucial matter related with the length of time it takes to fill a civil lawsuit or filling damages against the perpetrator. At the same time the Prosecutor files criminal charges against the perpetrator. These procedures require sufficient time to do, and the victim often has limited financial and is suffering more and more.⁶⁶

3. Resolution of Criminal Responsibility on Health Service Especially on Rejection of Emergency Patient at the Profession Council

a. Solution of Criminal Responsibility at Profession Council

Article 304 of Health Law 17/2023 refers to profession council whose task is to apply professional disciplinary establishment. It will evaluate whether there is a violation of professional discipline of medical staff or health staff. The council can be permanent or ad hoc existences.⁶⁷ Similarly, it was used

⁶² See Article 275 of Health Law 17/2023

⁶³ See Article 174 and Article 275 of Health Law 17/2023

⁶⁴ See Article 28 and Article 34 of 1945 Constitution of Republic Indonesia

⁶⁵ See Article 9 Paragraph 3 of Law No. 39 of 1999 on Human Rights

⁶⁶ Article 98 of Lawbook of Criminal Procedure Code

⁶⁷ Article 304 of the Health Law: Article 304 of the Health Law: paragraph 1 In order to support the professionalism of medical personnel and health workers, it is necessary to implement the enforcement of

to be Honorary Council of Indonesian Medical Discipline (MKDKI/Majelis Kehormatan Disiplin Kedokteran Indonesia). Members of MKDKI are : three members of doctors, three members of dentists, a doctor and a dentist as representative of hospitals and three members of scholars, totally 11 members.⁶⁸ According to Article 304 Paragraph 2 of Health Law 17/2023⁶⁹, profession council should be established by Minister of Health's decision, but unfortunately the council has not been existed.

According to Article 306 of Health Law 17/2023, if there is a violation of criminal law and after ethical sanction by profession council, restorative justice must be prioritized.

Restorative justice is under many regulations, such as :

1. Letter issued by Chief of Indonesian Police Number 8 /VII/2018 on the application of restorative justice in criminal cases. Article 3 of this letter provides guidelines for the implementation of restorative justice, one of which is if there are no human casualties.⁷⁰
2. Attorney General Regulation Number 15 of 2020
3. Decree of the Director General of General Courts of the Supreme Court of the Republic of Indonesia number 1691/DJU/SK/PS.00/ 12/ 2020
4. Article 132 Paragraph 1 letter g of the New Criminal Code, will not take effect until early January 2026 because it is in the socialization period.

From four regulations above, the restorative justice can not be applied if the victim was dead. That's why this restorative justice only can be applied to Article 438 Paragraph 1, but not to Article 438 Paragraph 2.

According to Article 308 of Health Law 17/2023, if medical staff and health staff are accused of commit criminal act, a recommendation by Profession Council must be asked before the case goes on. This article is connected to article 304 of Health Law which states that: a. to support professionalism of medical staff and health staff, it is necessary to apply professional discipline. b. In applying professional discipline, minister needs to form a council whose task is applying professional discipline. c. The council determine if there is a violation to professional discipline done by medical staff and health staff. d. the council can be permanent or ad hoc. e. more stipulation on task and function of the council is regulated by government regulation.⁷¹

Profession Council has an authority to give recommendation for medical staff and health staff who are accused of violating the law. A question arises how about if profession council does not give recommendation on whether police and investigator be able to examining or investigating the case ?. Article 5 to 59 of Lawbook of penal code (KUHP) state that the police is the main investigator to investigate criminal case.

b. Solution of Criminal Responsibility at the Court

After the police has finished its examination and investigation of the case, the police submit the case to attorney and the case is ready to go to the court. It involves items at article 438 of Health Law.

1. Article 438 (1) of health law on refusal or rejection to give first aid to emergency patient and it does not make any consequence to the patient, head of health facility, medical staff and health staff are threatened to be punished at prison as long as two years or fine of Rp. 200 000 000,00 (two hundred million rupiahs)

professional discipline. (2) In order to enforce professional discipline as referred to in paragraph (1), the Minister shall form a panel to carry out duties in the field of professional discipline. (3) The panel as referred to in paragraph (2) shall determine whether or not there is a breach of professional discipline which is conducted by medical and health personnel. (4) The Tribunal as referred to in paragraph (2) may be permanent or ad hoc. (5) Further provisions concerning the duties and functions of the council as referred to in paragraph (2) shall be regulated by Government Regulation.

⁶⁸ Article 59 of Law Number 29 of 2004 concerning the Practice of Medicine (has been revoked)

⁶⁹ See Article 304 Paragraph 2 of Health Law 17/2023

⁷⁰ Article 3 Letter released by Chief of Indonesian Police Number 8 /VII/2018

⁷¹ Article 304 of Health Law 17/2023

2. Article 438 Paragraph 2 of the Health Law 17/2023 states that if medical and health staffs violate Article 438 Paragraph 2 of the Health Law 17/2023, refusing to provide first aid to emergency patients that causes disability or defection or death, the penalty is ten years or a fine of two billion rupiahs.

Sanction at article 438 of health law arises from obligation based on articles as follow:

- Article 174 of health law which states that health service facility owned by central government, local government, and or private citizens must give health service for a man in emergency condition to prioritize in saving patient life and preventing disability. Health service facility must not refuse or reject patient and or ask for advanced payment and or prioritize administration affair before giving service so that service topatient will be delayed.
- Article 275 (1) of health law states that medical staff and health staff at health service facility are obliged to give first aid to emergency patient and or when disaster occurred.

Application of criminal sanction in article 438 of health law has alternative characteristic, namely: imprisonment or fine to the state. One of important question in this case is this law regulates fine to the state but no article which regulate compensation to the patient.

Related to article 28 H of 1945 Constitution of the Republic of Indonesia, the state offered an opportunity to have right to every citizen to live in wealthy condition, both physically and mentally, living in good environment and healthy and accepting health services as well. 1945 Constitution states that the state is obliged to serve health service and automatically the state does not the right to accept money from bad health services. The question is how about the patient suffered from the lack of health service because article 438 of Health Law 17/2023 does not regulate compensation to victimized patient.

How can the victims get compensation as quickly as possible for their suffering ? Formal legal considerations that can be applied although it will be difficult to do:

- Article 305 of the Health Law 17/2023 regulates how patient and his family can report to Profession Council if medical staff and or health staff made him suffer losses in health service.⁷²
- Article 98 of Lawbook of Penal Code (KUHP) states that compensation is complained when prosecuting attorney submit his criminal accusation.⁷³
- The patient and his family submit or bring the case to court independently although it is seen unpractical. If criminal accusation goes on the court, professional insurance may pay the compensation.
- Article 306 (3) of health law regulates if medical staff and health staff have finished their sanction and after that it is proven there was a criminal action, investigator must solve the case with restorative justice mechanism if there is no death consequencey.

Article 438 paragraph 2 of the Health Law threatens with a maximum threat of ten years imprisonment or a fine of Rp 10,000,000,000 (ten) billion rupiahs. This article relates to several important things:

- Medical personnel and health workers who have implemented disciplinary sanctions vary if the behavior results in serious consequences, such as disability or death, but they can be higher and there are also appeals, which take more time.
- After the sanction of the professional hearing was completed, it was later found that there were criminal allegations, it may be difficult for investigators to find the criminal elements. And if at the same time the criminal elements is found, of course health criminal investigators do not need to

⁷² See Article 35 of the Health Law 17/2023

⁷³ Article 98 of the Lawbook of Criminal Procedure Code (KUHP) : paragraph 1 stated that If an act which forms the basis of an indictment in an examination of a criminal case by a district court causes damage to another person, the presiding judge may, at the request of that person, decide to join the compensation claim case to the criminal case. The request referred to in paragraph (1) may only be made at the latest before the public prosecutor files the criminal charge. In the of the public prosecutor, the request shall be made at the latest before the judge pronounces the judgement

wait for the completion of the case in the professional trial, can it be resolved by restorative mechanisms ?.

- Law enforcement officials implement restorative justice.

4. CONCLUSION AND SUGGESTION

1. Resolution process of criminality of health service, especially on refusal to give first aid to emergency patient as offered by health law:
 - Through profession council that determine whether the case of criminality in health service can be continued to be investigated and examined by health investigator. The reason for this idea is that the profession council is the first body to examine whether action of medical staff and health staff is in accordance with health service standard or not. If the action is in accordance with health service standard, the case cannot be investigated by the police.
 - Through the court .If profession council's recommendation indicates that the case can be continued to the court, police begin to investigate the case .
2. Criminal responsibility on refusal to give first aid to emergency patient of subject of law such as head of health facility, medical staff, and health staff can be cumulative or alternative based on occurrence of the case. Cumulative responsibility can be applied for head of health facility and medical staff, and health staff as well, and alternative responsibility can be applied only one or two of them. Article 438 of health law does not regulate compensation to the patient, it regulates alternative sanctions of sentence to prison and fine of money to the state.
3. It is suggested that because state is an institution whose duty is to serve for health of the people, it is not necessary to collect fine from head of health facility, medical staff, and health staff who commit criminality in serving the patient. Compensation to patient must be considered because he is the victim of mal practice in health service.

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