

SUMMARY

Medical practice telemedicine is basically a remote medical care between health care facilities that are geographically separated so that doctors and patients can not meet in person but the meeting was conducted through telecommunications links and electronic systems telemedicine. Medical practice telemedicine is part of health care resources that are useful in providing health services to the people who are far away from the access hospital or medical specialist who generally are in town. In addition to saving time, cost, and power, is also promising medical practice knowledge transfer (transfer of knowledge) of senior doctors to the junior doctors. Therefore, it is not surprising that the medical practice of telemedicine began much practiced in health care facilities in Indonesia. Globally, this medical practice also has penetrated in some countries even done cross country.

Attention of various groups aimed at more advantages and benefits. So consciously or not, sometimes forget that the medical practice of telemedicine are also prone to malpractice. Therefore, in this dissertation studied is the other side of the telemedicine medical practice of accountability in medical practice telemedicine. When examined closely, medical practice telemedicine is a medical practice that is done through a combination of cooperation between specialists with primary physicians (primary care physician/PCP). Specialist physicians provide direction and delegate authority to a primary physician (primary care physician/PCP) for subsequent primary physicians under the direction and authority of the medical act to patients. This working relationship spawned superior and subordinate relationships, which had previously been provided for in an agreement or contract. In theory, the working relationship between superiors and subordinates or between the principal agent causing consequential legal relationship on liability for damages, which will be responsible is the boss (the doctrine of vicarious liability). Legal fiction that the action servant is the act of host (master). So if this doctrine applied to accountability in medical practice then if the primary

physician (primary care physician/PCP) made a mistake then a specialist as his superiors should be held accountable for the loss of load. Therefore, accountability is called liability risk (risico aansprakelijkheid), based on the doctrine of vicarious liability. The legal basis is Article 1367 paragraph (3) BW.

In the cases of liability risk on the court, there is no doubt that the judge when applying the doctrine Vicarius liability in accordance with Article 1367 paragraph (3) BW cover behind the phrase *qui facit per alium facit per se* "which means that a person who does through others considered he himself did., as it is also called the doctrine of vicarious liability doctrine, let the master answer / respondead superior or the negative connotation is called the doctrine of a thick wallet. This doctrine became commonly used by judges to liability employers for tort committed by its employees. Such decision, often considered to be unjust to become among the public and academic debate. Controversy of the application of the doctrine of vicarious liability form two different polarization thinking. For the legalistic positivistic, agree on the judge's decision to apply the doctrine of vicarious liability in accordance with Article 1367 paragraph (3) BW, because they think justice can be logically deduced from the rules without the need to refer to the social goals, virtue, and morality, however unfair and limited sound existing legislation. The law is still the law commands that should be executed because of legal certainty it could be enforced. Legalistic view of the positivistic challenged by the view that the principle of virtue and morality must be considered for measuring the validity of the law. Adherents of morality law principle that the law must reflect morality. Therefore, the law leaves the principles of morality, even contrary to morality, should not be obeyed based on a moral right. To that end, the judge is obliged to seek justice by exploring the values of law and justice in society not as a mouthpiece of Thought this legislation adopted by schools of Sociological Jurisprudence. Of the two streams above the law, there are two values of fairness preferences conflicting, that one

meaning of the doctrine of vicarious liability justice in accordance with Article 1367 paragraph (3) BW, based on justice law (legal justice). While others in the context of moral justice and social justice.

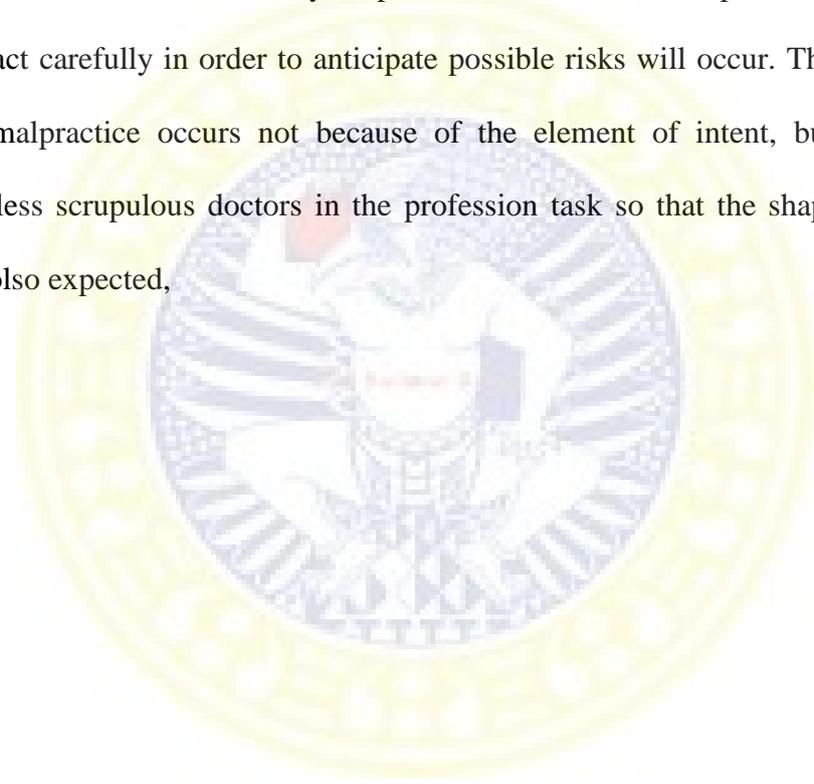
From the side of justice accountability is no less dynamic, the majority held that accountability is limited in corrective justice (corrective justice theory) so it seemed only see accountability on the right or the right corrective recovery after any incident, regardless of the nature of the incident itself and prevention efforts. Therefore, compensation plays an important role and be the primary focus in solving the problem in the view of corrective justice. While most of the others found to be viewed from a wider perspective, namely interactive justice (justice interactive theory). So the motivation is not to how accountable in the event of loss to the victim, but in essence it is to how to prevent and protect when interacting with others of the likelihood of a loss that can happen to him. Justice in liability risk can only be achieved if the parties have rights in proportion so shall otherwise be an obligation imposed on well proportioned. The size of proportionality in the distribution of rights and obligations of exchange should be based on the values of equality (equitability), freedom-proportional distribution, of course, also can not be separated from the principle or principles of accuracy (*zorgvuldigheid*), feasibility (*redelijkheid*; reasonableness) and propriety (*billijkheid*-equity). The principle of proportionality is not disputed balance (similarity) results mathematically, but more emphasis on the proportion of the distribution of rights and obligations between the parties that take place in a dignified and worthy (fair and reasonableness). Proportionately to reflect the existence of equitability is an equal relationship (equality), even-handed and fair (fair). Whenever there is a situation that does not equal or unequal, then the inequality or inequality should not be exploited by the dominant party to impose its will be insufficient to another party, this means that the

proportionality within the meaning of equitability should contain elements of justice and fairness reasonableness.

Thus, the perception of the doctrine of vicarious liability under Article 1367 paragraph (3) BW. must be approached through the principle of proportionality by considering factors juridical, philosophical and sociological. Therefore, after studying the weaknesses and anomalies of the doctrine of vicarious liability, the authors propose a new concept of law principle that the principle of proportionate liability risks. This legal principle can be applied in medical practice telemedicine. This principle is constructed based on the premise that given the principal; master; employer (specialist or hospital) is the organizer of electronic telemedicine system or as *pengampu*, then on their shoulders lies the burden of accountability that must be borne. However, the load must be weighed also proportionally when the location of the fault is not on his side. Likewise to the primary physician or primary nurse as a party to the agent; servant; or as an employee of teaching it must also have the same obligations to the principal; master; employer, within the limits of logical, appropriate and proper decorum when it was due to the emergence of liability due to his fault. Errors can be referred to the act is unlawful or contrary to the purpose of the contract. Thus any errors subordinates, should not always be reduced to a mistake employer. However, any subordinate errors not necessarily have to make the employer treated him unfairly. It is hoped by doing so, the doctrine of vicarious liability can be done strictly in order use can be obtained accurately.

Associated with liability and accountability of telemedicine medical practitioners in the principle of proportionate liability risks, it should be interpreted broadly is not limited only in the form of corrective justice, but must also be viewed from the standpoint of justice interactive. So the motivation is not to how accountable in the event of loss of the patient, but in essence it is the orientation for how to prevent and protect the patient from the likelihood

of a loss that can happen to him. Telemedicine practitioners can protect patients from "harmful interaction 'through the presumption of knowledge that have been learned. However, if the obligation had been implemented but it is conceivable that already before it happened also the telemedicine practitioner entitled to limitation of its responsibilities under the context of the accompanying actions. Basic assessment must be based on certain objective standards (specified standards of conduct), created as a standard guideline telemedicine medical profession. It also must consider the values of decency, propriety and accuracy and prudence in the association community. A professional telemedicine practitioner must think carefully and act carefully in order to anticipate possible risks will occur. Therefore, ideally telemedicine malpractice occurs not because of the element of intent, but because less carefully and less scrupulous doctors in the profession task so that the shape of plaintiff's negligence is also expected,



THE PRINCIPLES OF LIABILITY ON TELEMEDICINE PRACTICES

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Abstract

The main objective of this research is to find a proper legal principles of liability on the law of telemedicine. To reach this objective, the statute, conceptual, comparative and case approach are used as tools of the research. Some legal materials, such as Burgerlijk Wetboek (BW), Government Gazette No. 23 of 1847, Law No. 36 Year 2009 on Health, and Law No. 29 of 2004 regarding Medical Practice in conjunction with Regulation of the Minister of Health of the Republic of Indonesia Number 2052/Menkes/PER/X/2011 on the Licence of Medical Practice, and Law No. 44 Year 2009 on Hospitals are used as the factoring point of the research, and also the law of telemedicine implemented by some other countries are used as the legal comparison to review such principles of the present laws and to propose the future telemedicine law.

As the fact that the law of telemedicine still does not exist in Indonesia, it might be some problems for Judges to decide cases related to liability of risk on the practice of telemedicine. Pursuant to Article 24 paragraph (1) of the 1945 Constitution and Article 5 (1) of Law Number 48 of 2009 on Judicial Authority, to decide a case that appearing to him, the judge should explore and understand the legal values, as well as the social justice. Thus, the application of paragraph 3 of Article 1367 BW and Article 46 of Law Number 44 of 2009 on Hospital, should be in the context of proportional justice, where the needs of the patients for the safety medical services meets with the professional liability of the telemedicine practitioners.

The theory of this dissertation is structured by the relationship among code of ethics, professional standards, service standards and standard operating procedures that regulates the telemedicine practitioners which his or her actions are legitimated by the delegation of power of the primary care physician (PCP). By this structure, the liability of risk arises from the telemedicine practice of the subordinate does not necessarily to be based on fault by the primary PCP or primary nurse as it is stated by doctrine of vicarious liability. Concept of "proportional liability" on this dissertation means the balance distribution of rights and obligations of the professionals linked to a telemedicine practices, where the proportion liability to each party's is based on equitability, appropriate, reasonable and fair valuation. In line with the previous concept, the liability should based on viewpoint of interactive justice, that means based on the values of professional expertise, austerity, responsibility, and collegiality. This concept dedicated for the desire to do good for the sake of healing a patient (doing good).

Keywords: Liability, Medical Practice, Telemedicine