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The Civil Liability of Hospitals for Malpractice Committed by Healthcare Personnel Resulting in Baby Switched at Birth Incidents

Velliana Tanaya[1] Intan Indriani Putri[2],
[1]Universitas Pelita Harapan, Jakarta, Indonesia, velliana.tanaya@uph.edu
[2]Universitas Pelita Harapan, Jakarta, Indonesia, intanindrianip@gmail.com

Abstract

Justice serves as a fundamental goal in the legal framework governing healthcare, ensuring that victims of medical malpractice receive proper redress. This study examines the civil liability of hospitals in cases of baby-switched-at-birth incidents due to medical negligence. Despite clear legal provisions, victims often face challenges in obtaining fair accountability. Hospitals, as primary healthcare providers, are responsible for upholding professional standards to prevent malpractice and ensure patient safety. The failure to adhere to these standards constitutes an unlawful act (PMH) under Indonesian civil law, obligating hospitals to compensate for material and immaterial damages. However, inconsistencies in the implementation of patient protection laws hinder the realization of justice. Through a normative-empirical legal analysis, this study highlights the necessity of strengthening legal certainty, enforcing accountability mechanisms, and promoting non-litigation dispute resolution methods to uphold justice for affected patients. Achieving justice in medical malpractice cases requires a balanced approach between legal enforcement and ethical considerations to protect patients' rights effectively.

Keywords: *Justice, Malpractice, Hospital Liability, Civil Law, Patient Rights*

1. INTRODUCTION

National development can be defined as a series of developments that are carried out in a sustainable manner and cover all areas of the life of the community, nation, and state. It is a process that aims to implement the constitutional mandate as stated in the Preamble of the 1945 Constitution of the Republic of Indonesia. This mandate can be broadly interpreted as a commitment to protect the entire nation and all Indonesian people, advance public welfare, educate the nation, and participate in implementing a world order based on independence, lasting peace, and social justice.[1] From this statement, it can be seen that one of the constitutional mandates is to promote general welfare, which in this case is the welfare of the entire community. In essence, welfare can be defined as a condition of fulfillment of the basic needs of life, such as the need for health. Health is a fundamental aspect of human existence.[2] Health has a significant role because: (1) it affects human resources (HM) quality; (2) it is a prerequisite for achieving balanced development; and (3) it has an impact on the level of

1 Lumettu Jegiftha, *et.al*, "Performance of Public Works and Spatial Planning in Infrastructure Development in Talaud Islands Regency." *Executive: Journal of Government Science Department* 1 No. 1, 4, 5
2 Indar, *Concepts and Perspectives of Ethics and Public Health Law*, (Yogyakarta: Student Library, 2020), 97.

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achievement and productivity.[3] The statement is consistent with the definition of health as set forth in Article 1, Section 1 of Law No. 17 of 2023 concerning Health, which defines health as *"a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity."* As a fundamental necessity, the right to health is a a right for each individual that must be fulfilled through the provision of secure and superior quality healthcare services. This right is intrinsic to all members of society, regardless of their socioeconomic status (*the right to health care*).[4] Furthermore, Article 28H, Paragraph (1) of the 1945 Constitution of the Republic of Indonesia explicitly asserts that "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 living environment, as well as to obtain health services."

Health services are all efforts made both independently and together in an organization with the aim to maintain and improve health status, prevent and cure diseases, and restore individual and group health.[5] In the context of organizing health services, hospitals represent a prominent institution in this regard. In providing health services, the hospital must be able to ensure that the services provided are safe, quality, non-discriminatory, and prioritize the needs of patients in accordance with applicable service standards. The quality of a health service can be determined by several factors such as factors related to the availability of adequate facilities, infrastructure, and medical devices in accordance with applicable standards. In addition, hospitals must ensure that their health human resources (HR) are not only competent but also demonstrate professionalism. This is because high performance and *service quality* are the most important factors in achieving the quality of a health service.[6]

In principle, the provision of health services by a hospital is contingent upon the availability of qualified and adequate health human resources (HR), without which the objectives of the health service as a whole cannot be achieved.[7] They are required to be able to work in a loyal and professional manner.[8] This can be substantiated by reference to Article 291, Paragraph (1) of Law No. 17 of 2023 concerning Health, which states that "Every Medical and Health Worker in organizing health services is obliged to comply with professional standards, service standards, and standard operational procedures". Consequently, if hospital health human resources (HR) personnel engage in conduct that falls outside the scope of these standards, they may be deemed to have committed malpractice, specifically the improper professional actions of an individual

3 Dikir Dakhi and Dalinama Telaumbanua, "The Responsibility of Doctors and Hospitals to Patients." *Journal of Arrow Justice* 1 No. 1 (2022): 40, https://doi.org/10.57094/jpk.v1i1.444.

4 Riska Andi Fitriono, *et.al*, "Malpractice Law Enforcement Through Penal Mediation Approach." *Journal of Yustisia* 5 No. 1 (2016): 87, https://doi.org/10.20961/yustisia.v5i1.8724.

5 Abdul Bari Saifudin, *et.al*, *National Reference Book for Maternal and Neonatal Health Services - Edition. preparation 5*, (Jakarta: PT Bina Pustaka Sarwono Prawirohardjo, 2009), 18.

6 Maya Rahmayati Matondang, *et.al*, "Factors Related to the Quality of Health Services at Karadenan Health Center, Cibinong District, Bogor Regency in 2018." *Promoter: Public Health Student Journal* 2 No. 4 (2019): 277, https://doi.org/10.32832/pro.v2i4.2240.

7 Ricardo Goncalves Klau, *et.al*, "Hospital Civil Law Liability for Medical Actions of Partner Doctors Who Harm Patients." *e-Journalof Justinian Communication, Universitas Pendidikan Ganesha* 5 No. 3 (2022): 491-492, https://doi.org/10.23887/jatayu.v5i3.56323.

8 Dita Ayu Astuti, *et.al*, "Faktor-faktor yang Mempengaruhi *Burnout* pada Tenaga Kesehatan Instalasi Pelayanan Radiologi dan Kedokteran Nuklir RSUPN Cipto Mangunkusumo Tahun 2021." *Jurnal Kesehatan Masyarakat* 10 No. 1 (2022): 111, https://doi.org/10.14710/jkm.v10i1.32004.

in a position of trust.[9] In the field of medicine, malpractice can be defined as a mistake made d by hospital health workers (HR) in the course of their duties, which falls below the standards of professional conduct and operational procedure expected of them, and which results in adverse outcomes for patients.[10] These malpractice actions can occur either due to negligence or intentionality.[11]

The implementation of standard operational procedures at each hospital does not necessarily preclude the possibility of continued malpractice occurrences. Malpractice can generally happen anytime, anywhere, and to anyone, even to newborn babies. This assertion can be substantiated by the cases pertaining to the malpractice of health workers that resulted in the baby switched at birth incidents. Two notable instances include the cases at Bhakti Asih Hospital in Tangerang (2015) and Sentosa Hospital in Bogor (2023). Accoding to the information provided by the various hospital management entities, the incident in question can be attributed to the failure of health workers to adhere to established standard operational procedures (SOP). Negligence committed by health workers at Bhakti Asih Tangerang Hospital occurred during the process of handing over babies, while negligence committed by health workers at Sentosa Bogor Hospital occurred during the process of installing identity bracelets. When referring to the attached cases, it can be seen that the Health Workers at each Hospital have violated their obligations as stated in Article 274 of Law No. 17 of 2023 concerning Health, as well as violating the rights of Patients as stated in Article 276 of Law No. 17 of 2023 concerning Health.

The actions carried out by health workers at each of these hospitals can be classified as unlawful acts. This can be substantiated by reference to Article 1365 of the Civil Code, which defines unlawful acts as "Any act that violates the law and causes harm to others, obligating the person who caused the loss due to their fault to replace the loss." An act can be considered to be in against the law if the following fundamental criteria are met: (1) The act must exist; (2) The act must be in breach of the law; (3) An error (*schuld*) must be established; (4) Losses must be identified; and (5) A causal relationship (causality) must be demonstrated between the act in contravention of the law and the losses incurred. In addition to these criteria, an act may also be deemed unlawful if it infringes upon the subjective rights of individuals and the principles that govern social conduct, such as the principles of propriety, decency, prudence, and so forth. As previously stated, subjective rights are those recognized by law as belonging to every individual. These include, but are not limited to, the following: (1) Personal Rights (*persoonlijkheidsrechten*);(2) Right to Wealth (*vermogensrecht*); (3) Right to Freedom; and (4) Right to Honor and Good Name.[12]

In accordance with the aforementioned definition of unlawful acts, it is evident that individuals who inflict harm upon others are held accountable for providing compensation for the losses. The losses caused by an unlawful act are not only in the

9 Cecep Triwibowo, *Ethics & Health Law*, (Yogyakarta: Nuha Medika, 2014), 261.

10 Abdul Aziz A.H, "Criminology Review of Medical Malpractice Conducted by Nurses." |||UNTRANSLATED_CONTENT_START|||*Jurnal Ilmu Hukum Legal Opinion* 2 No. |||UNTRANSLATED_CONTENT_END|||3(2).

11 Sigit Lesmonojati, *Criminal Liability for Acts of Negligence in Medical Actions at Hospitals*, (Surabaya: PT. Scopindo Media Pustaka, 2020), 6.

12 Munir Fuady, *Unlawful Acts (Contemporary Approach*), (Bandung: PT. Citra Aditya Bakti.

form of material losses, but can also be immaterial losses such as fear, shock, pain, or loss of the pleasure of life.[13] In essence, the purpose of compensation liability is to rectify or redress violations of rights, as well as to provide a sense of assurance and legal protection for individuals who have incurred losses.[14] In practice, however, victims who have incurred losses as a consequence of an unlawful act, particularly within the healthcare sector, frequently fail to obtain redress for the losses they have sustained. It can thus be argued that there is a discrepancy between the legal facts and the provisions of the applicable laws and regulations.

In light of the aforementioned background explanation, it is deemed imperative to ensure legal certainty with respect to the losses incurred by patients as a result of malpractice perpetrated by hospital health workers. This is due to the fact that the patient, who in this case is a victim, is entitled to seek accountability for the losses he/she has incurred. Therefore, in this article, the author examined the following related topics: (1) the implementation of elements of unlawful acts against the malpractice actions of health workers leading to the baby swithced at birth incident; and (2) the accountability of hospitals to patients suffering losses as a result of the malpractice actions of health workers leading to the baby swithced at birth incident. The aim is to provide a comprehensive analysis of the legal problems associated with the baby swithced at birth incident resulting from malpractice by hospital health workers, and to identify effective dispute resolution processes. The research methodology employed in this article was normative-empirical legal research, which is a type of research that examines the implementation or enforcement of positive legal provisions (laws and regulations) on a specific legal event occurring in society.[15] In normative-empirical legal research, the type of data used is secondary data reinforced and supported by primary data. Secondary data was obtained through literature studies (*library research*), while primary data was obtained through interviews conducted with the management of South Tangerang BM Hospital and East Jakarta AH Hospital, as well as academics from Pelita Harapan University. The data was then analyzed qualitatively and used an approach to systematics and case law (*case study*).

2. ANALYSIS AND DISCUSSION

2.1. The Implementation Of Elements Of Unlawful Acts Against The Malpractice Actions Of Health Workers Leading To The Baby Swithced At Birth Incident

2.1.1. Standard Operating Procedures (SPO) in Providing Identity to Newborns

According to Article 3 jo. Article 4 of the Regulation of the Minister of Health No. 53 of 2014 on Essential Neonatal Health Services, self-identification is a form of essential neonatal service from 0 (zero) to 6 (six) hours, so it can be interpreted that self-identification is given as much as possible directly at the time of newborn.

13 Rosa Agustina, *Deeds Against the Law*, (Jakarta: Postgraduate Program, Faculty of Law, University of Indonesia, 2003), 53.

14 Razi Mardhika and Muhammad Faiz Mufidi, "Hospital Responsibility for Negligent Acts Committed by Nurses in Giving Medicine to Patients is Linked to Law Number 44 of 2009 concerning Hospitals." *Bandung Conference Series: Law Studies* 3 No. 1 (2023): 529, https://doi.org/10.29313/bcsls.v3i1.5041.

15 Muhaimin, *Legal Research Methods*, (NTB: *Mataram University Press*, 2020), 115.

In general, health worker responsible for overseeing the birth will proceed to affix the identification bracelet to both the mother and the baby. The identity nformation inscribedon the bracelet comprises the full name, date of birth, medical record number, name of Medical Personnel/Doctor in Charge of the Patient (DPJP). Additionally, the bracelet isequipped with a barcode. It is noteworthythat the color of the identity bracelet is gender-specific. Female babies will have a pink ID bracelet, while male babies will have a blue ID bracelet.

It is recommended that the ID bracelet be placed on the baby in the presence of the infant's parents or family members.. This is in line with the provisions as stipulated in Article 293 Paragraph (1) of Law No. 17 of 2023 concerning Health, which states, "Every individual health service action carried out by Medical and Health Personnel must obtain approval". However, before placing the bracelet, the Health Worker in charge will ensure and confirm the correctness of the identity listed on the bracelet with the hospital's administrative data. Additionally, the health worker will inquire about the identity of the mother and infant to ensure its accuracy (double check). It is imperative that the parents or family of the infant pay close attention during the identity matching process to ensure the accuracy and precision of the identification procedure. Then if it is appropriate, the Health Worker in charge will promptly affix the identity bracelet. After the identity bracelet is put on the mother and baby, medical personnel, especially pediatricians, will conduct a brief screening to ensure that the baby's condition and response are safe, and do not show any symptoms of abnormalities in both organs (congenital) and non-organs (stabl). If the baby's condition and response are declared safe, the Medical Personnel in charge will immediately transfer the baby and mother to the rooming in area. This facilitates the formation of a bond between the mother and the baby (early mother - infant bonding), as well as the implementation of early breastfeeding initiation (IMD).[16] Meanwhile, if there are symptoms of abnormality, an observational examination of the baby will be performed first.

The identity bracelet that has been put on must always be worn by the mother and the baby until they are permitted to go home. When the mother and baby are permitted to go home, the baby handover process will be carried out by the Medical Personnel in charge. During the handover process, the bracelet will be removed in the presence of the baby's parents or family. Prior to this, the Health Worker will ascertain the accuracy of the correctness of the identity of the mother and baby. This will entail a comparison of the identity stated on the bracelet with that recorded on the infant's birth certificate, as well as the posing of questions pertaining to the identity of the mother and infant at the time the bracelet was initially placed..

2.1.2. Factors Causing the Baby Swithced at Birth Incidents

In general, every hospital is familiar with the term patient safety incidents (IKP), which encompasses any event with the potential to cause or result in harm (including illness, injury, disability, death, loss, etc.), which could have been prevented or should

16 Merni Princess Laowo, *et.al*, "Hubungan Pelaksanaan *Rooming In* pada Ibu Nifas dengan Peningkatan Frekuensi Pemberian ASI di RSU Royal Prima Medan Tahun 2022." *Jurnal Ilmiah Kebidanan Imelda*, 9 No. 1 (2023): 8, https://doi.org/10.52943/jikebi.v9i1.1147.

not have occurred.[17] In patient safety incidents, incidents can be classified according to their severity. These categories encompass a range of incidents, from the mildest to the most severe, or fatal, incidents. The following are examples of such incidents::[18]

1. Potential Injury Event (KPC);

This condition has the potential to cause injury, but there has not been an incident.

2. Near Injury Event (NM);

An incident occurs but not to the Patient, resulting in no injury.

3. Incidents Not Injured (KTC);

An incident has occurred to the Patient, but resulting in no injury.

4. Unexpected Events (KTD);

An incident resulting in unintended injury to the Patient, whether caused by action or inaction..

5. Sentinel Event.

An incident that falls under the category of an Unexpected Event (KTD) that is fatal to the point of causing serious injury or death.

In the context of baby swithed at birth, such incidents are classified as sentinel events. This designation is justified by the fact that baby switched at birth is a very fatal incident and should never be avoided.

The baby sitched at birth incident often occurs due to negligence on the part of the hospital's health human resources. However, there are also several other factors that can lead to the occurrence of baby switched at birth incident, including: (1) standard operating procedure (SPO); (2) human resources (HR); and (3) other supporting factors. The standard operating procedure (SPO) factor refers to the contention that the standard operating procedures (SPO) implemented in the hospital are inadequate and not in accordance with generally accepted standards. In regard to the term generally applicable, it is a standard operating procedure (SPO) that refers to Law No. 17 of 2023 concerning Health, Minister of Health Regulation No. 11 of 2017 on Patient Safety, and a multitude of other relevant literature, including Joint Commission National Patient Safety Goal (NPSG.01.01.01) regarding Newborn Identification (2019). With regard to the human resources (HR) factor, it can be stated that there are instances of negligence or deliberate violation of standard operating procedures (SOP) by HR personnel in a hospital setting. Alternatively, the issue may be attributed to the competence of the HR personnel employed.. Meanwhile, what is meant by supporting factors is such as equipment, supplies, and other facilities both for medical and non-medical purposes.

Factors as described above are valuable assets of the Hospital. These factors also support and influence the quality and service excellence of a hospital. In order to elevate the quality and service excellence of their facilities and prevent undesirable occurrences, hospital owners must demonstrate the courageto invest resources, both in their human resources (HR), as well as in other supporting resources. The investment in human resources (HR) referred to in this case is by conducting periodic socialization, training,

17 Agus Aan Adriansyah, *et.al*, "Analisis Insiden Keselamatan Pasien di Rumah Sakit berdasarkan Pendekatan Beban Kerja dan Komunikasi." *Jurnal Manajemen Kesehatan Indonesia* 9 No. 3 (2021): 183, https://doi.org/10.14710/jmki.9.3.2021.183-190.

18 Liza Salawati, "Penerapan Keselamatan Pasien Rumah Sakit." *Jurnal Averrous* 6 No. 1 (2020): 100, https://doi.org/10.29103/averrous.v6i1.2665.

and supervision. Investment in human resources (HR) is one of the most important things in an effort to improve the quality and service excellence of hospital. It can be argued that an effectively empowered workforce is a crucial element in maintaining and improving the performance and productivity of an organization.[19] Meanwhile, investment in other resources can be in the form of good and adequate information technology (IT) facilities.

2.1.3. Implementation of Elements of Unlawful Acts against the Malpractice of Healthcare Personnel Resulting in Baby Switched at Birth Incidents

Hospitals are health service facilities that have an important role in achieving the highest level of public health.[20] Further stated in Article 1 Number 10 of Law No. 17 of 2023 on Health, that:

"Hospital is a health care facility that organizes comprehensive individual health services through promotive, preventive, curative, rehabilitative, and/or palliative health services by providing inpatient, outpatient, and emergency services".

In practice, the Hospital as one of the institutions that provides health service facilities is obliged to prioritize patient safety. This is clearly stated in Article 173 Paragraph (1) letter b of Law No. 17 of 2023 on Health that health service facilities are obliged to provide quality health services and prioritize patient safety.

Patient safety is the most important indicator in the health care system, which is expected to be a reference in producing optimal health services and reducing the possibility of patient safety incidents (IKS) which include: (1) Potential Injury Event (KPC; (2) Near Injury Event (KNC); (3) Incidents Not Injured (KTC); (4) Unexpected Events (KTD); and (5) Sentinel Event (KS).[21] In terms of patient safety, there are terms known as patient safety targets. The target consists of 6 (six) action points that must be carried out properly and correctly, including:[22]

1. Patient Identification Accuracy;
2. Improvement of Effective Communication;
3. Improved Safety of High-Alert Drugs;
4. Right-Site, Right-Procedure, and Right-Patient Assurance of Surgery;
5. Reduction of Infection Risk related to Health Services;
6. Reduction of the Risk of Patients Falling.

In regard to the baby switched at birth incident, it can be stated that a patient safety objective was not fulfilled with the requisite degree of precision and accuracy, specifically with regard to the accurate identification of patients. The target of patient safety (SKP) in terms of the accuracy of patient identification is very much needed in handling newborns, especially in providing identity. Health workers in charge of this

19 Didik Setiyawan, *et.al*, "Dampak Penerapan Standar Operasional Prosedur (SOP) Terhadap Kinerja Karyawan Rumah Sakit Umum Radjak Hospital Salemba." *MUFAKAT: Jurnal Ekonomi, Manajemen, dan Akuntansi* 2 No. 2 (2023): 3.

20 Sudirman, *Kualitas Pelayanan Rumah Sakit*, (Yogyakarta: PT Leutika Nouvalitera, 2016), 2.

21 Muhdar, *et.al*, *Manajemen Patient Safety*, (Klaten: Tahta Media Group, 2021), 1.

22 Andryani Larasati dan Inge Dhamanti, "Studi Literatur: Implementasi Sasaran Keselamatan Pasien di Rumah Sakit di Indonesia." *Jurnal Media Gizi Kesmas* 10 No. 1 (2021): 139, https://doi.org/10.20473/mgk.v10i1.2021.138-148.

matter must be able to truly ensure that the identity provided is appropriate, n order to prevent any adverse consequences.

As previously explained, Article 173 Paragraph (1) letter b of Law No. 17 of 2023 on Health states that in addition to being obliged to prioritize patient safety, health service facilities, in this case hospitals, are also required to provide quality health services. The quality of hospital services is determined by several factors, one of which is the human resources (HR) factor. In the provision of health services, hospitals must in principle be supported by qualified and adequate health human resources (HR) so that the overall goal of a health service can be achieved. Health human resources (HR) encompasses a range of professionals within the hospital, including but not limited to health workers. Health workers have a very important role in the implementation of health services. They are required to be able to work in a loyal and professional manner. This can be substantiated by reference to Article 291, Paragraph (1) of Law No. 17 of 2023 concerning Health, which states that "Every Medical and Health Worker in organizing health services is obliged to comply with professional standards, service standards, and standard operational procedures". However, when referring to the baby switched at birt incidents as attached to the background above, it can be seen that the Health Workers at each of these Hospitals had failed to fulfill their responsibilities in a satisfactory manner. Moreover, as a result of such negligence, it caused harm to the patients. It can therefore be argued that the actions of the health workers at each hospital constituted an unlawful act. (PMH).

An unlawful act (onrechtmatige daad) is an act that is contrary to the rules and regulations of the law, and as a result of the act, causes harm to others. An act can be said to be against the law if the act fulfills the following elements, among others: : (1) The act must exist; (2) The act must be in breach of the law; (3) An error (*schuld*) must be established; (4) Losses must be identified; and (5) A causal relationship (causality) must be demonstrated between the act in contravention of the law and the losses incurred. The actions of Health Workers in the baby switched at birt incidents as attached to the background above can be said to be unlawful because they fulfilled the elements as mentioned. The fulfillment of these elements is as follows[23]:

1. The existence of an act

   An unlawful act can occur because it begins with an act (*daad*) committed by the perpetrator. The action in question can be either doing something (in the active sense) or not doing something (in the passive sense). When referring to the cases of baby switched at birt incident as attached to the background above, it becomes evident that the actions involved can be classified as either inaction or, alternatively, as passive actions.. The passive action in this case means a situation in which an individual abstains from taking a specific action, despite being legally obligated to do so.. The passive action that causes the baby switched at birt incident is the absence of double check of the baby's identity. This is because the standard operating procedures (SPO) that apply in general to the provision of identity to newborns require that, prior to the installation of an identity bracelet, its release,

23 Zico Junius Fernando, *Pertanggungjawaban Pidana Rumah Sakit Terhadap Malapraktik Tenaga Medis (Sebuah Tinjauan Ius Constitutum dan Ius Constituendum)*, (Makassar: PT. Nas Media Indonesia, 2021), 91-101.

or the handing over of the baby to parents or family, the responsible health worker must match or re-confirm the identity data listed on the bracelet and ascertain its correctness.

The data matching process encompassednot only the hospital's administrative data, but also information obtained from the parents or family of the baby through the questions asked. These questions were not limited to binary responses, such as yes or no, but rather encompassed a range of detailed information, including the infant's full name, date of birth, and other pertinent details. In light of the aforementioned explanation, it becomes evident that the primary factor contributing to the occurrence of errors in the transfer of the baby and the attachment of identity bracelets is the failure to perform a double check of the baby's identity as observed in at both Bhakti Asih Tangerang Hospital and Sentosa Bogor Hospital..

2. The act is against the law

An act can be said to be against the law if the act not only violates the applicable laws and regulations, but also contradicts the rights of others, their own legal obligations, decency, and principles recognized in a society. As previously described, it can be seen that the baby switched at birth incident was caused by by the failure to do double checking to verify the identity of the baby.. This action clearly violates the standard operating procedures (SPO) in providing identity to newborns referring to Law No. 17 of 2023 concerning Health, Minister of Health Regulation No. 11 of 2017 on Patient Safety, and a multitude of other relevant literature, including the Joint Commission National Patient Safety Goal (NPSG.01.01.01) regarding Newborn Identification (2019).

With the violation of standard operating procedures (SPO) in providing identity to newborns, it can be posited that the actions of the aforementioned health workers are in direct contravention of the following::

1) Obligations of Health Workers as stipulated in Article 274 letter a of Law No. 17 of 2023 concerning Health, which is:

"Medical and Health Workers in carrying out mandatory practices:

a. Provide health services in accordance with professional standards, professional service standards, standard operating procedures, and professional ethics as well as the health needs of Patients".

2) Rights of the Patient as stipulated in Article 276 letter c of Law No. 17 of 2023 concerning Health, which is:

"The patient has the right to: "Obtain health services in accordance with medical needs, professional standards, and quality services".

In addition to contradicting the obligations of health workers and the rights of patients as described, the failure to do double checking to verify the identity of the baby is also clearly contrary to the principle of prudence. This can be substantiated by the fact that, in essence, Health Workers as one of the Hospital's health human resources (HR) who take part in the delivery of health services

aimed at the public must always consider their actions and decisions based on standard operating procedures (SPO) made and enforced in each Hospital.[24] Therefore, if the standard operating procedures (SPO) in providing identity to babies are violated, it can be concluded that the Health Workers in charge have not exercised the requisite degree of prudence in the fulfillment of their obligations and responsibilities.

3). The existence of faults

In addition to the elements of an act and the act being against the law, an act can be considered to be against the law if the act also fulfills the element of fault. In this context, the term "fault" can be understood to encompass a range of behaviors, including intentional actions, negligence, and instances where there is a lack of justification or excuse. Intentionality is an act that stems from the perpetrator's intention to cause harm to the victim, or at least being clearly aware that their actions may cause harm. Negligence is an act that is carried out without the intention of the perpetrator to cause harm. While there are no justifying or excusing reasons, it is an act committed not because of overmacht, not for self-defense in an emergency situation, not because of the obligations of the law, and not because of following orders from superiors. When referring to actions as previously described, it can clearly be seen that the failure to do double checking to verify the identity of the baby is a form of negligence. It is because basically, negligence is is the failure to fulfill a duty of care.

Duty of care is the obligation to provide good and reasonable health services. To be able to provide good and reasonable health services, Health Workers in a Hospital are required to organize health services in accordance with applicable standard operating procedures (SPO). It is because standard operating procedures (SPO) are made to help health workers working systematically and structured, and acting carefully to avoid the possibility of patient safety incidents (IKS), especially those that are fatal such as the baby switched at birth incident. From this explanation, it can be seen that the failure to do double checking to verify the identity of the baby has fulfilled the main elements of negligence which include: (1) the existence of a duty of care; (2) the failure to perform the duty of care; (3) the existence of harm to others; and (4) the existence of a causal relationship between the act or omission and the harm caused.

4). The existence of losses

An act can be said to be against the law if the act causes harm to others. [25] The losses incurred can be classified into two categories: material and immaterial. Material losses are quantifiable in monetary terms, whereas immaterial losses are not. Instead, they are assessed on the basis of an estimation, with the objective

24 Emmy Latifah, "*Precautionary Principle* sebagai Landasan dalam Merumuskan Kebijakan Publik." *Jurnal Yustisia* 5 No. 2 (2016): 277, https://doi.org/10.20961/yustisia.v5i2.8742.

25 Rini Dameria, *et.al*, "Perbuatan Melawan Hukum dalam Tindakan Medis dan Penyelesaiannya di Mahkamah Agung (Studi Kasus Perkara Putusan Mahkamah Agung Nomor 352/PK/PDT/2010)." *Diponegoro Law Journal* 6 No. 1 (2017): 5, https://doi.org/10.14710/dlj.2017.15542.

of restoring the aggrieved party to the position they would have been in had the unlawful act not occurred.[26]

When referring to the baby switched at birth incident as described earlier, it can be seen that the incident occurred due to the failure of double checking the identity of the baby. As a result of this action, the patient in this case will undoubtedly suffer losses, both material and immaterial. The estimated losses experienced by these patients are as follows:

1) Material Loss
   a. Costs that have been incurred for labor as well as treatment while in the hospital, which turns out that the service provided is not in accordance with the expected standard of care;
   b. Costs that have been incurred to take care of the baby who turns out not to be their biological child; and
   c. Costs that have been incurred for case management needs.
2) Immaterial Loss
   a. Feeling sad, worried, disappointed, uneasy, and losing the joy of life, because they cannot take care of and provide exclusive breast milk to their biological babies, as well as their babies cannot get the right to exclusive breast milk from their biological mothers as stated in Article 42 Paragraph (1) of Law No. 17 of 2023 concerning Health that, "Every baby has the right to get exclusive breast milk from birth until the age of 6 (six) months, except for medical indications"; and
   b. The time, thought, and energy expended to resolve this matter.

3). There is a causal relationship between the unlawful act and the loss incurred

As explained earlier, it is said that an act is against the law if the act causes harm to another person. This condition is referred to as a causal relationship. The concept of causality is of significant importance in determining whether the loss was a direct consequence of an unlawful act. This, in turn, allows for the identification of the perpetrator who committed the unlawful act and caused the loss, thus enabling them to be held legally liable.. When referring to the actions as previously described, it can be clearly seen that there is a causal relationship between these actions and the losses suffered by the Patient. In this case, the element of cause pertains to the negligence of health workers in fulfilling their duty of care, specifically the failure to confirm the identity of the infant. The element of consequence, as previously discussed, encompasses the material and immaterial losses incurred by the patient as a result of this negligence.

To be able to realize the element of causality, there are several theories used, including: (1) *Conditio Sine Quanon* - (Cause In Fact); (2) Adequate Theory - (Proximate Cause); (3) *Teorekening Naar Redelijkheid* - (proper liability); (4) *Schutznorm Theory* - (Relativity Theory); and (5) *Aanprakelijkheid Theory* - (Substitute Liability Theory). If the acts and losses as previously described are linked to the theory of causality, then the most appropriate theory with regard to this is the theory of liability / vicarious liability (*aanprakelijkheid theory*). It can

26 Ronald Fadly Sopamena, "Kekuatan Hukum MoU dari Segi Hukum Perjanjian." *Batulis Civil Law Review* 2 No. 1 (2021): 10, https://doi.org/10.47268/ballrev.v2i1.451.

be posited that, given the fact that health workers are under the auspices of the hospital, any losses incurred by patients as a consequence of errors made by health workers—whether the result of intent or negligence—are the responsibility of the hospital. This is in accordance with the understanding of the theory of vicarious liability that, generally, it is the perpetrator who is held liable for losses arising from unlawful acts. In certain instances, however, it is the guardian or other individual entrusted with the care of the perpetrator who is held accountable for the perpetrator's unlawful actions. This theory is generally used to determine who should be held liable for losses arising from an unlawful act.

2.2. The Accountability Of Hospitals To Patients Suffering Losses As A Result Of The Malpractice Actions Of Health Workers Leading To The Baby Swithced At Birth Incident

2.2.1. Hospital Liability

In general, hospital liability is closely related to the doctrine of vicarious liability. It is a doctrine that understands a person may be held liable for the harm caused by another person's actions.[27] This is also clearly stated in Article 1367 of the Civil Code, which is:

"A person is liable not only for damages caused by his own acts, but also for damages caused by the acts of the dependents or by goods under his supervision".

According to the doctrine of vicarious liability, the Hospital as a health institution with main function to provide care and treatment services (cure and care), is responsible for all events that occur within the scope of its area including but not limited to the losses incurred.[28] This is in accordance with the provisions as stated in Article 193 of Law No. 17 of 2023 on Health, which states, "The Hospital is legally responsible for all losses incurred for negligence committed by Hospital Health Human Resources". Nevertheless, the necessity for proof must be established.

In regard to the matter of proof, it should be noted that the process encompasses a number of distinct stages. The initial stage of the process entails the submission of a report to the Hospital including the Director, Quality Committee, & Owner. After receiving the report, the hospital will conduct an internal audit using the Root Cause Analysis (RCA) method, particularly given that the baby switched at birth is a sentinel event category, necessitating an exhaustive investigation. After the investigation, the results of the conclusion in the form of recommendations will be presented. From these recommendations, discerned where errors have occurred, the underlying causes of these errors, the corrective measures that will be implemented in the future, and the policies that will be put in place, including, but not limited to the form of liability.

Basically, the liability given for an unlawful act (PMH) is in the form of compensation. This is in accordance with the provisions as stated in Article 1365 of the Civil Code that, "Any act that violates the law and causes harm to others, obligating the person who caused the loss due to their fault to replace the loss". The nominal amount and form

27 Sutan Remy Sjahdeni, *Pertanggungjawaban Pidana Korporasi*, (Jakarta: PT. Grafiti Pers, 2006), 84-85.

28 Kurniawan Sinambung Agung, "Pertanggungjawaban Rumah Sakit J.K. atas Kelalaian dalam Pelayanan Kesehatan terhadap Pasien Ditinjau dari Undang-Undang No. 44 Tahun 2009 tentang Rumah Sakit." *Jurnal Sapientia Et Virtus* 4 No. 1 (2019): 4.

of compensation will be adjusted to the recommendations of the investigation results and the agreement of the parties through the mediation process (settlement mediation). It can be argued that, in resolving medical disputes, mediation and restorative justice should be given precedence, with legal remedies, particularly criminal ones, can be used as a last resort (ultimum remedy).. Settlement mediation or commonly known as compromise mediation is a mediation with main purpose to encourage the realization of a compromise of the demands of both parties in dispute.[29] The objective of mediation is to identify the optimal solution, which is contingent upon the circumstances and conditions of the parties involved.. This is also in line with the provisions as stated in Article 1371 of the Civil Code that, " this compensation is also assessed according to the position and ability of both parties and according to the circumstances". Therefore, it can be said that the nominal amount of compensation must be adjusted to the conditions of the parties, so it must be calculated fairly and proportionally.[30]

2.2.2. Hospital Liability to Patients who suffer Losses as a result of the Malpractice of Healthcare Personnel Resulting in the Newborns Switched

Unlawful acts (PMH) can generally occur at any time and anywhere, even in hospitals which in practice always prioritize good faith and strive for the maximum possible health services (*inspanning verbintenis*). As explained earlier, it can be seen that the loss is a result of an unlawful act. Basically, the liability given for an unlawful act is liability in the form of compensation. This is clearly regulated in Article 1365 of the Civil Code, namely, "Any act that violates the law and causes harm to others, obligating the person who caused the loss due to their fault to replace the loss". Compensation liability is actually carried out with the aim of restoring or returning rights that have been violated, as well as a form of certainty as well as a guarantee of legal protection for people who experience losses. In law, compensation does not always have to be in the form of money. It is because, accoding to the Hoge Raad Decision dated May 24, 1918, "the most appropriate compensation for an illegal act is to restore the situation as it was before the illegal act occurred".[31] In fact, in addition to compensation in the form of money, there are several other types of possible liability, such as including:[32]

1) Compensation in *natura* or restoration to the original condition[33];
2) A statement that the act committed is unlawful;
3) Stipulation of a prohibition against committing an act;
4) Cancellation of something that is done unlawfully; and
5) Notification of a decision or improvement that has been made.

29 Revy S. M. Korah, "Mediasi merupakan Salah Satu Alternatif Penyelesaian Masalah dalam Sengketa Perdagangan Internasional." *Jurnal Hukum Unsrat* 21 No. 3 (2013): 35.

30 Hery Zarkasih, "Pelaksanaan Prinsip Keadilan dalam Pemberian Ganti Rugi Pengadaan Tanah untuk Kepentingan Umum (Studi Kasus Pelebaran Jalan Raya di Kota Praya Kabupaten Lombok Tengah)." *Jurnal IUS: Kajian Hukum dan Keadilan* 3 No. 8 (2015): 390, https://doi.org/10.12345/ius.v3i8.219.

31 Rai Mantili, "Ganti Kerugian Immateriil terhadap Perbuatan Melawan Hukum dalam Praktik: Perbandingan Indonesia dan Belanda." *Jurnal Ilmiah Hukum De'Jure* 4 No. 2 (2019): 309.

32 Sri Redjeki Slamet, "Tuntutan Ganti Rugi Dalam Perbuatan Melawan Hukum: Suatu Perbandingan dengan Wanprestasi." *Lex Jurnalica* 10 No. 2 (2013): 113, https://doi.org/10.47007/lj.v10i2.359.

33 Zarkasih, Hery. "Pelaksanaan Prinsip Keadilan dalam Pemberian Ganti Rugi Pengadaan Tanah untuk Kepentingan Umum (Studi Kasus Pelebaran Jalan Raya di Kota Praya Kabupaten Lombok Tengah)." *Jurnal IUS: Kajian Hukum dan Keadilan* 3 No. 8 (2015): 390. https://doi.org/10.12345/ius.v3i8.219

When referring to the baby switched at birth incident as described earlier, it can be seen that the loss suffered by the Patient was caused by negligence committed by the Hospital Health Worker. In this regard, the party charged with compensation liability is the Hospital. As it can be stated that because Health Workers are under the auspices of the Hospital, all losses suffered by Patients as a result of mistakes made by their Health Workers are the responsibility of the Hospital, as stated in Article 193 of Law No. 17 of 2023 on Health, namely, "The Hospital is legally responsible for all losses caused by negligence committed by the Hospital's health human resources", but the necessity for proof must be established.[34] Based on this description, it can be seen that the principle of hospital liability is closely related to the doctrine of vicarious liability. It is a doctrine that understands a person may be held liable for the harm caused by another person's actions, as stated in Article 1367 of the Civil Code that:

> *"A person is liable not only for damages caused by his own acts, but also for damages caused by the acts of the dependents or by goods under his supervision".*

It is because the doctrine of vicarious liability posits that if a person performs an action through another person, then the action can be considered as an action carried out by the person himself.[35]

In the event of a medical dispute, the hospital can, in theory, be held legally liable for its actions. This includes:

1. Administrative Liability

   Administrative liability refers to the responsibility incurred for a violation of administrative regulations. In the context of healthcare, this typically pertains to licensing requirements, such as permits for the establishment or operation of a Hospital, or for practice from human resources (HR) within the Hospital's healthcare systems.
2. Criminal Liability

   Criminal responsibility refers to the responsibility imposed for the existence of an offense that fulfills the elements of a criminal offense, which include: (1) the existence of a subject; (2) the existence of an element of fault (*dolus/culpa*); (3) the act is against the law; (4) the act is prohibited or required by law; (5) the violator is punishable; and (6) in a certain time, place, and condition.
3. Civil Liability

   Civil liability refers to the liability imposed for a violation that is committed within the private sphere.. Generally, the liability is in the form of compensation for losses resulting from breaches of duty or unlawful actions. (PMH).

   When considering the baby switched at birth incident as described earlier, it becomes evident that the failure to do double cheking the identity of the infant in question constitutes a violation of the law... With the fulfillment of these elements, in this case, the patient who suffered a loss is entitled to file a civil lawsuit against the hospital. The

34 Billy Imanuel Mingkid, "Implikasi Yurdis Pasal 46 UU No 44 Thn 2009 Tentang Rumah Sakit Terhadap Kelalaian Yang Dilakukan Tenaga Kesehatan Dalam hal Ini Tenaga Medis." *Jurnal Lex Et Societatis* 8 No. 1 (2020): 51, https://doi.org/10.35796/les.v8i1.28471.

35 Sekar Ayu Dita dan Atik Winanti, "Analisis Asas *Vicarious Liability* dalam Pertanggungjawaban Penganti atas Perbuatan Melawan Hukum Pegawai Bank." *Jurnal USM Law Review* 6 No. 2 (2023): 527, http://dx.doi.org/10.26623/julr.v6i2.7037.

lawsuit was filed with the objective of securing compensation for the patient.[36] Prior to the filing of a lawsuit, an attempt at resolution through non-litigation is typically made, as outlined in Article 310 of Law No. 17 of 2023 concerning Health, which is:

"In terms of Medical Personnel or Health Personnel allegedly making mistakes in carrying out their profession that cause harm to the Patient, disputes arising from such mistakes are first resolved through alternative dispute resolution outside the court".

It is because, ideally, medical dispute resolution should not take long, expensive, and lengthy procedures.[37] Therefore, it should be resolved first through non-litigation procedures before making further efforts.[38] Moreover, the losses incurred are not caused by deliberate intent, so there is no need to impose severe liability.

In general, dispute resolution through non-litigation is aimed at achieving a win-win solution, because the parties in this case have the opportunity to submit proposals according to their respective interests.[39] It is important to note, however, that for the results of an agreement or peace agreement obtained through a dispute resolution process that does not involve litigation to have the same legal certainty as a court decision, it must be set forth in a deed of peace.. It is because the results of an agreement or peace agreement that has been confirmed and its status becomes a deed of peace (*acte van dading*) has the same power as a court decision with permanent legal force (*inkracht van gewijsde*). This is to say that they are binding and final, possess perfect evidentiary power, and are executorial.[40]

Based on this explanation, it can be seen that the provisions related to the liability of the Hospital for a malpractice action carried out by health human resources (HR) have been clearly regulated. With this provision, it is expected to provide legal certainty to Patients who in this case have suffered losses as a result of malpractice actions carried out by Hospital Health Workers. The provision is intended to safeguard individuals against arbitrary actions, thereby enabling them to secure their legitimate rights..[41]

3. CONCLUSION

As can be seen, the main cause of baby switched at birth incidents was generally due to the failure of double checking the identity of the baby, considered as unlawful act. It is because the act had fulfilled the main elements which include: (1) The existence of an act; (2) The act is against the law; (3) The existence of fault; (4) The existence of loss; and (5) The existence of a causal relationship between the unlawful act and the loss incurred. With the fulfillment of elements of unlawful acts, the Patients who in this case

36 Jeveline Mende, *et.al*, "Perlindungan Hukum terhadap Pasien Rawat Inap sebagai Konsumen Jasa Pelayanan Kesehatan." *Jurnal Lex Administratum* XII No. 5 (2023): 9.

37 Kastania Lintang, *et.al*, "Kedudukan Majelis Kehormatan Disiplin Kedokteran Indonesia dalam Penyelesaian Sengketa Medis." *Volksgeist: Jurnal Ilmu Hukum dan Konstitusi* 4 No. 2 (2021): 170, https://doi.org/10.24090/volksgeist.v4i2.5267.

38 Jovita Irawati, "Inkonsistensi Regulasi di Bidang Kesehatan dan Implikasi Hukumnya terhadap Penyelesaian Perkara Medik di Indonesia." *Jurnal Law Review* XIX No. 1 (2019): 55, http://dx.doi.org/10.19166/lr.v19i1.1551.

39 Muhammad Afiful Jauhani, *et.al*, "Kepastian Hukum Penyelesaian Sengketa Medis melalui Mediasi Luar Pengadilan." *Jurnal Welfare State* 1 No. 1 (2022): 30, https://doi.org/10.56013/welfarestate.v1i1.1470.

40 A. Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama*, (Jakarta: Raja Grafindo, 2001), 95.

41 Siti Halilah dan Mhd. Fakhrurrahman Arif, "Asas Kepastian Hukum Menurut Para Ahli." *SIYASAH: Jurnal Hukum Tata Negara* 4 No. 2 (2021): 61.

suffered losses as a result of malpractice actions carried out by Hospital Health Workers have the right to ask for liability to the Hospital.

In regard to the liability of the hospital, the actual liability of the hospital encompasses administrative, civil, and criminal liability. In the event of a baby switched at birth incident as described earlier, the patient who suffered a loss could ask for civil liability to the Hospital by submitting a lawsuit. However, Prior to the filing of the lawsuit, efforts were made to resolve the matter through non-litigation in order to achieve a mutually beneficial outcome.. Based on this explanation, it can be seen that the provisions related to the liability of the Hospital for a malpractice action carried out by health human resources (HR) have been clearly regulated. With this provision, it is expected to provide legal certainty to Patients who in this case have suffered losses as a result of malpractice actions carried out by Hospital Health Workers.

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