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## The Application of Article 359 of the Criminal Code In the Investigation of the Death of Post-Operative Patients (Juridical Analysis: Case of the Death of Three Patients in the MHP Hospital, Lampung)

I Ketut Seregi<sup>1</sup>

**Abstract:** The incident of the death of three post-operative patients in a line at the MHP hospital, Lampung on April 5, 2016 had emerged the decline of public confidence toward hospitals, both public and private hospitals. The symptoms in the patients' body before they died were convulsed and decreased consciousness. Based on dr. AA, Sp.An., if post-operative impact occurs, then a person who takes responsibility is an anesthesiologist. This means that responsible for the death of these patients was the doctor who performed anesthesia before the operation. All three patients, who died after operation in MHP Hospital, respectively, were Mr. RM suffered from varicose; Mr. S the patient with a tumor in the left leg calf; and Mrs. DP who performed a caesarean section. These patients underwent a convulsion and decreased consciousness after operation, although the anesthesiologist had tried to save their life. Yet, these patients died. During the operation, the doctor had operated with the use of Standard Operating Procedures. Based on the information from the Chairman of IDI and the Chairman of MKEK, they said that dr. EP, Sp. An. As the anesthesiologist had done the right procedures in doing anesthetic injection to these patients. During the investigation process conducted by the Regional Police of Lampung, toward dr. EP, Sp. An., he was presupposed in violation of Article 359 of the KUHP which stated "whoever due to his negligence has caused another person's death, will be sentenced with a maximum imprisonment of five years." In a juridical study over Article 359 of the Criminal Code committed by the writer in the cases described above, it can be concluded that the element of "negligence" as the main requirements of this article "is not fulfilled". Thus, this article applied in this case does not meet the main requirement of criminal elements which is presupposed, and the investigation process is terminated.

**Keywords:** Anesthesia; Convulsion; Die; Operation.

### ARTICLE HISTORY :

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### INTRODUCTION

On April 5, 2016, medical world in Indonesia was shocked by the death cases of three patients in surgery performed in MHP Hospital, Lampung. All three patients were RM suffered from *varicose*; Mr. S patients with a tumor in the left leg calf; and Mrs. DP who did the operation *sescio ciceasria*. These malpractice cases,

carried out by a team of doctors who conducted the operation at MHP Hospital, had spread widely, because there was a short message using Whatsapp:

*“Temporarily, generic bupivacaine spinal from Bernofarm brand should not be used, because there was a case in Pringsewu that three patients died convulsively after spinal yesterday, this case would be followed to the IDI-DINKES (Indonesian Doctors Association - Public Health Department) Lampung and PERDATIN Center (Specialist Doctors Association of Anesthesiology and Intensive Therapy Indonesia)”.*

The death case of three post-operative patients in a line at MHP Hospital, Lampung had emerged in the decline of public confidence toward hospitals, both public and private hospitals. The symptoms in the patients' body before they died were convulsed and decreased consciousness. Based on dr. AA, Sp.An (an anesthesiologist), if post-operative impact occurs, then a person who takes responsibility is an anesthesiologist. This means that responsible for the death of these patients was the doctor who performed anesthesia before the operation. Related to this case, the person who was responsible in surgery was dr. EP, Sp.An. as the anesthesiologist.

First, the chronology of RM's dead was on April 4, 2016 at 15:30 using WIB format (West Indonesian Time). He had been given anesthesia by an anesthesiologist, dr. EP, Sp. An.; at 15:30, the patient entered the operation room with the condition in general: full consciousness (*sensorium compos mentis*), BP (BP): 110/80 mmHg, HR (Heart Rate): 82 times/min,

RR (Respiration Rate): 14 times/min <SpO<sub>2</sub> (peripheral capillary oxygen saturation): 96% with binasal cannula. At 15:45, the patient was asked to sit and then injected to his back with a spinal needle number 25, contained bupivacaine 3cc, then he put to sleep in full consciousness with supine position, BP: 100/70 mmHg, HR: 102 times/min, RR: 12-14 times/min, SpO<sub>2</sub>: 94-96% with binasal cannula. At 16:45, the operation was completed and he was transferred to recovery room, at this time the patient was full consciousness, BP: 110/80 mmHg, HR 84/min, RR: 14 times/min, SpO<sub>2</sub>: 96% with binasal cannula.

At 17.00, the patient suddenly suffered convulsion with decreasing consciousness, then performed resuscitation with ETT (Endotracheal Tube) number: 7.0, and injected using thiopental 100 mg in 500 NaCl 0.9%, then given 10 liter oxygen to do resuscitation in recovery room until 18.00, the patient's condition at that time was unconsciousness (*sensorium soporosis*) with BP: 156-168/ 78-84 mmHg, HR: 150-166/min, RR: 14-20 / min, SpO<sub>2</sub>: 54-86%, body temperature: 40°C, then the patient was compressed with cold water and was given paracetamol infusion and 0.9% NaCl 1000 cc in one hour. At 18.00, the patient was transferred to ICU room, at that time the patient was still in convulsion condition. Then, dr. EP, Sp.An did knockdown and gave injection of tramus 1 ampoule and propofol of 0.9% NaCl 500 ml, equipped with ventilator using volume control mode with tidal volume of 460 ml, RR: 14 times/ min, IE: ratio 1:2 peep 5, PIO<sub>2</sub>: 95%, then injected with phenobarbital 1cc, IM: left thigh with furosemide injec-

tion of 2 ampoules IV and tripped with tramus 2 ampoules in 0.9% NaCl 500 ml, and the patient's condition under the influence of drugs was intermittent convulsions with BP: 110- 180 /70-90 mmHg, HR: 110-140 X/ min, RR: 14 X/ min, SPO2 86-96%, urine output 1000 ml. On April 5, 2016 at 03:35, the patient was declared dead in front of his family and ICU team. The patient died allegedly due to anesthetic, generic *bhupivacaine* spinal from *Bernofarm* brand. The drug was obtained from MHP Hospital.

Second, the chronology of Mr. S's death was on Monday, April 4, 2016 at 16.30, with the condition in general: full consciousness (*sensorium compos mentis*), BP: 160/90 mmHg, HR: 72 times/min, RR: 12 times/min, Spo2: 95% with binasal cannula. During the operation, the patient had no complaint in full consciousness, BP: 130-150/90, HR: 72-92 times/min, RR: 12-14 times/min, Spo2: 94-96%. At 17:50, the operation had completed, then the patient was transferred to recovery room with full consciousness, with BP: 150/80 mmHg, HR: 78 times / min, RR: 12 times / min, Spo2: 94-96%. At 18.30, the patient complained a pain in his buttock area, and he was given injection of ketorolac 1 ampoule IV, but there was no changes, then was added by injection of pethidin 1cc IM, not long ago, the patient experienced loss of consciousness accompanied by convulsions, then was performed resuscitation and installed ETT Number: 7,0 then injected with thiopental 100 mg in 500 ml of 0.9% NaCl and given oxygen 10 liters, the patient's condition was in unconsciousness (*sensorium soporous*), BP: 160-200/90-110 mmHg, HR: 78-98 times/min,

RR: 16-20 times/min, Spo2: 86-96%. At 19:30, the patient was transferred from recovery room to ICU room. Then, the patient was knocked-down and injected with tramus 1 ampoule and propofol 200 ml in 500 ml of 0.9% NaCl, then installed ventilator in volume control mode with tidal volume of 460 ml, RR: 14 times/min IE: Ratio 1:2 peep 5, FIO2: 95%, then injected with phenobarbital 1 cc in the right thigh, furosemide injection 2 ampoules IV and trip tramus 2 ampoules in 500 ml of 0.9% NaCl, the patient's condition under the influence of drugs was intermittent convulsions with BP: 160-200/90-110 mmHg, HR: 100-126 times/min, RR: 14 times/min, Spo2: 84-96%, total output of urine was 1000 ml. At 23:20, the patient who suffered from a tumor in the left leg calf was declared that he had died after the operation at MHP Hospital in front of his family and ICU team, the patient died, allegedly as the result of anesthetic which was administered by anesthesiologist, namely dr. EP, Sp.An.

Third, the chronology of Mrs. DP's death was on Monday, April 4, 2016 at 17:00. The preparations of Mrs. DP's operation for caesarean section was in a good condition and healthy. To prepare for caesarean section, the patient was given anti-biotic of cepotaxim and gentamicin drugs which had function to prevent infection due to the surgical wound. At 22.00, dr. UMB, Sp. OG met dr. EP, Sp.An as an anesthesiologist in OK room and he saw that the patient was ready for operation. Then, anesthesia injection was administered by dr. EP. At 22:15, with the permission from anesthesiologist, dr UMB performed caesarean section and

success to deliver the baby. The operation was held approximately an hour and after that the patient's condition was good and normal. Yet, this condition did not last long (it should be to be "was"), before being taken to inpatient room (still in OK room), the patient had convulsions. At 23:40, the patient was transferred from OK room to ICU room with convulsions, then at 23:42, operations officer handed the patient to ICU's officers. At that time, the patient's condition in a state of half-coma, convulsions constantly and equipped with ETT (Endotracheal Tube) to the patient's mouth. (re-read and make sure the sentence). At 23:50, the anesthesiologist provide (it should be V2) infusion therapy of NaCl 500 drip propofol 1 amp, tramus 1 amp bolus intravenous, infusion with NaCl 500 ml drip efedri 2 amps with the installation of a new infusion (all drugs obtained from MHP Hospital). At 24.30, the BP of patient decreased up to 40 times per minute, subsequent the patient was given two lanes infusion to the patient with 500ml NaCl and efedri 2 amps. On Tuesday, April 5, 2016 at 01.00, the patient's condition was getting worse and cardiac arrest, then dr. T gave an instruction to do CPR (Cardiac Pulmonary Resuscitation) +30 minutes with negative response, then dr. T instructed to perform ECG (Electrocardiogram), but the patient's family refused and requested that doctor continued to perform defibrillation, but it was not performed by dr. T. Although the patient experienced cardiac arrest and had also performed CPR movement, but the family requested that performed CPR again. At 1:45, there was a response from the patient with pulse  $\pm 70$ , but at 02:00, the pa-

tient's condition was dropped, then CPR was performed again with 5 cycles. Yet, at 2:10, dr. T stated that the patient, DP, had died.

In the investigation process of the reported, dr. EP, Sp.An was presupposed by Article 359 of the Criminal Code which stated: "Whoever due to his negligence has caused another person's death, will be sentenced with a maximum imprisonment of five years." To explore the facts on the fields which will be used as evidence on alleged criminal acts committed by the reported, then the writer will conduct a normative juridical study toward Article 359 of the Criminal Code that has been applied in this case to prove whether this Article can be applied or not related to the death of three post-operative patients in MHP Hospital, Lampung.

In addition to the reason above, this juridical analysis also will contribute to the reported in terms of legal certainty on the presupposition toward Article 359 of the Criminal Code in the investigation of the death of three post-operative patients MHP Hospital, three patients were named; RM suffered from *varicocele*; S patients with tumor in the left leg calf; and DP who performed caesarean section. Theoretically, the requirements of the punishment that must be met: a.) Formal requirement is the first step for investigators in determining the criminal laws based on the chronology of the event allegedly has been done by the reported, whether it meets the elements of crime contained in that Article or not; b.) Material requirement is the facts in the form of testimonies explored by investigator from some persons who have correlation

with the reported event, and some evidences which are founded by investigators in that event. Material requirement will be the justification on suspicion on an Article specified in formal requirement. If both of these conditions are fulfilled, then the investigators are declared as successful in making light of a case.

Based on the facts described above, the writer deems that it necessary to conduct a juridical study in the investigation process which is performed by investigators by applying Article 359 of the Criminal Code on the actions of doctors that can cause a death in medical practice. This juridical study will be valuable information in medicine, and also for police investigators who conducts the investigation process of medical practice. The result of juridical study will be written in the form of International Journal entitled "The Application of Article 359 of The Criminal Code in The Investigation of The Death of Post-operative Patients (The Juridical Analysis: The Case of The Death of Three Patients at MHP Hospital, Lampung)."

## **METHODS**

According to Bambang Waluyo<sup>1</sup>, research method is one of the ways that research should be conducted by the certain procedures, which can be seen from the procedures for data collection, data analysis, and writing research report.

### **Type of Study and Approaches**

This article uses literature review supported by empirical data derived from the

investigation results for malpractice case that occurred in MHP Hospital conducted by criminal Directorate of Special Regional Police of Lampung, by using two approaches, namely; normative juridical approach used to analyze the application of Article 359 of the Criminal Code toward the reported person, dr. EP, Sp.An., and empirical juridical approach used to explore the data fields in the investigation process conducted by Special Criminal Investigation Directorate (Ditreskrimsus) of the Regional Police of Lampung, related to the death case of three post-operative patients in MHP Hospital. These two approaches are expected to be able to answer the legal issue that have been identified by the writer related with the view of the pros and cons toward the application of Article 359 of the Criminal Code in the investigation process of malpractice case that occurred in MHP Hospital, Lampung.

### **Type of Data and Data Collection**

The type of data presented in this study are primary data obtained from some informants, such as; police investigators, the Chairman of IDI Lampung, the Health Law Expert from University of Lampung (UNILA), the Chairman of PERDATIN Lampung and the Chairman of MKEK Lampung; while the secondary data will be obtained from documents, literature or reference books, and the judge's decisions that have been final and binding to explore and expose the facts of law to match the requirements of the Article 359 of the Criminal Code that are applied by police investigators in the investigation process. To explore the empirical data, this writer conducts interviews, observation, and dialogue with informants related to the stu-

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<sup>1</sup> Bambang Waluyo, *Penelitian Hukum dalam Praktik*. Jakarta: Sinar Grafika, 1991, p2.

died problem<sup>2</sup>. What is meant by the informants in this study are: Police investigators, medical experts from IDI, MKEK, PERDATIN, and health law expert from UNILA, who are considered to have the competence to analyze that the use of Article 359 of the Criminal Code can be applied or not in the death cases of three post-operative patients at MHP Hospital, Lampung.

The important essence of this juridical analysis is "the verification of the elements of Article 359 of the Criminal Code that are applied in the investigation process". There are two important things that will be in the analysis of the application of Article 359 of the Criminal Code, those are: first, if in the investigation process conducted by Ditreskrimsus, Regional Police of Lampung, investigators are success to meet the material requirements that will be the evidence in this malpractice case. Thus, the case status of the anesthesiologist, who is responsible for the death of three post-operative patients in MHP Hospital, can be upgraded to be the suspect and the investigation process can be proceeded to the Public Prosecutor; Second, if in the investigation process, the legal facts are ineligible to be used as evidence in this case, then, the investigation process in MHP Hospital "must be stopped (Letter of Suspension of Investigation or SP3)".

### **Theoretical Framework**

The theory used as a tool for analysis in this article is Moeljanto's view about "the error theory", he states that there are two

error theories in the theory of Criminal Law in Indonesia, first, Deliberateness (*opzet*); second, Negligence (*culva*). The theory which will be used to analyze the deed of reported person related to the application of Article 359 of the Criminal Code is the Culva theory that states Culva in the science of law has a technical meaning, that is a kind of mistake of the offender which is not as heavy as in the deliberate act, such as less cautious, so an unintentional result happens.<sup>3</sup>

Related to administration of the investigation process, the writer refers to a theory from Frank Remington who has introduced the Criminal Justice System as a judicial system that is known in Indonesia. This theory emphasizes on the quality of coordination, synchronization of criminal justice components, supervision, and restraint toward the use of power by the components from this justice system; the effectiveness of crime prevention system is more important than the effectiveness of settling disputes; the use of law as an instrument in order to strengthen the administration of justice<sup>4</sup>. Related to this theory, the writer will use Remington's view as the administrative guidelines in the investigation process. Only through the provision of written law administratively, justice can be applied.

## **ANALYSIS AND DISCUSSION**

### **The Case Investigation Process**

To clearly expose the case of the death of three patients in MHP Hospital in order to find the suspect in this case, Sub Directo-

<sup>2</sup> Bambang Sunggono, *Metodologi Penelitian Hukum*. Jakarta: Raja Grafindo Persada, 2009, p81.

<sup>3</sup> Moeljanto, *Perbuatan Pidana dan Pertanggungjawaban Dalam Hukum Pidana*, Jakarta: Bina Aksara, 1993, p46.

<sup>4</sup> *Ibid*, p.9-10.

rate IV Ditkrimsus of Regional Police of Lampung had conducted the investigation process and forceful efforts to call the witnesses involved in this case, then the results can be described as follows:

#### **The information from dr. Z, Sp. OG**

The informant is a doctor who has performed a caesarean section toward the victim, namely Mrs. DP. This section was performed in consideration of "there was an abnormal condition with fetus in Mrs. DP's womb or OBLIG (fetus's head was in oblique position over pelvis)," so it was needed medical action to perform caesarean section. He stated that the required conditions in performing a caesarean section was (should be were) the doctors who perform this action had (should be have) to have a midwifery competence. In the sequences of medical steps in the implementation of the operation were laundering operation area (laundering pests); putting fabric on operation area; incision (or dissection on operation area); making sure the position of the womb, then cutting the uterus to take the fetus; after that the fetus was treated as it should be; cutting the umbilical cord and it was given to pediatrician; gave birth to the placenta; suturing (sewing up) the surgical wound; ensuring that the womb was in a good condition, then close the abdominal wall by suturing. After the caesarean section completed, the patient was given xepotaxine and gentamicin drugs in accordance with the procedure in caesarean section. He also stated that the operation of Mrs. DP was performed by obstetrician which consisted of an operator (doctor), operation assistant, instrument assistant, while the anesthesia con-

sisted of an anesthesiologist and an anesthesiologist assistant.

#### **The information from dr. A, Sp. An**

The informant is an anesthesiologist from PERDATIN of Lampung Province. He said that he knew about the incident of the death of three patients in MHP Hospital, Lampung from dr. EP, Sp. An via telephone on Tuesday, April 5, 2016 approximately at 07.00. Edi told him that three patient died after the operation of spinal anesthesia in MHP Hospital, Lampung. Dr. A explained that after he had received the information via telephone from dr. EP, Sp. An, then he had reported this case to PERDATIN center, but the Chairman of PERDATIN center was still on the way to go home from *Umrah*. At the time, he ordered dr. EP, Sp. An to send an email about the chronology of that incident to PERDATIN center. On Tuesday, April 5, 2016 at 16:30, he told his colleagues from anesthesiologists in Lampung through a message on Whatsapp that contained:

*"Temporarily, generic bupivacaine spinal from Bernofarm brand should not be used, because there was a case in Pringsewu that three patients died convulsively after spinal yesterday, this case would be followed to the IDI- Lampung and PERDATIN Center."*

On Wednesday, April 6, 2016, the chairman of PERDATIN center called him and asked about the chronology of that incident, and he said that he had already sent the detailed information via email, and the Chairman gave an instructions that "temporarily generic bupivacaine spinal from Bernofarm brand should not be used."

### **Information from dr. U, Sp. OG**

The informant is an obstetrician in MHP Hospital, Lampung who handles the patient's pregnancy, named Mrs. DP's. His patient routinely consulted with him for  $\pm 2.5$  years and succeeded to get pregnant, then after approaching her childbirth, the condition of the fetus was oblique (baby oblique position) and it was difficult to be born normally. Thus, he suggested to the patient to do a caesarean section in childbirth which was scheduled on April 4, 2016. It was the last consultation which was given to the patient on March 24, 2016. On April 4, 2016 at 17:00, according to a set schedule by doctor, a nurse had informed that the patient, Mrs. DP, was ready to undergo a caesarean section and her condition was good and healthy, and was informed that a caesarean section would be held at 23.00. When he was in VK room, he received a report that the patient was ready for operation and had been given antibiotics of cefotaxim and gentamicin to prevent infection from the surgical wound. At 22.00, he went to OK room to meet an anesthesiologist, dr. EP, Sp. An, and he saw that the patient was ready for surgery, then dr. EP performed anesthesia. At 22:15, he stated that the patient was performed surgery with a medical procedures that were: splitting the patient's stomach with transverse position, then splitting the uterus, subsequently giving birth to a baby and was lifted to be purged at resuscitation room, then he sewed the incision wearing vicryl, chromic, and catgut yarns. This sewing took approximately  $\pm 1$  hour, and during operation, he saw that the patient's condition was in a good condition and normal. He explained

that when in the operation, there were some people in OK room at that time; himself, DP (patient), dr. EP, Sp. An, P (operation assistant), Genti and two other nurses (who were not known their name by the informant). Then, when the patient, Mrs. DP, underwent convulsion after surgery, he did not help anything, because the condition was not on his domain, but an anesthesiologist.

### **The Information from Mr. W**

The informant is a duty nurse in ICU room of MHP Hospital in the examination by investigators. He got the information from OK room on April 4, 2016 at 23:30, that there was a patient who would enter to ICU room with convulsion after caesarean section and he was asked to prepare a respirator. At 23:40, he and his coworker, named T, fetched the patient in operation room with carrying gurney and oxygen tube. At 23:42, the operating officers handed the patient in half coma condition, convulsions continuously, and equipped with ETT (Endotracheal Tube) and he took to ICU room to get handling and further treatment. At 23:50, he received instructions from anesthesiologist to give injection of infusion therapy with NaCl 500ml drip propofol 1amp, tramus with 1 amp bolus intravenous, infusion with NaCl 500ml drip efedri 2amps with the installation of a new infusion. At 24.30, BP of patient decreased up to 40 times per minute, then dr. EP, Sp. An gave an instruction to provide two lanes infusion to the patient with fluid therapy of NaCl 500ml and efedri 2 amps. On April 5, 2016 at 01:00, the patient's condition was getting worse and cardiac arrest, then dr. T gave an instruction to the informant



to do CPR around 30 minutes with negative response, then CPR was performed again with 5 cycles. Yet, at 2:10, dr. T stated that the patient, Mrs. DP, had died.

### **The information from PM**

The informant is a duty nurse in operation room of MHP, Lampung, when he entered operation room to see the patient, RM, the patient had been given anesthesia by dr. EP, Sp.An. The patient's condition was still normal and could talk to, and he gave an information to dr. G, Sp.B that the patient was ready for operation. P saw the patient's condition after operation was in convulsions, and then given help by dr. EP, Sp.An by installing the hose, taking injection, and other tools, and dr.A helped dr. EP to pump oxygen and to prepare the hose.

### **The Information from KSG**

The informant is a duty nurse who served as nurse practitioner in ICU room of MHP Hospital, Lampung. He explained that he had received an information from OK room to pick up the patient, RM, in the operation room to do the handling and treatment, because the patient was in unconscious condition, the patient was in convulsions after varicocele surgery. At 18:30, he was together with Mr. I, dr. A, and dr. EP, Sp.An as the anesthesiologist to transfer the patient, RM, from operation room to ICU room. At 19:00, dr. EP, Sp.An received a telephone from OK room, then dr. Edi told him to pick up another patient, S, in OK room, and then he prepared the bed for the patient, oxygen, bagging, and then at 19:30, he was helped with OK room's functionary to

transfer the patient to ICU room and accompanied by the patient's family. The equipment had been already installed in the patient's body. The patient was in convulsions condition after surgical tumor removal on the patient's left leg calf.

At 24.45, dr. EP, Sp.An gave a prescription for RM, then the informant took injection drug (tiopental 1 vial) in pharmacy room, and was given it to dr. EP, Sp.An in ICU room. Both patients were still in convulsions. Then, K, his co-worker, and the reported one, dr. EP, Sp.An, still monitored both patients until 21.00, then, K took over shift. The next day, he received information from the hospital that both patients whom he left (due to over shift) in a state of unconsciousness and convulsions in ICU room, then they died.

Under the provisions of Article 359 of the Criminal Code, which was written by R. Soesilo, said that "Whoever due to his/her mistake caused someone's death, sentenced to a maximum imprisonment of five years or a maximum confinement of one year" (Susilo, 1991:248). The elements contained in this article are as follows:

#### **The Element of Whoever:**

This element is "fulfilled", because there is one who will be held accountable in the death case of three post-operative patients in MHP, Lampung, namely dr. Edi Pramiono, Sp.An. (an anesthesiologist).

#### **The element for his mistake:**

This element is "not fulfilled", based on the examination results of some witnesses, namely: the Health Law Expert, expert witnesses from IDI, PERDATIN,

and the testimonies of some doctors and investigators who conduct the interrogation toward dr.EP, Sp.An allegedly infringes Article 359 of the Criminal Code, it can be explained as follows:

- a. The definition of "wrong" in Article 359 of the Criminal Code according to R.Soesilo described in his book entitled *Kitab Undang-Undang Hukum Pidana (KUHP), serta Komentar-Komentarnya Pasal demi Pasal* is "inadvertent or negligent of the defendant (*culpa offense*)". In analogy of a driver who drives his car too fast, then bumping a person to death. The death of the person is not intended by the defendant. This analogy is in line with the actions of a doctor in the operation, who is trying to help the patient in order to survive and the patient's death is not intended by a doctor. Yet, when the patient's death is intended by the reported person, he can be subjected to murder Articles (Article 338 or 340 of the Criminal Code). In the explanation of Article 360 of the Criminal Code, further stated that which may be subjected to this Article for example; doctors, midwives, drug experts, driver, coachman gig, machinist, who as an expert in their job. If they ignore (neglect) the rules or imperatives in their work until they cause death (Article 359 of the Criminal Code) or serious injury (Article 360 of the Criminal Code), then they will be punished more severely<sup>5</sup>. In the theory of criminal law outlines that negligence, mis-

take, carelessness, or omission are called as *culpa*. Wirjono Prodjodikoro in his book, *Asas-Asas Hukum Pidana di Indonesia* states that the meaning of *culpa* is "a general mistake", but in science, the law has a technical meaning that is a kind of the offender's mistake which is not as heavy as in a willful mistake that is less cautious, so an unintended incident happens<sup>6</sup>.

Jan Rummelink in his book entitled *Hukum Pidana* states that in essence, *culpa* is less careful thinking, lack of knowledge, or act less directional. According to Jan Rummelink, *culpa* here obviously refers to a person's psychic ability, therefore it can be said that *culpa* means no or significantly less suspect (the first possibility emerges) toward the fatal consequence of the person's action, whereas it is easy to do, because it should be done<sup>7</sup>.

It is similar with Wirjono Prodjodikoro's argument that according to the Dutch writers, the meaning of *culpa* in Articles of the Criminal Code is a rather heavy mistake. The term which they use are a 'big mistake' (*groveschuld*). Although the measurement of this 'big mistake' is not yet assertive as same as deliberate, but in the term of *groveschuld* has owned the estimation that someone is not include as *culpa* if the offender does not need to be very careful to be free from punishment<sup>8</sup>.

Based on R. Soesilo's explanation above, the main requirement in the appli-

<sup>5</sup> Susilo R, *Kitab Undang-Undang Hukum Pidana (KUHP), serta Komentar-Komentarnya Pasal demi Pasal*, Bogor: Politeia, 1991, p248.

<sup>6</sup> Prodjodikoro Wirjono, *Asas-Asas Hukum Pidana di Indonesia*, Jakarta: Refika Aditama, 2003, p72.

<sup>7</sup> Rummelink Jan, *Hukum Pidana*, Jakarta: Gramedia Pustaka Utama, 2003, p177.

<sup>8</sup> Note 6, p73.

cation of Article 359 of the Criminal Code is "there is an unintentional mistake" in the form of "inadvertent or negligent act" that the consequence of "someone's death is unintended by the defendant." The words of "an unintentional mistake and the consequence which is unintended by the defendant" become the keywords in Article 359 of the Criminal Code. If the act committed by the defendant is "the opposite of that keywords", then this act will be the crime act of murder as provided for in Article 338 or 340 of the Criminal Code.

b. The meaning of negligent in general meaning is an unintentional mistake, while in narrow meaning is a mistake in the form of negligence, a conditions in such a way that endangers the safety of persons or goods, or brings disadvantage against someone in such a large loss and irreparable, so the Law regulates the prohibition that makes people cautious, reckless or careless act or in short as *schuld* (negligence which causes that condition). Negligence in one hand completely opposites with deliberateness and on the other hand, with accident (*toeval* or *caous*). Negligence is milder mistake than deliberateness, but it is not light deliberateness. Based on this explanation, it can be concluded that the mistakes in theory of criminal law, there are two types, namely: first, deliberateness (*dolus*, *opzet*, *vorsatz*, intention); and second, negligence (*culpa*, *onacht zaamheid*, *nelatigheid*).

#### **The Information from Investigators and Some Experts**

To expose the criminal act in the phenomenon of the death of three patients in MHP, Lampung, the elements of Article 359 of the Criminal Code that are applied by investigators in this case need to be studied and analyzed juridically, to find the facts of the Law whether Article 359 of the Criminal Code can be applied or not in the case of the death of three post-operative patients in MHP Hospital, Lampung. It depends on the investigations result conducted by Ditreskrim, Regional Police of Lampung. The information from the medical experts and the health law experts and the judges' decisions that have been established as the jurisprudence in the application of Article 359 of the Criminal Code toward the case of medical practice, then its results are described as follows:

#### **The Information from the Chairman of PERDATI Lampung**

Based on the investigation result conducted by Police investigator toward dr. AA, Sp.An who currently serves as Chairman of Lampung PERDATIN, he said about the job description of anesthesiologist that "if there is an impact occurred after the operation, such as convulsion, pain, and a doctor still be in that place, then the one who must to take action is anesthesiologist; if this patient has been given anti-seizure injection and consulted to neurologist and the patient itself, then it does not need to be consulted to another doctor."

In the interview with dr. AA, Sp.An (as the Chairman of PERDATIN Lampung) obtained information that he had reconstructed the chronology of operation performed toward three patients who died

after operation at MHP, Lampung and he had concluded that dr. EP, Sp.An as anesthesiologist, did not violate of the SOPs of operation toward these patients, who later died after operation. All procedures had been arranged in the SOPs of operation, and the steps had been done properly by dr. EP, Sp.An<sup>9</sup>.

### **The Information from the Health Law Expert**

The information from Dr. MF, SH, M.H. as Health Law Expert, stated that "principally, when an anesthesiologist is performing medical actions, he must refer to Article 2 of the Minister of Health No.519/MEN KES/PER/III/2011, which contains the Guidelines for Implementation of Anesthesiology Services and Intensive Therapy at Hospital, which listed in that Article." Furthermore, in the Chapter IV, letter A, No. 2 on the services of the Intra-Anesthesia, the Minister of Health No. 519 /MENKES/PER/III/2011, mentioned that an anesthesiologist and the team should remain in the operation room during general and regional anesthesia actions, and procedures that need sedation action; b) During the injection of anesthesia, this should be continuous monitoring and evaluating toward oxygenation, ventilation, circulation, temperature, tissue perfusion and documented in the anesthesia notes; c) The last action of anesthesia must pay attention to oxygenation, ventilation, circulation, temperature, and tissue perfusion, all in a stable condition.

<sup>9</sup> Interview with dr. AA, Sp.An (anesthesiologist), April 11, 2016.

In the literature of Medical Law<sup>10</sup> "an anesthesiologist is not allowed to perform two operating tables at once, except in exceptional circumstances". This exception is like the jurisprudence of the Netherlands, which states that:

*Medische Tuchtcollege Amsterdam, June 18, 1979, which states that in general, it is unintended (ongewenst) that an anesthesiologist serves more than one operation at once, except in exceptional circumstances (zeer buitengewone omstandigheden).*

The conclusion from Dr. MF, SH, M.H. as health law expert is "all actions of surgeon principally have met the procedures that have been implemented in the provisions of Article 35 paragraph (1) of the Law No. 29 of 2004 about Medical Practices that "doctors or dentists, who have had a letter of registration, have the authority to perform medical practice in accordance with the education and competencies, such as: to do an interview with patient (anamnesis), to examine physical and mental of patient, to determine the additional investigation, to do diagnosis, to determine the management and treatment for patients, to perform medical action or dentistry action"<sup>11</sup>.

### **The Information from Police Investigators**

The interview result with Rohim as an investigator of Ditreskrim of Regional Police of Lampung, who handled the case of reported person, dr. EP, Sp.An, he stated that "the result of this case, which

<sup>10</sup> J.Guwandi, 2007, *Medical Law*, Faculty of Medicine: Universitas Indonesia, 3rd, p187.

<sup>11</sup> Interview with Dr.Fakih, SH, MS (Health Law Expert) from UNILA, May 24, 2016.

was attended by Health Law Expert, the Chairman of PERDATIN Lampung, the Chairman of IDI Lampung, and internal oversight functions of Regional Police of Lampung, namely: Itwasda, Propam, Intelkam, and Bidkum had recommended that the criminal investigation process of the death of three patients in MHP, Lampung —allegedly was done by dr. EP, Sp.An as anesthesiologist on suspicion of Article 359 of the Criminal Code— "did not meet the elements of Article that was presupposed", because the element of "negligent" contained in Article 359 of the Criminal Code "was not fulfilled"<sup>12</sup>.

### **Jurisprudence**

In the application of Article 359 of the Criminal Code, there are some cases alike that have been judged by the District Court Judge, the High Court Judge, and the Supreme Court Judge on the Cassation level and judicial review (PK) toward some cases of medical practice that eventually always give acquittal verdict against the defendant with consideration of "non-fulfillment of negligence in Article 359 of the Criminal Code." These cases are:

First, judicial review (PK) Decision No. 79.PK/PID/2013, which granted an appeal for PK from dr. DASP, dr. HS, and HS and annulled the decision of *judex facti* and this decision as same as the decision at the first instance court. Then, dr. DASP and her friends were given verdict by the Supreme Court Judge that they violated Article 359 of the Criminal

Code. Due to this verdict, dr. DASP and friends purposed PK. In the next verdict, the judicial review judges finally granted an appeal from dr. DASP and friends. The composition of the panel of judges, who prosecuted dr. DASP and friends, consisted of MS (the chairman), SJ, MS, M, and MDP. Besides to acquit the defendant, the judges also ordered to vindicate the defendants' name.

Second, the decision of High Court of Semarang No: 203/1981/Pid/PT. Semarang on May 19, 1982 that strengthened the District Court's decision of Pati No.8/1980/Pid.B/PN.PT on September 2, 1981 and simultaneously accepted the Prosecution's appeal. Based on the science of criminal law, especially the theory of negligence, it could not eliminate the defendant's mistake. It was based on the recognition of the defendant, the witnesses' testimony, the evidences, and it was viewed from the aspects of relationship and compliance. The defendant's mistake had been proved legally and convincingly by the Law, because his negligence caused others died. Then, in the decision of Cassation, the Supreme Court Judge "cancelled the High Court of Semarang on May 19, 1982 No. 203 of 1981 and No. 8/1980/Pid.B/PT. Semarang and the Decision of District Court of Pati No: 8/1980/Pid.B/Pn.PT on September 2, 1981 and asserted the mistake of dr. S charged with Article 359 of the Criminal Code "*was not proved and the judge acquitted the defendant from the indictment*".

### **CONCLUSION**

Based on empirical facts obtained from the investigation process conducted by

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<sup>12</sup>Interview with Aiptu Rohim (an investigators maid at Special Criminal Investigation Directorate (Ditreskrimsus) of Regional Police of Lampung), May27, 2016.

Special Criminal Investigation Directorate (Ditreskrimsus) of Regional Police of Lampung and the testimonies from the medical experts and health law experts, the writer can conclude that:

- a. The application of Article 359 of the Criminal Code toward the impact of operation conducted by a doctor cannot be applied, throughout the operation that has been conducted using SOPs in accordance with Article 2 of The Minister of Health Regulation (Permenkes) No: 519/Menkes/Per/III/2011, which contains the Guidelines for Implementation of Anesthesiology Services and Intensive Therapy at the Hospital.
- b. Juridically, the incident of death of three post-operative patients in MHP hospital, Lampung, leads to the Special Act (*lex specialist*), then the application of Article 359 of the Criminal Code in this case has violated the principle of "*lex specialist derogat legi generalist*".

## RECOMMENDATION

In the provisions stipulated in the Law No. 29 of 2004 on the Medical Practice, the government has not explicitly listed criminal punishment for doctor who clearly violates SOPs of medical practice which affects to the patient. Related to this case, it is suggested to the government—in conducting law enforcement of medical practices—in order to make revision toward the Law No. 29 of 2004, to explicitly include criminal punishment for a doctor who violates SOPs of medical practices.

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- Dr. MF, S.H., M.H. (a health law expert of University of Lampung) in discussion with the writer, May 24, 2016.
- Mr. R (an investigator maid at Special Criminal Investigation Directorate (Dit Res Krimkus) of Regional Police of Lampung) in discussion with the writer, May 24, 2016.