

IMPLEMENTATION OF DOCTRINE RES IPSA LOQUITUR IN WRONG-SIDED ACTION, WRONG PROCEDURE IN SURGERY PATIENTS

IMPLEMENTAÇÃO DA DOCTRINA RES IPSA LOQUITUR EM AÇÕES ERRADAS E PROCEDIMENTOS INCORRETOS EM DOENTES CIRÚRGICOS

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Vira Komala*

*Faculty of Law, Universitas Islam Bandung, Bandung, Indonesia.
vira_kom@yahoo.com

Edi Setiadi *

*Faculty of Law, Universitas Islam Bandung, Bandung, Indonesia
2edi.setiadi@unisba.ac.id

Sri Ratna Suminar *

*Faculty of Law, Universitas Islam Bandung, Bandung, Indonesia
sri.ratna@unisba.ac.id

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Abstract

Wrong-sided, wrong-procedure surgical procedures are incidents that can occur in hospitals. These incidents can cause harm to patients and result in lawsuits against medical personnel and health workers as part of the surgical team for alleged medical malpractice. In several cases that occurred in Indonesia, the burden of proof of medical malpractice is placed on the patient, which of course can cause injustice for the patient. With this background, the purpose of this study is to determine the doctrine of Res Ipsa Loquitur in wrong-sided, wrong-procedure surgical procedures can be applied in Indonesia in order to provide justice to patients. The approach method used is normative juridical, the research specifications in this study are descriptive analytical. The data collection technique in this study is a literature study and the analysis method in the study uses qualitative analysis. The results of the study indicate that to prove medical malpractice in wrong-sided, wrong-procedure surgical patients, it is best to apply the doctrine of Res Ipsa Loquitur. This is because, under this doctrine, the burden of proof for medical malpractice rests with the doctor, not the patient, who is unfamiliar with medical knowledge. Applying this doctrine can also provide a sense of justice to patients, as Aristotle stated, who taught that everyone has proportional rights. Doctrine Res Ipsa Loquitur can be enforced through presumptive evidence concluded by the judge.

Resumo

Procedimentos cirúrgicos realizados de forma incorreta ou com o lado errado são incidentes que podem ocorrer nos hospitais. Estes incidentes podem causar danos aos pacientes e resultar em processos judiciais contra médicos e profissionais de saúde que fazem parte da equipa cirúrgica por alegada negligência médica. Em vários casos ocorridos na Indonésia, o ónus da prova da negligência médica recai sobre o paciente, o que, obviamente, pode causar injustiça. Perante este contexto, o objetivo deste estudo é determinar se a doutrina do Res Ipsa Loquitur, aplicada em casos de procedimentos cirúrgicos realizados de forma incorreta ou com o lado errado, pode ser aplicada na Indonésia para garantir justiça aos pacientes. A abordagem metodológica utilizada é a jurídico-normativa, com especificação descritiva e analítica. A técnica de recolha de dados foi a revisão bibliográfica e a análise foi realizada de forma qualitativa. Os resultados do estudo indicam que, para comprovar negligência médica em pacientes submetidos a cirurgias com o lado errado ou procedimento incorreto, a melhor abordagem é aplicar a doutrina da Res Ipsa Loquitur. Isto porque, segundo esta doutrina, o ónus da prova da negligência médica recai sobre o médico, e não sobre o paciente, que não tem conhecimentos médicos. A aplicação desta doutrina pode também proporcionar um sentido de justiça aos doentes, como afirmou Aristóteles, que ensinava que todos têm direitos proporcionais. A doutrina da Res Ipsa Loquitur pode ser aplicada através



Keywords: Res Ipsa Loquitur. Wrong Side. Wrong Procedure. Patient. Surgery.

de provas presumidas, conforme determinado pelo juiz.

Palavras-chave: Res Ipsa Loquitur. Lado Errado. Procedimento Errado. Paciente. Cirurgia.

1 INTRODUCTION

Hospitals are highly complex organizations. As time and technology evolve, their challenges and demands in adapting to the dynamics of society become increasingly complex (Lesmojati, 2020). Technological advances and the increasing criticality of society towards the medical services they receive have reduced the knowledge gap between patients and doctors and increased openness to assessment and criticism (Novianto, 2017). The Central Government and Regional Governments are responsible for the availability and access to Health Service Facilities (Pasha et al., 2020). The form of government responsibility for the availability of health service facilities is by providing hospitals, whether established by the central government, regional government or the community (Paulina & Prananingrum, 2018).

Article 1 number 10 Constitution No 17 of 2023 on Health, explains that a hospital is a health service facility that provides comprehensive individual health services through promotive, preventive, curative, rehabilitative and/or palliative services by providing inpatient, outpatient and emergency services. The function of a hospital according to Article 184 paragraph (1) of Law Number 17 of 2023 concerning Health is to provide individual health services in the form of specialist and/or subspecialist services. One of the specialists and/or subspecialist services that must be provided in a hospital is surgical services. In the context of surgical services, the hospital is obliged to provide supporting facilities by providing an operating room.

Surgical procedures carry high risks in their implementation so they must be planned carefully to ensure patient safety (KARS, 2022). Patient safety is paramount for doctors in carrying out their duties (*aegroti salus lex suprema*). This is a doctor's obligation in treating patients, as stated in the Hippocratic Oath. Hippocrates (in his book *Epidemics*), “*declare the past, diagnosis the present, foretell the future. As to the diseases,*

make a habit of two things – to help, or at least” primum non nocere” (to do no harm) which is used as a basic guideline for doctors to this day (Widianto, 2017). In addition, doctors in carrying out their obligations must comply with professional and legal standards as regulated in Article 291 paragraph (1) of Law Number 17 of 2023 concerning Health. In reality, doctors don't always comply with the obligations stipulated in the aforementioned provisions. For example, in Indonesia, there's a case currently being discussed where a doctor operated on the wrong leg when the left leg should have been operated on (Kompas.com, n.d.). In some cases, in Indonesia, when a case like this occurs, the burden of proving medical negligence falls on the patient. However, if we look at the case, based on the doctrine of *Res Ipsa Loquitur* It is the doctor who must prove negligence. This is what interests the author in conducting a study to understand the doctrine *Res Ipsa Loquitur* In wrong-sided actions, wrong procedures can be applied in Indonesia in order to provide justice to patients.

The author has read the literature from articles written by Harper, F. V., & Heckel, F. E. by title *Effect of the Doctrine of Res Ipsa Loquitur* which examines the application of the doctrine of *Res Ipsa Loquitur* in various countries (Harper & Heckel, 1956). Apart from that, the author also read articles from Murdi, P. B., Novianto, W. T., & Purwadi, H entitled *The Application of the Doctrine of Res Ipsa Loquitur in the Settlement of Medical Malpractice Cases*. This article examines court decisions, but there are differences in the legal basis used in each court's decision in resolving medical malpractice cases (Murdi et al., 2018). Therefore, it is important to provide an understanding of the provisions regulated in the application of the doctrine *Res Ipsa Loquitur*.

2 METHOD

The method chosen for this research is normative juridical. The data used is secondary data consisting of primary, secondary, and tertiary legal materials. The data collection method is through document study using literature review techniques obtained from *Proquest Research Library* (PRL) and *Ebscohost* which is accessed by e-Resources of the Bandung Islamic University Library.

3 RESULTS AND DISCUSSION

3.1 Doctrine *Res Ipsa Loquitur*

The doctrine *Res Ipsa Loquitur* is stated as ‘*the thing speaks for itself*’, only applies to cases of unlawful acts in the form of negligence (*negligence*) (Fuady, 2017). This doctrine only applies if it is real or the doctrine of *Res Ipsa Loquitur* is said to be the thing speaks for itself, only applicable to cases of unlawful acts in the form of negligence. Based on lay knowledge, the incident would not have occurred if there was no element of negligence/carelessness on the part of the defendant (M.Achadiat, 2006). The application of the doctrine of *Res Ipsa Loquitur* is often carried out against perpetrators of certain acts that require a high level of caution (Fuady, 2017). The doctrine of *Res Ipsa Loquitur* does not impose the obligation on the victim to prove negligence on the part of the doctor. The application of the doctrine of *Res Ipsa Loquitur* provides greater justice, with the presumption of negligence, the victim's physical condition being a fact, and the circumstantial evidence being a fact. Therefore, the evidence presented is a fact resulting from previous actions, and these facts speak for themselves. This has a specific impact on the perpetrator of the unlawful act, with any perpetrators not actually known to the victim (Sylvana & Widjaja, 2022).

Circumstantial evidence is evidence of a fact or a number of facts from which a reasonable conclusion can be drawn. *Res Ipsa Loquitur* is nothing other than a presumption that can be refuted by contrary evidence (rebuttable presumption) which states that unless the perpetrator can prove otherwise, although the real purpose of *Res Ipsa Loquitur* is not to reverse the burden of proof (*omkering van bewijslast*) and not to change the criteria of responsibility (strict liability), but only to make it easier for the victim to prove who is guilty by showing circumstantial evidence (Murdi et al., 2018).

In order to draw a fact that constitutes a presumption of guilt against the perpetrator, the application of the doctrine of *Res Ipsa Loquitur* must meet the requirements. These requirements are: 1) it must be shown that the incident would not normally occur without negligence (or intent) on the part of the perpetrator; 2) it must also be shown that the loss was not caused by the actions of the victim or his family; 3) in certain cases, at the time of the incident, the instrument that caused the loss was under

the exclusive control of the party accused of being the perpetrator; 4) the cause of the negligence must be within the scope of the existing obligations of the perpetrator to the victim; 5) it is not the fault of the victim (there is no contributory negligence). In addition to these 5 (five) requirements, it is also necessary to consider that proof of the incident is more easily accessible to the perpetrator than to the victim. (Fuady, 2017).

The legal consequences of the application of the doctrine of *Res Ipsa Loquitur* are as follows: 1) Providing more justice to the victim by shifting the burden of proof to the perpetrator; 2) Constitutes a presumption of negligence. By revealing the consequences of a consequence and the facts that gave rise to that consequence, the law presumes that the party suspected of committing an unlawful act. Therefore, it is deemed to have done so negligently (or intentionally), without the victim needing to prove negligence (or intention); 3) Becomes evidence according to the situation and conditions. The victim only proves the facts, situations and conditions (circumstantial evidence) by drawing certain conclusions, and letting the facts speak for themselves; 4) Forces the perpetrator to explain the actual incident; 5) Consequences for multiple perpetrators. One or more perpetrators can be held legally responsible, even though the victim cannot show who among them is guilty and committed the act (Fuady, 2017)

The legal requirements that must be met so that the doctrine of *Res Ipsa Loquitur* can be applied to cases of multiple perpetrators are as follows: 1) fulfilling the standard requirements for the application of the doctrine of *Res Ipsa Loquitur*; 2) fulfilling the additional requirements for cases of multiple perpetrators, namely the existence of a "professional colleagues" relationship between the perpetrators; 3) complying with the additional requirements for cases of multiple perpetrators, in the form of the requirement that all have an obligation (duty) to maintain the safety or health of the victim (Fuady, 2017)

3.2 Ensuring the correct surgical location, correct procedure in surgery patients

The legal relationship between a doctor and a patient in the practice of medicine is a contract formed through an agreement called a therapeutic contract. A therapeutic contract (transaction) is an agreement between a doctor and a patient, a legal relationship that creates rights and obligations for both parties. The object of this agreement is the

effort or therapy to heal the patient (Purwadi, 2004). In a therapeutic agreement, both the doctor and the patient have rights and obligations that must be fulfilled. The doctor's rights and obligations are regulated in Articles 273 and 274 of Law Number 17 of 2023 concerning Health. Furthermore, the patient's rights and obligations are regulated in Articles 276 and 277 of Law Number 17 of 2023 concerning Health.

According to Sidharta, states that the types of services provided between professional service providers and users of professional services are divided into 2 types, namely: 1) services that are agreed to produce something (*resultaatsverbintenis*) and services that are agreed to attempt something (*inspanningsverbintenis*). If these two types of agreements are connected with a therapeutic agreement, then the therapeutic agreement can be categorized as a business agreement (*inspanningsverbintenis*). A doctor makes maximum and serious efforts in carrying out healing based on applicable medical standards (Purwadi, 2004). Article 291 paragraph (1) of Law Number 17 of 2023 concerning Health, regulates the obligations of medical personnel and health workers to comply with professional standards, service standards and operational procedure standards. In surgical procedures to improve patient safety during surgery, prevent errors in the surgical site and surgical procedures, the surgical team needs to comply with the established standards (Nuaristia Dewi et al., 2019)

Referring to the Regulation of the Minister of Health Number HK.01.07/Menkes/1128/2022 concerning Hospital Accreditation Standards, the requirements that must be carried out by the surgical team in surgical procedures are to carry out universal protocols. This is done to prevent wrong-site and wrong surgical procedures, which include: **First**, the pre-operative verification process. This process is a continuous collection of information and confirmation. The objectives of the pre-operative verification process are: a) verifying the correct site, correct procedure, and correct patient; b) ensuring that all documents, radiology or imaging results and examinations related to the operation are available, labeled, and prepared; c) verifying that the necessary blood products, special medical equipment, and/or implants are available.

Second, marking the surgical site. This is done with the patient's involvement and using a non-ambiguous and immediately recognizable mark. The "X" mark is not used as a marker because it can be interpreted as "not here" or "wrong side" and can potentially

lead to errors in marking the surgical site. Marking the surgical/invasive site is performed by the Physician in Charge of Surgical Services. The mark should be made while the patient is awake and conscious (if possible) and must be visible until the patient is prepared for surgery. Marking the surgical site is only done in all cases involving both sides (lateralization), multiple structures (fingers, toes, lesions), or multiple levels (spine).

Third, a time-out is performed just before the procedure begins. The surgical team agrees on the following components: correct patient identity, correct procedure to be performed, and correct surgical/invasive site. The time-out actively involves the entire surgical team. The entire time-out is documented and includes the date and time the time-out is completed. The nurse, as a member of the team, then signs the patient out at the procedure site. The nurse verbally confirms the following sign-out components: a) the name of the surgical/invasive procedure recorded; b) the completeness of the instrument, gauze, and needle count (if any); c) any equipment issues that need to be addressed (if any). Hospitals can use the Surgical Safety Checklist from The World Health Organization.

The WHO Surgical Safety Checklist is listed in table 1, as follows:

Table 1*Surgical Safety Checklist*

World Health Organization SURGICAL SAFETY CHECKLIST (FIRST EDITION)		
Before induction of anaesthesia	Before skin incision	Before patient leaves operating room
SIGN IN <ul style="list-style-type: none"> <input type="checkbox"/> PATIENT HAS CONFIRMED <ul style="list-style-type: none"> • IDENTITY • SITE • PROCEDURE • CONSENT <input type="checkbox"/> SITE MARKED/NOT APPLICABLE <input type="checkbox"/> ANAESTHESIA SAFETY CHECK COMPLETED <input type="checkbox"/> PULSE OXIMETER ON PATIENT AND FUNCTIONING <p>DOES PATIENT HAVE A:</p> <p>KNOWN ALLERGY?</p> <ul style="list-style-type: none"> <input type="checkbox"/> NO <input type="checkbox"/> YES <p>DIFFICULT AIRWAY/ASPIRATION RISK?</p> <ul style="list-style-type: none"> <input type="checkbox"/> NO <input type="checkbox"/> YES, AND EQUIPMENT/ASSISTANCE AVAILABLE <p>RISK OF >500ML BLOOD LOSS (7ML/KG IN CHILDREN)?</p> <ul style="list-style-type: none"> <input type="checkbox"/> NO <input type="checkbox"/> YES, AND ADEQUATE INTRAVENOUS ACCESS AND FLUIDS PLANNED 	TIME OUT <ul style="list-style-type: none"> <input type="checkbox"/> CONFIRM ALL TEAM MEMBERS HAVE INTRODUCED THEMSELVES BY NAME AND ROLE <input type="checkbox"/> SURGEON, ANAESTHESIA PROFESSIONAL AND NURSE VERBALLY CONFIRM <ul style="list-style-type: none"> • PATIENT • SITE • PROCEDURE <p>ANTICIPATED CRITICAL EVENTS</p> <ul style="list-style-type: none"> <input type="checkbox"/> SURGEON REVIEWS: WHAT ARE THE CRITICAL OR UNEXPECTED STEPS, OPERATIVE DURATION, ANTICIPATED BLOOD LOSS? <input type="checkbox"/> ANAESTHESIA TEAM REVIEWS: ARE THERE ANY PATIENT-SPECIFIC CONCERNS? <input type="checkbox"/> NURSING TEAM REVIEWS: HAS STERILITY (INCLUDING INDICATOR RESULTS) BEEN CONFIRMED? ARE THERE EQUIPMENT ISSUES OR ANY CONCERNS? <p>HAS ANTIBIOTIC PROPHYLAXIS BEEN GIVEN WITHIN THE LAST 60 MINUTES?</p> <ul style="list-style-type: none"> <input type="checkbox"/> YES <input type="checkbox"/> NOT APPLICABLE <p>IS ESSENTIAL IMAGING DISPLAYED?</p> <ul style="list-style-type: none"> <input type="checkbox"/> YES <input type="checkbox"/> NOT APPLICABLE 	SIGN OUT <p>NURSE VERBALLY CONFIRMS WITH THE TEAM:</p> <ul style="list-style-type: none"> <input type="checkbox"/> THE NAME OF THE PROCEDURE RECORDED <input type="checkbox"/> THAT INSTRUMENT, SPONGE AND NEEDLE COUNTS ARE CORRECT (OR NOT APPLICABLE) <input type="checkbox"/> HOW THE SPECIMEN IS LABELLED (INCLUDING PATIENT NAME) <input type="checkbox"/> WHETHER THERE ARE ANY EQUIPMENT PROBLEMS TO BE ADDRESSED <p>SURGEON, ANAESTHESIA PROFESSIONAL AND NURSE REVIEW THE KEY CONCERNS FOR RECOVERY AND MANAGEMENT OF THIS PATIENT</p>

Source: (Rachmawaty et al., 2020)

The World Health Organization (WHO) has developed a Surgical Safety Checklist, to be implemented by teams in the operating room. The three-part checklist and instructions for use are published in <http://www.who.int/patientsafety/safesurgery/en/> (Rachmawaty et al., 2020)

3.3 The burden of proof according to law in Indonesia

In the concept of civil law, the definition of fault can be distinguished between the broad definition of fault and the narrow definition of fault. The broad definition of fault includes both intent and negligence. Meanwhile, the narrow definition of fault only includes negligence. The definition of intent is an act committed with the knowledge and will of the perpetrator. Meanwhile, negligence is an act in which the perpetrator is unaware of the potential consequences that will harm others. An act of negligence is not based on the perpetrator's intent. Negligence in performing a medical procedure can result

in patient dissatisfaction with the doctor. This negligence can result in harm to the patient, so the doctor and/or health care facility can be held civilly liable for unlawful acts (Purwadi, 2004). To prove that someone has committed an unlawful act, evidence is required. Evidence is a tool to prove the truth of a legal relationship, as stated by both the plaintiff and the defendant in a civil case (Heryani A. A., 2012).

The laws (BW, HIR, and Rbg.) basically divide evidence in civil procedural law into: 1) Written evidence or letters are classified into three types, namely authentic deeds, private deeds, other documents that are not deeds; 2) Testimony is evidence that is presented verbally and personally by a witness who is not a party to the case. Testimonial evidence to provide certainty to the judge before the trial regarding the disputed event; 3) Allegations are indirect evidence, because with conjectures you can draw conclusions from events that have been proven to events that have not been proven. In Indonesia, estimates can be divided into two, namely estimates according to the judge and according to the law. In the judge's opinion, it is the judge who makes these estimates. Meanwhile, allegations according to law are divided into two types, namely those that allow opposing evidence and those that do not allow opposing evidence. The differences between the judges' estimates and those according to the law are: a) The statutory suspicions are determined before a concrete event occurs; b) The judge's estimates are determined by the judge, after concrete events have occurred; 4) Confession is divided into three, namely: a) Pure confession (*aveu pur et simple*); b) Recognition with qualifications (*aveu qualifié*); c) Acknowledgment with clauses (*aveu complexe*); 5) Oaths are divided into three types, namely: a) Decisive oath (*deciding oath*); b) *Supletoir* oath (supplementary oath); c) *Aestimatoir* oath (estimation oath); 6) Expert information (*expertise*); 7) Local inspection (*descente*) (Heryani A. A., 2012).

An allegation can be declared as perfect evidence if it is supplemented and/or accompanied by other evidence related to the legal event that occurred. In Indonesia, there is the theory of positive proof. This theory requires that judges are not bound by written positive law at all in terms of evidence, but that the assessment of evidence is completely left to the judge's discretion. The judge's suspicion or reality is free evidence (*vrijbewijskracht*), that is, the strength of the evidence is left to the judge's consideration (Heryani A. A., 2012). Referring to Article 173 RIB, allegations that are not based on applicable legislation may only be taken into account by the judge in handing down his

decision, if the allegations are important, thorough, certain and in accordance with each other. Furthermore, Article 1922 of the Civil Code explains: "Suspects that are not based on law are left to the consideration and vigilance of the judge, in which case other allegations must not be taken into account, other than those which are important, thorough and certain, and in accordance with each other" (Fuady, 2017).

In civil proceedings, the principle of burden of proof is known as regulated in Article 163 HIR (Article 283 Rbg, 1865 Civil Code) which states: "Anyone who claims to have a right or who bases it on an event to strengthen his right or to deny the right of another person must prove the existence of that right or event." From this provision, it can be concluded that both the plaintiff and the defendant can be burdened with proof. In particular, the plaintiff is obliged to prove his claim, and the defendant is obliged to prove his denial (Heryani A. A., 2012). The doctrine of Res Ipsa Loquitur emphasizes the victim's presentation of the facts of the incident, but the perpetrator is given the right to prove their innocence. The distribution of the burden of proof based on the provisions of Article 1865 of the Civil Code and Article 163 of the HIR will be considered fair if the parties are in equal positions. However, it will be considered unfair if there is an imbalance between the parties, especially due to a gap in knowledge. The shifting of the burden of proof allows for the guarantee of the principle of balance (Widiyastuti, 2020). The doctrine of Res Ipsa Loquitur goes hand in hand with the doctrine of reverse burden of proof (*omkering van bewijslast*) and also with the doctrine of strict liability, although there are differences between the three doctrines. These differences can be seen in Table 2 below:

Table 2

The doctrine of Res Ipsa Loquitur goes hand in hand with the doctrine of reverse

Doctrine of Best Evidence	What is emphasized is the obligation to provide proof from the party suspected of being the perpetrator.
The Doctrine of Res Ipsa Loquitur	What is emphasized is the indication of the facts of the incident by the victim even though the party suspected of being the perpetrator is given the right to prove their innocence (rebutation of presumption).
Doctrine of Absolute Liability	What is emphasized is the presentation of the facts of the incident by the victim and Responsibility by the party suspected of being the perpetrator, without giving the right to the alleged perpetrator to prove his innocence

Source: (Fuady, 2017)

3.4 Application of the Res Ipsa Loquitur doctrine in wrong-side, wrong-procedure actions on surgery patients

In law, one of the principles of civil liability is liability based on fault. According to this principle, a person is responsible for doing something that harms another person (Purwadi, 2004). Article 1865 of the Civil Code is the legal basis used to prove fault. This article, which has been used in Indonesia, stipulates that the burden of proving fault rests with the plaintiff (Widiyastuti, 2020). While *res ipsa loquitur* is rarely used, it is necessary in medical law. The requirement for establishing proof based on the doctrine of *res ipsa loquitur* is the reverse burden of proof (*omkering van bewijslast*), which requires proof from the alleged perpetrator (Fuady, 2017). In the case of a doctor operating on the wrong patient's leg, as quoted in the online media Kompas.com, which was published in <https://medan.kompas.com/read/2023/01/11/112753778/kasus-dugaan-salah-operasi-kaki-dokter-dan-rs-tak-hadiri-panggilan-polda-sumut>.

According to the author, it is necessary to apply the doctrine of *Res Ipsa Loquitur* as a form of proof because it can provide a sense of justice for patients. This doctrine is necessary in medical law because patients are laypeople in medical science. Patients fully entrust their health to doctors who are considered experts in medical science and operate based on the principle of prudence (Sylvana & Widjaja, 2022). In addition, the legal requirements in the case of a doctor operating on a patient's leg incorrectly for the application of the *Res Ipsa Loquitur* Doctrine as stated by Fuady in the book "Unlawful Actions" have met the requirements in the case of multiple perpetrators. These requirements can be proven as follows: 1) The surgical action involves collaboration between a team, namely a surgical team consisting of medical personnel (anesthesiologists, surgical specialists) and health workers (anesthesiologists and circulating nurses); 2) The surgical team in carrying out the surgical action has an obligation to maintain the safety and health of the patient by using the surgical safety checklist (Surgical Safety Checklist from WHO) as attached in Table 1 above. One or more people from the surgical team can be held legally responsible. Even though the patient cannot indicate who among the surgical team is at fault and committed the action. In the case of a wrong side, wrong procedure if the marking of the surgical site is done but the doctor still makes a mistake as in the case published in Kompas.com, so according

to the author the physical condition of the patient is a fact, and also the condition of the circumstantial evidence, so that the existing evidence is a fact, and the fact will speak for itself.

The author argues that the application of the doctrine of Res Ipsa Loquitur aligns with the purpose of law as stated by Aristotle, namely to provide justice to society. According to Aristotle, justice is understood as equality, but not equality. Aristotle distinguishes between equal rights and proportional rights. Proportional equality gives each person what they are entitled to according to their abilities and achievements (Ana Suheri, 2018). When related to the resolution of a patient's incorrect leg surgery case, Aristotle's proportional rights are highly applicable. If the patient is given the burden of proof, they will be unable to prove the error. Therefore, according to Aristotle, the doctor is the one who can prove it. It would be unfair for the patient to be burdened with proof, as the surgical error was not the patient's fault.

Therefore, the judge should require the surgical team to bear the burden of proof. First, they must present evidence in accordance with applicable procedural law. Second, they must prove the truth of the facts presented based on the evidence presented, so that the judge is convinced of the truth of the facts they present (Heryani A. A., 2012). Proof in determining the existence of unlawful acts by the surgical team is very necessary. According to civil procedural law, evidence consists of: 1) written evidence or letters; 2) testimony; 3) estimates; 4) recognition; 5) oath; 6) expert information (expertise); 7) local inspection (descente) (Heryani A. A., 2012). To ensure the correct patient, the correct procedure, and the correct site, the surgical team needs to demonstrate proof of the pre-operative verification process using a surgical safety checklist documented in the medical record. This medical record will be presented as legal evidence by the surgical team to prove whether or not there was negligence during the operation. In court practice, witnesses are generally used to strengthen the evidence. However, in cases of wrongful death or incorrect surgical procedures, the author believes the victim/patient will have difficulty presenting witnesses to the trial. The operation is performed in the operating room, attended only by the patient and the surgical team.

The patient is under anesthesia during the operation, which affects their consciousness. Therefore, no other parties can serve as witnesses who heard, saw, or experienced the events that occurred. In such circumstances, the surgical team has the

most knowledge about the circumstances of the incident. Therefore, the burden of proving the surgical team's innocence rests solely with the surgical team. What actually occurs is a kind of reversal of evidence from the patient to the surgical team, or what is known as the application of reverse evidence (*omkering van bewijslats*).

In proving the element of unlawful act of negligence committed by the Surgical Team in the wrong side action, wrong procedure on the patient, then all parties including the judge must adhere to the benchmark outlined by the legal principle of evidence. The doctrine of *Res Ipsa Loquitur* can be applied in Indonesia through presumptive evidence concluded by the judge because the law gives the judge the authority in the form of freedom to formulate presumptions as regulated in Article 1922 of the Civil Code (Fuady, 2017)

4 CONCLUSION

Based on the doctrine of *res ipsa loquitur*, the burden of proof is reversed from what should be on the patient as the plaintiff to the doctor as the defendant. In order to provide a sense of justice for patients as victims who find it very difficult to obtain evidence, but an error/negligence is so clear, then proof by applying the doctrine of *Res Ipsa Loquitur* is deemed necessary to be applied in Indonesia in resolving cases in the medical field. Proof of the Doctrine of *Res Ipsa Loquitur* is carried out with presumptive evidence concluded by the judge in accordance with Article 1922 of the Civil Code.

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AUTHOR CONTRIBUTION STATEMENT

Author 1 was primarily responsible for the conceptualization, research design, data collection, data analysis, and manuscript preparation. Author 2 provided support in the theoretical refinement, literature review, and final editing. Authors 3 and 4 assisted in data collection, while Author 5 assisted in the analysis of the results. All authors discussed the results and contributed to the final version of the manuscript.

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Authors' Contribution

All authors contributed equally to the development of this article.

Data availability

All datasets relevant to this study's findings are fully available within the article.

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