

RES IPSA LOQUITUR: APPLICATION IN PRODUCT LIABILITY

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ABSTRACT

Consumers who experience loss, injury, or death due to a damaged or defective product can claim compensation. However, the difficulty of proof is a scourge for consumers. In law, the doctrine of *res ipsa loquitur* was introduced, which in English means that things speak for itself. Based on the doctrine, the law presumes a presumption of negligence which can then be applied to the reverse burden of proof. This study examines the principle of product responsibility in the Consumer Protection Act and the application of the *res ipsa loquitur* doctrine in product liability. This research is normative research using a conceptual approach and a statute approach. This study found that the principle of product liability in the Consumer Protection Act contains two principles: first, the presumption of negligence, and second, the presumption of liability principle with the burden of proof reversed. In line with the consumer interest-oriented doctrine, *res ipsa loquitur* also contains the presumption of negligence followed by the presumption of liability principle. The application of the *res ipsa loquitur* doctrine in product liability is found in 2 things: first as a principle and second as a means of evidence in civil procedural law which can be enforced through evidence of a presumption concluded by a judge.

Keywords: civil; consumer protection; product liability; *res ipsa loquitur*

INTRODUCTION

In the realm of law, perfection eludes every field, and this disclaimer notably extends to the sphere of product liability.¹ Generally, product liability entails the obligations or duties of business entities, wholesalers (or other intermediaries), or retailers/sellers (alongside other relevant parties) towards consumers, buyers, users, and even “observers” when a product is discovered to be defective. Irrespective of the theory underpinning responsibility, the foundational premise for product liability litigation is rooted in the existence of a defective product.² Legal certainty encompasses the entirety of endeavors aimed at empowering consumers in the acquisition or selection of goods and/or services while concurrently safeguarding their rights when aggrieved by the actions of business entities providing for consumer needs.³ Pharmaceuticals represent one of the quintessential needs of consumers. As widely recognized, drugs serve purposes ranging from diagnosis, prevention, healing, recovery, health enhancement, to contraception for humans.⁴ However, pharmaceuticals themselves constitute a paradox. On one facet, they possess the potential

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¹ Keith N. Hylton, “The Law and Economics of Products Liability”, *Notre Dame Law Review* Vol. 88, No. 5, 2013, p. 2457.

² Jr. Richard J. Hunter, Henry J. Amoroso, and John H. Shannon, “A Managerial Guide to Products Liability: A Primer on the Law in the United States”, *International Journal of Learning and Development* Vol. 2, No. 3, 2012, p. 35.

³ Azwir Agus, “Embodiment Principles of Clearing Justice in Consumer Arbitration”, *Hasanuddin Law Review*, Vol. 4, No. 3, 2018, p. 383.

⁴ Norma Sari, “Consumer Protection of Drug in Indonesian Law: Examining The Paternalism Theory”, *IConProCS* Vol. 317, 2019, p. 177.

to preserve millions of human lives; on the other, due to potent contents in raw materials (and the consequential side effects), they can instigate significant suffering and substantial losses.⁵

One of the greatest tragedies is thalidomide, a drug initially used as an antiemetic to treat morning sickness during pregnancy. However, between 1957 and 1961, when the drug was withdrawn from the market, over 10,000 children in 46 countries were born with congenital abnormalities, predominantly phocomelia, characterized by the absence of limbs.⁶ A recent case in the United States related to opioid use, a pain-relief medication, saw a federal judge in August 2022 ordering the three largest pharmaceutical companies to pay \$650.5 million to two districts in the state of Ohio. The judge determined that the companies should be held accountable for their role in the opioid crisis.⁷

In Indonesia, the most recent case involves Acute Kidney Injury in Children (GGAPA), with 324 recorded cases as of November 15, 2022. Of these cases, 111 patients have recovered, while there have been 199 deaths, primarily among children aged 1-5 years.⁸ BPOM, in a press release, reported findings of syrup medication containing contamination of Ethylene Glycol (EG) and Diethylene Glycol (DEG) suspected to be linked to GGAPA cases. The head of BPOM revealed, "Examination results of production facilities also found evidence that the pharmaceutical industry changed suppliers of Active Pharmaceutical Ingredients (API) and used API that did not meet the criteria, with EG contamination in raw materials exceeding the safe threshold of not more than 0.1%."⁹

In relation to consumers who have suffered losses, injuries, or death due to damaged or defective products, they may seek compensation based on: (1) contractual liability; (2) liability based on tort; and (3) absolute liability.¹⁰ Meanwhile, in Indonesia, the liability of business actors for consumer losses is specifically regulated in Law Number 8 of 1999 concerning Consumer Protection (UUPK) in one chapter, namely Chapter VI, from Article 19 to Article 28. UUPK employs a principle of semi-strict liability, as demonstrated in Article 19, where business actors are obligated to compensate for the losses or damages experienced by consumers, and in Article 28, where proof of the absence of fault must be established by the business actor.¹¹ Article 19 is inconsistent with Article 28, as on

⁵ Mitja Kovac, Salvini Datta, and Rok Spruk, "Pharmaceutical Product Liability, Litigation Regimes, and the Propensity to Patent: An Empirical Firm-Level Investigation", *SAGE Open* Vol. 11, No. 2, 2021, p. 3.

⁶ P. J. Lachmann, "The Penumbra of Thalidomide, the Litigation Culture and the Licensing of Pharmaceuticals", *Qjm* 105, No. 12, 2012, p. 1179.

⁷ The New York Times, "CVS, Walgreen and Walmart Must Pay \$650.5 Million in Ohio Opioid Case", 2022, <<https://www.nytimes.com/2022/08/17/health/opioids-cvs-walmart-walgreens.html>>, [accessed 22 November 2022].

⁸ Rokom Redaksi Sehat, "Tidak Ada Kasus Baru Gangguan Ginjal Akut", 2022, <<https://sehatnegeriku.kemkes.go.id/baca/rilis-media/20221116/1641741/tidak-ada-kasus-baru-gangguan-ginjal-akut/>>, [diakses pada 18 November 2022].

⁹ Kerjasama dan Humas, "Tindakan Tegas BPOM dan Bareskrim Polri Terhadap Industri Farmasi Produsen Sirup Obat yang Tidak Memenuhi Standar dan/atau Persyaratan Keamanan, Khasiat, dan Mutu", 2022, <<https://www.pom.go.id/new/view/more/pers/664/Tindakan-Tegas-BPOM-dan-Bareskrim-Polri-Terhadap-Industri-Farmasi--Produsen-Sirup-Obat-yang-Tidak-Memenuhi-Standar-dan-atau-Persyaratan-Kemaman--Khasiat--dan-Mutu.html>>, [diakses pada 18 November 2022].

¹⁰ UNCTAD, *Manual on Consumer Protection*, United Nations, 2018, p. 64.

¹¹ Gede Adhitya, Ariawan Ni Made, dan Ari Yuliantini Griadhi, "Tanggung Gugat Product Liability Dalam Hukum Perlindungan Konsumen di Indonesia", *Kertha Semaya*, Vol. 01, No. 06, 2013, p. 4.

one hand, it specifies that the obligation to pay compensation can be interpreted based on fault or non-fault, while on the other hand, it establishes the presence of fault with a reversed burden of proof. As a result, the absolute liability arising from the responsibility for the product of the business actor is only implicitly stated in several different articles, causing inconsistencies in the norms of the liability principle.¹²

In the case of business actors who behave in such a manner and considering the fulfillment of the elements of product liability, resolution against them can be pursued through legal avenues provided by UUPK.¹³ As exemplified by legal actions taken by dozens of families of GGAPA patients who filed a class action lawsuit against BPOM, the Ministry of Health, and seven pharmaceutical companies, the victims seek compensation for the suffering they endured due to this case.¹⁴ However, the difficulty of proof poses a daunting challenge for consumers. In other words, consumers' failure to prove negligence on the part of the business actor is a threat to the success of claims by consumers who have suffered losses due to defective products. It is evident that the position of the business actor is stronger than that of the consumer, as the business actor is the one who knows and understands the production materials, the production process, and the potential errors in their products.¹⁵

In the field of law, the doctrine of *res ipsa loquitur* is introduced, which in English means "the thing speaks for itself."¹⁶ This doctrine originated from the Anglo-Saxon legal system and traces back to the 1865 case of *Scott v. London and St. Kathrine Docks, London*. In this case, wooden barrels containing flour and bags containing sugar fell from a multi-story building, injuring pedestrians passing below. The judge opined that if the barrels and bags were stacked carefully, it would be impossible for them to fall. The burden of proving the absence of negligence was imposed on the owner in this case. In such instances, the law deems the existence of a presumption of negligence, and a reversed burden of proof can be applied.¹⁷

From the theories and doctrines related to product liability explained above, this article will analyze two legal issues. First, what is the principle of product liability in UUPK? Second, how is the doctrine of *res ipsa loquitur* applied in product liability?

METHODS

This research adopts a normative or doctrinal approach, also known as dogmatic research, utilizing conceptual and statutory regulation approaches.¹⁸ Legal materials are classified into two

¹² Holijah, "Pengintegrasian Urgensi dan Eksistensi Tanggung Jawab Mutlak Produk Barang Cacat Tersembunyi Pelaku Usaha dalam Undang-Undang Perlindungan Konsumen di Era Globalisasi", *Jurnal Dinamika Hukum*, Vol. 14, No. 1, 2014, p. 187.

¹³ Yudha Hadian Nur dan Dwi Wahyuniarti Prabowo, "Penerapan Prinsip Tanggung Jawab Mutlak (Strict Liability) Dalam Rangka Perlindungan Konsumen", *Buletin Ilmiah Litbang Perdagangan*, Vol. 5, No. 2, 2011, p. 182.

¹⁴ Amirullah, "Gugatan Class Action Keluarga Korban Gagal Ginjal Akut," 2022, <<https://fokus.tempo.co/read/1664287/gugatan-class-action-keluarga-korban-gagal-ginjal-akut>>, [diakses pada 6 Januari 2023].

¹⁵ Windi Eka Oktaviani, "Tanggung Jawab Pelaku Usaha Terhadap Kerugian Konsumen Akibat Produk Cacat", *Reformasi Hukum* Vol. XIX, No. 2, 2016, p. 222.

¹⁶ J. Guwandi, *Tindakan Medik dan Tanggungjawab Produk Medik*, Balai Penerbit Fakultas Kedokteran Universitas Indonesia, Jakarta: 1993, p. 17.

¹⁷ J. Guwandi, *Hukum Medik (Medical Law)*, Balai Penerbit Fakultas Kedokteran Universitas Indonesia, Jakarta: 2007, p. 152.

¹⁸ Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Kencana, Jakarta: 2005, p. 132-135.

categories: first, primary legal materials in the form of legislation, including Law Number 8 of 1999 concerning Consumer Protection (UUPK), Herzien Inlandsch Reglement (HIR), and the Civil Code (KUH Perdata); and second, secondary legal materials in the form of expert opinions or doctrines obtained from legal articles in law journals or books related to the raised issues.¹⁹

The data collection technique in normative research involves literature reviews or searches for legal materials, which in this study include both primary and secondary legal materials. The means to obtain these research sources and materials include reading and utilizing the convenience of technology by conducting in-depth searches on the internet. Legal materials are then selected, classified, and analyzed descriptively, specifically aimed at providing arguments for the research findings. These arguments are subsequently transformed into prescriptions or evaluations, allowing for a consideration of what is right or wrong, or what is fitting within the legal context related to the examined issues based on the research findings.²⁰

DISCUSSION

Principle of Product Liability in UUPK

Liability for Defective Products

In *Black's Law Dictionary*, there are three formulation regarding Product Liability, namely: (1) A manufacture's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product. Products Liability can be based on a theory of negligence, "strict liability", or breach of warranty. (2) The legal theory by which liability is imposed on the manufactures or seller of a defective product. (3) "Refers to the legal liability of manufactures and sellers to compensate buyers, users and even bystanders, for damages or injuries suffered because of defects in goods purchased."²¹

Product liability is the civil liability of a business entity for the losses suffered by consumers resulting from the use of its produced products. The business entity is responsible for providing compensation for: a. Damage; b. Pollution; and c. Consumer losses due to consuming goods produced or traded.²² The Working Team for the Preparation of Academic Texts of the National Law Development Agency formulates the definition of a defective product as follows: "Any product that cannot fulfill its intended purpose, whether intentionally, negligently in its production process, or due to events that may occur in its circulation, or fails to provide safety requirements for humans or their property in its use, as expected by people."²³

¹⁹Mukti Fajar Nur Dewata dan Achmad Yulianto, *Dualisme Penelitian Hukum Normatif dan Empiris*, Fakultas Hukum Universitas Muhammadiyah Yogyakarta, Yogyakarta: 2007, p. 111-113.

²⁰Mukti Fajar Nur Dewata dan Achmad Yulianto, *Ibid*, p. 131.

²¹Soemardjono Brodjo Soedjono, "Hukum Perlindungan Konsumen Dalam Transaksi Konsumen di Dunia Maya Tentang Tanggungjawab Produk", *Journal of Physics A: Mathematical and Theoretical*, Vol. 44, No. 8, 2011, p. 2.

²²Soemardjono Brodjo Soedjono, *Ibid*, p. 3.

²³Fabian Fadhly, "Ganti Rugi Sebagai Perlindungan Hukum Bagi Konsumen Akibat Produk Cacat", *Arena Hukum*, Vol. 6, No. 2, 2013, p. 241.

There are several categories that determine whether a product can be considered defective or unable to fulfill its intended purpose. First, manufacturing or manufacturing defects, which are products generally below consumer expectations. Defective products can endanger the property, health, or life of consumers. Manufacturing defects can also be interpreted as the relationship between the conformity of details, satisfaction, users, and deviations from regulations. The liability to be responsible for defective products initially applied specifically to food and beverage products, but over time, this specificity has been expanded to all manufactured products. Second, design defects can be defined as demands that generally pose too many preventable dangers. The product may be imperfect if it fails to display as closely as possible to what is expected by consumers in general. This context is interpreted as something expected, presumed to have a predicted meaning in the failure of form. Design defects occur at the product preparation level, consisting of design, composition, or construction.²⁴ Third, warning or instruction defects, which are product defects because they are not equipped with specific warnings or inadequate user instructions.²⁵

In connection with consumers who have suffered losses, injuries, or death due to damaged or defective products, they can seek compensation based on:

(1) contractual liability

That parties subject to an agreement have rights determined by the provisions of the agreement. A plaintiff who suffers loss or injury arising from a product based on an agreement must prove that the product does not meet the standards required in the agreement. However, legal recourse is limited in some situations. This is due, among other things, to the doctrine of contracts in the form of a heavy standard on one side. Consumers only have the option to comply or not enter into an agreement at all;

(2) liability based on tort

This liability offers legal protection beyond contractual protection. Consumers can claim compensation for losses suffered as a result of unsafe products. Based on the House of Lords case in *Donoghue v Stevenson* 1932, it was decided that the business entity owes a duty of care to the end consumer. This decision opens the way for direct claims against the business entity resulting from defective/damaged products.²⁶

In Indonesia, based on Article 1365 of the Civil Code, any wrongful act that causes harm to another person as a consumer obliges the person who caused the harm to compensate for it. Wrongful acts in the business entity's liability for products that harm consumers can also be interpreted as acts that violate the rights of others, contrary to the obligations of the business entity, contrary to morality, and not in accordance with societal appropriateness regarding consideration for the interests of others (consumers). To claim compensation for products that harm consumers based on wrongful acts, several conditions must be met, such as the existence of an unlawful act, fault, harm, and a causal relationship between the harm and the fault.²⁷

²⁴ Fabian Fadhly, *Ibid*, p. 242.

²⁵ Ahmad Sudiro, "Asuransi Tanggung Jawab Produk Dan Perlindungan Terhadap Konsumen", *Jurnal Hukum Ius Quia Iustum*, Vol. 21, No. 4, 2014, p. 682.

²⁶ UNCTAD, *Op.cit.*, p. 64

²⁷ Oktaviani, *Op.cit.*, p. 228.

(3) strict liability

This liability refers to the responsibility of each or all parties in the production chain for all losses caused by the product, without prejudice to recovery actions among the responsible parties. Strict liability makes each party legally responsible regardless of fault and without the need to prove fault, negligence, or intent.²⁸

The Principle of Product Liability with 2 Modifications

In the UUPK, there are 2 (two) articles that describe the product liability system in consumer protection law in Indonesia, namely Article 19 and Article 23 UUPK. Article 19 UUPK formulates the responsibility of business actors as follows: a. Business actors are responsible for compensating for damage, pollution, and/or consumer losses due to the consumption of goods and/or services produced or traded, b. Compensation as referred to in paragraph (1) may take the form of a refund or replacement of goods and/or services of the same kind or equivalent value, or health care and/or compensation in accordance with the provisions of applicable laws and regulations. c. Compensation is provided within a period of 7 (seven) days from the transaction date. d. Compensation as referred to in paragraphs (1) and (2) does not eliminate the possibility of criminal charges based on further evidence of the existence of fault. e. The provisions as referred to in paragraphs (1) and (2) do not apply if the business actor can prove that the fault is the consumer's fault. Article 19 UUPK is then elaborated in Article 23 UUPK, which states: "Business actors who reject and/or respond and/or do not fulfill compensation for consumer claims as referred to in Article 19 paragraphs (1), (2), (3), and (4) can be sued through the Consumer Dispute Settlement Body or file a lawsuit with the court in the consumer's domicile."²⁹

Formulation of Article 23 of UUPK arises from two conceptual frameworks: firstly, that Article 19 of UUPK adheres to the principle of presumption of negligence. This principle starts from the assumption that if a business actor does not make a mistake, the consumer does not suffer a loss, or in other words, if the consumer incurs a loss, it means the business actor has made a mistake. As a consequence of this principle, UUPK sets a 7-day time limit for compensation payment after the transaction date. In the context of Article 23, the 7-day limit is not intended for the proof process but only provides an opportunity for the business actor to pay or seek other solutions, including dispute resolution through the court.³⁰ The second concept is that the business actor does not pay compensation within the specified time limit. This stance by the business actor opens the opportunity for consumers to file a lawsuit in court or settle disputes through the Consumer Dispute Settlement

²⁸ UNCTAD, *Loc. Cit.*

²⁹ Soedjono, *Op. Cit.*, p. 5-6.

³⁰ Inosentius Samsul, *Perlindungan Konsumen Kemungkinan Penerapan Tanggung Jawab Mutlak*, Program Pascasarjana Fakultas Hukum Universitas Indonesia, Jakarta: 2004.

Body. Furthermore, the formulation of the relevant article with Article 23 is the formulation of Article 28 known as the reversed burden of proof system.³¹

The formulation of Article 23 demonstrates that the principle of responsibility embraced by UUPK is the presumption of always being responsible (presumption of liability principle) with a reversed burden of proof. Therefore, it can be concluded that UUPK adheres to the principle of responsibility with 2 modifications, namely: firstly, the principle of responsibility based on the presumption of fault/negligence, or the business actor is already considered at fault, so there is no need to prove their fault, and secondly, the principle of always being responsible with a reversed burden of proof. Such a legal construction depicts progress from the liability system based on tort (Article 1365 of the Civil Code) that shows Indonesia is still in the stage of modification toward the principle of strict liability. This is a step toward the principle of strict liability.³² Thus, in accordance with Article 1365 of the Civil Code, UUPK maintains the principle of liability based on fault, which aligns with the principle of strict liability that requires reversed burden of proof to establish the element of fault.³³

Application of *Res Ipsa Loquitur* in Product Liability

***Res Ipsa Loquitur* in Terms of Doctrine**

Based on the theory of fault, liability arises due to the existence of a mistake. Mistakes always exist even if the elements are not explicitly stated, but they must be presumed to exist. In order to seek compensation based on tort, this element of fault must be proven. Fault here is generally understood broadly, including intentional actions (*opzet*) and negligence. Negligence by a business actor is behavior that does not comply with the standards of conduct established by the law for the protection of the public against irrational risks. What is meant here is the presence of less careful and less cautious actions that a seller or business actor should have the duty to maintain the interests of others (duty of care). The main element in negligence is the obligation to maintain the interests of those violated by the business actor regarding their product. This obligation requires that the business actor be careful in safeguarding the interests of others as users of the product. This lawsuit is accompanied by evidence based on the losses caused by defects in the product, losses related to defects in the product that occurred before the delivery of the product, and losses caused by defects in the product due to the lack of care by the business actor.³⁴

Unlawful Act in Business Liability for Products Harming Consumers tends to be less successful because it is difficult to expect consumers to be aware of design issues, production processes, and other matters related to production processes.³⁵ On the other hand, the plaintiff/consumer must sue every party whose actions are deemed to contribute to the damage/defect of the goods that result

³¹ Inosentius Samsul, *Ibid.*

³² Inosentius Samsul, *Ibid.*

³³ Deviana Yuanitasari, "Re-Evaluasi Penerapan Doktrin Caveat Venditor Dalam Tanggung Jawab Pelaku Usaha Terhadap Konsumen", *Arena Hukum*, Vol. 10, No. 3, 2017, p. 439.

³⁴ Oktaviani, *Op. Cit.*, p. 229.

³⁵ Oktaviani, *Ibid.*, p. 221.

in loss or harm, for example: the manufacturer, product creator, part of the manufacturer or raw material provider, distributor, and retailer.³⁶

One doctrine oriented towards consumer interests is *res ipsa loquitur* with the application of the presumption of negligence principle. This principle means that negligence does not need to be proven again because the fact of an accident or loss experienced by the consumer is the result of negligence by the business actor. The consumer would not suffer harm if the business actor were not negligent. According to this doctrine, the burden of proof is placed on the defendant, whether the defendant was negligent or not. Thus, the presumption of negligence is followed by the presumption of responsibility. This principle states that the defendant is always considered responsible (presumption of liability principle) until they can prove their innocence. So the burden of proof lies with the defendant.³⁷

An example of the application of this doctrine is the case of *Richenbacher v. California Packing Corporation*, where the plaintiff suffered injuries due to a piece of glass found in canned food. The defendant marketed the canned food using its Del Monte label. In this case, it is not necessary to prove that the defendant was negligent in preparing and putting the food into the can because there would be no glass fragments in the can if the business actor were not negligent.³⁸

In Black Law's dictionary states that "*Res Ipsa Loquitur* is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the *Res Ipsa Loquitur* doctrine, properly applied, does not entail any covert form of strict liability ... The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."³⁹

Responsibility for a product can be established based on the doctrine of *res ipsa loquitur*. In this regard, a lawsuit based on product liability must meet several elements: (1) the plaintiff has suffered an injury as a result of using the product; (2) the product must be defective or damaged at the time of sale; (3) the product must be damaged at the time it is marketed by the business actor. The fulfillment of these elements is a requirement for the success of the filed lawsuit.⁴⁰

As a defense against such a lawsuit, business actors can use the following grounds for defense: the presence of fault on the part of the consumer, known as contributory negligence, for example, not following the proper usage instructions; the consumer was already aware of and acknowledged a certain risk (assumption of risk), for example, the inherent risk of radiation therapy; the existence of factors that negate fault (disclaimer), for example, warnings regarding the use and

³⁶ UNCTAD, *Op. Cit.*, p. 64.

³⁷ Inosentius Samsul, *Op. Cit.*

³⁸ Inosentius Samsul, *Ibid.*

³⁹ Setyo Trisnadi, "Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis", *Jurnal Pembaharuan Hukum*, Vol. 4, No. 1, 2017, p. 25.

⁴⁰ Guwandi, *Tindakan Medik Dan Tanggungjawab Produk Medik*, *Op. Cit.*, p. 54-55.

contraindications of the product that the consumer did not adhere to, such as the use of medication for pregnant women.⁴¹

The application of the *res ipsa loquitur* doctrine has specific implications for tortious acts (Article 1365 of the Civil Code) involving multiple actors or one of many individuals where the exact victim is not precisely known. The general legal rule is that victims of tortious acts must prove who among the many individuals actually committed the tortious act. Legally, they are responsible for providing compensation. For example, in a case where a victim experiences an accident due to the explosion of a newly purchased bottle of beverage, the *res ipsa loquitur* doctrine is suitable for application so that both the seller, agent, and manufacturer can be held accountable for the incident without the victim needing to prove who among them is actually at fault.⁴²

In the class action lawsuit regarding the tragedy of Acute Kidney Failure in Children (GGAPA) with Case Number 771/Pdt.G/2022/PN Jkt.Pst, which has recently passed the interim judgment⁴³ stage, for the success of the filed lawsuit, it must meet three elements: (1) the plaintiff has suffered an injury as a result of using the product; (2) the product must be defective or damaged at the time of sale; and (3) the product must be damaged at the time it is marketed by the business actor.

On the other hand, the application of the *res ipsa loquitur* doctrine in judicial practice, as long as it is not regulated in Indonesian procedural law, holds the position of a principle. All principles have value for judges. The duty of the judge is to explore various legal sources, including relevant principles. Principles have value and significance when there is a legal impasse, and these principles serve as sources for judges to discover the law. This can be achieved if the judge has a scientific insight.⁴⁴

***Res Ipsa Loquitur* in Civil Procedure and the Principle of Reversed Burden of Proof in Consumer Protection**

The civil procedure law in Indonesia is based on the Civil Code and the HIR (Herzien Inlandsch Reglement), which recognizes evidence in the form of written proof, testimony, presumption, acknowledgment, and oath. Beyond these five types of evidence, HIR acknowledges on-site inspections and expert testimony as evidence.⁴⁵

Firstly, written proof or evidence through documents is crucial in civil case examinations in court. As previously mentioned, written evidence or documents are intentionally created for the purpose of future proof in case of disputes. Broadly speaking, written evidence consists of two types: deeds and other writings or documents, as regulated in Article 1867 of the Civil Code. Secondly, the

⁴¹Guwandi, *Ibid*, p. 55.

⁴²Janeman Jehezkiel Lanawaang, "Res Ipsa Loquitur Doctrine In Proofing Process Of Environmental Dispute", *Hang Tuah Law Journal*, Vol. 4, No. 2, 2020, p.84 .

⁴³Rizky Suryarandika, "Class Action Kasus Gagal Ginjal, Hakim Tolak Eksepsi Kemenkes, BPOM, Dan PT Afifarma," 2023, <<https://news.republika.co.id/berita/s1wo4c436/class-action-kasus-gagal-ginjal-hakim-tolak-eksepsi-kemenkes-bpom-dan-pt-afifarma>>, [diakses pada 4 Oktober 2023].

⁴⁴Muh. Endriyo Susila, "Penerapan Asas Res Ipsa Loquitur Dalam Penyelesaian Perkara Malpraktik Medik di Indonesia", *Fakultas Hukum Universitas Muhammadiyah Yogyakarta*, 2007, p.10.

⁴⁵Sandra Dini Febri Aristya, "Pembuktian Perdata Dalam Kasus Malpraktik Di Yogyakarta", *Mimbar Hukum*, 2011, p. 194.

term "witness" here refers to a factual witness. In the context of civil cases, if written evidence is insufficient, further proof is presented through arguments presented in court. There are witnesses brought to court who coincidentally saw, heard, or experienced an event themselves, and there are also witnesses intentionally asked to witness a legal event when it occurred in the past.⁴⁶

Thirdly, presumption (Article 1915 of the Civil Code). Subekti states that "presumption is a conclusion drawn from an event that is clear and evident." Presumptions can be divided into two types: (1) Legal presumption (Article 1916 of the Civil Code) is a presumption connected to a specific act or event based on legal provisions. In other words, legal presumption is an event that the law concludes as proving another event. For example, in the case of rent payments, the evidence of payment three times in a row proves that the previous installments have been paid; (2) Non-legal presumptions (Article 1922 of the Civil Code) left to the consideration and prudence of the judge, who in this case must not consider other presumptions. In other words, it is referred to as the judge's presumption, where an event that the judge concludes proves another event. For example, a divorce case filed on the grounds of continuous disputes. This reason is disputed by the defendant, and the plaintiff cannot prove it. The plaintiff only presents a witness who explains that the defendant and the plaintiff have been living separately for years. From the witness's testimony, the judge concludes that continuous disputes must have occurred because it is impossible for both parties to live harmoniously while living separately and on their own for years.⁴⁷

Fourth, concerning admissions made by one of the parties, some are made in court during proceedings or outside the courtroom (Article 1923). Admission made in court is conclusive evidence against the party making it, whether individually or through someone specifically authorized for it. An admission made in court cannot be withdrawn unless it is proven that the admission resulted from a mistake about the facts. An admission cannot be retracted on the grounds that the person making the admission was mistaken about the law. Oral admissions made outside the courtroom cannot be used as evidence unless allowed by testimony of witnesses. However, the probative value of an oral admission outside court is left to the judge's consideration and discretion. In other words, the judge has the full authority to assess the probative value of the admission as evidence. Fifth, in broad terms, oaths are divided into two types: promissory oaths and confirmatory oaths. A promissory oath is taken by someone when assuming a position or testifying in court. On the other hand, a confirmatory oath serves as evidence.⁴⁸

If the doctrine of *res ipsa loquitur* (the thing speaks for itself) is to be applied in cases where the victim's position is very difficult to prove that harm has occurred, the judge can use the 'presumption of evidence' as regulated in Article 1915 of the Civil Code. In this case, the judge uses

⁴⁶Octavianus Momuat, "Alat Bukti Tulisan Dalam Pemeriksaan Perkara Perdata di Pengadilan", *Lex Privatum*, Vol.II/No.1/Jan-Mar/2014 II, No. 8, 2014, p. 136-137.

⁴⁷Erich Masinambow, "Kedudukan Doktrin Res Ipsa Loquitur Dalam Hukum Pembuktian Perdata Dalam Kasus Malpraktik," *Lex Et Societatis* 4, No. 5, 2016, p. 93-94.

⁴⁸Momuat, *Op. Cit.*, p. 137-138.

the 'presumption of evidence not based on the law' as regulated in Article 1922 of the Civil Code, which states: "Presumptions not based on the law are left to the consideration and prudence of the judge, who must not consider other presumptions, except those that are important, careful, and specific and consistent with each other." In this case, the presumption is drawn by the judge's conclusion.⁴⁹ Therefore, it can be concluded that in civil procedural law, the doctrine of *res ipsa loquitur* (the thing speaks for itself) can be applied through the 'presumption of evidence' concluded by the judge, in accordance with the applicable rules.⁵⁰

As an example of the application of the doctrine of *res ipsa loquitur* as a presumption of evidence, it can be seen in the decision of the Court Decision Number 281/Pdt.G/2012/PN.Bdg.⁵¹ In the judge's considerations, the legal principle drawn from the decision is that the presumption is made based on the *res ipsa loquitur* principle, which states that in cases of wrongdoing, the plaintiff only needs to prove the facts of the incident experienced, from which a conclusion is drawn that leads to a series of events constituting the wrongdoing. Based on the *res ipsa loquitur* principle, a presumption can be drawn from a systematic series of events that there was an intentional effort by the defendants to conceal the true facts during the trial.

If such an approach is applied to the class-action lawsuit regarding the Acute Kidney Failure Tragedy in Children (GGAPA) with Case Number 771/Pdt.G/2022/PN Jkt.Pst, then the plaintiff only needs to prove the facts of the incident they experienced, from which a conclusion is drawn leading to a series of events constituting the wrongful act. From these facts, a presumption can be drawn by the judge.

From the plaintiff's perspective, there will certainly be difficulties in presenting evidence to strengthen their lawsuit, while the defendant, as a business entity with various advantages, may find it easier to argue. Therefore, the Consumer Protection Law (UUPK) introduces the principle of reversed burden of proof, which has legal consequences that shift the burden of proof onto the business entity. This principle places the responsibility on the business entity to prove the presence or absence of elements of fault that caused the harm. The reversed burden of proof principle in the UUPK distributes the burden proportionally to each party; the consumer only needs to prove the harm they suffered, while the business entity has the responsibility to prove the presence or absence of fault on their part.⁵²

CLOSING

The principle of product liability in the UUPK incorporates two principles: first, the principle of liability based on the presumption of fault/negligence, where the business entity is already considered guilty, and thus, there is no need to prove its fault; and second, the principle of always being responsible with the burden of reversed proof. In line with this, there is a doctrine oriented towards consumer interests, namely *res ipsa loquitur*, with the application of the principle that

⁴⁹ Masinambow, *Op. Cit.*, p. 94.

⁵⁰ Munir Fuady, *Sumpah Hippocrates (Aspek Hukum Malpraktek Dokter)*, PT Citra Aditya Bakti, Bandung: 2005, p. 106.

⁵¹ Mahkamah Agung RI, Putusan Pengadilan 281/Pdt.G/2012/PN.Bdg (n.d.).

⁵² Yuanitasari, *Op. Cit.*, p. 438.

negligence does not need to be proven again because the fact of the accident or harm suffered by the consumer is the result of the business entity's negligence. Subsequently, the burden of proof is shifted to the defendant. Thus, the presumption of fault is followed by the presumption of responsibility. The application of the *res ipsa loquitur* doctrine in product liability is evident in two aspects: first, as a principle, and this principle serves as a source for judges to find the law; second, as evidence in civil procedural law, which can be applied through the presumption of evidence concluded by the judge. Recommendations for the future include conducting a study on the application of the *res ipsa loquitur* doctrine in the reform of Indonesian civil procedural law.

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