

# Wrong Site Surgery as a Tort An Analysis of the Liability of Surgeons and Hospitals

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## Abstract

*Wrong Site Surgery (WSS) is one of the most serious never events in health care because it is conceptually preventable, yet when it occurs it causes physical, psychological, social, and economic harm to patients. This study examines the juridical parameters of WSS as a tort and analyzes the allocation of liability between the surgeon as an individual actor and the hospital as a corporate health-care provider. The study applies a normative-analytical legal design using statutory, conceptual, and case approaches. The research target is not a statistical population but legal norms, doctrines, scientific studies, and concrete cases relevant to WSS. Data were collected through a systematic library study of primary, secondary, and tertiary legal materials. The data were analyzed qualitatively and prescriptively through grammatical, systematic, and teleological interpretation to assess the elements of tort, the surgeon's position, and the hospital's legal obligations. The findings show that WSS fulfills the elements of an unlawful act because it involves unlawful conduct, fault, damage, and a clear causal relationship. Surgeons bear personal liability for professional negligence in patient verification, site marking, and compliance with the time-out process, whereas hospitals may be liable under vicarious liability and corporate liability when systemic failures, weak supervision, deficient policies, and poor safety culture contribute to the event. Practically, the study underscores the importance of documented preoperative verification, audits of time-out compliance, non-punitive incident reporting, and prompt, accountable compensation mechanisms*

**Keywords:** *wrong site surgery; tort; medical liability; hospital liability; patient safety.*

## A. Introduction

Patient safety has evolved into a key parameter of healthcare quality, as clinical success cannot be separated from the obligation to prevent avoidable injuries. The World Health Organization emphasizes that approximately one in ten patients experience harm during healthcare delivery, and millions of deaths each year are associated with unsafe care. In the surgical context, one of the most serious errors is Wrong Site Surgery (WSS), which refers to surgical or invasive procedures performed on the wrong side, wrong site, wrong procedure, or wrong patient. <sup>1</sup>

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<sup>1</sup> Manjusha Rajagopala, "World Patient Safety Day: An Overview of Safer Healthcare," *Journal of Ayurveda Case Reports* 8, no. 3 (2025): 143–47.

Recent empirical data show that WSS continues to occur despite long-established prevention protocols. The Joint Commission recorded 127 sentinel events classified as wrong surgeries in 2024, a 13% increase compared to 2023, with 68% being wrong site surgeries. Most of these incidents were associated with failed time-outs, non-compliance with policies, and weak shared understanding within the team.<sup>2</sup> On a broader reporting system level, research by Taylor, Quesenberry, and Yonash on 664 WSS incidents reported in Pennsylvania between 2015 and 2024 indicates that WSS remains multifactorial, involving a combination of clinical errors, administrative mistakes, and interprofessional communication failures. These findings demonstrate that WSS is not merely a technical operator error, but rather a form of system failure that directly impacts patients' rights to safety.<sup>2,3</sup>

In Indonesia, the issue of WSS has its own urgency because nationally published data have yet to specifically detail the number of WSS cases, even though the patient safety system mandates incident reporting and sentinel event management. Studies by Dhamanti et al. show that patient safety incident reporting in Indonesia still faces challenges such as underreporting, a blame culture, and inconsistent quality of reporting. As a result, cases like WSS may not be fully brought to public attention or formal accountability forums. This condition is reinforced by further research from Dhamanti et al. in Indonesian hospitals, which indicates that the implementation of the Surgical Safety Checklist is highly influenced by clinical leadership, team discipline, communication, and safety commitment; in other words, compliance with the checklist does not automatically improve simply because the administrative format is available.<sup>4</sup>

Normatively, Law Number 17 of 2023 on Health reaffirms patients' rights to safety and security in healthcare services, while Ministry of Health Regulation Number 11 of 2017 establishes patient safety as a systemic obligation for healthcare facilities. Therefore, when WSS occurs, the issue does not end with professional ethics and discipline, but may shift to civil law through the construction of an Unlawful Act (PMH) if the elements of unlawfulness, fault, loss, and causal relationship can be proven.

Previous studies indicate that WSS is entirely preventable and, therefore, very difficult to justify as an ordinary medical risk. DeVine and Choy emphasize that the preventability of WSS strengthens the legal basis for liability in malpractice disputes, while Tan et al. and Vacheron et al. have shown that closed claims and insurance claims related to wrong-site, wrong-organ, wrong-procedure, and wrong-person surgery continue to arise in contemporary practice. Zil-E-Ali et al. further highlight that the burden of WSS lies not only in patient injury but also in litigation costs, damaged public trust, and prolonged professional

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<sup>2</sup> Inge Dhamanti et al., "Surgical Team Perceptions of the Surgical Safety Checklist Implementation in Indonesian Hospitals: A Descriptive Qualitative Study," *BMJ Open* 15, no. 6 (2025): e089013.

<sup>3</sup> Inge Dhamanti et al., "Patient Safety Incident Reporting in Indonesia: An Analysis Using World Health Organization Characteristics for Successful Reporting," *Risk Management and Healthcare Policy*, 2019, 331–38.

<sup>4</sup> Dhamanti et al., "Surgical Team Perceptions of the Surgical Safety Checklist Implementation in Indonesian Hospitals: A Descriptive Qualitative Study."

stress.<sup>5,6,7,8,9</sup>

Nevertheless, existing literature focuses more on clinical prevention, safety incidents, or claim patterns, while the division of responsibility between surgeons as individuals and hospitals as corporations under Indonesian health law after the enactment of Law Number 17 of 2023 has not been specifically discussed. From a theoretical perspective, this study clarifies the legal parameters of WSS as an Unlawful Act (PMH) and situates the issue within the framework of corrective justice and patient safety governance. From a practical standpoint, this research offers formulations that can be used by doctors, hospitals, and regulators to assess points of liability, strengthen prevention, and develop recovery policies for patients.<sup>10,11</sup>

Nevertheless, existing literature focuses primarily on clinical prevention, patient safety incidents, and malpractice claim patterns, while limited attention has been given to the allocation of legal responsibility between surgeons and hospitals within the framework of Indonesian health law after the enactment of Law Number 17 of 2023. Most studies examine medical negligence from either the perspective of individual professional fault or institutional liability separately. This study addresses that gap by developing a layered accountability model that explains how responsibility for Wrong Site Surgery may arise simultaneously at both the individual-professional level and the organizational level. The novelty of this research therefore lies not only in conceptualizing Wrong Site Surgery as an Unlawful Act (PMH), but also in constructing a legal framework that integrates surgeons' personal liability and hospitals' corporate liability within a single accountability structure. This approach provides a more comprehensive understanding of patient protection, corrective justice, and patient safety governance in cases of preventable surgical harm.

## B. Research Method

This research employs a normative juridical legal research design with a prescriptive-analytical character. This design is chosen because the main focus of the research is not to measure population behavior statistically, but rather to interpret legal norms, doctrines, and principles of liability that are relevant to determining the legal status of WSS as an unlawful act (PMH) and to allocate responsibility between surgeons and hospitals. The approaches used include the statute approach, which examines the Indonesian Civil Code, Law Number 17 of 2023 concerning Health, and Minister of Health Regulation Number 11 of 2017

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<sup>5</sup> Dhamanti et al., "Patient Safety Incident Reporting in Indonesia: An Analysis Using World Health Organization Characteristics for Successfull Reporting."

<sup>6</sup> Ika Wahyuni, "Perlindungan Hukum Bagi Pasien Dan Tanggung Jawab Medis Dalam Praktik Kesehatan," *RETORIKA: Journal of Law, Social, and Humanities* 1, no. 2 (2023): 23–37.

<sup>7</sup> John DeVine et al., "Avoiding Wrong Site Surgery: A Systematic Review," *Spine* 35, no. 9S (2010): S28–36.

<sup>8</sup> Joy Tan et al., "A Contemporary Analysis of Closed Claims Related to Wrong-Site Surgery," *The Joint Commission Journal on Quality and Patient Safety* 49, no. 5 (2023): 265–73.

<sup>9</sup> Charles-Hervé Vacheron et al., "Insurance Claims for Wrong-Side, Wrong-Organ, Wrong-Procedure, or Wrong-Person Surgical Errors: A Retrospective Study for 10 Years," *Journal of Patient Safety* 19, no. 1 (2023): e13–17.

<sup>10</sup> Fauzi Rahman and Asep Sapsudin, "Legal Issues in Limiting Authority of Health Professional Organizations After Indonesia's 2023 Health Law Enactment," *Research Horizon* 5, no. 4 (2025): 1501–12.

<sup>11</sup> Cara L Bowman et al., "Identifying a List of Healthcare 'Never Events' to Effect System Change: A Systematic Review and Narrative Synthesis," *BMJ Open Quality* 12, no. 2 (2023).

concerning Patient Safety; the conceptual approach, which analyzes the concepts of unlawful acts (PMH), professional negligence, vicarious liability, corporate liability, and corrective justice; and the case approach, which reviews concrete cases and dispute patterns of WSS in practice.<sup>12,13</sup>

The target of this research is not a population and sample in the quantitative sense, but rather the material objects of legal research, which consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include legislation governing patient safety, the responsibilities of medical personnel, and the liability of hospitals. Secondary legal materials include scientific journal articles, research reports, and institutional reports discussing WSS, surgical safety checklists, safety culture, and patterns of claims or complaints. Tertiary legal materials include legal dictionaries, glossaries, and scientific indexes that facilitate the search for terms and the mapping of concepts.<sup>14</sup>

The data collection technique is carried out through a systematic literature study, which involves the following stages: identification of legal issues, searching for legal sources and scientific references, selection of materials relevant to the two research questions, classification of materials based on authority and substance, and citation recording for analytical purposes. The research procedure begins with problem formulation, inventory of norms and previous studies, examination of cases and patterns of WSS incidents, comparison between norms and the scientific facts found, and then formulation of legal arguments in a prescriptive manner. Data analysis is conducted qualitatively through grammatical interpretation to understand the textual meaning of legal phrases, systematic interpretation to connect norms of unlawful acts (PMH) with norms of patient safety and hospital liability, and teleological interpretation to assess the objectives of patient protection, incident prevention, and loss recovery in the health law system.<sup>15,16,17</sup>

## C. Results and Discussion

### 1. Juridical Parameters of Wrong Site Surgery as an Unlawful Act

Wrong Site Surgery (WSS) may be classified as an unlawful act (PMH) if four cumulative elements are fulfilled: the existence of an unlawful act, fault, loss, and causality. The element of an unlawful act is evident when a surgical procedure is performed on the wrong side, organ, procedure, or patient identity that has previously been verified and approved. The element of fault in WSS generally appears in the form of professional negligence, such as failure to verify the patient, misreading the operative schedule, failure to perform site marking, or inadequate

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<sup>12</sup> Jonaedi Efendi, Jhonny Ibrahim, and Prasetijo Rijadi, "Metode Penelitian Hukum: Normatif Dan Empiris," 2016.

<sup>13</sup> S H I Jonaedi Efendi, *Rekonstruksi Dasar Pertimbangan Hukum Hakim* (Prenada Media, 2018).

<sup>14</sup> Mike McConville, *Research Methods for Law* (Edinburgh University Press, 2017).

<sup>15</sup> Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research.," *Deakin Law Review* 17, no. 1 (2012): 83-119.

<sup>16</sup> Edward L Rubin, "Law and and the Methodology of Law," *Wis. L. Rev.*, 1997, 521.

<sup>17</sup> Vicki C Jackson, "Law: Methodologies," *The Oxford Handbook of Comparative Constitutional Law*, 2012, 54.

implementation of a time-out. Losses include physical injury, loss of function of a healthy organ, psychological suffering, costs of further treatment, and socio-economic damages. Meanwhile, causality is relatively easy to prove, as the injury or wrongly targeted intervention directly causes harm to the patient.

From the perspective of corrective justice, WSS creates an imbalance that must be remedied by identifying the responsible party and providing appropriate compensation. At this point, the legal parameters of PMH in WSS should not be narrowly interpreted as merely individual operator error. Literature on never events indicates that wrong-site, wrong-procedure, and wrong-patient surgeries are among the most serious and preventable incidents, so the determination of fault must also consider governance, safety culture, and organizational failures that enable such errors to occur.<sup>18</sup>

From the perspective of corrective justice, Wrong Site Surgery represents a disruption of the normative balance between healthcare providers and patients. Corrective justice, as developed by Aristotle and later elaborated by Ernest Weinrib, requires that a party who wrongfully causes harm to another must restore the imbalance created by that conduct. In the context of WSS, the patient suffers harm that should never have occurred because the procedure was performed on the wrong site, wrong organ, wrong procedure, or wrong patient. Consequently, the legal response should not merely focus on identifying professional error but also on restoring the patient's position through compensation, accountability, transparency, and institutional correction. Corrective justice therefore provides the normative foundation for imposing liability on both surgeons and hospitals when preventable surgical errors result in patient injury.

These findings are consistent with the research by Taylor and Yonash, which demonstrates that informed consent and scheduling errors are critical factors in the chain of events leading to WSS. This means that the initial point of PMH in WSS may arise even before the patient enters the operating room, when documents, schedules, and early communications already contain inconsistencies that are not effectively corrected during the preoperative verification stage.<sup>19</sup>

Indonesian courts have consistently recognized that healthcare providers may be held liable when professional negligence causes patient harm. Although court decisions specifically involving Wrong Site Surgery remain limited, judicial approaches in medical negligence disputes generally emphasize the existence of professional fault, breach of the applicable standard of care, and a causal relationship between the medical act and the injury suffered by the patient. These decisions demonstrate that Indonesian courts increasingly place patient safety at the center of legal evaluation and are willing to impose civil liability when healthcare providers fail to meet professional obligations. Such judicial developments strengthen the

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<sup>18</sup> Bowman et al., "Identifying a List of Healthcare 'Never Events' to Effect System Change: A Systematic Review and Narrative Synthesis."

<sup>19</sup> Matthew A Taylor and Robert A Yonash, "Risk Factors for Wrong-Site Surgery: A Study of 1,166 Reports of Informed Consent and Schedule Errors," *PATIENT SAFETY* 6, no. 1 (2024).

argument that Wrong Site Surgery, as a preventable never event, may satisfy the elements of an unlawful act when negligence and causation are adequately established.

## 2. Personal Liability of the Surgeon

The surgeon is personally liable as long as negligence can be traced to professional actions within his or her control. The role of the surgeon as the executor of invasive procedures requires the utmost diligence in verifying patient identity, matching the diagnosis with the surgical plan, marking the side or site of the procedure, and providing final approval during the time-out process before the first incision is made. If the surgeon ignores available operative information, fails to correct apparent discrepancies, or proceeds with the procedure despite incomplete verification, such professional negligence forms the basis for personal liability.

Research by DeVine and Choy asserts that WSS is a completely preventable event, making it very difficult to categorize as an inherent medical risk that cannot be held accountable. Similar findings are evident in the closed claim analysis by Tan et al., which shows that wrong-site surgery continues to occur even in the era of modern safety protocols, thereby requiring serious evaluation of clinical decision-making, operator leadership, and compliance with preoperative verification. Therefore, when the element of fault lies in professional negligence directly committed by the surgeon, the personal responsibility to compensate the patient becomes very strong.<sup>20</sup>

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## 3. Corporate Liability of the Hospital

Hospital liability in WSS cases can be pursued through at least two avenues. First, vicarious liability, which is the substituted responsibility for losses caused by medical personnel acting within the scope of their hospital duties. Second, corporate liability, which is the hospital's direct responsibility when incidents are triggered or aggravated by weak policies, supervision, training, verification system design, documentation, or safety culture. In this context, the hospital cannot be regarded merely as a provider of facilities and infrastructure, but rather as a legal entity obligated to organize safe services.

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<sup>20</sup> Tan et al., "A Contemporary Analysis of Closed Claims Related to Wrong-Site Surgery."

The importance of corporate liability is supported by contemporary literature. Vacheron et al. show that insurance claims for wrong-side, wrong-organ, wrong-procedure, and wrong-person surgeries continue to occur in modern practice, while Hajjaj et al. found that in non-hospital settings, wrong-site and wrong-procedure events are closely related to incomplete preoperative verification, inadequate documentation, and workplace disorganization. Thus, as long as a hospital fails to provide systems capable of preventing data inconsistencies, supervising time-out implementation, or creating an effective communication culture, the hospital can be considered corporately negligent.<sup>21</sup>

#### 4. The Interrelation Between Allocation of Liability and Risk Mitigation

This subsection directly addresses the second research question. The allocation of responsibility between the surgeon and the hospital should not be viewed as mutually exclusive alternatives, but rather as a layered structure of accountability. The surgeon is responsible for professional aspects within his or her direct control, while the hospital is responsible for the systems that establish, supervise, and evaluate safety practices. Therefore, WSS risk mitigation must also be designed at two interconnected levels: the individual professional level and the organizational level.

Previous studies reinforce this pattern. Geraghty et al. found that lists of errors in surgical services may persist into the implementation stage if not corrected in a disciplined manner. Watson et al. and Daly et al. demonstrated that improvements in scheduling and standardization of surgical administrative workflows are important components in preventing procedural errors. Qaiser et al. and Mohamed et al. also showed that surgical checklists and time-outs remain relevant as safety instruments, but their effectiveness depends heavily on genuine compliance, team training, and ongoing monitoring. Thus, legally relevant risk mitigation is not sufficient if limited to periodic audits; it must be expanded to include standardized informed consent specifying side and procedure, operator-performed site marking, digital verification or double-checking of the surgical schedule, cross-professional time-out simulation, non-punitive incident reporting, and root cause analysis that must be followed up in hospital coaching, credentialing, and quality service evaluation.<sup>22,23,24,25,26</sup>

## D. Conclusion and Recommendations

First, Wrong Site Surgery (WSS) legally fulfills the parameters of an unlawful act

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<sup>21</sup> Omar I Hajjaj et al., "Wrong-Site, Wrong-Procedure, and Retained Foreign Object Events in out-of-Hospital Settings: Analysis of Closed Medico-Legal Complaints in Canada (2012–2021)," *Patient Safety in Surgery* 19, no. 1 (2025): 11.

<sup>22</sup> Joseph J Pariser et al., "Operating Room Inefficiencies Attributable to Errors in Surgical Case Scheduling and Surgeon Procedure Heterogeneity," *American Journal of Medical Quality* 31, no. 6 (2016): 584–88.

<sup>23</sup> Shehrbano Qaiser et al., "The Role of WHO Surgical Checklists in Reducing Postoperative Adverse Outcomes: A Systematic Review," *Cureus* 16, no. 10 (2024).

<sup>24</sup> Ahmed Mohamed et al., "Best Practices for Surgical Safety in Orthopaedics: A Comprehensive Review of Checklist Implementation," *Cureus* 17, no. 8 (2025).

<sup>25</sup> Donna S Watson et al., "Reducing Surgery Scheduling Errors in Multihospital System," *Journal of Patient Safety* 17, no. 5 (2021): e469–74.

<sup>26</sup> Alistair Geraghty et al., "Incidence of Wrong-Site Surgery List Errors for a 2-Year Period in a Single National Health Service Board," *Journal of Patient Safety* 16, no. 1 (2020): 79–83.

(Perbuatan Melawan Hukum) when there is evidence of actions deviating from service standards and the legal obligation to ensure patient safety, the occurrence of errors or negligence, actual harm to the patient, and a causal relationship between the wrongful act and the resulting harm. Consequently, the answer to the first research question is that the juridical parameters of an unlawful act in WSS lie in the combination of deviation from verification standards, failure to follow safety procedures, concrete harm to the patient, and a direct link between negligence and the resulting impact.

Second, the answer to the second research question is that The principal theoretical contribution of this study is the development of a layered accountability model in Wrong Site Surgery cases. Under this model, liability is not viewed as an alternative choice between the surgeon and the hospital, but as a complementary structure in which professional liability and corporate liability may operate concurrently. Surgeons remain responsible for failures within their professional sphere, while hospitals bear responsibility for systemic failures, patient safety governance, supervision, and organizational deficiencies that contribute to the occurrence of Wrong Site Surgery. The surgeon bears personal responsibility if negligence arises within their professional domain, particularly during patient verification, procedure matching, site marking, and time-out stages. Meanwhile, the hospital holds corporate responsibility if the incident is related to system failures, weak supervision, ineffective safety policies, lack of training, or poor safety culture. Therefore, the surgeon's personal responsibility and the hospital's corporate responsibility may operate concurrently to ensure patient recovery.

Third, theoretically, this study strengthens the development of health law science by positioning WSS as an issue of corrective justice and safety governance, rather than merely an individual's technical error. Practically, hospitals should require site marking by the operator, detailed informed consent, audit and observation of time-outs, inter-professional training, non-punitive incident reporting, and rapid and transparent compensation mechanisms. In addition to regular audits, policy recommendations to regulators include the obligation for segregated reporting of WSS, root cause analysis for every sentinel event, strengthening supervision of compliance with the Surgical Safety Checklist, and linking the results of surgical safety evaluations to accreditation and disciplinary enforcement in healthcare facilities.

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