

# Notary's Liability for Notarial Protocol Damaged by Disaster .pdf

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## Notary's Liability for Notarial Protocol Damaged by Disaster

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### Abstract

This study discusses the notary's liability for notarial protocol damaged by disaster. This study applies empirical normative legal research method conducted by examining library materials and direct observation in the field of notary's liability against notarial protocol and forms of legal protection for notary. Notarial protocol is a collection of documents that are state archives that must be stored and maintained by a notary in accordance with the provisions of the legislation. Notary has a very important position and role in the life of the nation and state, because he/she has the authority specified in the laws and regulations. *Force majeure* is an event or situation that occurs outside the power of the parties concerned; in this case, the company and workers/ laborers. *Force majeure* uses the term "overmacht". Fixed *overmacht* means *overmacht* which results in a continuous agreement or forever and is impossible to implement or cannot be fulfilled at all. In such circumstances, the *overmacht* automatically ends the agreement because it cannot be fulfilled. Temporary *overmacht* means *overmacht* which results in the implementation of an agreement postponed from the time specified in the agreement. In addition, authentic deeds are deeds made by officials authorized to do so. They are rulers according to stipulated provisions with or without assistance from related parties. They note what the related parties requested to be included in the authentic deed. The authentic deed contains information about an official who explains what happened or was seen before him/her. In this case, there are no rules that regulate about how a notary must be liable for the damaged protocol and how the forms of legal protection.

**Keywords:** Notary; Legal Protection; Disaster

### Introduction

Notary has a very important position and role in the life of the nation and state because he/she has the authority specified in the legislation.<sup>1</sup> Notary is state official who carries out the profession of legal services to the public. In carrying out his/her duties, he/she needs to get

<sup>1</sup> Salim H.S., 2018, *Notary Position Regulations*, East Jakarta: Sinar Grafika, page 26

protection and guarantees in order to achieve legal certainty.<sup>2</sup> In addition, as a state official, a notary is able to provide assurance, order, and legal protection which requires authentic written evidence regarding legal circumstances, events, or actions which are carried out through certain positions.<sup>3</sup>

A notary is a public official who is authorized to make authentic deeds as long as the making of an authentic deed is not specific to other public officials (Kartikosari & Sesung, 2017). As a public official, a notary is a person who carries out part of the state's public functions, especially in the field of civil law (Purwaningsih, 2019). Some authentic deeds are required by law in order to create certainty, order and legal protection.<sup>4</sup>

Habib Adjie stated:

*A notary position is held or its presence is desired by the rule of law with the intention of helping and serving the community who need authentic written evidence of legal circumstances, events or actions.*<sup>5</sup>

Article 2 Paragraph (1) Law No. 2 of 2014 concerning the Amendment to Law No. 30 of 2004 concerning Notary Position, mentioning the authority of a notary as an official making an authentic deed: "a notary is a public official who has the authority to make an authentic deed and has other authorities as referred to in this law or under other laws". Conceptually, the definition of authentic deed is contained in various laws and regulations and is listed in legal dictionary and Indonesian language dictionary.<sup>6</sup>

Article 1 point 7 Law No. 2 of 2014 concerning the Amendment to Law No. 30 of 2004 concerning Notary Position states that "authentic deed is made before a notary according to the form and procedure stipulated in this Law".

This type of study is empirical normative legal research. The author will provide an argument about notary's liability for the damaged notarial protocols due to the earthquake (case study in Bima City).

## **Conceptual Framework**

### *1. Definition of Notarial Protocol*

Notarial protocol is a state document that one of its functions is to be used as evidence of legal actions that have been committed by the parties related to the agreement in the realm of civil law (Sukisno, 2008). Kie (2007) argued that the protocol belongs to the community and does not belong to a notary who makes a deed and does not belong to a notary assigned or appointed by the Minister of Justice to store the protocol. Someone who stores documents in a notary protocol generally knows that a document is safe in the hands of a notary.<sup>7</sup> Notarial protocol, according to Article 1 point 13 of Law on Notary Position Amendment, is a collection of documents or state

<sup>2</sup> Sub-c Consideration of Law No. 30 of 2004

<sup>3</sup> Sub-b Consideration of Law No. 30 of 2004

<sup>4</sup>Herianto Sinaga, *Former Notary's Liability against the Deed of Which He/ She Made*, BAHAN%20TESIS/14062-ID-liability-werda-notaris-terhadap-akta-yang-dibuatnya.pdf

<sup>5</sup>Habib Adjie, 2009, *Civil and Administrative Sanctions against Notary as Public Official*, (Bandung: Refika Aditama.), page 32.

<sup>6</sup> Salim H.S., *Op. Cit.*, page 17

<sup>7</sup> Salim H.S., 2008, *Contract Law*, Sinar Grafika, Jakarta, page 100

6 archives that must be stored and maintained by a notary in accordance with the provisions of legislation (Anand, 2018).

In addition to the list of books included in the notarial protocol mentioned previously, a good notary must make good and neat administration and archives. The filing system that must be considered is related to the following matters:<sup>8</sup>

- a. Book containing the daily list of deeds;
- b. Special map containing the original deeds before being compiled into books every month;
- c. Archive containing the certificate of deed;
- d. Archive containing the certified copies of private documents;
- e. File containing the private documents which are compiled;
- f. Archive containing the copies of the list of protests;
- g. Archive containing the copies of *collatione*; i.e. copies of private documents in the form of duplicate which contains the description as written and described in the letter concerned; 10
- h. Archive containing the notary monthly reports which are attached by the receipts from the Regional Supervisory Board (MPD);
- i. Archive containing the testament reports to the Director of Civil Code c.q. Hall of Heritage of Sub-Directorate of Testament;
- j. Archive containing the receipt of the duplicates of the deed;
- k. Book containing the notary's incoming and outgoing letters;
- l. Archive containing the copies of notary's incoming letters;
- m. Archive containing the copies of notary's outgoing letters;
- n. Book containing the lists of social legal entities and business entities that are not legal entities created in his/her office.

## 2. Definition of Notary

11 The authority of a notary as a public official is also affirmed in Chapter I Article I concerning the Notary Position Regulations in Indonesia (Ord. Staatsblad 1860 No. 3 which came into force on 1 July 1860), which stipulates that the notary is the only official authorized to make authentic deed concerning all acts, agreements and stipulations required by a general regulation or by those concerned, to be stated in an authentic deed. A notary is also liable to guarantee the certainty of the date, keep the deed and provide a *grosse*, copy and extract during the making of the deed, as long as it is not also assigned or excluded from officials or other people by a general rule.

Some of the Articles of the laws and regulations have stipulated the existence of a notary as a public official and regulates the duties and authority of the notary public regarding the storage of the protocol. It is stated in Article 16 Paragraph (1) letter b and e of Law on the Notary Position Amendment which requires each notary to keep original deed as part of a notarial protocol and requires each notary to issue a *grosse* deed, duplicate of deed or extract of deed based on the original deed upon the request of the parties or heirs of the parties.

## Discussion

16 Storing original deed is one of the obligations of the notary as stated in Article 16 paragraph (1) of Law on the Notary Position, that in carrying out his/her position, a notary is required to:

<sup>8</sup> Salim H.S., 2008, *Ibid*

- a. act trustfully, honestly, thoroughly, independently, impartially, and safeguard the interests of the parties involved in legal actions;
- b. make deed in original form and keep it as part of a notarial protocol;
- c. attach the letters, documents and fingerprints of the appearers in original deed;
- d. issue *grosse* deed, copy of deed, or extract of deed based on original deed;
- e. provide services in accordance with the provisions of this Law, unless there is a reason to reject them;
- f. keep everything about the deed that he/she made and all information obtained in order to make the deed in accordance with the oath/ promise of office, unless the law stipulates otherwise;
- g. compile the deeds he/she made in 1 (one) month to a book containing no more than 50 (fifty) deeds. If a number of deeds cannot be compiled in one book, the deeds can be compiled to more than one book and then record the number of original deeds along with the month and year of deed making on the cover of each book;
- h. make a list containing the protest deed against no payment or receipt of securities;
- i. make a list of deeds relating to the testament according to the order in which the deed is made every month;
- j. send a list of deeds as referred to in letter i or zero list relating to the testament to the center of the testament list in the ministry which administers government affairs in the legal field within 5 (five) days in the first week of each subsequent month;
- k. record in the repertoire the date of delivery of the testament list at the end of each month;
- l. have a stamp containing the state emblem of the Republic of Indonesia and write down the name, position, and place of residence of the concerned notary in the space surrounding it;
- m. read the deed before the appearers in the presence of at least 2 (two) witnesses, or 4 (four) witnesses especially for making private testament signed at that time by appearers, witnesses and notary; and
- n. accept prospective notary apprentices.

Notarial protocol is a state document that one of its functions is to be used as evidence of legal actions that have been committed by the parties related to the agreement in the realm of civil law. Tan Thong Kie argued that the protocol belongs to the community and does not belong to a notary who makes a deed and does not belong to a notary assigned or appointed by the Minister of Justice to store the protocol. Someone who stores documents in a notary protocol generally knows that a document is safe in the hands of a notary.<sup>9</sup>

Notarial protocol, according to Article 1 point 13 of Law on Notary Position Amendment, is a collection of documents or state archives that must be stored and maintained by a notary in accordance with the provisions of legislation.

Storing protocols is an obligation for a notary. In addition to storing notarial protocol, a notary is also liable to keep the notarial deed. However, Law on Notary Position does not explain the standard procedure for file or protocol storage. Therefore, the notary tends to keep the protocol plainly without any security which ensures that the protocol is properly maintained.

The notarial protocol is regulated in Law No. 30 of 2004 concerning Notary Position and Law No. 2 of 2014 concerning Amendment to Law No. 30 of 2004 concerning Notary Position, as well as other laws and regulations.

<sup>9</sup> Salim H.S., 2008, *Contract Law*, Sinar Grafika, Jakarta, page 100

The provisions or articles, governing the notarial protocol in Law No. 2 of 2014 concerning Amendment to Law No. 30 of 2004 concerning Notary Position, cover:

- a. Article 1 point 13 of Law No. 2 of 2014 concerning Amendment to Law No. 30 of 2004 concerning Notary Position relating to the definition of notarial protocol;
- b. Article 62 of Law No. 30 of 2004 concerning Notary Position, relating to types of notarial protocol; and
- c. Article 63 of Law No. 2 of 2014 concerning Amendment to Law No. 30 of 2004 concerning Notary Position, relating to the delivery of notarial protocol.

In addition, matters related to notarial protocol are also regulated in Law No. 43 of 2009 concerning Archive.

The types of notarial protocol that must be stored and maintained by a notary have been determined in the explanation of Article 62 of Law No. 30 of 2004 concerning Notary Position. There are seven notarial protocols that must be stored and maintained by a notary that include:

- a. original deed;
- b. book containing a list of deeds or repertoire;
- c. book containing a list of private deeds whose signing is carried out before a notary or the registered private deed;
- d. book containing a list of names of appearers or clappers;
- e. book containing a list of protests;
- f. book containing a list of testaments; and
- g. book containing other lists that must be kept by a notary based on the provisions of the legislation.

Original deed is a deed that includes the signatures of appearers, witnesses and notary that are stored as part of the notarial protocol.<sup>10</sup> Book containing a list of deeds or repertoire is a book which contains notes on the number of deeds that have been made by a notary (Salim & Kontraktor, 2015). Book containing a list of private deeds whose signing is carried out before a notary or the registered private deed is a book that contains a number of records relating to the deed that has been legalized and the deed that has been approved (Dinaryanti, 2013). Book containing a list of names of appearers or clappers is a book that contains a record of the names of people who have appeared before a notary to make a deed. Book containing a list of protests is a book that contains a number of notes relating to a statement of disapproval from a notary to another party or other institution, and/or from another institution or other party to a notary in relation to making a deed (Suwignyo, 2009). Book containing a list of testaments is a book that contains a number of notes relating to a testament. Testament is a message from the testator to the recipient of the inheritance. Book containing other lists is a book that contains a number of different records or those that are not the same as numbers 1 through number 6. Book containing other lists must be kept by a notary based on statutory provisions.<sup>11</sup>

Delivery of notarial protocol, which in Dutch is called the *voorleggen protocol van notarissen*, is the process of providing or delivering notarial protocols from a notary to other party. Article 62 of Law No. 30 of 2004 concerning Notary Position has determined eight causes for the delivery of the notarial protocol, which includes:<sup>12</sup>

<sup>10</sup> Article 1 point 8 of Law No. 2 of 2014 on the Amendment of Law No. 30 of 2004 regarding the Notary Position

<sup>11</sup> Salim H.S., S.H., 2015, *Technique in the Making of Deed One*, Depok: Raja Grafindo Persada, page 199

<sup>12</sup> Salim HS., S.H., 2015, *ibid*, page 200

- a. pass away;
- b. the term of office has ended;
- c. personal request;
- d. mentally and/or physically unable to carry out assignments as a notary continuously for more than 3 (three) years;
- e. appointed as state official;
- f. transfer area of office
- g. temporarily dismissed; or
- h. dishonorably dismissed.

Notarial protocol is submitted no later than 30 (thirty) days by making a notarial protocol delivery report signed by the party submitting and receiving notarial protocol. Meanwhile, Article 63 up to Article 65 of Law No. 2 of 2014 concerning Amendment to Law No. 30 of 2004 concerning Notary Position has determined the parties that submit and parties that receive notarial protocol. These parties consist of:<sup>13</sup>

- a. Notary who passed away. If a notary passed away, the party delivering the notarial protocol is the heir; meanwhile, the party receiving it is another notary appointed by the Regional Supervisory Board.
- b. Notary whose term of office has ended; in this case, the party delivering the notarial protocol is the notary concerned to another notary appointed by the Minister at the suggestion of the Regional Supervisory Board.
- c. Notary who submits personal request; in this case, the party delivering the notarial protocol is the notary concerned to another notary appointed by the Minister at the suggestion of the Regional Supervisory Board.
- d. Notary who is mentally and/or physically incapable of carrying out office assignments as a notary continuously for more than 3 (three) years, in this case, the party delivering the notarial protocol is the notary concerned to another notary appointed by the Minister at the suggestion of the Regional Supervisory Board.
- e. Notary who is appointed as a state official; in this case, the party delivering the notarial protocol is a notary who is appointed as a state official delivers it to a notary appointed by the Regional Supervisory Board.
- f. Notary who transfers the area of office; in this case, the party delivering the notarial protocol is the notary concerned to another notary appointed by the Minister at the suggestion of the Regional Supervisory Board.
- g. Notary who is temporarily dismissed; in this case, the party delivering the notarial protocol is the notary concerned to another notary appointed by the Minister at the suggestion of the Regional Supervisory Board if the temporary dismissal is more than 3 (three) months; or
- h. Notary who is dishonorably dismissed, in this case, the party delivering the notarial protocol is the notary concerned to another notary appointed by the Minister at the suggestion of the Regional Supervisory Board.

Delivery of notarial protocol from a notary to another notary, as presented above, is alternative. The term alternative here means that the delivery depends on the conditions of the notary concerned when carried out his/her authority. For instance, if the notary concerned is the Regent/Mayor, he/she must deliver a notarial protocol to other notaries because the position as Regent/Mayor is a state official.

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<sup>13</sup> Article 63 of Law No. 2 of 2014 on the Amendment of Law No. 30 of 2004 regarding the Notary Position

However, related to the case that occurred in Bima, the protocol of a notary has been damaged due to the Bandang Flood that occurred in 2016. Thus, there are many considerations.

The concept of legal liability is closely related to the concept of rights and obligations. The concept of rights is a concept that emphasizes the notion of rights in pairs with the notion of obligations.<sup>14</sup> Common opinion mentions that rights to a person always correlate with obligations to others.<sup>15</sup>

A concept related to the concept of legal obligation is the concept of legal liability. It means that a person is legally liable for certain actions or that he/she bears legal liability which means that he/she is liable for a sanction if his/her actions conflict with applicable regulations.<sup>16</sup>

Hans Kelsen, in his theory of legal liability, states that a person is legally liable for a particular act or that he/she bears legal liability means that he/she is liable for a sanction for an act contrary to the law.<sup>17</sup>

Some parties who must bear liability from acts against the law carried out by other parties as follows:<sup>18</sup>

- a. Parents or guardians are liable for actions taken by children under their care or under their guardianship.
- b. An employer is a liable for the actions taken by his/her employees.
- c. A teacher is a liable for his/her students.
- d. An overseer is liable for actions taken by workers who are under his/her.
- e. An owner of an animal is a liable for actions taken by his/her pet.<sup>19</sup>
- f. An owner of the building is a liable for the collapse of the building due to negligence in maintenance or due to defects in construction or order.<sup>20</sup>

In general, the principle of liability in the law can be distinguished as follows:<sup>21</sup>

#### 1. *Liability Based on Fault Principle*

This principle is a fairly common principle that applies in civil law, especially Articles 1365, 1366, and 1367 Civil Code. In general, this principle of liability is acceptable because it is fair for wrongdoers to compensate the victim. In other words, it is unfair if an innocent person has to compensate for someone else's loss.<sup>22</sup>

The case that needs to be explained in this principle is the definition of wrongdoers in which the legal doctrine has the principles of vicarious liability and corporate liability. Vicarious liability means that an employer is liable for the loss of another party caused by a person or employee under his/her supervision. Corporate liability has the same meaning as vicarious liability. According to this doctrine, the institution that employs a group of workers has a liability

<sup>14</sup> Salim H.S., S.H., 2015, *ibid*, page 201

<sup>15</sup> Satjipto Rahardjo, *Legal Studies*, PT Citra Aditya Bakti, Bandung: 2000, page 55

<sup>16</sup> *Ibid*, page 57

<sup>17</sup> Hans Kalsen, *General Theory of Law and State*, PT Raja Grafindo Persada Bandung: 2006 page 95

<sup>18</sup> *Ibid*, page 81

<sup>19</sup> Article 1367 of the Civil Code

<sup>20</sup> Article 1368 of the Civil Code

<sup>21</sup> Article 1369 of the Civil Code

<sup>22</sup> Celina Tri Siwi Kristiyanti, *Consumer Protection Law*, PT Sinar Grafika, Jakarta: 2008 page 92



for the workforce they employ.<sup>23</sup> Such problems are not simple, because in practice each courier is not necessarily willing to admit his/her mistakes. Therefore, the passenger, sender or consignee or third party may not act unilaterally and must be able to prove that the loss occurred due to a courier error. The proof was made in court to be decided by the judge.

## 2. *Presumption of Liability Principle*

This principle states that the defendant is always considered liable until he/she can prove that he/she is innocent. Thus, the burden of proof is on the defendant. If the defendant cannot prove a courier's fault, compensation will not be given to him/her.<sup>24</sup> In connection with this principle of liability, legal doctrines related to the courier recognize four variations as follows:

- a. A courier can free him/herself from liability if he/she can prove that losses are caused by things beyond his/her control.
- b. A courier can free him/herself from liability if he/she can prove that he/she is taking an action that is needed to avoid a loss.
- c. A courier can free him/herself from liability if he/she can prove that the loss arises not because of his/her mistake.
- d. A courier is not liable if the loss is caused by a passenger error or the bad quality of the goods.

## 3. *Nonliability Presumption Principle*

This principle is the opposite of the presumption of liability principle. This principle is only recognized in the scope of very limited consumer transactions.<sup>25</sup> This principle is more applied to cases such as traffic accidents in which the plaintiff has an active role in conducting evidence. Based on the explanation in Law No. 22 of 2009, the application of this principle based on Article 194 paragraph (1) states that the courier company is not liable for losses suffered by third parties, except if a third party can prove that the loss is caused by the fault of the courier company; thus, he/she can sue for compensation he/she has suffered.

## 4. *Strict Liability Principle*

The strict liability principle is often identified with the absolute liability principle. Some say that strict liability is the principle that sets errors not as a determining factor. On the contrary, absolute liability is a liability without error and without exception.<sup>26</sup> The principle of strict liability is one type of civil liability.<sup>27</sup> Civil liability is a civil law instrument in the context of law enforcement to get compensation in that case.

In this case, it is not explained how the notary must do and how to be liable for the damage to the protocol due to the disaster. In addition, there is nothing that is very burdensome to the notary regarding liability to the protocol damaged by the disaster. However, the notary must do it very carefully because the notary carries the mandate to maintain and store all forms of protocol.

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<sup>23</sup> *Ibid*, page 93

<sup>24</sup> *Ibid*, page 94

<sup>25</sup> E Suherman, *Various Aerospace Legal Issues (Collection of Papers 1961-1995)*, Mandar Maju, Bandung: 2000, page 37.

<sup>26</sup> *Ibid*, page 95

<sup>27</sup> *Ibid*, page 95

According to Abduloh SH. MH. “we cannot do anything because this is purely a natural disaster; however, the notary needs to carry out liabilities by reporting to the Regional Supervisory Board (MPD) where MPD will then conduct a review and report to the Regional Supervisory Board (MPW) regarding the damage”.<sup>28</sup>

According to Mr. Yudik Adrianto, as secretary of the Regional Supervisory Board, notary must carry out data collection regarding any protocols which are damaged starting from those that are severely damaged and those that are lightly damaged and then sort them. Mr. Yudik Adrianto also added that notary must also report to the local police to obtain a protocol report on damage by bringing proof of evidence regarding the damaged protocol. Then, the notary makes a report and reports it to the Regional Supervisory Board (MPD).

The Regional Supervisory Board checks, reviews and field surveys related to whether the notary’s office is truly affected by the Bandang Flood that has struck Bima; therefore, MPD can make a report that will be sent to MPW.

MPW then communicates with the MPD regarding the justification of the damage to the protocol and the MPD determines the report.

After that, MPD make a report and reports it to MPW where MPW makes a report that serves as legal protection related to the truth of the occurrence of a disaster that damaged the notarial protocol.<sup>29</sup>

Related to the case that happened to one of the notaries in Bima, so far, the protocol was stored properly in a good place.

During this time, according to the resource person, there was no reprimand regarding the issue of storage so it was true that the notary kept the protocol properly. However, according to the source, the flood that hit Bima City happened twice. The first time, the notary cleaned up the debris from the first flood. After that, the subsequent flood ensued which destroyed some of the notary’s deeds.

### **Conclusion**

Based on the description and discussion in the previous chapters, the following conclusion can be drawn: notary’s liability to the notarial protocol damaged by the disaster is that the notary is required to maintain and keep the protocol which is included in the state archive, the notary cannot be subject to the consequences of the disaster. However, in this case, the notary must carry out a mechanism related to the damage. The notary must carry out data collection regarding any protocols which are damaged starting from those that are severely damaged and those that are lightly damaged and then sort them. The notary must also report to the local police to obtain a protocol report on damage by bringing proof of evidence regarding the damaged protocol. Then, the notary makes a report and reports it to the Regional Supervisory Board (MPD) where MPD then prepares the report regarding the justification regarding the damaged protocol.

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<sup>28</sup> Salim H.S., *Introduction to Written Civil Law (Burgerlijk Wetboek)*, PT. Sinar Grafika, Jakarta: 2008, page 45

<sup>29</sup> The result of interview with Mr. Abdullah, SH, MH, as a senior notary

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**Legislation**

Sub-c Consideration of Law No. 30 of 2004.

Sub-b Consideration of Law No. 30 of 2004.

Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning Notary Position Civil Code.

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