



## MEDICAL PRACTICE MAL IN HEALTH LEGAL FRAMEWORK

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### Abstract

*The legal research method is a scientific activity based on certain methods, systematics, and thoughts, which aims to study one or several certain legal phenomena by analyzing them, except that, an in-depth examination of the legal facts is also held to then seek a solution. on the problems that arise in the symptoms in question. For this reason, research is carried out which includes methods. This research is a descriptive analysis which aims to describe in detail, systematically and thoroughly related to the problem. In this study, the data collection technique used is a library study. The literature study is carried out through secondary data sources, namely data that includes official documents, books, Malpractice in Article 11 paragraph (1) letter b in Law Number 6 of 1963 concerning Health Workers, which has been declared abolished by Law Number 23 of 1992 concerning Health. Based on the provisions of Article 11 paragraph (1) letter b of Law Number 6 of 1963, it can be used as a reference regarding malpractice, in the fields of administration, civil law, and criminal law. In medical malpractice which becomes an act against the law because of its nature, the will is often directed at the form of the act and not at the result. Culpa is usually only focused on the result. The adverse effects on the patient are not desired. In medical malpractice the form of action must be inconsistent with medical professional standards and standard operating procedures or at least contrary to normal general practice in the medical world.*

**Keywords: medical practice mal, health law, framework**

### 1. BACKGROUND

The term medical malpractice began to be known in Indonesia in the eighties and has become very popular since 2003 when there was a 'medical malpractice crisis in Indonesia. As a relatively new legal issue, there is uncertainty in the community about how to deal with the medical malpractice issue. It is not yet clear what exactly is meant by medical malpractice and what the legal liability is. Law No. 29 of 2004 concerning Medical Practice (Medical Practice Law). The main objective of the Medical Practice Act is to encourage the realization of good medical practice. Thus, in a contrario, it can be understood that the law functions as an instrument to prevent bad medical practice/medical malpractice. In addition, the Medical Practice Law also mandates the establishment of an institution that carries out the function of a medical disciplinary tribunal called the Indonesian Medical Discipline Honorary Council (MKDKI). Despite all its shortcomings, the existence of the MKDKI has more or less answered the demand for a special court for the medical profession.

Law Number 29 of 2004 concerning Medical Practice. Meanwhile, in Law Number 36 of 2009 concerning Health, Article 29 contains the term negligence, namely "In the event that a health worker is suspected of negligence in carrying out his profession, the negligence must be resolved first through mediation". Law Number 44 of 2009 concerning Hospitals in Article 46 also contains the term negligence, namely "The hospital is legally responsible for all losses caused by negligence committed by hospital health personnel". With the existence of Law No. 44 of 2009, has provided a legal basis for the community to ask for legal responsibility for hospitals if the Regulation of the Minister of Health No. 585/Menkes/Per/IX/1989 concerning Approval of Medical Actions,

About Medical Records provide technical arrangements for patients and doctors in the event of a loss in medical services. A legislation is said to be effective after the existence of a legal

system, the enforcement of the law is then seen whether the regulations are adhered to and binding on the community. This is based on the principle of legality theory from Fuller, law enforcement theory by Ten Berge and validity theory by Hans Kelsen. To see whether the existing medical malpractice rules are effective and can be implemented for medical malpractice law enforcement or not.

## **2. THEORY AND CONCEPT FRAMEWORK**

### **2.1 Theoretical Framework**

The purpose of the theory is very clear, namely in general it questions knowledge and explains the relationship between a social phenomenon and the meaning of the observations made. A theory in addition to functioning to explain facts, must also be able to predict or prove facts.

In addition to the theory has a purpose, of course the theory also has several functions, including:

- a. Theory provides patterns for data interpretation
- b. Theories link one study to another
- c. Theories provide the framework within which concepts acquire special meaning.
- d. Theory opens the possibility to interpret the broader meaning of the findings, both for researchers and for others.

### **2.2 Rule of Law**

The elaboration in the preamble to the 1945 Constitution is followed up as described in Article 28D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, namely: "Everyone has the right to recognition, guarantee, protection and legal certainty. Sudargo Gautama and Soediman Kartohadiprodjo stated regarding the rule of law that "the notion of the rule of law comes from the teachings of the rule of law, it gives an understanding of the rule of law as a state where the instruments of the state are subject to the rule of law and the independence of the people in it is guaranteed as well as possible by law." .

The state of law relies on basic law (constitution), constitution or basic law (grondrecht) and the implementation of its government is carried out based on legal principles (fundamental recht) or (principle of law), equality before the law, and upholds human values. human rights), a state of law is also a state whose government serves the needs of the majority of all its people (public service), without discriminating against their origin, religion, and social strata. Equal before state law (positive law). Government is run not based on power, but authority or the accumulation of rights and obligations (rights and liabilities).

Law has a goal that leads to something to be achieved, therefore, it cannot be denied that the purpose of law refers to something ideal so that it is perceived as abstract and not operational. Based on the opinion of Lon L. Fuller which means "law is an ethical method for creating and guaranteeing social relations. The rules of law are more expressive, are every rule that contains the goal of realizing legal values that occur in every country.

### **2.3 Law Enforcement**

Law enforcement is an effort used to realize legal ideas and concepts that are expected to be real. Law enforcement is a process that results in various things, with this thought reinforced by the habits of the people called law enforcers, namely the police, prosecutors and judges. Law enforcement is a process that involves many things. Law enforcement lies in the activity of harmonizing the relationship of values outlined in solid rules and responding to attitudes of action as a series of elaboration of the final stages of creating, maintaining, and maintaining peaceful social life.

Seen functionally, the law enforcement system is a system of action. It is said to be an action system because in it there are many activities carried out by state equipment in the context of law enforcement, including the police, legislators, government agencies



(bestuur), and execution officers. Law enforcement is carried out from the stage of law formation (to prevent onrecht in potentie), and also prevents onrecht in actu by law enforcement officials.

## 2.4 Conceptual Framework

Conceptual framework is also called a theoretical framework or a literature review. Conceptual frameworks are characterized by the emergence of linkages between facts and theories, which can be in the form of descriptive, pictures and others. The conceptual framework shows the research flow like what the problem is, what the solution (theory) is, and what the results are. The conceptual framework can also be called a research map.

The concepts in this writing consist of:

1. Medical malpractice is the negligence or carelessness of a doctor in carrying out his professional obligations. The scope of malpractice is negligence that causes death or injury of any kind.
2. An outline is a writing plan that contains the outlines of an essay to be written, and is a series of ideas arranged in a systematic, logical, clear, structured, and orderly manner.
3. Health Law is a law that is directly related to health care, including: the application of civil, criminal and state administrative laws.

## 2.5 Research Method

The legal research method is a scientific activity based on certain methods, systematics, and thoughts, which aims to study one or several certain legal phenomena by analyzing them, except that, an in-depth examination of the legal facts is also held to then seek a solution. on the problems that arise in the symptoms in question. For this reason, research is carried out which includes methods.

This research is descriptive analysis which aims to describe in detail, systematically and thoroughly related to the problem. In this study, the data collection technique used is a library study. The literature study is carried out through secondary data sources, namely data that includes official documents, books, research legal dictionaries, legal journals, and comments on court decisions.

While the data analysis in this study using qualitative analysis is to discuss the results of research that are described comprehensively, trying to see the background factors based on programs, articles, relevant laws and the selection of principles or theories used.

## 3. DISCUSSION

### 3.1 Medical Malpractice Regulations in Health Law

Malpractice in Article 11 paragraph (1) letter b in Law Number 6 of 1963 concerning Health Workers, which has been declared abolished by Law Number 23 of 1992 concerning Health. Based on the provisions of Article 11 paragraph (1) letter b of Law Number 6 of 1963, it can be used as a reference regarding malpractice, the definition of "Malpractice" by neglecting obligations which also means not doing something that should be done. Article 11 paragraph (1) letter b of the Health Manpower Law:

Without prejudice to the provisions in the Criminal Code and other statutory regulations, administrative actions may be taken against health workers, including:

1. The act of neglecting obligations.
2. Doing something that should not be done by a health worker, either remembering his oath of office or remembering the oath as a health worker
3. Ignoring something that should be done by health workers
4. Violating any provisions under or based on this law.

Malpractice does not only refer to a certain profession, but also includes several existing professions, for example doctors and dentists as regulated in Law Number 29 of 2004 concerning Medical Practices, Law Number 18 of 2003 concerning Advocates, Law No. Number 30 of 2004 concerning the position of a Notary, as well as Law Number 5 of 2011 concerning Public Accountants.

Each of these professions has its own code of ethics as a guide in carrying out professional duties. In addition to statutory regulations, codes of ethics are usually also used as the basis for these professional organizations to check whether there are violations in the performance of their duties. Specifically regarding medical practice, Article 66 Paragraph 3 of the Medical Practice Law states that people who feel aggrieved by the actions of a doctor/dentist can report to the Indonesian Medical Disciplinary Council (MKDKI) and the report does not eliminate the public's right to report criminally or criminally. sue in court.

### **3.2 Liability of Doctors Who Do Malpractice**

A doctor can be said to have practiced good medicine if it is in accordance with medical ethics, has obtained informed consent from the patient, and is in accordance with the standards of the medical profession.

In medicine, the ethical principles of doctors according to Danny Wiradharma's opinion consist of:

a. No harm

This principle is the basic principle according to Hippocrates, which if we can't do good to someone we shouldn't hurt someone else.

b. Doing good

The principle does not harm but the obligation to do good without any limitations. There are 4 steps as a process for assessing the risk of loss so that a doctor can estimate the extent of a binding obligation including: people who need help (patients), helpers (doctors) who are able to do something for the occurrence of danger or loss, rescue actions, the benefits received by the person outweigh the harm to the rescuer and carry minimal risk.

c. Autonomy

A form of freedom of action in which a person makes decisions according to his own determined plan. Such as the provisions of making a decision to choose an existing alternative.

d. Justice

The treatment of people in the same situation as the atrian does on equality and need

The types of medical malpractice consist of:

1. Ethical Malpractice

The definition of ethical malpractice is any action by a doctor in carrying out medical practice that is contrary to medical ethics. The regulation of medical ethics in Indonesia is based on the Indonesian Medical Code of Ethics and has been determined based on the Decree of the Minister of Health Number 434/Men.Kes/SK.X/1983 which applies to doctors. Ethical malpractice has a negative impact on advances in comfort technology for patients. And aims to provide an convenience and comfort for patients.

2. Judicial Malpractice

Is a medical malpractice in the field of administration, civil law, and criminal law, including:

a) In the field of Administrative Law

Regulates the conditions that must be met by doctors to carry out a medical practice as regulated in the Medical Practice Act. The actions of doctors who violate the administration are described in Law No. 29 of 2004 concerning Medicine. Among them are:

- Doing medical practice without having a registration certificate (STR), some of which are contained in Article 29 Paragraph 1 concerning Medical Practice)





- Doing medical practice with STR whose validity period is 5 years is stated in article 29 paragraph 4
- Doing medical practice without having a practice permit (SIP) in Article 36
- Not putting up a nameplate in front of the place where medical practice is carried out Article 4 Paragraph 1
- Not carrying out medical record obligations when practicing medicine in Article 46 paragraph 1

b) In the field of civil law

The practice of medicine includes the study of civil law. Based on Article 1234 BW, the relationship between doctor and patient in medical practice can occur because of an agreement (*ius ontracto*) and law (*ius contracto*). The legal basis for civil malpractice is therapeutic transactions that occur between doctors and patients in medical practice, where doctors are willing to provide medical services in seeking patient recovery and patients are willing to pay a certain amount of compensation to the doctor.

c) in the field of criminal law

The law between doctors and patients born from therapeutic transactions is not only related to aspects of civil law but also aspects of criminal law. The basis for questioning the criminal aspect starts from the civil relationship that arises between the doctor and the patient, namely in the form of a therapeutic transaction as an effort to heal, but in carrying out the healing effort there is an error or omission in the form of an act regulated by criminal law, the doctor can be subject to a crime. A criminal event (*crime/delict*) is an act or series of actions that can be subject to criminal penalties. An event can be declared a criminal event if it has fulfilled the criminal elements.

Civil malpractice occurs when in a medical practice the patient feels aggrieved by the actions taken by the doctor, so he has the right to file a claim for compensation as compensation for the loss he has incurred. A patient's lawsuit against a doctor in civil law is based on two legal grounds, namely based on contractual liability as regulated in Article 1239 BW.

The existence of a patient's claim for compensation against a doctor who commits malpractice based on an unlawful act is different from a claim for compensation based on an agreement that was born because of an agreement (default) because the act against the law does not have to be preceded by an agreement. A lawsuit based on an unlawful act has its own characteristics when viewed from the responsibility model applied, namely fault liability which is based on three (3) principles as stated in the articles in the BW as follows:

1. Article 1365 BW  
Every unlawful act that brings harm to another person who because of his fault published the loss to compensate for the loss
2. Article 1366 BW  
Everyone is responsible not only for losses caused by his actions, but also for losses caused by his negligence.
3. Article 1367 BW  
Each person is not only responsible for losses caused by his own actions, but also for losses caused by the actions of those who are his dependents or caused by goods under his control.

### 3.3 Legal Consequences of Malpractice Performed by Doctors

Doctor's errors arise as a result of inappropriate actions, or non-fulfillment of medical procedures that should be carried out. Such errors may occur due to intentional or negligence of a doctor. Errors are always shown in inappropriate actions, namely doing something that should not

be done and or not doing something that should have been done. Errors made by doctors if they occur due to lack of knowledge, lack of experience, and or lack of caution.

There are clearer differences when viewed from the motives of each. Where malpractice has a narrow meaning, namely an act that is carried out consciously, and the purpose of the action has been directed to the consequences to be caused or does not care about the consequences, even though it is known or should have known that the action could be contrary to applicable law. Meanwhile, negligence has no motive or purpose to cause the consequences that occur. The consequences that arise are also caused by negligence which actually occurs against the will.

While negligence can be said to be one of the mistakes that arise because the perpetrator does not meet the predetermined standards of behavior. This negligence arises because of the factor of the person or the perpetrator. In health services, the factors that cause negligence are due to lack of knowledge, lack of sincerity and lack of thoroughness of doctors at the time of treatment. In Article 1367 of the Civil Code, a person must provide accountability not only for the losses caused by his own actions, but also for the losses caused by the actions of other people under his supervision.

In essence, the provisions of Article 1367 regulates the payment of compensation by the party who orders or orders a job that results in loss to the other party. Based on Article 46 of Law Number 44 of 2009 concerning Hospitals, the hospital in this case the hospital director is legally responsible for all losses due to negligence committed by health workers in the hospital. In medical malpractice which becomes an act against the law because of its nature, the will is often directed at the form of the act and not at the result. *Culpa* is usually only focused on the result. The adverse effects on the patient are not desired.

In the Criminal Code, criminal liability can be ensnared in Article 90, Article 359, Article 360 paragraphs (1) and (2) and Article 361 of the Criminal Code.

One of them is Article 360 of the Criminal Code which states "Whoever because of an oversight causes a person to be seriously injured, shall be punished with imprisonment for a maximum of one year. Any person who because of his mistake causes a person to be injured in such a way that that person becomes temporarily ill or is unable to carry out his position or work temporarily, shall be punished with imprisonment.

a maximum of nine months or a maximum imprisonment of six months or a maximum fine of four thousand five hundred rupiahs. If based on the articles mentioned above, if applied to the case. Malpractice committed by doctors, there are 3 prominent elements, namely:

- a. The doctor has made a mistake in carrying out his profession
- b. The doctor's actions were carried out due to negligence or negligence
- c. The error was caused by the doctor not using the knowledge and skill level that should have been carried out based on professional standards
- d. No longer using (losing) any of the five senses.
- e. Verminking or flawed so that it looks ugly.
- f. Verlamming (paralysis) means not being able to move his limbs.
- g. His mind was disturbed for more than four weeks. Aborting or killing the future child of the mother's womb.
- h. Injuries that cause illness (*ziek*) or hinder daily work. Meanwhile, due to his fault (inadvertence) causing minor injuries, this article is not subject to this article. Article 361 states

Based on Article 183 of the Criminal Procedure Code, a judge can impose a sentence on the condition that there are two valid pieces of evidence and the judge's conviction obtained from the two pieces of evidence or a proof system according to the 'negative *wetelijk*' theory, because it combines elements of the judge's belief and elements of legal evidence. according to law. In Law No. 36 of 2009 concerning Health Health does not include the notion of malpractice.



## 4. CONCLUSIONS AND SUGGESTIONS

### 4.1 Conclusion

Malpractice in Article 11 paragraph (1) letter b in Law Number 6 of 1963 concerning Health Workers, which has been declared abolished by Law Number 23 of 1992 concerning Health. Based on the provisions of Article 11 paragraph (1) letter b of Law Number 6 of 1963, it can be used as a reference regarding malpractice, in the fields of administration, civil law, and criminal law. In medical malpractice which becomes an act against the law because of its nature, the will is often directed at the form of the act and not at the result. *Culpa* is usually only focused on the result. The adverse effects on the patient are not desired. In medical malpractice the form of action must be inconsistent with medical professional standards and standard operating procedures or at least contrary to normal general practice in the medical world.

### 4.1 Suggestions

The existence of a criminal application for a doctor in committing malpractice, is expected to minimize related malpractice in Indonesia and in the future more specifically regulates penalties for malpractice to ensure legal certainty for doctors who commit malpractice. It is hoped that the government will always be able to provide protection for health workers and patients who have problems in the health sector.

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