

## Civil Liability in Medical Practice in Indonesia

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**Abstract:** The objectives of this research were to analyze, explore and investigate the civil liability applied in medical malpractices for doctors in Indonesia. This study employed the normative legal research method. The analysis showed that criminal settlement was considered unfavorable for patients who became the “victims” of medical malpractice cases, moreover when the cases were categorized unintentional and which administratively fulfilled the complete requirements (having Medical License) and which patients had been informed about the medical consents). Even if the doctor was sentenced to prison, patients would not have received any benefit at all, except a sense of satisfaction or dissatisfaction after taking the revenge, even though the doctor error or malpractices were accidental or unintentional. Civil judicial which adjudicates the dispute between doctor and patient, the reverse the burden of proof system is applied in which doctors are required to prove his innocence. In conclusion, legal responsibility seen from the context of civil law in medical services appears in the form of liability based on breach of contract and liability based on tort. Based on the principles of reversed evidence, offenders are allowed to do actions that could prove his innocence. It is important that people change their mindset to choose undergoing the civil law procedure over criminal law procedure in dealing with medical malpractice cases. It is necessary to empower the Majelis Kehormatan Disiplin Kedokteran Indonesia (Honorary Council of Indonesian Medical Disciplinary): as an institution that holds the responsibility in resolving doctor’s liability towards medical malpractice.

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## INTRODUCTION

Definition of responsibility is quite broad. Salim<sup>[1]</sup> stated that the notion of responsibility can be grouped into three categories which refer to the sense of accountability,

responsibility and liability. Responsibility in the sense of accountability is usually related to finance, accounting or payment-related matters. In addition, accountability can be interpreted as trust. Responsibility in the sense of responsibility can be interpreted as the burden sharing as

the consequences of certain acts. Responsibility in the sense of responsibility can also be interpreted as the obligation to fix the mistakes that occur. Responsibility in the sense of liability means the obligation to compensate the loss that have been created by an act.

Liability in the realm of civil law is generally offered in the form of compensation to pay for the loss. Definition of losses as stated by J.H. Nieuwenhuis is reducing assets of one a party as the consequence of the violation of norms toward another party<sup>[2]</sup> which relatively relies on certain consideration of the two parties. Meanwhile, loss refers to the different condition between the adverse circumstances that is obtained as a result of violation of norms and certain condition which should be obtained if there is no violation of the norms.

Medical law currently ranges in various provisions and codes such as the KUHPPerdata (Indonesian Civil Code), KUHP (Indonesian Criminal Code), UU Praktik Kedokteran (Indonesian Medical Practice law), UU Kesehatan (Indonesian Medical Law), UU Tenaga Kesehatan (Indonesian Health Workers Law) and so on. Thus as the medical law does not stand independently, then any kind of provisions related to medical acts follow the general law (criminal, civil or administrative)<sup>[3]</sup>.

There are some possible medical cases that might occur based on KUHPPerdata (Indonesian Civil Code) such as tort (Article 1239), the act against the law (Article 1365), negligence resulting in losses (article 1366), malpractice that lead to losses caused by irresponsible act done by people or goods under their responsibility (Article 1367).

Seen from the civil law point of view, medical malpractice occurs when misconduct made by doctors related to the provision of medical services to patients causes civil damages or loss. This problem sometimes appears simultaneously with the consequences of certain criminal acts. The loss of physical health, life and the lives of patients which are resulted by maltreatments done by doctors are the essential elements of malpractice cases within the context of civil law and criminal law. The civil damages or loss that are experienced by patients had triggered the formation of civil legal liability for doctors toward the losses that they caused<sup>[4]</sup>.

Philosophical problems that arise in medical practice can be seen within these different aspects as follow: based on the ontology aspect, the definition of medical practice refers to the professional acts done by medical personnel's who are competent in medical field after studying attending medical school and have sworn to devote their life for the benefit of humanity. Meanwhile, medical malpractice, according to the World Medical Association (WMA) refers to "the failure of doctors in implementing professional standards in treating a patient or a lack of skill or negligence which directly causes harm, injury or death to the patient".

**Literature review:** The implementation of courteous law techniques requires disparity on the liability of the violations done by violators who have anticipated beforehand the consequence of their actions and those who did not know about it. The goal of the justice is ensuring that a punishment goes to individuals who have anticipated the consequences of their actions and if the individuals have understood that they would harm other people with their actions or if their actions are considered crimes or hatred. A damage/loss can be intentionally caused by certain actions even if the doers do not have any intention to harm others. For instance, a son/daughter is allowed to euthanize (mercy killing) his/her father due to terminal critical illness in order to end his/her father's agony. In this case, the motive of the son/daughter ends his/her father's life is not considered as a crime or hatred action<sup>[5]</sup>.

According to the law, an individual is not only considered of being responsible from doing objectively harmful actions as intended beforehand, she/he might be responsible for harmful actions she/he conducted even without having bad intentions since she/he should have anticipated the consequences of the actions. In this case, punishment is given to the doer due to the fact that the harmful action was conducted within certain psychological criteria. The psychological state in which the doer has anticipated or intended the harmful consequences of the actions (called *mens rea*) can be considered as a crime. This criteria is shown by the term "fault" (in the broader scope it is called *dolus* or *culpa*). If the punishment applies only for the actions with certain psychological condition, then it is called fault-based responsibility (*culpability*) which is different from the absolute responsibility (*liability*)<sup>[6]</sup>.

A concept that is closely related to the law obligation is the concept of law-liability. A person is legally responsible for certain action that he/she does which means that she/he also holds the responsibility to receive punishment if the action goes against the law or violates the law. Generally, an individual holds responsibility of his/her own action. Thus, the subject of legal liability is identical to the subject of legal obligation<sup>[6]</sup>. The civil liability points to the compensation given to the disadvantaged party by the person who conduct faults (Article 1365 of Indonesian Civil Code) or negligence (Article 1366 of Indonesian Civil Code).

Seen from the civil law point of view, medical malpractice occurs if a doctor does a fault within the medical service given to a patient which causes certain loss. Sometimes, this case is followed by certain consequences in which the consequences can be categorized as the consequences of certain criminal actions. Physical and mental loss or the death of the patient which are caused by wrong medical treatment given by the doctor is considered as the most essential

element of medical malpractice based on either civil law or criminal law. The loss that is experienced by the patient becomes the main consideration to determine the legal liability that should be paid by the doctors as the compensation to the loss.

Based on the review above, there are some problems that occur in Indonesia. Firstly, in Indonesia, it is difficult to find patients who are willing to undergo law procedure after experiencing medical malpractice performed by doctors. Secondly, the procedure of civil law settlement takes quite a long time to finish and requires great amount of money. Moreover, it is not easy to prove the guilt of doctors. Finally, patients prefer to report medical malpractice cases to the police to be settled under crime law.

Therefore, this research aimed at analyzing, exploring and finding the civil liability of medical malpractice in Indonesia. The result of this research is beneficial in determining the medical malpractice and the medical civil liability in Indonesia. This study also suggested an effective system and appropriate formula to the implementation of medical civil liability that provides patients with benefits, justice, safety while enabling the doctors to learn the best from their mistakes and to act more carefully, accurately and thoroughly in the future in order to avoid law sanctions especially the sanctions of the civil law.

## **MATERIALS AND METHODS**

This research employed the normative legal research method. The researcher has also reviewed the literature related to medical malpractice cases in Indonesia that were blown up by the media recently and its comparison to the implementation of medical law in other countries.

## **RESULTS AND DISCUSSION**

Criminal settlement is quite an unfavorable way to take for patients who become the "victims" of medical malpractice cases, particularly when the case is considered an unintentional act which have fulfilled the administrative requirements (having Medical License and information related to the consent). Even when the doctor was sentenced to prison, patients would not received any benefit at all, except the sense of satisfaction/dissatisfaction from the revenge, moreover when the case is considered an intentional error caused by accident or oversight. More importantly, the public will be aggrieved for the doctors will be unavailable to serve those in need. In relation to the criminal prosecution, Abolitionism concept which was proposed by Louk Hulsman can be used as the reference to the criminal justice system in Indonesia. In Hulsman's perspective, the criminal justice

system can be seen as a social problem. There were four considerations that underlie the Hulsman's ideas which were:

The criminal justice system causes suffering, restrictions on the freedom those who are being involved in it and they are being separated and alienated from society, receiving negative stigma and demeaned dignity that might isolate them from the society.

The criminal justice system can not work in accordance with the objectives as aspired and the perpetrators do not receive thorough explanation related to the ultimate goal of the punishment. Even more, the victims of crime have never received any benefit from the law sentences as the result the criminal justice system received by the perpetrators. The criminal justice system tends to be unmanageable when it faces the decision that have been taken, making it often become vulnerable and capricious which causes violations on offender's human rights.

The approach used in criminal justice system suffers from a fundamental defect that is the misperception of the concept of criminal and law-violation action which do not simply refer to the idea that if there is a crime (and criminals) there must always be the criminal prosecution. Thus, this concept has created criminal justice system which is not flexible and less creative to implement as a mean of social control.

In malpractice cases, doctors have been given solutions in such ways that the solutions provide patients with compensation for the loss and damages that they experience. Meanwhile, the doctor will receive a valuable lesson from the case to act more cautiously in the future without receiving negative stigma and being fearful in performing risky medical actions. Compensation system of medical liability is a good solution to take in addition to the compensation system obtained from mediation process. Therefore, dissemination and socialization to the public and law enforcement officials on the advantages of the system of liability are necessary to administer in order to shift the mindset related to the compensation system from being seen as something "travails" into valuable "lessons" for the doctors.

Legal report that can be taken by patients by reporting the issue to Majelis Kehormatan Disiplin Kedokteran Indonesia (Honorary Council of Indonesian Medical Disciplinary or MKDKI), reporting to law enforcement officers (police and prosecutors) when there are found indications of mistakes/errors done by doctors, suing the civil court related to the tort or unlawful acts to be resolved through alternative dispute resolution (mediation). Civil justice system should affirm the core principle that is providing easy, fast and cheap court system to the public. Thus, the court should:

- Consistently implement the principle of “quick in quick out”
- Seriously implement the final and binding system  
Provide open access to medical records for the patient or the family, since, the records basically belong to the patients
- Make sure that the expert witnesses have excellent professionalism related to their field and do not have any conflict of interest with the accused doctor

Regarding to the article 29 of Indonesian Health Act, it has been mentioned that “in case the health workers are suspected to conduct negligence in carrying out their profession, the issue must be firstly resolved through mediation”. The context of the meaning of article 58 of Indonesian Health Act should also be highlighted in which it states: Everyone has the chance to claim for compensation over the damages or loss caused by other person, health personnel and/or the health provider who cause losses due to human errors or negligence of any health care that he/she received. The claim for compensation referred in article shall not apply to health workers who perform life-saving actions or prevention of disability of a person in an emergency situation. The procedure of taking the claim as stated in article shall be regulated in accordance to the provisions of the legislation.

Those articles of the Indonesian Health Act above imply that the role of the MKDKI should be improved and empowered in order to effectively implement the Liability rule related to medical malpractice with the premise that all disputes do not always have to be resolved through formal court. Thus, MKDKI should become the institution that holds responsibilities related to the settlement of medical disputes between doctor and patient. In civil judicial which adjudicates the medical disputes between doctor and patient the term “shifting the burden of proof” system needs to be taken into account in which doctors are required to prove their innocence.

Penal Mediation is an alternative to the process of dispute resolution (generally, known as “Alternative Dispute Resolution” or “Appropriate Dispute Resolution”) which is generally applied in solving civil cases instead of criminal cases. Based on the law applied in Indonesia at present, principally criminal case (positive law) cannot be settled outside formal court, although in certain cases, it is possible that the settlement of a criminal case is done outside the formal court.

Even though generally, the resolution of law outside the court exists only in civil disputes but in the real practice, there are certain criminal cases that can be settled outside formal court through various discretions taken law enforcement officers or through deliberation/peace mechanism or palliate institution in a society (the family council; village deliberation;

customary deliberation etc.). There is no formal legal basis that underlies the practice of settling disputes outside the court for crime cases that often forces a crime case has achieved a peace settlement informally (even though it has gone through the mechanism of customary law) to still undergo formal court as regulated by the law.

According to the Article number 29 of Act No. 36 Year 2009 about the Indonesian Health Act, it is stated that “in the case of health workers being suspected of negligence in carrying out his profession, negligence must be resolved first through mediation”. At this present time, the government has not yet issued any regulations that rule the procedure of medical liability between the patient and the doctor related to medical malpractice cases; there is not yet any formal agency designated to carry out the process of medical liability, mediation provisions, exact procedure, news events and how it legalized. There has not yet any explanation related to the result of mediation that has been agreed by both parties whether or not the criminal law process should be continued. Following passages explain the writer’s thought and analysis in order to find solutions to these issues.

Mediation is a process which is applicable to solve any kinds of disputes or cases. Mediation appears to be an effective procedure to take since it considers future condition or probabilities in the attempts of finding solutions for all the parties that are involved in a case. In the legal proceedings, court uses its powers to implement certain decisions. Whereas in mediation, the parties that are involved in a case are able to authorize themselves to find the solution. Therefore, mediation is often said to be the first resort while the formal court procedure is often said to be: the last resort for those who are seeking for justice. Mediation is more effective and more efficient since it saves more time and money that should be paid by the litigants. Mediation provides process that does not require the review of foreign terms related to the legal process as well as technical terms used in medical fields. Mediation gives authority to the parties that are being involved in a case to find their own fair and affordable solution which can be quickly resolved and provides mutual benefits for both parties. It also can protect the privacy and dignity of those who are being involved in the case and prevents the case from being exposed in mass media such as newspapers and television. Mediation solves the problem without endangering personal matters, family life and relationship with the society in the future.

Mediation is generally, applied in civil cases instead of criminal cases. Based on the regulations applied in Indonesia presently, principally, criminal cases cannot be settled outside the court, although, for some special cases, it is possible that settlement of a criminal case is processed outside the formal court through mediation<sup>[7]</sup>. Article 66 verse (1) of Act No. 29 of 2004 on Indonesian Medical Practice states that: “Every person whose

interests got harmed by medical actions performed by doctors in performing medical practices are allowed to complain by reporting it to the Chairman of the MKDKI". However, if there is an allegation of error/negligence conducted by doctors, generally, the patient immediately report the issue to the police to be processed by law. Unfortunately, law enforcement officials often find difficulties in their attempts to prove the medical errors/omissions done by doctors.

Indonesian Attorney General had issued the Letter of Secret Hints Number: B006/R-3/I/1982 in October 19, 1982 on "Matters of the Medical Profession" which gave order not to continue any medical malpractice case before consulting the issues with the officials of the local Health Department or Ministry of Health of the Republic of Indonesia<sup>[14]</sup>. Indonesian Supreme Court has also issued an Order Letter in 1982 that essentially gave directions to the judges related to the law process of medical malpractice cases done by doctors or other health personnel who are suspected of committing errors or omissions in any action or medical services not to be directly processed through legal channels, instead, they should seek for the opinion of the Honorary Council of Medical Ethics (MKEK) first which now has been replaced by MKDKI. In Indonesian Constitutional Court Decision No. 4/PVV-V/2007 it is stated that medical disputes should be firstly resolved through the profession judicial.

Despite of the order letters had been issued the Indonesia General Attorney and by Indonesian Supreme Court, the number of medical cases in which doctors were sentenced under crime law of formal court keeps increasing. This fact scares the doctor and puts them in unfavorable situation. Some doctors have filed a request to conduct judicial review of criminal provisions in Act Nomor 29 of 2004 on Indonesian Medical Practice Act to the Indonesia Constitutional Court. A number of lawsuit that were issued against the doctor's criminal provisions in the legislation have been granted by the Constitutional Court such as the abolishment of the Article 75 and Article 77 which imposed imprisonment penalties to doctors who perform medical practices without having the license.

The fundamental concept of MKDKI as explained in Act No. 29 of 2004 on Indonesian Medical Practice Act is to replace the Article 54 paragraph (3) of Act 23 of 1992 on Health which issued an order to replace the role of the Disciplinary Council of Health Workers. This council holds the responsibility in controlling if the professional standards have been fulfilled by medical personnel in performing their job.

MKDKI is an autonomous institution which was established by the Indonesian Medical Council to perform

independent duties related to medical cases. In order to stay neutral, MKDKI members consist of doctors and 3 dentists from different respective professional organizations who represent the hospital associations and 3 bachelors of law. Any decision issued by MKDKI is a binding disciplinary sanction. In accordance with Article 69 which stated that:

- Honorary Council of Indonesian Medical Disciplinary (MKDKI) decision binds doctors, dentists and Indonesian Medical Council
- The decision as referred in paragraph (1) may be in the form of guilty declaration or disciplinary sanctions
- Disciplinary sanctions as stated in paragraph (2) refer to
  - A written warning
  - Recommendation for revocation of *STR* (registration) or *SIP* (License) and/or
  - The obligation to follow education or training at an educational institute of medicine or dentistry

If in the inspection there were found violations of ethical rules, MKDKI pursues the complaint to the medical professional organizations (Indonesian Doctors Association or Indonesian Dentists Association) in accordance with Article 68 "If in the inspection there were found violations of ethical rules, MKDKI pursue the complaint on the medical professional organization".

Currently, there is only an office of MKDKI which is located in Jakarta. At the beginning of the council establishment, MKDKI was located in Semarang. The activities done by this independent institution is barely known by the public because of the lack of publication through mass media. On the contrary, when any medical malpractice cases occurred, media would publish the case and the court process of the issues through printed and electronic mass media.

After the enactment of Act No. 39 of 2014 on Indonesia Health Workers, the duties and functions of MKDKI which is a product of the Act No. 29 of 2004 on Indonesian Medical Practice should be enhanced. MKDKI should be integrated to Indonesia Honorary Council of Health Workers (MKTKI) which should cover broader scope of duties and functions. It has been known that the Indonesia Health Workers Act has also established the Indonesia Health Worker Council (KTKI) as the coordinator of any council of the health personnel form any categorization including the Indonesian Medical Council (KKI). It is suggested that the duties and functions of MKDKI cover the adjudication of:

- Violation of the professional discipline done by medical personnel

- Violation of the ethical rules of medical personnel
- Violation of the provisions on the general appropriateness of the behavior of medical personnel and
- As an agency to settle disputes between the medical personnel and the patient

Thus, MKDKI can be divided into two different “rooms”. First, the court room of disciplinary, ethics and decency; Second, the court room for compensation (indemnity). The first room performs the tasks and functions of MKDKI while the second room serves as the only institution that conducts judicial process of any disputes that occur between medical professionals (including doctors) with the patient which process is apart from the function of Badan Penyelesaian Sengketa Konsumen (Consumer Dispute Settlement Board or BPSK) as the product of Indonesian Consumer Protection Act. The number of doctor-patient disputes keeps increasing, thus, MKDKI should open new branch offices in every province or a minimum of 10 offices in 10 province which are evenly spread. It is also suggested that MKDKI form some commissions within the organization including:

- Clarification commission that investigates medical malpractice performed by doctors and the loss experienced by patients
- Losses estimator commission that determines the nominal amount of losses including the material and immaterial losses
- Mediator commission that mediates the parties and then ratifies the agreements as agreed by both parties.

#### **Other provisions:**

- The council should conduct trials to make decisions quickly, simply and at a low cost in accordance with the principles of justice
- The council is considered performing fast action as it should issue decision within a maximum of 21 working days
- The decision shall be final and binding, without appeal deals
- Both parties are allowed to be accompanied by legal counsels
- The parties are free of charge while the operational cost is taken from state’s budget
- During the process in MKDKI, no law procedure is taken either civil or crime law procedure
- Once the dispute resolution process reaches an agreement and has been notarized, there will be no following formal process of civil law and criminal law

The members of MKTKI are the experts and seniors who are credible in the fields of law, health, medicolegal, as well as hospital management experts who are chosen by a special selection committee appointed by the president; Regards the principle of equality, usefulness and fairness. The council is allowed to adopt certain provisions applied in BPSK (Consumer Dispute Settlement Board) such as the principle of reverse the burden of proof.

It is expected that the civil liability of medical malpractice in Indonesia perform effectively, helpful, and fair both for the doctor and the patient as well. Thus, it certain modifications in the judicial system of law in Indonesia are necessary to implement including evidentiary system which used to apply the principle “the one who argued should prove” should be transformed into a system of reverse the burden of proof in which the doctor is the one who must prove his own innocence) actions to shift people’s mindset should be taken in order to change their mindset to prefer civil settlement over criminal settlement to solve medical malpractice cases The implementation civil justice process go in accordance with the principle of easy, cheap and fast process. In order to achieve those goals, government should strengthen the role MKDKI to run its function as a legal court (dispute settlement) that solves medical malpractice cases. In determining the compensation for damages/losses, the council is allowed to involve the selected insurance companies.

#### **CONCLUSION**

Based on the results of the analysis, it can concluded as follows. Responsibility as referred by civil law related to medical services can be in the form of liability of contract and liability of law-violation acts. Liability of contract is a responsibility is created by certain contract (Contractual Liability). Therefore, it can only apply among those who are involved in a therapeutic transaction. Liability of law-violation acts is responsibility that appears as the consequences of conducting actions that violate certain law (Liability Based on Fault). Therefore, it applies to anyone who commits unlawful acts that cause damage or losses to other parties. Based on the scope of those two different system, it is obvious that the liability of law-violation act is has a broader scope than the liability of contract.

The settlement of medical disputes is administered using the principle of reversed evidence in which the offender is allowed to apply for things that could prove his innocence. Based on the theory of rights, the burden of proof might be done by both parties, since both doctors

and patients have their rights and obligations to each other in the form of give-and take services. It is necessary to change the mindset of the public to prefer the process of civil settlement over criminal settlement. MKDKI should be given power to be the institution that resolves medical malpractice cases and the liability of the doctors who got involved in a malpractice case.

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