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The Malpractice Administration Procedure in the Vortex of Crime: An Indonesian Perspective and Its Comparison with Other Countries

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Abstract. *Medical malpractice has become a complex issue that extends to criminal law, having serious implications for health practitioners and patients. The legal argument in determining the elements of negligence and medical malpractice is based on the difference in interpretation between ordinary criminal offenses regulated in the KUHP and medical criminal offenses. Th e aim of this study is to explain the theory and legal analysis related to the handling of medical malpractice cases in Indonesia and its comparison with other countries. This research uses normative juridic methods. The outcome of this study is the need for reforms in handling alleged medical malpractice cases in Indonesia by considering the paradigms and concepts of other countries to protect patient rights and improve the quality of health services in reducing the risk of malpractice in Indonesia.*

Keywords: *Health; Malpractice; Medical; Negligence.*

1. INTRODUCTION

Medical malpractice is a complex issue that extends into the realm of criminal law, carrying significant implications for healthcare practitioners and patients. In Indonesia, cases of medical malpractice have emerged as a significant concern, necessitating a profound understanding and a comparative analysis with criminal law approaches in other countries. According to court decision data obtained from the Supreme Court of Indonesia's Decision Directory website, there are 69 cases of medical malpractice, with 36 rulings on unlawful acts.[1] According to the data available on the Unissula repository page, there were over 300 alleged cases of fraud recorded between 2006 and 2015, including incidents of medical malpractice reported to the Indonesian Medical Council (KKI). To date, the incidence of medical malpractice remains prevalent in Indonesia.[2]

Soerjono Soekanto elucidates that malpractice constitutes a professional error encompassing the incapacity or negligence in executing professional duties. Additionally, he asserts that negligence is actually a consequence of medical oversight. Should certain actions that ought to be carried out are neglected, such negligence is deemed to have occurred, or conversely, actions that should not have been executed

[1] Mahkamah Agung RI. (2023). *Direktori Putusan Mahkamah Agung RI*. https://putusan3.mahkamahagung.go.id/search.html?q=malpraktik&jenis_doc=restatement
[2] *Unnisula Repository*. (2017). Unnisula. http://repository.unissula.ac.id/7045/4/BAB I.pdf

are undertaken.[3] From a criminal law perspective, medical malpractice refers to acts of negligence or error committed by healthcare practitioners within the context of medical service, which can result in injury or death to a patient. Medical malpractice cases may involve criminal liability for the healthcare practitioner involved. Criminal law also aims to protect patient rights. Patients have the right to receive medical treatment consistent with prevailing standards, and a violation of this right may open avenues for criminal prosecution. Medically negligent acts that can be criminally prosecuted must meet the elements of criminal law, including a mistake or negligence that can be considered criminal negligence or a breach of the applicable medical care standard.[4]

In some cases, criminal liability may depend on whether the act was intentional (dolus) or negligent (culpa). Intentionality may include actions deliberately harming the patient, while negligence involves actions not meeting a reasonable standard of care. Noncompliance with Medical Standards consists of Negligence, where healthcare practitioners are accused of negligence if they fail to adhere to the applicable standard of medical care, and Misconduct, which deliberately harms the patient.[5] In the Judicial Process, medical malpractice cases typically begin with an investigation by the authorities. If found guilty, healthcare practitioners may be subject to criminal penalties including fines, imprisonment, or other criminal sanctions. The Right to Sue is a form of patient rights protection; criminal law can provide the right to file a lawsuit and seek compensation if harmed by medical malpractice.[6] It is important to note that criminal legal action against medical malpractice cases involves a meticulous process and strong evidence. Authorities must prove that the healthcare practitioner in question truly violated the applicable standard of medical care.

In certain cases, the subjective considerations of criminal law may assess whether a mistake or negligence was intentional or unintentional. However, in many jurisdictions, unintended errors can still result in criminal liability if deemed to constitute gross negligence. While criminal law evaluates actions legally, medical ethics bodies, such as Medical Councils, may also take action against healthcare practitioners who breach medical ethics. Similarly, Japan, like Indonesia, emphasizes ethical aspects and professional accountability. Healthcare practitioners found in violation of ethical standards may face administrative sanctions and restrictions on practice.[7] The Republic of Indonesia Law No. 29 of 2004 on Medical Practice is the regulation governing medical practice in Indonesia. This law aims to protect the public from unethical or harmful medical practices. It specifically regulates the rights and obligations of doctors, medical practice ethics, and the establishment of the Indonesian Medical Council (IMC). Although it does not specifically mention "malpractice," this law provides a legal basis for handling cases involving negligence or actions detrimental to patients.[8] Furthermore, it also provides a legal foundation for the establishment of a Medical Court to handle disputes or cases involving medical practice. Some jurisdictions may

[3] Soekanto, S. (t.t.). *Kelalaian dan Tanggung Jawab Hukum Dokter*. Harian Sinar Harapan.
[4] Adji, I. S. (t.t.). *Malpraktek Medis: Standar Profesi dan Pertanggungjawaban Pidana*.
[5] Ari Yunanto, Cs. (2009). *Hukum Pidana Malpraktik Medik*. ANDI.
[6] Azrul Azwar. (1996). Kriteria Malpraktik dalam Profesi Kesehatan. *Makalah Kongres Nasional IV PERHUKI*.
[7] Chan, K. W. (2017). Legal malpractice lawsuits in Japan: Past, present and future. *International Journal of the Legal Profession*, *24*(2), 159–176. https://doi.org/10.1080/09695958.2016.1247709
[8] Darmawan, R. (2020). Penegakan Hukum Terhadap Malpraktek Dokter Yang Melakukan Aborsi (Studi Putusan No.288/Pid.Sus/2018/Pn. Njk). *El-Iqthisadi : Jurnal Hukum Ekonomi Syariah Fakultas Syariah dan Hukum*, *2*(2), 15. https://doi.org/10.24252/el-iqthisadi.v2i2.13999

have specialized courts or criminal legal procedures focused on medical malpractice cases, such as Medical Courts, designed to address legal disputes in medical practice. In all cases, the handling of medical malpractice within the criminal law perspective requires careful examination of the facts and the law, necessitating the involvement of medical experts who can provide a professional viewpoint.[9]

Health Law regulations serve as Lex Spesialis, embodying exceptional norms for legal protection of both providers and receivers of healthcare services. Law No. 29 of 2004 marks a significant milestone in the regulation of medical practice in Indonesia. Nonetheless, to maintain its effectiveness, it requires periodic evaluation and updates in line with the latest developments in medical practice and international standards.[10] In contrast to Indonesia, malpractice lawsuits in the United States often involve jury trials, where the jury assesses evidence and determines the liability of healthcare practitioners and the amount of compensation due.[11] As outlined in the Pancasila and the 1945 Constitution of the Republic of Indonesia, health is a fundamental human right and a vital component of welfare. Any effort to improve the health of the Indonesian population necessitates investment in national development, and any health disturbance results in substantial economic loss to the country. The background of malpractice in Indonesia and selected countries reflects the complexity within healthcare systems, variances in care standards, as well as social and economic challenges. To reduce the risk of malpractice, efforts must be made to enhance access to quality healthcare services, improve education and training for medical personnel, and strengthen oversight and legal protection for patients.

2. RESEARCH METHODS

The research methodology refers to the scientific method employed by the author to gather various data for specific purposes and utilities. To achieve these objectives, a relevant method is requisite.[12] This writing necessitates a method or means to extract data to fulfill the research in completing this legal study. The present study utilizes a normative juridical method, an approach that involves the examination of all legislation by investigating medical malpractice issues within the context of the criminal system in Indonesia and comparing them with other countries. Through literature research and legal analysis, the author examines the differences and similarities in legal approaches to handling medical malpractice, exploring the variations and commonalities in legal responses to medical malpractice in Indonesia.

3. RESULTS AND DISCUSSION

3.1. Malpractice in the Indonesian Legal System

In the Indonesian Legal System, patient safety is the paramount priority for a physician (aegroti salus lex suprema), as the treatment of the ill is their obligation in accordance with the Hippocratic Oath, which serves as the fundamental guideline for doctors.

[9] Fitriono, R. A., Setyanto, B., & Ginting, R. (2016). Penegakan Hukum Malpraktik Melalui Pendekatan Mediasi Penal. *Yustisia Jurnal Hukum*, *5*(1), 87–93. https://doi.org/10.20961/yustisia.v5i1.8724

[10] Novianto, W. T. (2015). Penafsiran Hukum Dalam Menentukan Unsur-Unsur Kelalaian Malpraktek Medik (Medical Malpractice). *Yustisia Jurnal Hukum*, *92*(2), 488–503. https://doi.org/10.20961/yustisia.v92i0.3832

[11] Stamm, J. A. (2016). Medical Malpractice: Reform for Today's Patients and Clinicians. *The American Journal of Medicine*, *129 no.1*, 20.

[12] Sugiyono. (2018). *Metode Penelitian kuantitatif, Kualitatif, dan R&D.* Alfabeta.

Seeking healthcare is every individual's responsibility, as treating the sick and healing people represents a societal need for medical expertise.[13] A doctor is an individual authorized and empowered to provide medical services, particularly the examination and treatment of diseases, conducted in accordance with medical law, based on humanitarian values.[14] The Medical Code of Ethics aims to ensure that the medical profession is always practiced with noble and correct intentions, prioritizing the interests and safety of patients. In practice, doctors provide specialized advice to patients through medical care, thereby establishing a legal bond with their patients, known as a therapeutic transaction.[15] The legal relationship described above acknowledges the responsibilities and obligations between doctors and patients, as well as the importance of everyone's understanding of the law. As is widely recognized, a doctor undertakes their medical duties with inherent risks. For instance, a patient who has a higher likelihood of death and eventually passes away after being treated by a doctor, despite the doctor having performed all required procedures. This scenario is commonly referred to as medical malpractice risk.[16]

According to Munir Fuady, medical malpractice is a legal, ethical, and commonsensical act perpetrated by a doctor, an individual under their supervision, or healthcare personnel towards a patient, whether in terms of diagnosis, therapeutics, and disease management. When conducted in violation of the law, propriety, morality, and professional principles—whether intentionally or due to negligence—causing incorrect treatment, pain, injury, disability, bodily harm, death, and other losses, it necessitates that the doctor or nurse be held accountable administratively, civilly, or criminally. The explanation for Law No. 36 of 2009 on Health, Article 58, generally does not find a definition of malpractice in the current applicable Indonesian legislation. However, the meaning or understanding of malpractice is actually found in Article 11 paragraph (1) letter b of Law No. 62 of 1963 on Healthcare Personnel, which was revoked by Law No. 23 of 1992 on Health, and then replaced again by Law No. 36 of 2009 on Health. Therefore, the provision of Article 11 paragraph 1 b of the law on Healthcare Personnel becomes a reference for the meaning of Malpractice, identifying Malpractice with neglecting a duty, meaning not doing something that should be done. The occurrence of malpractice will only be determined by a professional organization or a special body, which in this case, a law enforcement institution is established to supervise professional tasks based on legislation and the code of ethics.[17]

Syahrul Machmud posits that the provisions of Article 11 paragraph (1) of the Healthcare Personnel Act can serve as a reference for malpractice, which characterizes malpractice as neglecting a duty, meaning the failure to perform an action that should have been taken.[18] Article 11 paragraph (1) of the Healthcare Personnel Act provides a reference for the meaning of malpractice by detailing it as a dereliction of duty,

[13] Novianto Fuady, M. (2005). *Sumpah Hippocrates Aspek Hukum Malpraktik Dokter*. Citra Aditya Bakti.
[14] Astuti, E. K. (t.t.). *Perjanjian terapeutik dalam upaya pelayanan medis di Rumah Sakit* (Vol. 2009). Citra Aditya Bakti.
[15] Haiti, D. (2017). Tanggung Jawab Dokter Dalam Terjadinya Malpraktik. *Badamai Law Journal*, *2*(September), 206–223.
[16] Soetrisno. (2010). *Malpraktek Medik dan Mediasi Sebagai Alternatif Penyelesaian Sengketa*. PT Telaga Ilmu Indonesia, Tangerang.
[17] Dwi Dananjaya, A. A. N., Sagung, A. A., Dewi, L., Luh, D., & Suryani, P. (2019). Sanksi Malpraktik Dan Resiko Medik Yang Dilakukan Oleh Dokter. *Jurnal Analogi Hukum*, *1*(1), 6–10.
[18] Machmud, S. (2008). *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*. Mandar Maju.

implying an omission of necessary action. The text of Article 11 paragraph (1) letter b of the Healthcare Personnel Act states without reducing the provisions within the Criminal Code and other legislation, administrative actions may be taken against healthcare personnel in cases of: a) Neglecting duty; b) Engaging in an act that should not be committed by healthcare personnel, considering both their professional oath and the oath as healthcare personnel; c) Overlooking actions that should be performed by healthcare personnel; and d) Violating any provision according to or based on this law.[19] Most people in Indonesia believe that medical failure is wrong and even equate medical failure with criminal violations. This is not entirely accurate because in criminal acts, what is intended is the result of the crime itself. Whereas in medical actions, the process is of utmost importance.

Thus, the term malpractice does not solely refer to a specific profession. There are responsible parties tasked with coordinating and imposing sanctions for breaches of professional guidelines, as stipulated in both law and ethical codes. To safeguard such professions, there are typically specialized organizations or bodies. Disciplinary Honor Councils and administrative sanctions are generally levied against members who violate the ethical code by professional organizations or special bodies constituted to oversee professional duties. Moreover, if they are proven to satisfy the elements of a criminal act as outlined in specific professional laws, they may also be subject to criminal sanctions.[20] If a doctor or other medical personnel engages in medical practice poorly, known as gross negligence (culpa lata), or intentionally in a manner not befitting a general practitioner and contrary to the law, resulting in patient harm, that doctor is considered to have committed malpractice.[21]

Azrul Azwar articulates that malpractice meets three criteria. First, malpractice is any professional error committed by a doctor because they fail to conduct examinations, assessments, or actions that a doctor in the same situation and conditions typically would. Second, malpractice is any professional error by a doctor due to performing medical work in a manner that deviates from the standard and is unreasonable. Third, malpractice is any professional error made by a doctor, including errors due to unreasonable actions and errors due to a lack of skill in fulfilling professional obligations.[22] Article 52 of Law No. 29 of 2004 on Medical Practice establishes several obligations for doctors, including providing medical services according to standard operating procedures and the medical needs of patients, referring patients to other doctors with greater expertise or capability if they are unable to perform examinations or treatments, and maintaining the confidentiality of all known patient information, even after the patient has passed away.

Moreover, doctors are required to adhere to the Medical Code of Ethics, which includes the following stipulations: to practice the Physician's Oath, comply with professional standards, maintain professional independence, avoid self-promotion, provide treatments or advice that consider patient consent and resilience, exercise caution in

[19] Dwi Dananjaya, A. A. N., Sagung, A. A., Dewi, L., Luh, D., & Suryani, P. (2019). Sanksi Malpraktik Dan Resiko Medik Yang Dilakukan Oleh Dokter. *Jurnal Analogi Hukum*, *1*(1), 6–10.
[20] Machmud, S. (2008). *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*. Mandar Maju.
[21] Atmadja, D. S. (t.t.). *Malpraktek Medis, Pembuktian dan Pencegahannya" (dalam Trilogi Rahasia Kedokteran, Malpraktek dan Peran Asuransi).* 36.
[22] Azrul Azwar. (1996). Kriteria Malpraktik dalam Profesi Kesehatan. *Makalah Kongres Nasional IV PERHUKI*.

announcing and publicizing examination results, issue certifications post-examination, and deliver competent medical services, taking responsibility for their patients.[23] Victims are disadvantaged due to breaches of duty by healthcare professionals, particularly malpractice violations. The consequences can range from physical and mental harm to even death. Consequently, the law affords protection to the public by establishing substantive rules as the legal foundation for protection against malpractice actions for victims. The Criminal Code (KUHP) also stipulates criminal threats for malpractice perpetrators. This is articulated in Article 360 of the KUHP, which stipulates that anyone who, due to negligence, causes serious injury is punishable by imprisonment for up to one year. Furthermore, anyone who, due to negligence, causes injury such that the person becomes temporarily ill or is unable to perform their duties or work temporarily, is punishable by imprisonment for up to nine months or by detention for up to six months or a maximum fine of four thousand five hundred rupiah. If based on the aforementioned articles, if applied to a case.

Any medical action performed by a doctor or other medical personnel towards a patient can be considered a criminal act under the written criminal law in Indonesia. Some actions by doctors that are deemed criminal according to positive law include:

a. Article 378 of the Criminal Code (KUHP) governs the act of deceiving a patient, stating that "Any person who, with the intent to benefit oneself or another unlawfully, by using a false name or false title, by deceit or a sequence of misleading statements, induces another to hand over an item, or to create or write off a debt, is punishable by a maximum imprisonment of 4 (four) years."
b. Violations of decency are found in articles 285, 286, 290, and 294 of the Criminal Code.
c. Abortion as stipulated in articles 347–349 of the Criminal Code.
d. Intentionally leaving a patient unaided (articles 304, 531 of the Criminal Code), disclosing medical secrets (article 322 of the Criminal Code), negligence resulting in injury or death (articles 359, 360, 361 of the Criminal Code), providing or selling counterfeit drugs (article 386 of the Criminal Code), and conducting euthanasia (article 344 of the Criminal Code).

In medical practice, a doctor can be held accountable for their errors, both directly and indirectly. However, if a doctor or other medical staff commits a medical error that harms the hospital, there is a responsibility towards personnel, professional liability, and quality assurance; responsibilities towards facilities/equipment; and responsibilities for the safety of the building and its maintenance.[24] Furthermore, a hospital can be held accountable for patient healthcare services based on several laws, such as professional ethics, administration, civil, and criminal law. The types of legal liability imposed by a hospital for errors in medical actions performed by doctors are as follows: a. Hospital Accountability in Administrative Law; b. Hospital Liability in Civil Law; c. Hospital Accountability in Criminal Law. Although the relationship between a doctor and a patient is fundamentally considered a data relationship, there is a possibility that medical services provided by a doctor outside professional standards may fall under the domain of administrative or criminal law. It is indeed challenging to differentiate between harm caused by unlawful acts and harm caused by a doctor's breach of contract in medical practice. Therefore, damages caused by a doctor's

[23] Guwandi, J. (2008). *Hukum dan Dokter*. Sagung Seto.
[24] Tuti, T. T. (2010). *Perlindungan Hukum Bagi Pasien*. Prestasi Pustaka.

breach of contract or unlawful act depend significantly on the reason the patient files a claim.

According to Law No. 36 of 2009 on health, article 58 paragraphs (1), (2), and (3) states that: 1. Every person has the right to claim damages against an individual, healthcare personnel, and/or healthcare provider who causes harm due to an error or negligence in providing healthcare services. 2. Claims for damages as referred to in paragraph (1) shall not apply. Legislation regulates the procedure for filing requirements as mentioned in paragraph (1). Hospital regulations on healthcare service practices and medical practices in hospitals strive to be applied without deviating from the origin of Law No. 44 of 2009 concerning Hospitals, Law No. 36 of 2009 on Health, Law No. 36 of 2014 on Healthcare Workers, Law No. 29 of 2004 on Medical Practice, and Law No. 38 of 2014 concerning Nursing.[25] In his writings, Hasrul Buamona discusses how Hospitals manage patient health improvements, whether promotive, preventive, curative, and rehabilitative, in accordance with the provisions of Law No. 36 of 2009 On Health. This also pertains to the foundation and purpose of hospitals, which must be established based on Pancasila, ethics and professionalism, humanity, justice, equality of rights, anti-discrimination, patient protection and safety, and social function.[26]

However, Law No. 44 of 2009 concerning Hospitals states: "Hospitals are legally accountable for all harm caused by the services provided by healthcare personnel, including doctors." This occurs in cases where patients feel aggrieved due to the inadequacy of healthcare personnel. Hospitals find it increasingly difficult to absolve themselves of responsibility for employee negligence. Doctors in hospitals are typically held responsible for the negligence of their workers or agents. Currently, there are two types of vicarious liability. Hospitals can be held responsible for the actions of their employees based on actual agency theory. Secondly, hospitals can be held liable for the actions of independent contractors who are not employees and who violate the standard of care.

3.2. The Element of Negligence in Malpractice

Malpractice stems from the word 'mal' meaning bad, and 'practice' signifying an action. Linguistically, malpractice is defined as poor medical action by healthcare professionals in their relationship with patients. According to the Great Dictionary of the Indonesian Language, malpractice is the practice of medicine that is incorrect, inappropriate, contravenes the law, or violates ethical codes. In Black's Law Dictionary, malpractice is any professional misconduct, lack of skill, or negligence to an unreasonable degree. In Article 1, Paragraph 1 of Law No. 36 of 2009 on Health, Ari Yunanto uses the term "malpractice" to describe medical practice that violates laws or ethical codes. In medicine, negligence is also known as culpa lata, or gross negligence. In criminal law, negligence is typically defined as carelessness or an error in the narrow sense. Penalties for medical malpractice are directed at the actions and attitudes towards those actions. Differing understandings of malpractice issues arise when the term "medical malpractice" is substituted with "medical negligence". Consequently, incorrect medical actions may be regarded as violations of professional ethics as well as

[25] MUHIBBUN, S. (2017). *MALPRAKTEK OLEH KORPORASI (Analisis Pasal 201 UU Nomor 36 tahun 2009 Tentang Kesehatan Ditinjau Dari Hukum Pidana Islam)*. 1–90.
[26] Buamona, H. (2016). *Tanggungjawab Pidana, Korporasi Rumah Sakit*. situs: http://www.fimny.org/

malpractice. Conversely, some argue that medical malpractice (medical negligence) cannot be defined as the presence of treatment risk or errors in judgment.

The term "medical negligence" is defined as follows: "Medical malpractice involves the physician's failure to conform to the standard of care for the treatment of the patient's condition, or lack of skill, or negligence in providing care to the patient, which is the direct cause of an injury to the patient." Further elaborated by the World Medical Association, not all medical failures are the result of medical malpractice, because an unforeseeable adverse event that occurs during standard medical treatment but results in injury to a patient is considered an untoward result, for which the physician should not bear any liability.[27] In linguistic terminology, "negligence" means an error, implying that the mental attitude of the person causing the prohibited condition is not one of opposition, desire, or approval of the emergence of that condition, but due to a mistake or an error made during the act, resulting in the prohibited condition because of a failure to heed the prohibition, leading to the occurrence of negligence, carelessness, or oversight. Medical actions that do not meet the standard of medical care are termed negligence. Gross negligence, or culpa lata, is considered a criminal act if it results in material damage, injury, or even the loss of life of another person. If not, the negligence is not considered a violation of the law or a crime. Negligence is the most frequently occurring type of malpractice. Essentially, injustice occurs when someone inadvertently does something that should not be done or fails to do something that a person of similar capabilities would do in the same situation and conditions.[28]

Negligence is deemed to lack the foresight, mental attitude, or caution mandated by law. One of two reasons that can lead to a lack of foresight is as follows: (1) the perpetrator believes that their action will not produce an undesirable result, although this belief ultimately proves false; negligence also means not having the foresight or mental attitude required by law and not exercising the caution mandated by law. (2) the perpetrator thinks that a consequence will not result from their action, even though this view turns out to be incorrect. In this case, there has been conscious negligence (bewuste culpa), lying in an erroneous belief/thought that should not have been entertained; (The criminal actor does not at all consider that their action can cause a prohibited consequence, including unconscious negligence (onbewuste culpa).[29] Lack of foresight due to the complete absence of thought that one's actions will lead to a fatal consequence. To determine whether an individual is considered capable of bearing legal responsibility, the following are considered: (1) the mental state of the person committing the act, closely related to the capacity to be responsible, meaning the mental state of the person at the time of the act; (2) the existence of a mental connection between the perpetrator and the act committed, which may be dolus (intention) or culpa (negligence), each constituting an element of the capacity to be responsible; (3) the absence of an excusing reason.[30]

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[27] Healy, J. (t.t.). *Medical Negligence: Common Law Perspectives*. Sweet & Maxwell.

[28] Hanafiah, Jusuf dan Amir, A. (1999). *Etika Kedokteran dan Hukum Kesehatan*. Kedokteran EGC.

[29] Lantapon, G. T., Pinasang, R., & Regah, R. (2018). Peran Aparatur Sipil Negara (ASN) dalam pemberantasan tindak pidana korupsi menurut UU No. 5 Tahun 2014 Tentang Aparatur Sipil Negara. *Lex Crimen*, *VII* (4), 128–135.

[30] Novianto, W. T. (2015). Penafsiran Hukum Dalam Menentukan Unsur-Unsur Kelalaian Malpraktek Medik (Medical Malpractice). *Yustisia Jurnal Hukum*, *92*(2), 488–503. https://doi.org/10.20961/yustisia.v92i0.3832

At the 56th WMA General Assembly in Santiago, Chile, October 2005, the WMA issued a statement on medical liability reform. This statement was reaffirmed at the 200th WMA Council Session in Oslo, Norway, April 2015. According to the WMA General Assembly, Medical negligence is: "Injury caused by negligence is the direct result of the physician's failure to conform to the standard of care for treatment of the patient's condition, or the physician's lack of skill in providing care to the patient," whereas an untoward result is "an injury occurring in the course of medical treatment that was not the result of any lack of skill or knowledge on the part of the treating physician, and for which the physician should not bear any liability." Furthermore, Stamm explains that medical malpractice arises from negligence as follows: "Medical malpractice is a form of tort law, civil wrongs that do not arise from contracts. Malpractice generally aligns under negligence, a tort law that provides civil remedies for alleged wrongful acts resulting in injury to person or property."

Indriyanto Seno Adji, referencing Joseph H. King Jr, outlines parameters to assess the suspicion of criminal law violations in medical practice. The existence of a causal relationship between the medical actions taken by a doctor and the patient's failure or death is as follows:

a. The presence of zorgvuldigheid (diligence), meaning a doctor possesses normal capability, usual in the context, and associated with the objective of treating (patients);
b. The presence of a diagnosis or therapy, which means a doctor performs these actions based on existing knowledge, abilities, and experience. If the diagnosis is influenced by the position, development, and state of medical science itself, then therapy can be affected by several factors such as psychological state, psychology, and compilations that arise without being foreseeable;
c. Professional standards, consisting of: (a) Average ability, (b) Category and Condition equal (same category and conditions) (c) The fulfillment of the principles of proportionality and subsidiarity in the purpose of performing medical actions.

An act against the law in medical practice occurs if there is a mistake causing a loss, then the patient can sue based on an unlawful act as regulated in Article 1365 of the Civil Code which is implicitly formulated "every unlawful act that causes loss to another person, obliges the person who due to their fault causes that loss to compensate for it." The phrase "due to their fault" in the provision of Article 1365 of the Civil Code can take the form of intention (*dolus*) or negligence (culpa) carried out by a doctor in wrongful medical treatment of a patient.[31] According to court decision data taken from the website of the Supreme Court of the Republic of Indonesia's Decision Directory, there were 36 cases of unlawful acts out of 69 malpractice cases, which still dominate. There are conditions that must be met to claim damages for an act against the law in Article 1365 of the Civil Code, including the following: 1) The presence of an act (daad) that qualifies as an act against the law; 2) The presence of fault (dolus and/or culpa); 3) The presence of damage (*schade*). Incorrect treatment becomes a breach of contract (wanprestasi) and/or an unlawful act (*onrechtmatige daad*). For a doctor to be said to have committed an unlawful act in accordance with the provisions of Article 1365 of the Civil Code, the conditions or elements that must be fulfilled include: (a) The act is an unlawful act (onrechtmatigedaad), (b) there must be fault, (c) there must

[31] Jamaluddin, J., & Karmila, R. (2022). Malpraktik Kedokteran Ditinjau dari Aspek Hukum Pidana, Administrasi dan Etika Profesi. *Jurnal Indonesia Sosial Teknologi*, *3*(4), 538–550. https://doi.org/10.36418/jist.v3i5.419

be damage caused, (d) there must be a causal relationship between the act and the damage.

According to Packer, the purpose of criminal sanctions is the criminal sanction is a prime guarantor and prime threatener of human freedom. Used providently and humanely, it is a guarantor; used indiscriminately and coercively, it is a threatener.[32] Criminal sanctions in Law No. 36 of 2009 on Health (UUK) and Law No. 29 of 2004 on Medical Practice (UUPK), as well as the Criminal Code (KUHP), can be used as a threat to violators and can also provide legal protection guarantees for patients and doctors. Based on the writings of Albertus Drepane Soge, who made comparisons from the UUK, UUPK, and KUHP, it was found that criminal sanctions in the UUPK and UUK are executed with intent, while in the KUHP there are articles carried out with culpa or negligence. This is contrary to the error theory explained because the form of Unlawful error is only done with intent. Regarding the types of punishment, UUK and UUPK have regulated fines and additional penalties for corporations, while KUHP has not yet regulated penalties for corporations. Furthermore, Article 3 of the Supreme Court Regulation No. 2 of 2012 regarding the Settlement of the Limitation of Minor Criminal Offenses and the Amount of Fines in the KUHP sets the highest fine value at IDR 9,000 (multiplied by 1,000).[33]

This amount is still very small compared to the fines in the UUK and UUPK. These matters indicate that the KUHP no longer provides adequate legal protection for providers and receivers of healthcare services. The development of Health Law in Indonesia has entered a new stage with the Constitutional Court Decision No. 4/PUU-V/2007 dated June 19, 2007. In its decision, the Constitutional Court (MK) stated that the penalties of imprisonment and detention for doctors and dentists in Articles 75, 76, and 79 of the UUPK are abolished. The Constitutional Court opined that the detention and imprisonment sanctions in the UUPK were not in accordance with the philosophy of criminal law and had caused feelings of insecurity and fear due to the disproportionate violations committed with the threat of punishment.

According to Ali Budiardjo, in many cases at the district courts, the average resolution time is between 4 to 6 months, in the high courts it can reach 12 months, and in the Supreme Court it can take 2 to 3 years.[34] The longer it takes to resolve cases of alleged medical malpractice, the more time, energy, and costs are required for the disputing parties, impacting both patients and doctors. The slow resolution process in medical malpractice cases causes patient frustration, weakens the prevention of doctor errors, and disrupts the improvement of patient outcomes. Based on this, the existence of negligence in healthcare services must be proven with elements:

a. Duty of Care
   A doctor is obligated to provide professional service (with reasonable care and skill) to patients. This obligation arises immediately once a doctor indicates their willingness to examine and serve patients. Duty of care is a social contract from the doctor to the patient, based on causality; however, the doctor's social contract can be seen when they take the Hippocratic oath. Whether the principle of duty of care is observed by the doctor or not can be measured with reference to culpa lata.

[32] Packer. (t.t.). The Limits of The Criminal Sanction. *Stanford University Press*, *1968*, 366California.
[33] Soge, A. (2019). Tinjauan Penanganan Kasus Malpraktek Medis Di Pengadilan Pidana Dalam Perspektif Hukum Kesehatan. *Justitia et Pax*, *35*(1), 81–100. https://doi.org/10.24002/jep.v35i1.2467
[34] Budiardjo, A. (t.t.). Reformasi Hukum di Indonesia. *Jakarta Cyberconsult*, 116.

b. Breach of Duty
   This element is that a doctor commits either culpa lata or culpa levis against the standards of service that must be performed.
c. The existence of harm and damages
   To determine this element, it is necessary to prove the causation both as cause in fact and proximate cause. This element is crucial to prove to determine the unlawful nature of the act as one of the elements of a crime. Law enforcement must be able to prove a causal relationship between the doctor's negligence or unprofessional conduct and the damage caused by the doctor's or institution's actions to the patient. Care is needed from law enforcement to determine malpractice, because the doctor's action may be an adverse outcome in medical treatment. So, the harm that could have been foreseen is not due to a lack of capability or skill of the doctor.

3.3. The Issue of Handling Medical Malpractice

The majority of the Indonesian public assumes that a failure in medical action equates to malpractice and even equates such failures with criminal acts. This is not entirely accurate because in criminal acts, the focus is on the consequences of the crime itself. In medical actions, however, the emphasis is on the process of applying maximum effort, and there are parameters that must be adhered to, namely the standards of the Medical Profession according to health law. Errors in performing health profession duties are actually a medical settlement with the core demand for compensation or other compensation, "positive defenses in the medical profession," which is handled by the health profession and mediation first without the intervention of general law enforcement officers.[35] This is based on Article 66 of the UUPK, which stipulates that anyone who knows or observes a doctor's role in medical practice can refer them to the Medical Ethics Committee (MKDKI). This regulation is effective because it aims to avoid problems, comply with medical ethics, and not threaten patient safety.[36] The Supreme Court has also made Supreme Court Regulation No. 1 of 2016 which requires mediation for disputes submitted to the court, but specifically for civil disputes. The attitude of "deny and defend" results in patients' questions and problems often going unanswered, so medical errors are often not identified, and patient safety is not addressed. Consequently, this arrangement is still not effective. Complaint examinations at MKDKI are conducted confidentially by internal medical experts.

Furthermore, health disputes resolved through a public open court process can lead to character assassination damaging the reputation of doctors and healthcare providers. The WMA also provides the following opinion: "A culture of litigation is growing around the world that is adversely affecting the practice of medicine and eroding the availability and quality of health care services. Some National Medical Associations report a medical liability crisis whereby the lawsuit culture is increasing healthcare costs, restraining access to healthcare services, and hindering efforts to improve patient safety and quality."[37] A complex and fragmented healthcare system can pose challenges in care coordination, increasing the risk of malpractice. Weaknesses in the

[35] Chazawi, D. (2016). *Malpraktik Kedokteran*. Sinar Grafika.
[36] Azrul Azwar. (1996). Kriteria Malpraktik dalam Profesi Kesehatan. *Makalah Kongres Nasional IV PERHUKI*.
[37] WMA. (t.t.). *Statement on Medical Liability Reform Adopted, diadopsi oleh the56th WMA General Assembly, Santiago, Chile, Oktober 2005 dan ditegaskan kembali oleh the200th WMA Council Session, Oslo, Norway, April 2015*.

criminal trial process indicate the need for reform in handling cases of alleged medical malpractice by doctors. In this regard, America employs a jury system. Although rare, medical malpractice cases in the United States can lead to criminal charges if there is evidence indicating gross negligence or deliberate acts that harm the patient. Beyond civil processes, healthcare practitioners can also face professional accountability claims from regulatory bodies and their professional associations. This can involve administrative sanctions, practice restrictions, or license revocation.[38] Malpractice lawsuits are often brought to civil court and involve a jury. The jury assesses the evidence presented by both parties and makes decisions regarding the healthcare practitioner's liability and the amount of compensation to be paid.[39]

In the United States, the resolution of medical malpractice cases involves multiple mechanisms, and this process generally falls under state jurisdiction. The current medical malpractice law originates from 19th-century English common law.[40] The resolution of medical malpractice cases in the United States is typically carried out through the civil legal system. Patients or their families who feel aggrieved may file a civil lawsuit against healthcare practitioners or facilities deemed responsible for injuries or losses. Malpractice lawsuits in the United States are also known to be very common, with high legal costs. In the United States, malpractice lawsuit reform has been regarded by many as a primary way to reduce the high costs of medical care. In West Virginia and among international residents of Houston, it was found that only 5% of respondents reported a high number of medical malpractice legal claims. The study also found that the majority of medical malpractice lawsuits have a weak link to the fact that medical malpractice claims have increased over the last decade.[41]

The legal system is designed to encourage extensive discovery and negotiation between opposing parties with the aim of resolving disputes without going to jury trial. Injured patients must show that the doctor was negligent in providing care, and that negligence resulted in injury. To do so, four legal elements must be proven: (1) a professional duty owed to the patient; (2) breach of such duty; (3) injury caused by the breach; and (4) resulting damages. Monetary compensation, if awarded, typically accounts for actual economic losses and non-economic damages, such as pain and suffering. Healthcare practitioners generally have professional liability insurance to protect them from malpractice claims. Insurance associations or companies are responsible for responding to and settling claims. The concept of medical malpractice handling reform evolving in Japan offers another perspective, though not as comprehensive as in America. In Japan, the resolution of medical malpractice cases involves various mechanisms, including legal and ethical procedures. Although criminal charges in medical malpractice cases are relatively rare, they still constitute a possible

[38] Magnagnagno, O. A., Luciano, E. M., & Wiedenhöft, G. (2022). Impact of information system institutionalization on corruption in the Brazilian public health system. *Transforming Government: People, Process and Policy*, *16*(4). https://doi.org/10.1108/TG-01-2022-0013

[39] Mello, M. M., Frakes, M. D., Blumenkranz, E., & Studdert, D. M. (2020). Malpractice Liability and Health Care Quality: A Review. *JAMA - Journal of the American Medical Association*, *323*(4), 352–366. https://doi.org/10.1001/jama.2019.21411

[40] Bal, B. S. (2009). An introduction to medical malpractice in the United States. *Clinical Orthopaedics and Related Research*, *467*(2), 339–347. https://doi.org/10.1007/s11999-008-0636-2

[41] Magnagnagno, O. A., Luciano, E. M., & Wiedenhöft, G. (2022). Impact of information system institutionalization on corruption in the Brazilian public health system. *Transforming Government: People, Process and Policy*, *16*(4). https://doi.org/10.1108/TG-01-2022-0013

resolution mechanism. Criminal charges may arise if there is evidence of intentional or gross negligence that could be considered a criminal act.

The Japanese legal system has a stronger tradition of responding to medical errors through civil liability rather than criminal. In many cases, civil lawsuits are more common than criminal prosecutions. According to a survey conducted in 2005, the Japanese public is willing to contact the responsible parties to file claims.[42] The malpractice system performs fairly well in its function to separate baseless claims from meritorious ones and to provide compensation to meritorious claims. Non-error claims are twice as likely to be taken to court compared to error claims; they are almost a third more likely to receive compensation; and when plaintiffs do receive compensation, the average payout reaches 60 percent of the amount paid for error claims.[43]

In cases of medical malpractice considered as crimes of negligence (kansetsu hanzai) or Negligent Crime, the Japanese criminal legal system can prosecute healthcare practitioners deemed negligent in adhering to reasonable medical care standards. Doctors found in violation of medical ethical standards may face disciplinary actions by medical associations and professional organizations, which can include restrictions on practice or revocation of licensure.[44] One reason for the relatively few legal specialists in claims and malpractice in Japan is due to economic factors; both patients and plaintiff attorneys face a less favorable reward structure compared to the United States. Japanese patients must pay a significant upfront fee to lawyers and court filing fees based on the amount claimed. Secondly, in Japan, like in most countries outside the United States, cases are brought before judges, not juries. Trials are conducted over months or even years, and not concentrated into a single hearing. A panel consisting of three judges determines the facts, decides whether medical personnel were negligent, and whether negligence was the cause of harm, and assesses the patient's injuries.

Japan has a medical court system known as "Ishikai," which plays a crucial role in resolving medical ethics disputes and can recommend disciplinary actions or remediations. Japanese criminal law tends to reflect restorative principles, focusing on rehabilitation and restitution rather than solely on punishment. This can be seen in the actions of medical courts and disciplinary actions that prioritize rectification and learning. In its process, the Japan Medical Association (JMA) plays an important role in establishing medical ethical standards and providing guidelines related to medical ethics disputes.

4. CONCLUSION

Medical malpractice emerges as a complex issue that not only involves the realm of criminal law but also has serious implications for both healthcare practitioners and patients. In Indonesia, medical malpractice cases necessitate a profound

[42] Chan, K. W. (2017). Legal malpractice lawsuits in Japan: Past, present and future. *International Journal of the Legal Profession*, *24*(2), 159–176. https://doi.org/10.1080/09695958.2016.1247709
[43] Ohira, M. (2023). Characteristics of Malpractice Litigation Involving Pathological Autopsies Themselves in Japan: A Database Analysis. *JMA Journal*, *6*(4), 393–396. https://doi.org/10.31662/jmaj.2023-0003
[44] Leflar, R. B. (2013). The Law of Medical Misadventure in Japan. *Medical Malpractice and Compensation in Global Perspective*, *February*, 239–274. https://doi.org/10.1515/9783110270235.239

understanding and comparison with the criminal law approaches of other countries. Court decision data indicates that malpractice cases remain fairly common, featuring a number of unlawful act judgments. In malpractice cases, criminal liability may depend on the nature of the fault, whether intentional (dolus) or unintentional (culpa). Courts typically consider evidence meticulously, and healthcare practitioners found guilty may face criminal penalties, administrative sanctions, or practice restrictions. In Indonesia, Law No. 29 of 2004 on Medical Practice serves as the legal foundation regulating medical practice and involves the Indonesian Medical Council. The legal system in the United States more frequently involves jury trials, with patients having the right to file civil lawsuits. It is crucial to understand that resolving medical malpractice requires careful examination of facts and law, involving a series of legal or arbitration processes. Regulatory updates and legislation must continually be pursued to maintain relevance and effectiveness in addressing medical malpractice issues. There is a need for reform in handling existing medical malpractice cases in Indonesia, considering paradigms and concepts from other countries as efforts to protect patient rights and enhance healthcare quality in reducing the risk of malpractice in Indonesia. Many weaknesses in the criminal trial process indicate the necessity for reform in the handling of suspected medical malpractice cases by doctors, thus necessitating the role of the Government, related healthcare institutions, and the community to collaborate in enhancing the quality of medical malpractice handling in Indonesia.

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