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Sept 23 - 24 2020

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 Kaligawe Rd KM 4, Central java

# THE 2ND INTERNATIONAL CONFERENCE AND CALL FOR PAPER



## Our Speaker



Prof. Henning Glasser  
 Thammasat University



Prof. Yuzuru Shimada  
 Nagoya University



Melissa Crouch  
 UNSW Australia



Prof. Henk Adding  
 Utrecht University



Assoc. Prof. Dr. Hj. Sri Kusriyah  
 Sultan Agung Islamic University

*Democracy In Digital Era : Law,  
 Governance, Sosial And Economic  
 Perspective In Asia, Australia And  
 Dutch*



September 23-24, 2020  
 Imam Assafel Buiding, Faculty of Law, Unissula  
 Kaligawe Rd KM 4 Semarang, Central Java

**THE 2<sup>ND</sup> INTERNATIONAL CONFERENCE AND CALL FOR PAPER**

**THEME : DEMOCRACY IN DIGITAL ERA: LAW, GOVERNANCE, SOCIAL AND ECONOMIC PERSPECTIVE IN ASIA, AUSTRALIA AND DUTCH**

**Keywords:** *Digital Media, Political and Governance Institutions, Electoral Processes, People Representation, Digital Disinformation, Democracy, Digital Economic, Social issue*



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Melissa Crouch  
UNSW Australia



Prof Henk Adding  
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Prof. Henning Glaser  
Thammasat University



Prof. Yuzuru Shimada  
Nagoya University



Assoc. Prof. Dr. Hj. Sri Kusriyah  
Sultan Agung Islamic University

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1. Seminars will be conducted using the Zoom application
2. The Committee will provide a Zoom ID 1 day before the seminar

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This agenda aims to provide insights in theory and practice:

1. To exchange and discuss views on the most important issues on Democracy in Digital Era: Law, Governance, Social and Economic Perspective in Asia, Australia and Dutch and its consequences to Law in countries.
2. To discuss the challenges and practical aspect of Democracy and Governance in a Digital Era.

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- Full Paper Submission and Transfer September, 07-22 2020
- Conference and Presentations September 24<sup>th</sup> 2020

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September **23<sup>th</sup>** 2020

# The 2<sup>nd</sup>

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*"Democracy In Digital Era : Law, Governance, Sosial And Economic Perspective In Asia, Australia And Dutch"*

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## KATA PENGANTAR

*Bismillahirrohmanirrohim*

*Assalamu'alaikum Wr. Wb.*

Puji syukur kehadiran Allah S.W.T, Tuhan Semesta Alam Yang Maha Esa. Alhamdulillah, sebagai ucapan syukur kehadiran Allah Subhanahu Wata'ala kami dapat menyelenggarakan The 6nd Proceeding International Conference And Call Paper dengan tema "*Democracy In Digital Era : Law, Governance, Sosial And Economic Perspective In Asia, Australia And Dutch*" terselenggara dengan baik. Pemilihan tema tersebut dipilih karena pada era searang ini kita dihadapkan dengan era industri 4.0, dimana para kandidat doktor dituntut untuk bisa menyesuaikan dengan perkembangan global dan meningkatkan kompetensi keilmuan serta kemampuan.

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# Criminal Liability Medical Negligence And Medical Malpractice

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## Abstract

*Medical malpractice is still a problem in the health sector, which has not been clearly regulated in national law. This study aims to see and analyze criminal liability in medical negligence and medical malpractice that causes people to be harmed by medical malpractice and analyze legal protection that results in further harm or suffering for patients and to create legal certainty and health. The approach method used is normative juridical, namely legal research that places law as a norm system building. The norm system in question is about the principles, norms, rules of legislation, and doctrine. Normative juridical research examines the rule of law as a system-building related to certain legal events. The type of data used in this research is secondary data, which consists of primary legal materials, secondary legal materials, and tertiary law materials obtained from books, literature, papers, laws and regulations, and other data sources. The research found that the study found that criminal liability against doctors for errors and negligence in providing medical services in hospitals, where doctors' responsibility in the field of criminal law for an act can be categorized as criminal malpractice if it fulfills the formulation of criminal offenses.*

Keywords: *Criminal Liability; Medical Malpractice; Medical Negligence;*

## A. Introduction

In the past, the world of medicine seemed to be inaccessible to law, with the growing public awareness of its need for legal protection, making the world of medicine not only a civil relationship, it even often developed into a criminal issue.<sup>4</sup> Health is one of the important needs of supporting people's lives. Without health, of course, someone will not be able to carry out their activities properly. As a basic need, health becomes the right of every individual (the right of self-determination), which must be realized in the form of providing safe, quality, and affordable health for the community.<sup>5</sup> Law plays an important role in realizing this form of health provision and optimizing public health status.

Health services basically aim to carry out efforts to prevent and treat a disease, including medical services based on an individual relationship between a doctor and a patient who needs recovery for their illness. Doctors are parties who have expertise in the medical or medical field who are considered to have the ability and expertise to perform medical actions. Meanwhile, patients are sick people who are common with their illness and entrust themselves to be treated and cured by doctors. Therefore, doctors are obliged

1. Faculty of Law, Universitas Islam Sultan Agung Semarang

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4. I Gede Indra Diputra, Ni Md. Ari Yuliantini Griadhi, Pertanggungjawaban Pidana Terhadap Dokter Yang Melakukan Tindakan Malpraktek Dikaji Dari Kitab Undang-Undang Hukum Pidana Indonesia, *Kerthanegara*, pp.1-5

5. Riska Andi Fitriano, Budi Setyanto dan Rehnalemken Ginting, Penegakan Hukum Malpraktik Melalui Pendekatan Mediasi Penal, *Yustisia*, Vol. 5 No. 1 of 2016, p. 87.

to provide the best possible medical service for patients. In addition, there are also frequent occurrences of negligence or negligence, which is a form of error that is not intentional, but also not something that happens by chance. So, in this neglect, there is no evil intention from the perpetrator. Negligence or negligence and errors in carrying out medical actions cause patient dissatisfaction with doctors in carrying out treatment efforts according to the medical profession. These negligence and errors cause harm to the patient.<sup>6</sup>

In Law no. 23 of 1992, which was later amended by Law no. 36 of 2009 concerning Health, Article 2 states that every activity and effort to improve the degree of public health must be carried out on the basis of humanity, balance, benefits, protection, respect for rights and obligations, justice, gender, and non-discrimination as well as religious norms.

Law No. 36 of 2009 is the government's effort in realizing a better health service for the community. In line with the high level of public awareness of health services, the parties who carry out health services, in this case, medical personnel and hospitals, are required to participate in improving optimal health services for the community. However, it is not easy to create a health service without a Standard Operating Procedure by taking into account every patient's rights and obligations.

According to Hodgetts and Casscio, health services are called medical services and public health services. Leavel and Clark argue that the two types of health services have their own characteristics; health services are generally held together in one organization and involve the community; Meanwhile, medical services can be organized independently with the main objective of treating (curative) and restoring (rehabilitative) and the main objective is individuals.<sup>7</sup>

Medical practice is not a job that anyone can do, but can only be done by a group of medical professionals who are competent and meet certain standards. Theoretically, a social contract occurs between the professional community and the general public. This contract gives the professional community the right to regulate professional autonomy, an agreed professional standard. On the other hand, the general public (patients) have the right to receive services in accordance with the standards created by the professional community.<sup>8</sup>

Thus, doctors have responsibility for their profession in terms of medical services to their patients. Doctors, as a profession have a duty to cure their patients' illnesses. Sometimes differences of opinion arise due to different points of view, this can arise because of many influencing factors, such as the doctor's negligence, or the patient's illness is so severe that it is unlikely to be cured, or there is an error on the part of the patient. In addition, the public or patients see more from the point of view of the results, while doctors can only try, but do not guarantee the results as long as doctors have worked in accordance with the applicable medical professional standards.

The implementation of medical services is more specific. Adherence to applying the principles of medical management (medical care) includes, among others, establishing a diagnosis, taking medication, and determining prognosis. This is done using indicators that meet standards. These indicators include competency standards, service standards, ethical behavior standards, medical care standards, and clinical standards. Concretely, in carrying out medical practice, doctors must be carried out in accordance with service standards, professional standards, and standard operating procedures. This is done so that doctors in carrying out their profession apply standards that have been regulated in disciplinary norms. On the other

6. Sri Endah Wahyuningsih, *The Implementation of Punishment Theories in the Verdict of Narcotics Case by Judge in Indonesia*, TEST Engineering and Management, ISSN 0193-4120, Mach-April 2020, P 2797.

7. Moh. Hatta, *Hukum Kesehatan dan Sengketa Medik*, Liberty, Yogyakarta, 2013, p.120.

8. Erdiansyah, Pertanggungjawaban Pidana Terhadap Dokter Atas Kesalahan Dan Kelalaian Dalam Memberikan Pelayanan Medis Di Rumah Sakit, *Jurnal Ilmu Hukum*, volume 3 no. 2 of 2017, pp.296-320

hand, if doctors do not implement standards in disciplinary norms when practicing medicine, it can be categorized as a violation of disciplinary norms.<sup>9</sup>

Advances in biomedical technology are accompanied by the ease in obtaining information and communication in this era of globalization, making it easier for patients to get second opinions from various parties, both from within and from abroad, which in the end, if doctors are not careful in giving explanations to patients, they will result in reduced patient trust in these doctors. Until now, medical law in Indonesia has not been formulated independently, so that the boundaries regarding malpractice have not been formulated, so that the content of the definition and limitations of medical malpractice are not uniform depending on which side people view it. Law No. 29 of 2004 concerning Medical Practice also does not contain provisions for medical malpractice. Article 66 paragraph (1) contains sentences that lead to errors in doctor's practice, namely:

“Anyone who knows or has harmed their interests due to the actions of a doctor or dentist in carrying out medical practice can report in writing to the chairman of the Indonesian Medical Discipline Honorary Council.” This norm only provides a legal basis for reporting a doctor to his professional organization if there is an indication that a doctor's action causes harm, nor as a basis for demanding compensation for the actions of doctors. That article only has the meaning from the point of view of medical practice administrative law.<sup>10</sup>

Therefore, to see the extent to which a doctor's actions have juridical implications if there is an error or negligence in health services, as well as what elements are used as a measure to determine whether there is an error or negligence committed by a doctor, it cannot be answered by only stating a number the formulation of what and how the error occurs.

This study aims to identify and analyze criminal liability in medical negligence and medical malpractice that causes the community to be harmed by medical malpractice, as well as to analyze legal protection that results in further harm or suffering for patients and to create a form of legal certainty and health.

## B. Research Methods

The research method used in this research is to use a normative juridical approach. Zed Mestika defines library research as library research that utilizes library sources to obtain research data, so that library research limits its activities to library collections.<sup>11</sup> In contrast, the approach used in this research is a normative juridical approach. In Soerjono Soekanto's view, normative juridical research is a series of legal research carried out by examining library materials or secondary data as the basic material to be studied by searching for regulations and literature related to the problem under study.<sup>12</sup> Meanwhile, the legal materials used in this study consist of primary and secondary legal materials. Primary legal materials consist of statutory regulations, official records, or minutes relating to this research. Meanwhile, secondary legal materials relate to legal materials that provide explanations for primary legal materials, such as books, literature, articles, papers, and other materials taken from legal experts.<sup>13</sup>

9. Setyo Trisnadi, *Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis*, *Jurnal Pembaharuan Hukum*, Volume IV No. 1 January-April 2017, pp.24-40.

10. Anis Mashdurohatusun, Irsyam Risdawati, Hendro Sucipto & Mahmutarom, *Protection of Doctors and Patients in Implementing Informed Consent Based on Justice Value*, *Talent Development & Excellence* Vol.12, No.2s, 2020, pp.3470-3472

11. Mustika Zed, *Metodologi Penelitian Kepustakaan*, Yayasan Obor Indonesia, Jakarta, 2008, P. 1-2.

12. Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, Rajawali Pers, Jakarta, 2001, P. 13

13. Anis Mashdurohatusun, Gunarto, R Hajar Handoko Jati, *A Policy Handling Domestic Violence Against Women In Indonesia Based On Justice*, *International Journal Of Innovation, Creativity And Change*. Volume 13, Issue 4, 2020, pp.197. Haris Budiman Anis Mashdurohatusun, Eman Suparman, *A Comparative Study Of Spatial Policy In Indonesia And The Netherlands*, *Jurnal Dinamika Hukum* Vol. 18.No. 3, September 2018, pp.296.

## C. Discussion

### 1. Medical negligence and practice mal criminal liability

Doctors as members of the profession who devote their knowledge to the public interest have freedom and independence oriented towards human values in accordance with the medical code of ethics. This medical code of ethics aims to prioritize the interests and safety of patients, ensuring that the medical profession must always be carried out with noble intentions and in the right manner.<sup>14</sup>

Before practicing medicine or medical services, a doctor has had a fairly long education and training. So that people, especially patients, are very much dependent on the life expectancy and / or recovery of patients and their families who are suffering from illness.

However, as we know, this doctor, as an ordinary human being, is full of deficiencies in carrying out his medical duties, which are full of risks. Such as patients who have the possibility of disability or death after being treated by a doctor can happen, even though the doctor has performed his duties according to professional standards or good medical service standards. This kind of situation is usually referred to as a medical risk, but is sometimes interpreted differently by parties outside the medical profession as medical malpractice.<sup>15</sup>

In the medical world, a small mistake can often result in a big loss, especially for patients. In general, patients cannot differentiate between what constitutes an ethical violation and which one is categorized as an act against the law. In principle, a violation of ethics is not necessarily malpractice, whereas malpractice is certainly a violation of the medical profession's code of ethics.

In connection with the violation of the code of ethics in the health law, there are several ethical theories that can be used as a basis for consideration in making a decision to violate the code of ethics for the medical profession. There are two kinds of ethical theory that are widely recognized in the aspect of health:<sup>5</sup>

#### 1. Classical Ethical Theory.

One of the theories in classical ethics is teleology. This theory provides the basis of whether an action is correct or not depends on the results it produces. For example, in the act of abortion, according to the teleological approach, abortion can be justified if the reasons used are adequate, and the goal is really to save the life of the mother. So, if an action is beneficial or has a good effect, it can be done. It's just that the goals or benefits for some people can cause injustice for some.

#### 1. Ethical Value Theory.

Value ethics states that value is determined as material quality, an inherent property. The value does not exist but is valid and cannot be returned to human empirical elements. There are several benchmarks that can be used as a measure of value ethics, namely the value of honesty and authentic value. Authentic values can be interpreted as "authentic" or be oneself. Authentic humans are humans who live and show themselves according to their authenticity and personality. As an example, a doctor is expected to become a specialist because that person loves his profession, respects human values in his profession, and aspires to dedicate his life to his profession. Thus, his

14. Soetrisno, *Malpraktek Medik Dan Mediasi Sebagai Alternatif Penyelesaian Sengketa*, Telaga Ilmu Indonesia, Tangerang, 2010, p. V

15. Syahrul Machmud, *Penegakan Hukum Dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, Mandar Maju, Bandung, 2008, p. 1.

profession as an authentic doctor with that person's personality.

## 2. Contemporary Ethical Theory.

Contemporary ethics deals with the basis for ethical decision making in modern medicine issues. A noble character is included in it because every action taken must reflect the noble character of each paramedic.

Doctor's legal responsibility to patients. Doctors, as professionals, are responsible for every medical action performed on patients. In carrying out his professional duties based on good intentions, namely making serious efforts based on his knowledge which is based on the doctor's oath, medical code of ethics, and professional standards to cure or help patients, among others:<sup>16</sup>

### 1. Ethical Responsibilities

The regulations governing the ethical responsibility of a doctor are the Indonesian Medical Code of Ethics and the Pronunciation of the Doctor's Oath. A Code of conduct is a code of conduct. The Indonesian Medical Code of Ethics was issued by the Decree of the Minister of Health No. 434 / Men.Kes / SK / X / 1983. The Indonesian Medical Code of Ethics was prepared by considering the International Code of Medical Ethics with the ideal foundation of Pancasila and the structural basis of the 1945 Constitution. This Indonesian Medical Code of Ethics regulates human relations, which include the general obligations of a doctor, the relationship between doctors and patients, the obligations of doctors to their colleagues. And the doctor's obligations to himself. Violation of the points of the Indonesian Medical Code of Ethics is a purely ethical violation, and some is a violation of ethics as well as a violation of the law. Violation of ethics does not always mean a violation of the law. On the contrary, violation of the law is not always a violation of medical ethics.

Here are some examples:<sup>17</sup>

#### a. Pure ethical violation

- 1) Withdrawing unreasonable fees or withdrawing fees from family doctors and dentists.
- 2) Taking over the patient without peer approval.
- 3) Praising yourself in front of the patient
- 4) Never attended continuous medical education.
- 5) Doctors neglect their own health.

#### b. Ethicolegal violation

- 1) Subpar doctor services.
- 2) Issued a false certificate.
- 3) Opening the secrets of the doctor's position or job.
- 4) Provocate Abortion.

## 2. Professional Responsibilities

The responsibility of the doctor's profession is closely related to the professionalism of a doctor.

16. Y.A Triana Ohoiwutun, *Bunga Rampai Hukum Kedokteran*, Bayu Media Publishing, Malang, 2007, p. 17.

17. Endang Kusumah Astuti, *Hubungan Hukum Antara Dokter dan Pasien Dalam Upaya Pelayanan Medis*, Semarang, 2003, p. 83.



This is related to:<sup>18</sup>

a. Education, experience, and other qualifications in carrying out his professional duties, a doctor must have a degree of education following his / her field of expertise. With the basic knowledge gained during education at the medical faculty and specialization and experience to help sufferers.

b. degree of treatment risk

The degree of risk of treatment is kept to a minimum, so that the treatment's side effects are kept to a minimum. Besides, the degree of risk of treatment must be notified to the patient and his family, so that the patient can choose an alternative to the doctor's treatment. Still, the information regarding the degree of care causes problems for patients or their families with low educational levels because they have been given information, but they cannot catch it well. <sup>16</sup>

c. Maintenance Equipment

It is necessary to use inspection using maintenance equipment if the results of external examinations are less accurate, so it is necessary to check using tools. However, not all patients are willing to be examined using assistive devices. This is closely related to the costs incurred for economically weak patients.

Every act of violating a doctor's code of ethics will always be related to ethical values in its resolution. Sometimes, differences in views in making an ethical decision are caused by medical action based on obligation and conflicting morals. The role of medical ethics institutions is also very necessary in solving ethical violation problems.<sup>19</sup>

In the legal responsibility of doctors in criminal law, along with the increasing awareness of public law, in subsequent developments, the problem of a doctor's criminal responsibility arises, especially concerning negligence, which is based on theories of error in criminal law. Criminal responsibility here arises when it can be proven that there is a professional error, for example, an error in diagnosis or an error in the methods of treatment or treatment.

An act can be categorized as criminal malpractice if it fulfills the formulation of a criminal offense, namely: The act must be a disgraceful act, and the wrong mental attitude is carried out, namely in the form of deliberate action, carelessness or neglect. Errors or negligence of health workers can occur in the field of criminal law, which are regulated, among others: Articles 263, 267, 294 paragraph (2), 299, 304, 322, 344, 347, 348, 349, 351, 359, 360, 361, 531 Criminal Code.<sup>20</sup>

There is an important difference between an ordinary crime and a "medical crime". In ordinary crime, the main concern is "the result", while in medical crime is "the cause". Although the consequences are fatal, if there is no element of negligence or error, then the doctor cannot be blamed

Some examples of criminal malpractice in the form of a deliberate leak are leaking medical secrets, performing abortions without medical indications, failing to carry out the obligation to provide help to someone who is in an emergency, committing euthanasia, issuing a doctor's certificate that is not under actual

18. Ibid.

19. Sri Endah Wahyuningsih, Anis Mashdurohaturun, Abd Syakur, *Protection against Witnesses in Criminal Justice Proceedings in Indonesia Based on the Humanitarian Value*, International Journal of Innovation, Creativity and Change. [www.ijicc.net](http://www.ijicc.net). Volume 13, Issue 7, 2020.

20. Endang Kusuma Astuti, *Transaksi Terapeutik Dalam Upaya Pelayanan Medis di Rumah Sakit*, Citra Aditya Bakti, Bandung, 2009, p. 14.

conditions, making visum et repertum that is not true, and gives untrue information in court in their capacity to be present as expert witnesses. Article 79 letter c of the Medical Practice Law also regulates doctors' responsibility to carry out their profession in accordance with their obligations as regulated in this law. Shall be punished with a maximum imprisonment of one year or a maximum fine of Rp.50,000,000,000.00- (fifty million rupiah) for every doctor or dentist who deliberately fails to fulfill his obligations as regulated in Article 51 of the Medical Practice Law.<sup>21</sup>

## 2. Legal Protection for Doctors in Health Services

A doctor who is suspected of committing medical malpractice or acts of violation of the law in the medical profession, then he can be prosecuted in administrative law, civil law, or criminal law, regardless of whether or not a doctor has been accused of medical malpractice, then if this has been widely published through the media, it destroyed the career he had started so far. Medical malpractice is possible, whether on purpose or because of negligence. However, as a human being, a doctor cannot escape the possibility of making mistakes and mistakes because it is an innate human nature.

The medical profession is not a science where everything can be measured. The medical profession, according to Hippocrates is a combination or combination of knowledge and art (science and art). As in making a diagnosis is an art in itself for a doctor because after hearing the patient's complaint, the doctor will do his imagination and make careful observations of the patient.<sup>22</sup>

Legal protection includes three dimensions of law, namely administrative, civil, and criminal. If a doctor is suspected of committing malpractice, the administrative dimension should be placed as the premium ultimatum. The medical ethics code trial process passes this dimension. As long as the doctor has carried out his duties in accordance with the SPK, SOP, and IC are cumulative, the Honorary Council of Medical Ethics (MKEK) is obliged to declare that the doctor is innocent or has not committed any legal violations in the form of malpractice. On the other hand, as long as the Panel considers that the doctor has violated the SPK and SOP, then the doctor can be subject to administrative sanctions, and a violation of IC, then the doctor can be sued in civil law. As long as doctors do not carry out their duties according to the SPK, SOP, and IC, the violation fulfills a criminal act's elements, as stipulated in Article 359, Article 361 jo. Article 55 paragraph (1) of the Criminal Code and Article 76 of Law no. 29 of 2004 concerning Medical Practice. Doctors can also be charged with criminal penalties if they are suspected of having committed gross violations, for example, falsifying a license to practice, selling organs, abortion and so on. The trial process at MKEK did not stop any civil or criminal complaints from the patient.<sup>23</sup>

According to Philipus M. Hadjon, legal protection is a protection provided to legal subjects in the form of both preventive and repressive legal instruments, both written and unwritten.<sup>24</sup> In this case, Sudikno Mertokusumo also defines legal protection as all efforts made to ensure legal certainty based on all rules or regulations that exist in life together. Likewise, legal protection, according to Satjipto Rahardjo, is the protection of human rights that are harmed by other people and given to the community so that they can enjoy all the rights provided by law.<sup>25</sup>

Article 66 paragraph (1) of Law No. 29 of 2004 concerning Medical Practice states that any person who knows that his / her interests have been harmed by a doctor or dentist's actions in carrying out medical

21. Yussy A. Mannas, Hubungan Hukum Dokter dan Pasien Serta Tanggung Jawab Dokter Dalam Penyelenggaraan Pelayanan Kesehatan, *Jurnal Cita Hukum*, Vol.6 No.1 (2018), pp.163-182

22. Michel Daniel Mangkey, Perlindungan Hukum Terhadap Dokter Dalam Memberikan Pelayanan Medis, *Lex et Societatis*, Vol. II No. 8 Sep-Nov 2014, pp14-21

23. Setyo Trisnadi, Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis, *Masalah - Masalah Hukum*, Jilid 45 No. 2, April 2016, pp. 150-156

24. Novita Listyaningrum, *Informed Consent dalam Perlindungan Dokter yang Melakukan Euthanaisa*, *Journal Advokasi*, Vol. 6, No. 1, 2016, p.30.

25. Satjipto Rahardjo, *Ilmu Hukum*, Pt. Citra Aditya, Bandung, 2000, p. 54.



practice can report in writing to the Chair of the Indonesian Medical Discipline. Honor Council. The existence of this provision means that the law of medical practice has provided legal protection to patients so that doctors do not harm their interests. It's just that, of course, patients not only get legal protection from the law, but doctors also get legal protection in carrying out their duties as a medical profession. In connection with legal protection, several things can exempt a doctor or dentist from lawsuits. They are as follows:<sup>26</sup>

1. Has provided health services in accordance with operational standards and procedural standards. Referring to Article 50 letter a of Law No. 29 of 2004 concerning Medical Practice, which states that a doctor or dentist in carrying out medical practice is entitled to legal protection as long as carrying out their duties in accordance with professional standards and standard operating procedures. The existence of this provision provides legal protection for a doctor or dentist if he has provided health services in accordance with professional standards and standard operating procedures.
2. Legal Protection Based on Informed Consent. Article 6 Regulation of the Minister of Health of the Republic of Indonesia No. 290 / MENKES / PER / III / 2008 concerning Approval of Medical Measures regulates that the granting of approval for medical action does not eliminate legal responsibility if it is proven negligence in bringing medical action that endangers the patient. Based on this provision, medical action's approval does not necessarily eliminate the doctor's responsibility if it is proven that medical negligence has resulted in harm to the patient. Although informed consent can still lead to accountability if there is a doctor's negligence in providing treatment, legally informed consent has a vital role in health services. This is because informed consent is the consent given by patients to doctors to provide treatment. Medical action in the form of surgery that is not accompanied by informed consent, resulting from the doctor's action can be equated with acts of persecution as stipulated in Article 351 of the Criminal Code. Likewise, in anesthesia that is not accompanied by informed consent, then this action can also be equated with an act that makes a person unconscious, which means that it is in accordance with committing violence as stipulated in Article 89 of the Criminal Code. Article 89 of the Criminal Code states that making people unconscious or helpless is then equated with violence.
3. Honorable Minority Rule and Misjudgment. In treatment efforts, of course, there is often disagreement to provide the right therapy for certain medical conditions, so it could be that the approach to disease has differences from one doctor to another. However, the existence of this difference is still based on reliable knowledge. Based on the situation, the court's legal theory is called the honorable minority rule, that is, a doctor is not considered negligent if he chooses one of the many recognized treatments. Choosing one of these methods turns out to cause errors in medical action, thus giving birth to a new theory called medical judgment or medical error, which means that medical action based on professional standards turns out to be the wrong choice. This doctrine states that the mistake of a doctor's choice cannot be justified because

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26. Bambang Tri Bawono, Legal Protection of Doctors in Providing Health Services, *International Journal of Law Reconstruction*, Volume 4, No. 1, April 2020, pp.24-33

there is no negligence in this choice unless this doctor does not follow the medical standards used by his peers.

4. Negligence of Contribution. Apart from some of the above, doctors are also not to blame. Suppose the doctor is not successful in treating the patient when the patient is not cooperative because it is not according to the doctor's instructions. In that case, it does not explain honestly about the history of his disease. Illness, drugs he took when he was sick, or refusing the agreed treatment. This is considered a plural patient error called negligence of contribution, or the patient is also guilty

#### **D. Conclusion**

This paper aims to identify and analyze criminal liability in medical negligence and medical malpractice that causes the community to be harmed by medical malpractice, as well as to analyze legal protection that results in further loss or suffering for patients and to create a form of legal certainty and health and produce findings, namely that criminal responsibility to doctors for errors and negligence in providing health services where the responsibility of doctors in the field of criminal law for an act can be categorized as criminal malpractice if it fulfills the formulation of a criminal act, the doctor is also required to make informed consent as part of health service standards, and carry out obligations as referred to regulated in Article 51 of Law No. 29 of 2004 concerning Medical Practice. In addition, doctors are free from accusations of malpractice if they have provided health services according to professional standards and operational procedures and provide health services based on informed consent.

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