

ASPECTS OF CRIMINAL LAW WITHIN MEDICAL PRACTICES

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ABSTRACT

Aspects concerning legal protection for doctors in the case of their day to day practice as medical professionals is still considered lacking. This article aims to dissect provisions stated within Article 50 under Law No. 29 of The Year 2004 concerning medical practice, which discusses legal protection for practicing doctors, more specifically about reconstructing legal events concerning disputes between doctors and their patients, or criminal charges put forth by patients against doctors and how these disputes can be resolved based on the values of justice. It can be inferred that the contents of Article 50 under Law No. 29 of The Year 2014 concerning Medical Practice is that legal protection for practicing doctors is still very limited, this rings true by the method in which police would use to investigate cases of malpractice still borrows from conventional means regulated by The Indonesian Legal Code for Criminal Procedure. Pertaining to the problem stated above, it is the hope of the publisher that the government as a whole (Judiciary, Executive, and Legislative branches) can perfect the above mentioned legislations so that better protection can be afforded to doctors and other medical professionals alike.

Key Words : *Legal Protection, Malpractice, Medical Dispute*

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I. Introduction

Indonesia is a social democratic state that strives to protect the revolutionary spirit that defined the country that is done by protecting and ensuring the livelihood of its citizens. One way which Indonesia aims to achieve this goal is by increasing the country's healthcare in regards to its accessibility and inclusivity for the public, increasing the overall education of its citizens, and participating in maintaining order on a national and/or international level based on the principles of freedom, everlasting peace, and social justice. This mission, so to speak, is embodied within the preamble of the Indonesian constitution of 1945.

Practically speaking, in order to achieve the above mentioned goal is no easy task. There must be breakthroughs in the fields pertaining to the practice of medicine that is done in a manner that is both gradual and sustainable in its nature. Relevant to this end, maintaining and developing healthcare services carried out by medical professionals is key.

The right to healthcare and the right to self-determination was first conceived in the form of a legitimate legal document that was accepted internationally by countries worldwide was provisioned under Article 25 of The United Nations Universal Declaration of Human Rights of the year 1948 and was later on provisioned further under Article 1 of The United Nations International Convention for Civil and Political Rights of the year 1966 (Poernomo, 2013: 5).

Developments in the field of medicine is one of Indonesia's national goals which aims to increase awareness, willingness, and capability of its citizens to achieve a sustainable level of wellbeing that is considered optimal. Developing this field requires the participation of various variables from all walks of life which highlights a few key topics such as the physical, mental, and socio-economic conditions of the citizenry in regards to their medical wellbeing. In implementing these developments, it is imperative to increase the effectiveness of medical care able to be given as well as the resources required to give the abovementioned medical care in a way that is both integrated and sustainable in order to achieve worthwhile results. Administering healthcare was up until this point focused on gradually healing a patient through conventional appointments, but this paradigm in medical practices has thus since shifted to a method that is all-encompassing in nature, what is meant here is that medical professionals are more proactive in handling issues of healthcare by means of promoting healthy lifestyles to

patients, discouraging patients from adopting or maintaining lifestyles that are detrimental to their health, advising preventive action to patients in order to avoid medical afflictions, and administering healthcare that aims to rehabilitate patients, and a host of other means that aims to increase the quality of healthcare. In regards to developing a healthcare system that is both integrated and sustainable, it is important for the methods mentioned above to be executed and performed by both the government and the general public. (Soewono, 2007: 3-4).

Medical professionals when practicing and carrying out their duties have quite the noble cause that drives them, this cause is to ensure that patients are able to maintain their health, to cure a patient of any and all ailments, and to minimize the suffering a patient is experiencing due to an affliction.

In carrying out the duties of medical professionals, it is important to measure the interacting relationships between medical personnel and patients, this is especially the case for doctors or dentists that directly provide medical services to the general public. The general public agrees that the actions of a doctor in carrying out this noble duty are worthy of legal protection to a certain degree. Doctors in carrying out their medical duties must be adjusted to the limits that have been determined within existing laws so that a doctor is not liable to unjustified legal prosecution for committing an action that may be, subjectively speaking, unfavorable to a patient. (Soewono, 2007: 6).

The relationship between doctor and patient must have equal standing before the law with all its consequences and rights because of the possibility of an existing legal aspect in medical practice, which involves a specific ruling by a judge often referred to as malpractice (Waluyadi, 2000: 9).

Within this point in time, it is difficult to ascertain consistent legal certainty for practicing medical professionals because of the existing legal framework in regards to medical practice in Indonesia that is not independent, what is meant here is that there is no one specific law that provisions how to measure the limits of what or what is not considered medical malpractice in a uniform manner. An example of this can be observed by studying the contents of Law 29 of the year 2004 concerning medical practice. Article 66 of the above law states that "Anyone who has acquired factual knowledge that his / her interests have been harmed by the actions of a doctor or dentist that was actively practicing can report in writing to the Chairperson of the Indonesian Medical Disciplinary

Council". The article above only explains a "known" fact to the wrongdoing committed by a doctor but does not elaborate on what specific action or inaction constitutes as medical malpractice.

These presumptions made against doctors can happen at any stage of a doctor's tenure in advising a patient, whether that be during the preliminary phases such as diagnosing a patient or in the later phases of medical treatment such as the therapeutic phase. Examples of presumptions made during initial diagnosis of a patient can range from a variety of variables such as inaccurate evaluation of afflictions, incorrect methods performed to ascertain information on an affliction, using an outdated method to analyze an affliction. Examples of presumptions made during the therapeutic phases can range from any of the following: incorrect medical administering procedures, and medication administering. Though it is a given that a doctor's professional responsibility in the matter of analyzing and treatment of ailments is unquestionable, there is a point to be made that the dynamic relationship (professional) between a doctor and their patient must be conducted in a way where miscommunications and misinterpretations can be kept at a minimum.

Doctors in their assessment of problems relating to the medical field are paramount because it relates directly to a patient's wellbeing. If a doctor is not accurate in their assessment, then that inaccurate assessment may result in risks to a patient. These risks, whether they be detectable or undetectable serve as adequate information for doctors to utilize. Normatively speaking, a medical professional is obligated to abide by the principles that govern their profession, these principles are stipulated within existing laws within the Indonesian legal framework. They range from principles of cautionary action, standard medical practices, and respecting the patient's input. All of these requisites must all be done accumulatively in order for medical professionals to receive legal protection.

Observing how a medical professional is to conduct themselves in a normative manner that is in accordance with principles relevant to the practice of medicine, shows that medical professionals in carrying out their duties are subject to legal principles that is distinctive in nature, that is, where the legal basis in question contains a normative element that is exceptional in its nature. What this description means in applicative terms is that a medical professional is

afforded the right to a medical audit if they are allegedly accused of conducting acts that are against the law.

II. Discussion

Black's Law Dictionary defines malpractice as the following: "any professional misconduct, unreasonable lack of skill or fidelity in professional or judiciary duties, evil practice, or illegal or immoral conduct". Veronica explains that the word "malpractice" is defined as an error or fallacy in judgement in execution relating to a medical practice conducted, which is part of their responsibility as doctors. (Erina Pane. 2009: 41).

There are several cases of jurisprudence practiced by Anglo-Saxon countries that are relevant in measuring the extent in which a doctors are to be held responsible for their craft, these are of the following : (Syahrul Machmud. 2007: 60)

a. Informed Consent

Informed consent is interpreted in the medical field as being an agreement between a doctor and their patient regarding the medical information that is exchanged. Informed consent can also be interpreted as an agreement of medical conduct. Doctors are obligated to inform their patients or their immediate families regarding ailments that are afflicting them (diagnosis) and also the medical treatment that the doctor plans on administering to them before any medical action can be taken. This exchange of information intends to explain to the patient or their families the intent and purpose of a particular procedure, the possibility of alternative medication, risks that are prevalent to certain medical procedures, the possibility of complications arising if a certain procedure is conducted, and the prognosis or success rate of a procedure.

Regulations regarding Informed consent are stipulated under Article 45 of Law No. 29 of the year 2004 concerning medical practice, which states the following:

- 1) Any and all medical action that a doctor or dentist is to take towards their patient is to have an agreement concerning the action to be taken beforehand between the two parties.
- 2) The agreement mentioned on subsection (1) above can only take effect if the patient has complete understanding of the medical action that is to be taken that is explained by their doctor.
- 3) The explanation mentioned on subsection (2) above must contain the following information:

- a) Diagnosis of the patient and the medical procedure with which to be conducted,
 - b) The purpose of the medical action conducted,
 - c) The possibility of alternative medical procedures and their associated risks,
 - d) The prognosis of a medical procedure if they were to be conducted.
- 4) The agreement mentioned on subsection (2) can be given in written or oral form.
 - 5) If a medical action is considered to have high risk in its execution and / or outcome, then the agreement mentioned on subsection (2) must be given in written form.
 - 6) Provisions regarding the procedure for approval as mentioned on subsection (1), (2), (3), (4), and (5) above is further elaborated under The ministry of Health Regulations.

Any and all forms of medical procedure conducted by doctors must first be approved or agreed upon by the patient and / or their families. This agreement can be in oral form (expression consent), though as explained earlier, if a medical procedure is associated with a high level of risk to the welfare of the patient, then the patient or their families must give a clear written agreement that is signed by authorized individuals in accordance to national law. Although high risk procedures require that the patient or their families give written agreements, it is possible for a doctor or any other medical professional to administer medical treatment if the situation is considered an emergency or if the action taken by the medical professional is well known and is considered a normality for a patients wellbeing under certain circumstances. If there is indeed a situation that matches with the description above, then it is not required to seek agreement from a patient or their families (applies consent). This right given to patients before a procedure can be conducted is in accordance with principles pertaining to a person's right to healthcare as well as their right to self-determination that must be recognized and respected.

When a patient has been properly informed of the situation concerning their wellbeing, and if a doctor carries out a medical procedure that is accordance with accepted medical standards in Indonesia, then a doctor is not liable to any legal detriment in account of his actions.

b. Contributing Negligence

A doctor cannot be blamed for failing to cure a patient if that patient withholds vital information regarding their medical history, this information can range from types of medicine the patient has consumed in the past, treatments that were administered by a different medical professional, or even the patients lack of compliance to a doctor's orders. If a patient does in fact act in a way that mirrors the description above, then the blame is all the same put on the shoulders of the patient, this is what is called contributing negligence where the patient contributes to the failure of a treatment. Complete honesty and compliance to a doctor is required for any patient to be able to receive the intended outcome of a treatment.

c. Respectable Minority Rules & Error of (in) Judgment

The medical profession is known to be a very complex field. The complexity does not stem only from the hard science relevant to the field but also the dynamic that exist in the space of doctor-patient relationship. This relationship tends to fluctuate and not all for the best outcome of results because a doctor may suggest a particular treatment for the patient to follow but is then met with objection from the patient regarding the suggestion. The medical world is one where science and art meet in a sense that depending on the pair of eyes currently overseeing a patient, different diagnosis can be produced as well as different methods of treatment, though of course any and all deliberations made by a doctor regarding assessment and treatment must all be grounded in scientific analysis. Through the description made above 2 new legal theories were introduced by the courts, with the first being titled "Respectable Minority Rule", where the theory explains that a practicing doctor cannot be alleged to have committed wrongdoing if it is the case where said doctor has actively chosen a method out a plethora of methods that are accepted in the medical field in order to cure or treat a patient. The second theory is titled "error of (in) judgement" where the theory explains of a factual condition where a doctor has chosen an accepted method of treatment but as it turns out existed a fallacy on the part of the doctor's judgement of choice, thus the term false medical judgement or medical error.

d. Volenti Non Fit Iniura or Assumption of Risk

Volenti Non Fit Iniura is an old legal doctrine that may be applicable in handling cases related to medical law. By definition Volenti Non Fit Iniura is described to be an assumption associated with prior understanding of certain medical risks relevant to a patient's condition if a medical procedure is to be administered. If a doctor were to explain this prior understanding of risks of conducting a medical procedure to the patient or their family and they were to agree to this knowing of the possibility of failure (informed consent) then the doctor cannot be held accountable for his role in administering medical treatment. Furthermore, the application of this legal doctrine can also extend to cases where a patient by their own accord leaves the care of their doctor despite the doctor's objections. When conditions as explained above is met, then doctors and the hospital that houses them are free from legal liability be they of a criminal or civic nature.

e. Res Ipsa Loquitur

This doctrine is related to the concept of the burden of proof in criminal trials where the doctrine explains a shift of the party that is responsible in providing the burden of proof. In the case of medical disputes, the party that bears the burden of proof changes from traditionally being a burden carried by the plaintiff to now being carried by the defendant. In the case of clear negligence on the part of a doctor that has provided medical care to a patient, it falls on the doctor to be able to disprove the claim that negligence was made.

f. Vicarious Liability and Respondent Superior (hospital liability/corporate liability)

The Indonesian legal system, closely mirrors that of continental Europe which is positivistic in nature. Article 1367 under the Indonesian burgerlijk wetboek or what more modernly referred to as the Indonesian civil code state that an employer has the right to control the actions of his subordinates relating to results produced or methods used by the subordinate. the development of medical law in conjunction with the development of sophisticated medical technology, hospitals cannot detach from the partially shouldering the responsibilities of the work carried out by their employees, including what is done by doctors, dentist, or any other medical professional.

Regulation provisioning malpractice:

a. The Indonesian Criminal Code (KUHP)

Articles contained under KUPH that are relevant to the question of responsibility towards cases of malpractice can be found under articles 359 through 361. Malpractice that results in the death of a patient is provisioned under article 359 which states: whoever because of his action be they intentional or negligent causes another person to die, is therein possible to be punished by a sentencing that has a maximum imprisonment of five years or a maximum confinement of one year. What can be inferred form Article 359 under KUPH is that it can accommodate an act that results in death, where death is not something that is aimed at or desired by the subject. It is required to fulfill at least three additional elements in order for there to be an offense of causing death to another, which include:

- a) There must be a certain form of action,
- b) There exists a state where the death of a person is present,
- c) There is a causal verband between the form of action and the result of death.

The 3 elements mentioned above is not in contention against the elements that are present under Article 338 concerning actions that causes death and murder. The difference with murder is only in the element of error or negligence, namely Article 359 explains that there is such a thing as a negligent act that causes death. Moving on to Article 360, the article here provisions concerning negligent acts that causes harm, the contents are as follows:

- a) Any person who commits an act that is negligent in nature which causes another person to be seriously injured, is punished by a maximum imprisonment of five years or a maximum imprisonment of one year
- b) Whoever commits an act that is negligent in nature which causes another person be seriously injured to the point where the injured person becomes incapable of performing their professional duties or if the injuries that were afflicted causes an illness that was previously not present, is punished by a maximum sentencing of 9 months of imprisonment or a maximum confinement of six month or a fine that incurs a fee of up to four thousand five hundred Rupiah (IDR 4,500.00).

Article 360 explains that there are two types of criminal conducts that are differentiated by the elements of each associated act. These are explained in the following subsection:

- a) Elements of a criminal act must contain elements, namely:
 1. The presence of a negligent act
 2. The existence of an act
 3. The existence of an act which has caused severe injuries
 4. The existence of causality relating from an act of criminality to the result of severe injury.
- b) Subsection (2) explain further elements which are relevant must be present to an act of criminality, which are the following:
 1. There exists an act of negligence
 2. There exists an action
 3. There exist an action which causes ailments or sickness, and injuries that prevents the person injured from carrying out their professional duties for an amount of time.
 4. There exists causality between the action in question and the associated result of the action.

Article 90 under KUHP defines severe injury as the following:

- a) Suffering of an illness or is afflicted by an injury that is impossible to recover from or could lead to death of the person afflicted.
- b) Is unable to consistently perform occupational relevant to their livelihoods;
- c) Permanently losing one or more of a person's senses (sight, smell, etc.)
- d) Is crippled
- e) Mental instability that lasts for more than four weeks,
- f) The death or miscarriage of a woman's fetus.

There exists an alternative definition for injuries that causes a person to be unable to perform occupational or professional tasks. The definition here stresses the impact caused by the injury rather than the injury itself. Examples of this are disruptions of the ability to work as evidenced by a doctor's certificate that the person in question needs rest due to disturbances in the function of his organs that were caused by sustaining an injury.

A doctor may incur some injury that is not intentional when they are performing a medical procedure to a patient such as pulling out a teeth or administering an injection as stipulated under Article 351 KUHP, but even so, a doctor can't be liable to any legal detriment if in fact that the procedure which was conducted in a way that is legally acceptable or the act is forgivable by law (beroepsrecht). This sort of element of forgiveness by law is apparent for not only doctors but for other medical professionals as well. Article 361 KUHP states the following:

“If the crime described in this chapter is committed by an official or someone which occupation correlates in its capacity in aiding at committing this crime, then the sentencing for this criminal act may be increased by one third, and the criminal can be deprived of the right to work, which was used to carry out said crime”.

Article 361 KUHP is considered an article that functions as a ballast for the sentencing of a criminal act that resulted in death or heavy injury as stated on article 359 and 360, but in the case where the criminal act was committed by using a place of occupational power to inflict the injury or death in question. This sentencing is relevant to medical professionals because if a doctor were to cause the death of a patient or inflict an injury so great as to cripple the patient, then because of their positions as doctors, it would automatically be charged with not only Article 359 and 360 but 361 as well.

- b. Law No. 23 of the year 1992 concerning health juncto presidential declaration No, 56 of the year 1995 concerning medical workforce discipline (MDTK).

The law above explains that the authority authorized to determine the presence or absence of a doctor's negligence or error concerning their practice is the authority of the medical Workforce Disciplinary Council (MDTK). The MDTK is an autonomous, independent, and non-structural institution that hosts members from fields that practice law, health, religion, psychology and sociology.

- c. Law No. 29 of the year 2004 concerning Medical Practice.

This law provisions matters relating to the practice of medicine, thus to keep with consistency of the subject matter, the authority to judge any and all alleged cases of wrongdoing committed by active practitioners of medicine are

to be weighed by *The Indonesian Doctors Disciplinary Assembly (MKDKI)*. The MKDKI are an authorized body which can receive complaints by patients pertaining to medical problems, conduct limited investigations concerning medical disputes, and pass verdicts of innocence or wrongdoing committed by medical practitioners as well as burdening sanctions to them if need be. If it founded that a doctor or any other medical practitioner is indeed guilty of violating medical ethics, then the MKDKI will escalate the case to the Indonesians Doctors Association (IDI), which can be escalated again to the Honorary Council of Medical Ethics (MKEK).

Sanctions given to by the MKDKI can constitute administrative sanctions, such as giving written warnings, recommendations to revoke a doctors Registration Certificates (STR), Practice Permits (SIP), obligation to attend re-education or compulsory ethics training at medical institutions. It does not rule out the possibility of civil or criminal prosecution from the patient or the patient's family.

d. Civil Lawsuits

Civil charges filed against medical practitioners can be in the form of a claim for default based on contractual liability and / or illegal acts (onrechtmatigedaad). The doctrine described above explains that, if a doctor practices privately, for example a small private clinic, if any suit were to be filed against them, it would be an individual lawsuit, but if the doctor in question has with him employees, then the doctor is responsible for his and the actions of his employees that are under him. If there is indeed an organized structure where there exists an employer-employee's system, then personal responsibility in this case is measured in proportion to how large their responsibility is in comparison to the structure as a whole. Likewise, a hospital as it stands as a legal subject of the law, can be charged with a civil suit for all actions taken by its employees (whether they be medical or non-medical personnel). Hospitals may also be liable to civil suits if an independent doctor that is not part of the hospitals management, were to open an independent practice inside the hospital, because the act was committed inside the confines of the hospital, then that is enough for legal liability to be shared.

e. Criminal Charges

Criminal charges may be subject to the provisions of the articles due to intentional or negligent acts which resulted in the death of another person, illness, or injury and articles concerning abortion of a fetus. For example, a doctor is faced with a dilemma of choice between saving a fetus or the life of the mother, in an emergency situation, then saving the life of the mother takes precedent over the fetus (*abortion provokatus medicalis*). This is not considered a criminal offense, because the doctor acted in accordance to medical indications and accepted practices. The case mentioned previously differs drastically to cases of *criminalis provoke abortion*, which is an act where the life of a fetus is taken not by any medical necessity but rather because of reasons pertaining to extra-marital pregnancies.

There are certain factors in the field of medicine that aren't subject to any law that is conventional in its nature of provisioning, this is true for cases of medical accidents and risk of treatments. In any medical procedure of course there will always be some form of risk involved in its administering. If a doctor performs a medical action carefully, and in accordance with medical service standards, but a medical risk still occurs despite all efforts to mitigate it, then the doctor cannot put to trial for doing their job to the extent of their abilities. This also rings true for any medical treatments that result in allergic reactions that are not detectable before the procedure was to be administered such as cases of pulmonary embolism, vascular injury, and other such reactions that the human body may experience. The medical profession is a field of work that is characterized by professionalism, expertise, responsibility, and that of a caring nature. In carrying out a doctors professional practice, two main things that underlie a doctor's behavior must be evident and they are acting for and in the best interest of the patient and there can be no ill intention be made against the patient by way of hurting, injuring, or even killing the patient (*primum non nocere*). In the practice of medicine, there are no special guarantees by doctors that carry out their professions, this means that no matter how careful or compliant a doctor maybe to any set or laws or professional standards of practice, it will not guarantee a perfect turnout for every case that a doctor is responsible for but it can be assured that optimal

efforts from doctors are put in to serve the best for their patients (inspanning verbintenis).

Doctors are expected to act and carry themselves in a manner that standardized. these standards are as the following:

1. Standards of professional competence: commonly referred to as professional standards.
2. Standards of behavior: described in the Doctor's Oath, medical ethics, or what commonly known in Indonesia as KODEKI.
3. Standards of service: In carrying out their professional duties, doctors are given a guideline labeled as standard operating procedures (SOP), whilst providing medical services.

Diagnostic discrepancies can also be excused because a doctor is at the end of the day still considered a human being that is liable to mistakes. There exists a term from the science of law, namely *errare humanum est* which means that the act of committing an error is to be considered humane. The theory of respectable minority rule, states that a doctor is not considered to be negligent if he chooses a method, from the many methods of treatment that are recognized by the medical community.

III. Conclusion

- a. Articles 359 through 361 KUHP are not applicable to acting doctors that administer procedures that contain medical risks. The non-applicability of the articles mentioned is due to an element of the offense that is not fulfilled that is concerning a negligent act. Though if a negligent act is proved to have been committed, then all three articles mentioned are applicable to be used as the legal foundation to make a criminal report against the doctor in question. It is important to mention though, that even in the event of alleged negligence, there are still elements pertaining to medical law that negates wrongdoing on the part of a doctor's actions. This is applicable if certain conditions are met which include risks of medical treatment (in relation to unknown and unknowable allergic reactions) and reasons of dismissal of wrongdoing (in relation to high risk medical procedures).
- b. If all protocols relating to medical standards have been carried out perfectly, including professional standards, health service standards, and behavioral

standards, then in the event of failure on the part of the doctor in healing or providing medical treatment to a patient cannot be categorized as medical malpractice, and any and all legal liabilities are considered non applicable to the acting doctor.

Suggestions

The government need to place further emphasis on laws which afford legal protection to medical practitioners, this is because there simply does not exist any intentional ill-intent on the part of doctors to injure, maim, or kill a patient, because a doctor has taken a sworn legal-medical oath that is recognized by the state which legally binds a doctor to the Indonesian medical ethics code (KODEKI). In an attempt to treat or administer medical procedures or treatments to a patient, of course there will always be inherent medical risks. Good communication between doctors, patients, and their families is an important key in the doctor-patient relationship (therapeutic contract).

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