Malpractices and Negligence That are Legal Issues and Problems in Service Practices Health in The Hospital

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Abstract

Although medical malpractice is not a new phenomenon in the Indonesian world, however, handling medical malpractice cases is confusing to some extent. The lack of a statutory definition of medical malpractice creates confusion as to how to handle it. This paper aims to outline the concept of medical malpractice and its implications. In addition, any misconceptions regarding medical malpractice liability will also be evaluated. This normative legal research relies on secondary data and employs both legal and comparative approaches. It was found that there were misconceptions about medical malpractice in Indonesia. Misunderstandings do not occur only among lay people, but also among academics and law enforcement agencies. This misunderstanding leads to confusion about how to establish medical malpractice liability.

Keywords: Malpractice, Negligence, Issue, Legal Problems

1. INTRODUCTION

Malpractice is a central issue in the field of medical legal studies, especially in Indonesia. As a study material, the issue of malpractice has a strong magnetic force to become a legal issue and problem in health services . Malpractice is also a sexy issue for media reporting purposes. There are several analyzes that can be used to explain this phenomenon. First, malpractice is a relatively new issue in Indonesia. Something new generally attracts people's attention to find out and explore. Second, the event which is sociologically constructed as malpractice has 'hit' the awareness of the general public regarding the risks of medical procedures due to human error (negligence of medical personnel) (Chawazi, 2019). Traditionally the doctor-patient relationship is built on the principle of trust. This kind of relationship is called a fiduciary relationship. In order to obtain healing from the illness they suffer, patients completely rely on the ability and integrity of the doctor who treats them. The phenomenon of malpractice opens up patient awareness that doctors can be negligent and place patients as victims of that negligence (Dahlan, 2021). The term malpractice became known in Indonesia in the eighties and became very popular since 2003 when the 'medical malpractice crisis' occurred in Indonesia. As a relatively new legal issue, there is uncertainty among society about how to handle the issue of malpractice. It is not yet clear what exactly is meant by malpractice and what the legal responsibility is (Fuady, 2020). It is acknowledged that the term malpractice is a foreign term that was never previously known in Indonesia. The legal construction of malpractice was born from different legal traditions. It is not easy to accurately place this legal construction in the context of the Indonesian legal system. Although legal responsibility for doctors (medical liability) has been known for a long time in Indonesia, legal responsibility for doctors related to malpractice (medical malpractice liability) is a new issue (Guwandi, 2021). Even though the term malpractice is now very popular, the term is not well known in the legal landscape.

The term malpractice is not found in statutory regulations and is not used in legal proceedings. Because malpractice is not a legal term, events that are sociologically constructed as malpractice are approached and interpreted according to existing legal provisions. The application of existing legal instruments (especially the

Criminal Code) to malpractice issues seems too forced, giving rise to a lot of dissatisfaction, especially among the medical profession. Various demands have emerged in society regarding the phenomenon of malpractice, ranging from demands for the establishment of a special judiciary for the medical profession to demands for the creation of a law on malpractice (Guwandi, 2022). Responding to these various demands, on October 6 2004 the government ratified the enactment of Law Number 29 of 2004 concerning Medical Practice (Medical Practice Law). The main objective of the Medical Practice Law is to encourage the realization of good medical practice , so in contrast it can be understood that the law functions as an instrument to prevent bad medical practice (medical malpractice) . . In addition, the Medical Practice Law also mandates the establishment of an institution that carries out the functions of a medical disciplinary tribunal called the Indonesian Medical Discipline Honorary Council (MKDKI). Despite all its shortcomings, the existence of the MKDKI has more or less answered the demand for a special court for the medical profession for malpractice and negligence which has become an issue and legal problem in the practice of health services in hospitals. Apart from that, various related laws and regulations were created in order to support the realization of a system/order that supports the process of legal accountability and resolution of cases of malpractice and negligence which have become issues and legal problems in the practice of health services in hospitals (Guwandi, 2019).

2. METHODOLOGY

Normative legal research examines primary and secondary legal materials related to the issue of malpractice and legal responsibility. A comparative approach is used to explain the concept of malpractice as understood in the country where the legal construction of medical malpractice originates. A comparative approach is also useful as an analytical tool for evaluating various misunderstandings regarding the issue of malpractice and legal liability.

3. RESULTS AND DISCUSSION

Medical Malpractice

The term malpractice comes from the English word medical malpractice. As written by Sal Fiscina, " The word malpractice literally means bad practice. It is formed from two words, 'mal' means bad and 'practice' means work". According to this opinion, in linguistic terms, malpractice means bad medical action (practice). Actions are considered bad if they deviate from the standards of medical service. In terms of terminology, malpractice can be understood as a doctor's negligence in carrying out medical procedures which results in harm to the patient. This negligence generally takes the form of ignoring service standards or professional standards (Hamzah, 2018).

Legal Responsibility of Medical Personnel (Medical Liability)

Staff (doctors) can be held accountable both criminally and civilly according to the form of legal violation committed. Criminal liability is held if the person concerned has been proven to have committed an act that violates the provisions of criminal law (criminal wrongdoing), and civil liability is held if the person concerned has committed an act that violates the provisions of civil law (civil wrongdoing). In general, criminal liability refers to the provisions in the Criminal Code (KUHP), and civil liability (accountability) refers to the provisions in the Civil Code (KUHPer) (Hariyani, 2019). Wrongful actions in the criminal sense are technically referred to as criminal acts (delik). The Criminal Code contains various kinds of offenses that are directly or indirectly related to the medical profession. The form of connection referred to here is that medical personnel (doctors) have a high chance of being perpetrators/subjects of these offenses. In other words, medical personnel are potential perpetrators of the offenses in question (potential offenders). To facilitate identification, these types of offenses may be called medical offenses or medical crimes. Examples of medical crimes regulated in the Criminal Code include abortion (Article 348 of the Criminal Code), ending a patient's life at the request of the person concerned (Article 344 of the Criminal Code), and disclosing patient secrets to third parties (Article 322 of the Criminal Code) (Ide, 2020). Criminal liability can also refer to the criminal provisions contained in Law Number 29 of 2004 concerning Medical Practice (2004 Medical Practice Law) and Law Number 36 of 2009 concerning Health (2009 Health Law). Doctors can be criminally liable if they are proven to have committed one of the criminal acts regulated in the 2004 Medical Practice Law, such as committing an act of disclosing a patient's confidentiality as regulated in Article 79 letter (c) in conjunction with Article 51 letter (c) or being unwilling to provide emergency assistance. (emergency care) as regulated in Article 79 letter (c) in conjunction with Article 51 letter (d) (Isfandyarie, 2021).

Doctors can also be held criminally responsible if they are proven to have committed one of the criminal acts regulated by the 2009 Health Law, including: being involved in the trade in organs or body tissue as

regulated in Article 192, carrying out plastic surgery for the purpose of falsifying a person's identity as regulated in Article 192. Article 193, carrying out illegal abortions as regulated in Article 194, or buying and selling blood as regulated in Article 195 (Koeswadji, 2020). There are basically two forms of wrongful acts in the civil sense, namely acts of breaking a promise (wan achievement) and acts against the law (onrechtmatige daad). Civil liability based on default is regulated in Article 1239 of the Civil Code, while liability caused by unlawful acts (onrecthmatige daad) is regulated in Articles 1365, 1366 and 1367 of the Civil Code (Nemie, 2019). Article 1365 of the Civil Code regulates liability based on unlawful acts in general. Article 1366 of the Civil Code explains that liability can be carried out for unlawful acts that are intentional or occur due to negligence (negligence). Article 1367 of the Civil Code regulates liability based on unlawful acts committed by other people. The provisions of Article 1367 of the Civil Code are the basis for the application of vicarious liability. Based on the provisions of Article 1365 of the Civil Code, it is possible for patients who experience losses as a result of errors/negligence committed by medical personnel (doctors) to submit claims for compensation (Sal, 2019).

Legal Liability of Medical Personnel Due to Malpractice and Negligence which Become Issues and Legal Problems in the Practice of Health Services in Hospitals

After the enactment of the 2004 Medical Practice Law, legal responsibility for medical personnel must first refer to the provisions contained in this specific law (lex specialist). The Medical Practice Law regulates various administrative obligations that must be complied with by medical personnel in carrying out their professional work. Apart from that, this law also regulates ethical obligations such as the obligation to keep patient secrets (medical secrecy) (Soewono, 2019). The inclusion of ethical obligations is intended to strengthen previously known ethical norms (medical ethics). Once included in the provisions of the law, these ethical obligations are strengthened (upgraded) into legal obligations. Thus, violations of these various obligations can drag doctors into legal liability processes. Because violations of these various obligations are threatened with criminal sanctions, doctors can be held criminally responsible if they are proven to have violated them (Subekti, 2018). The 2004 Medical Practice Law also introduces disciplinary accountability . Disciplinary accountability arises when there is a violation of disciplinary norms. In its development, these disciplinary norms have been formulated in writing in the form of medical disciplinary rules. Medical discipline regulations are prepared by the Indonesian Medical Council (KKI) (Supriadi, 2021). KKI has formulated 28 types of violations of medical discipline. (KKI Regulation No. 4 of 2011). Disciplinary accountability is carried out through the Indonesian Medical Discipline Honorary Council (MKDKI). As stated in Article 64 point (a), the MKDKI is tasked with receiving complaints, examining and deciding on cases of disciplinary violations of doctors and dentists that are submitted. Complaints can be submitted directly by aggrieved patients or other people who are aware of violations of medical discipline. (Article 66 paragraph (1) Law No. 29 of 2004).

Professional errors (professional misconduct) which are at the core of events which are sociologically constructed as medical malpractice are in the domain of disciplinary norms. The concrete form of bad medical practice referred to by the term medical malpractice is medical actions carried out without heeding various applicable standards (professional standards, service standards, standard operational procedures, etc.). Therefore, every case of suspected medical malpractice becomes the domain of MKDKI. However, MKDKI is not positioned as the only institution with the authority to examine cases of suspected medical malpractice (Hamzah, 2018). The legal policy taken by the government regarding MKDKI's position regarding the examination of cases of alleged medical malpractice is to place MKDKI as the first door but not the only one. The mechanisms operating in this institution do not prevent legal accountability mechanisms from taking place through judicial institutions (Article 66 paragraph (3) Law No. 29 of 2004). The placement of MKDKI in such a position is appropriate. MKDKI is the first door for efforts to seek justice regarding incidents of medical malpractice, but it must not be the last door. Borrowing Wahyu Andriyanto's term, efforts to seek justice must not be confined only to the MKDKI level but must continue to culminate in the Supreme Court as the holder of the supremacy of the judiciary (Hamzah, 2018). MKDKI is good but has various limitations. MKDKI is quite effective in carrying out the function of professional accountability, but does not carry out the function of dispute resolution and indeed this institution was not created for that purpose. Sanctions imposed by MKDKI can have serious impacts on affected doctors, but do not always have positive implications for patients who are harmed by the doctor's actions. For example, a patient who has been harmed by a doctor's actions wants compensation (compensation), the patient cannot expect that from MKDKI. Therefore, it would be natural for patients to be given the opportunity to try this at another institution (Koeswadji, 2020).

Confusion in Understanding of the Concept of Medical Malpractice and Legal Liability

Mistakes by medical personnel in carrying out their professional duties or known technically as medical malpractice are the basis for legal liability known as medical liability. Even though malpractice is not the only basis for legal liability for medical personnel , generally people always link the two. This has blurred the concept of legal responsibility of medical personnel. The conceptual boundaries become unclear, in the sense that what constitutes liability due to malpractice and what constitutes liability due to other acts becomes confused. This confusion occurs partly as a result of confused understanding of the concept of malpractice itself (Koeswadji, 2020). Malpractice is actually a general term that applies to all professional fields. In English, malpractice is understood as professional misconduct, which etymologically means professional error. In this case, what is meant is an error that occurs when a professional staff carries out their duties or professional work. If the error is made by a medical professional when carrying out a medical procedure, this is known as medical malpractice (Nemie, 2019). Even though malpractice is only one form of malpractice, in reality ordinary people almost always associate it with the medical profession. This kind of stigmatizing view is certainly detrimental to the medical profession. The medical profession receives more public scrutiny than any other profession. The critical power of society and the spirit of litigation are directed more towards the medical profession than other professions even though they have the same opportunity to be entangled in malpractice issues (Sal, 2019).

The term malpractice, as already mentioned, was adopted from the English term medical malpractice. The essence of the act called malpractice is the negligence of medical personnel when carrying out medical procedures. Therefore, in various countries such as England, Canada, Australia, Sweden, New Zealand, India, Singapore, and also Malaysia, the concept of malpractice is more popular as medical negligence. In terms of the term itself, it is clear that medical negligence has more nuances than 'negligence'. Departing from this reality, malpractice should be constructed as a form of 'negligence' only, not including the element of 'intentional' (Hamzah, 2018). The element of intent in the context of the term malpractice does not seem relevant because it is generally believed that no doctor intentionally wants to harm their own patient. The medical profession is a noble profession whose implementation is framed by various noble moral values, namely medical ethics. It is difficult to accept reason if practitioners in a profession rich in noble traditions are involved in an evil scenario aimed at injuring or harming other people who should be helped. In Indonesia, the concept of malpractice has expanded to include actions that occur intentionally. This kind of conception is widely held by writers and observers of malpractice issues in Indonesia (Dahlan 2021), (Guwandi 2021). Alexandra Ide classifies the type of malpractice that is carried out intentionally as pure malpractice (Ide 20 20). The intentional factor in the context of malpractice is captured, among other things, in a concept called criminal malpractice. It may be that the concept of criminal malpractice was adopted from the concept of criminal negligence which is known in common law countries. However, if observed carefully, these two concepts have significant differences. The basic concept of criminal negligence is negligence which allows criminal prosecution to be carried out.

This criminal prosecution is possible because it takes into account a form of negligence which, according to its nature, is very gross or is called gross negligence. A simple example that can be used is a surgeon carrying out an operation while drunk, resulting in the patient suffering serious injuries. With simple reasoning, people will generally be able to accept the use of criminal sanctions against doctors who commit such negligence. On the other hand, the basic concept of criminal malpractice, as introduced in various literature in Indonesia, is that a doctor's actions fulfill the definition of an offense. Considering that in terms of the perpetrator's intention, offenses can be divided into dolus offenses (with an element of intent) and culpa offenses (with an element of negligence), then the assumption must be accepted that malpractice can also occur due to an element of intent. Even though this assumption seems logical, it is actually ambiguous. If an event that is assumed to be malpractice arises due to deliberate factors, what is being discussed is not actually medical malpractice but is more accurately called a medical crime (medical offense), namely a criminal act where the perpetrator is a medical personnel (Hamzah, 2018). Including the element of 'intentional' in the conceptual framework of malpractice, apart from being inconsistent with the general view prevailing internationally (common practice), also has no significance. If in an incident that is assumed to be malpractice the element of intent is truly proven, the case in which the legal process takes place is a legal process for an ordinary criminal case, not a malpractice case. It would be appropriate if malpractice is conceptualized as a form of negligence on the part of medical personnel (medical negligence) which results in harm to the patient (Guwandi 2021).

Furthermore, it should be understood that technically this negligence takes the form of ignoring the standards that apply in the implementation of medical procedures, whether professional standards, service standards, or standard operational procedures. In various countries that have developed what is called the Law of Medical Negligence, the term often used is standard of care. Malpractice itself is often defined as " the failure to comply with the standard of care" (Koeswadji, 2020). If the above construction is agreed, then from the

Indonesian perspective, malpractice is more appropriately constructed as a form of unlawful act which allows the victim, namely the patient, to file a claim for compensation based on Article 1365 of the Civil Code. There are at least three reasons that can be relied upon. First, this construction is more in line with legal practice that is generally accepted internationally (common practice). Second, this construction allows the injured party to obtain compensation (compensation). Third, this construction is a way out to avoid the negative impacts of criminal prosecution (Nemie, 2019). As has been mentioned, in countries that adhere to the common law system, medical malpractice or medical negligence is a form of negligence. Negligence itself is a form of civil wrong, namely 'tort'. The concept of 'tort' which is known especially in common law based countries is parallel to the concept of unlawful acts (onrechtmatige daad) which is known in the Indonesian legal system (Sal, 2019). Constructing malpractice as a form of unlawful act allows the patient to file a claim for compensation. The case settlement model based on compensation payments is more in line with the culture of Indonesian society. In addition, a criminal responsibility model that has a confrontational nuance has negative effects not only for doctors involved in cases but in the long term can also be detrimental to society in general. The punishment of doctor 'A' and his friends , which actually triggered extraordinary social unrest, is proof enough that a penal approach to malpractice cases is not always profitable (Hamzah, 2018).

If traced, the root of the problem of this confusion is the absence of laws and regulations that specifically regulate malpractice issues in Indonesia. The absence of regulations like this means that malpractice cases that occur in Indonesia are approached and handled based on existing regulations, especially the Criminal Code. As previously mentioned, in the Criminal Code there are two criminal provisions that are often applied to malpractice cases, namely Article 359 and Article 360. Article 359 regulates negligence which results in the death of another person, while Article 360 regulates negligence which results in injury. to other people (Hamzah, 2018). At first glance, the imposition of Article 359 or 360 of the Criminal Code in malpractice cases that result in the death of a patient or the patient suffering injuries appears to be appropriate. Both the elements of negligence and the resulting consequences in the form of death or injury have all been fulfilled. However, in practice, law enforcement officers often misunderstand the elements of negligence. The element of negligence is often seen and measured through a juridical lens, even though it should be seen and assessed through a medical lens. Quoting Plato's statement, Puteri Nemie wrote, "only physicians should judge the action of physicians" (Kassim. 2003). This kind of juridical perspective will only give rise to formal justice, and not substantive justice. In the case of a doctor (doctor 'A' for example), the criminal decision handed down by the cassation panel of judges actually caused shock in society (Hamzah, 2018). The opening of the opportunity to prosecute doctors criminally in malpractice cases has encouraged many patients to take the criminal route. The criminal route is seen as more practical in the eyes of the patient. Patients do not have to go to the trouble of proving the doctor's negligence as in civil cases. The burden of proof can be shifted to law enforcement officials. What patients who feel they have been victims of malpractice need to do is make a report to the investigator, and the rest of the work will be done by the investigator. The possibility of prosecuting doctors criminally is supported by the fact that many cases of suspected malpractice are criminalized, making people in Indonesia perceive medical malpractice as a criminal event (Chawazi, 2019).

As mentioned previously, understanding of the concept of malpractice is sometimes confused with the concept of medical crimes. Events that actually fall into the category of criminal acts are included within the framework of the concept of medical malpractice with special specifications, namely that they are included in the concept of criminal malpractice. Events or actions that are often used as examples of criminal malpractice are illegal abortion, euthanasia and exposure of medical secrets (Hariyani 2005). These three acts are pure criminal acts and do not constitute malpractice (Dahlan, 2021). Abortion with any motive is a criminal offense under the provisions of Article 348 of the Criminal Code, while euthanasia is a criminal offense under the provisions of Article 344 of the Criminal Code. If a doctor is arrested by the authorities for carrying out an illegal abortion or euthanasia, he will be held criminally responsible for committing an ordinary crime, namely a crime that falls into the category of crimes against life. This kind of criminal liability is ordinary criminal liability, not criminal liability due to malpractice incidents (Fuady, 2020). Malpractice requires an element of loss on the part of the patient. It is further determined that the patient's harm must arise as a direct result of negligence committed by the doctor. If there is no element of loss then there is no malpractice, even though there is actually an element of negligence on the part of the doctor. As the saying goes, " to err is human", a doctor's mistakes must be understandable within certain limits, because making mistakes is human, and as ordinary humans doctors can also make mistakes. The element of loss on the part of the patient in the event of illegal abortion or euthanasia as in the example above is not fulfilled (Guwandi, 2021). In the case of abortion, for example, the patient feels that he will benefit if the doctor succeeds in aborting the fetus he doesn't want. Likewise, in the case of euthanasia, patients who are no longer able to face suffering due to illness and ask the doctor to end their life will actually be

helped if the doctor is willing to fulfill their request. So it is clear that in both the abortion and euthanasia cases above, there was no element of harm on the part of the patient. Therefore, the form of legal liability for these two incidents is ordinary criminal liability, and not malpractice legal liability (Hariyani, 2019).

It is true that doctors who are involved in illegal abortions or euthanasia can face legal liability, but not medical malpractice liability, but purely criminal liability. The basis for the punishment is because the person concerned committed an ordinary criminal act and not because he committed a professional error which resulted in harm to the patient as required by the malpractice legal liability scheme. This type of criminal liability model was known in the Indonesian legal system long before the term malpractice was known in Indonesia (Ide, 2020). Based on legal provisions in Indonesia, professional mistakes, which are often referred to as malpractice, can also be the basis (cause of action) for both criminal prosecution and civil lawsuits. These criminal charges and civil suits are the basis for carrying out criminal and civil liability (Isfandyarie, 2021). As previously mentioned, according to Indonesian legal provisions, civil liability can be carried out for two reasons, the first is a breach of promise (default), and the second is an unlawful act (onrechtmatige daad) . Onrechmatige daad, which is known in the Dutch legal system and is also applied in Indonesia, is similar to the concept of 'tort' which is known in countries that adhere to the common law system (Guwandi 2022). In various countries, liability based on broken promises is known as contractual liability, while legal liability based on unlawful acts is known as tortuous liability. Based on the assumption that the relationship between doctor and patient is contractual, theoretically contractual liability can be applied to malpractice cases. In this regard, Adami Chazawi stated that basically the doctor-patient relationship is a civil relationship where if medical treatment goes wrong it enters the civil field in the form of a breach of contract or an unlawful act. Legal obligations based on contracts (contractual obligations) that arise in the implementation of treatment by doctors can be classified into two, namely the obligation to realize results (resultats verbintenis) and the obligation to make serious efforts (inspannings verbintenis) (Hamzah, 2018).

In the resultsaats verbintenis format, doctors are required to realize certain work results (outcomes) as agreed before the medical action is carried out. Doctors are considered to have carried out their obligations towards patients if certain promised outcomes have been achieved or carried out . On the other hand, if the promised work results are not achieved, then the doctor concerned is deemed to have broken his promise and therefore can be held contractually responsible. The obligation to realize work results can arise in various medical procedures such as plastic surgery for aesthetic purposes or in tooth extraction (tooth removal/dental extraction) (Sal, 2019). In the inspannings verbintenis format, doctors are required to make serious efforts in carrying out medical procedures in order to help or treat patients. It is not important whether the result is that the patient recovers or not, as long as the doctor has shown serious efforts, the doctor concerned is considered to have carried out his legal obligations towards the patient. More concretely, a doctor's obligations are deemed to have been carried out if the doctor concerned has carried out the diagnosis and therapy well. The definition of serious effort refers to the proper application of medical science and clinical skills in treating the disease suffered by the patient (Nemie, 2019). In the context of medical inspannings, the issue of breach of contract can arise if the doctor is deemed not to have made serious efforts in carrying out medical procedures on the patient. The assumption of not making serious efforts refers to the implementation of medical procedures that are not in accordance with the standards applicable in the medical profession. However, contractual legal liability in such cases is very rare. Compliance with applicable standards is more of an obligation outlined by law (statutory obligation) than a contractual obligation (contractual obligation). Moreover, the obligation to comply with various applicable standards has been strictly regulated in Law Number 29 of 2004, so that the issue of contractual liability which is based on a violation of contractual obligations is increasingly losing its relevance. Instead, civil lawsuits can be filed based on unlawful acts (onrechtmatige daad) which also include violations of statutory obligations (Hamzah, 2018).

4. CONCLUSION

In the description above, it can be concluded that legal liability for medical personnel can occur either because of malpractice or because of actions that violate legal regulations, whether criminal law, civil law or administrative law. Medical malpractice legal liability requires the existence of a legal event called medical malpractice. The main characteristic of a legal event which is sociologically constructed as medical malpractice is negligence on the part of medical personnel which results in harm to the patient. Medical personnel negligence refers to violations or deviations from applicable standards, whether professional standards, service standards, or standard operating procedures (SOP). In general, negligence by medical personnel that results in losses is a legal basis for patients to file a claim for compensation through a civil lawsuit. Only gross negligence that causes

serious consequences (serious injury, disability or death) can give rise to implications in the form of criminal liability.

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