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Legal Review of Physician Malpractice Cases: A Narrative Literature Review

Patricia Wulandari^{1*}, Rachmat Hidayat²

¹Cattleya Mental Health Center, Palembang, Indonesia

²Department of Biology, Faculty of Medicine, Universitas Sriwijaya, Palembang, Indonesia

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*Corresponding author:

Patricia Wulandari

E-mail address:

dr.patricia.wulandari@gmail.com

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ABSTRACT

This review aimed to discuss legal reviews related to physician malpractice in medical practice. Malpractice is carrying out a profession wrongly or wrongly, which can only form legal responsibility for the maker if it results in a loss determined or regulated by law. Malpractice can occur in carrying out all kinds of professions, including the medical profession. Mistakes in carrying out the medical profession will form criminal or civil legal liability (depending on the nature of the consequences of the losses incurred) containing three main aspects as an inseparable unit, namely treatment that is not according to the norm, done with culpa and causing losses in law. Regarding the doctor not providing services in accordance with professional standards, which then results in disability or death of the patient, this doctor has violated the patient's right to obtain such humane service, so the patient has the right to sue the doctor concerned.

1. Introduction

Efforts to improve the quality of human life in the health sector is an effort that includes improving public health, both physical and non-physical. Basically, health problems concern all aspects of life and cover all times of human life, both past, present, and future lives. Various changes occurred, in which each aspect, including health, experienced developments in both ideas and technology. Development policies in the health sector, which were originally in the form of efforts to cure sufferers, have gradually developed towards a unified development effort, health for the entire community with community participation that is comprehensive,

integrated, and sustainable (Chandra et al., 2016; Garon-Sayegh, 2019).

Today the advancement of science and technology in the health sector has developed rapidly and is supported by increasingly sophisticated health facilities. This development has also influenced professional services in the health sector, which is also growing from time to time. Various ways of treatment are developed so that the consequences are also getting bigger, and thus the possibility of making mistakes is also getting bigger. In many cases related to health problems, cases that are detrimental to patients are often encountered. Therefore, not surprising that the health profession is widely discussed both among intellectuals and the general



public (Nayar et al., 2018; Abu-Dagga et al., 2019; Stanley et al., 2019).

Health is one of the basic human needs, in addition to clothing, food, and shelter. As the medical world develops, the role of the hospital is very important in supporting the health of the community. Advancement or withdrawal of the hospital will be largely determined by the success of the parties working in the hospital, in this case, doctors, nurses, and the people who are in that place. The hospital is expected to be able to understand its consumers, in this case, the patient as a whole, so that they can progress and develop and avoid medical negligence caused (Bordonaba-Leiva et al., 2019; Indla et al., 2019; Bielen et al., 2020).

Doctors and patients have a legal relationship, which gives a responsibility. Among other things, the responsibility of a doctor in law is very closely related to the efforts made by a doctor, namely in the form of steps or therapeutic and diagnostic actions bound by an oath. Position and professional code of ethics. Article 1 number 11 of Law Number 29 of 2004 concerning medical practice states that the medical or dental profession is medical or dental work carried out based on science, competition obtained through tiered education, and a code of ethics that serves society. Doctors, as members of the profession, devote their knowledge to the public interest and have freedom and independence orientated toward human values, as well as a medical code of ethics. The existence of this code of ethics aims to prioritize the interests and safety of patients, ensuring that the medical profession must always be carried out with the right intentions and the right way. This review aims to discuss legal reviews related to physician malpractice in medical practice.

The legal relationship between patient and doctor

Doctors, as providers of health services, are generally considered to know all the health problems of patients. Thus giving rise to a paternalistic relationship between doctors as providers of health services and patients as recipients of health services.

This paternalistic relationship pattern is identical to the vertical relationship pattern, where the position or position between the health service provider and the recipient of health services is not equal. The health service provider knows everything related to the disease, while the patient (recipient of health services) knows nothing about the disease, let alone how to cure it. Therefore, patients really trust and leave their fate completely to the doctor.

The development of information facilities through various mass media has made the secrecy of the medical profession open. Meanwhile, the patient's ignorance of health has changed towards an educated society in the health sector. Increasing public knowledge and awareness of responsibility for their own health has resulted in a shift in the prevailing paradigm of doctors. This is where the awareness of the community arises to demand a balanced relationship between the doctor and the patient as the recipient of health services, where the patient is no longer completely surrendered to the doctor.

The development of the relationship between doctor and patient is described as follows; (1) Patients go to the doctor because they feel that something is endangering to their health, so they need the help of the doctor as a person who has advantages because of their ability to treat; (2) Patients go to the doctor, knowing that they are sick, and the doctor will be able to cure them. Patients who begin to realize their right to health care which is the doctor's obligation towards themselves, consider their position equal to that of doctors, but patients still realize that the doctor's role is more important than themselves; (3) Patients go to the doctor to get an intensive examination and treat diseases that are usually ordered by a third party (e.g., insurance). In this case, the nature of the inspection is preventive.

The relationship between patient and doctor is divided into three perspectives, namely paternalism, individualism, and reciprocal or collegial. The view of paternalism requires doctors to act as parents to



patients or their families. All decisions regarding treatment and care are in the hands of the doctor as a party who has knowledge of treatment, while the patient is considered to have no knowledge at all in the field of medicine. The information that can be given to the patient is entirely under the authority of the doctors and their professional assistants, and the patient may not interfere with the treatment he recommends. The view of individualism assumes that patients have absolute rights over their own bodies and lives. Therefore, all decisions regarding treatment and care are fully in the hands of the patients, who have the right to themselves. Reciprocal and collegial views, which group patients and their families as the core of the group, whereas doctors, nurses, and other health professionals must work together to do what is best for patients and their families. The patient's right to their body and life is not seen as something that absolutely belongs to the patient, but doctors and other medical staff must view the body and life of the patient as the top priority, which is the goal of the health services they perform.

There are two patterns of relationship between doctors and patients, namely the paternalistic vertical relationship pattern and the contractual horizontal relationship pattern. In a vertical relationship, the position or position of a doctor as a provider of health services is not equal to that of a patient as a user or recipient of health services. Whereas in a contractual horizontal relationship pattern, the position between doctors and patients has equal position. Regarding this horizontal contractual relationship pattern, an equal relationship is the starting point of a contractual relationship that requires an agreement between parties to provide mutual achievements (by doing something or not doing something) between service providers, namely doctors and patients, as recipients of health services (Albolino et al., 2019).

The principle underlying this horizontal contractual relationship pattern is essentially the buying and selling of services between the seller of

health services, in this case, a doctor, and the recipient of the health service, namely the patient, which in contract law can be identified with the relationship between producers and consumers. With this equal relationship, patient compliance with the treatment process and advice given by doctors will be achieved if doctors can hold reciprocal communication with their patients. From this contractual relationship, rights and obligations arising from each party, both the doctor and the patient (de Santana Lemos et al., 2019; Meng et al., 2019).

There are several obligations of doctors towards patients contained in the Indonesian Code of Medical Ethics from Article 10 to Article 13. With the enactment of Law Number 29 of 2004 concerning Medical Practice, these obligations are clarified in the provisions of Article 51, which are equipped with doctor's rights or dentist in Article 50 as well as the rights and obligations of the patient in Article 52 and Article 53.

According to the provisions of Article 50 of the Medical Practice Act, it is stated that doctors or dentists practicing medicine have the following rights; (1) obtain legal protection as long as carrying out duties in accordance with standard operating procedures; (2) provide medical services according to professional standards and standard operating procedures; (3) obtain complete and honest information from patients or their families; and (4) receive compensation for services. However, if the doctor does not perform his duties according to the standards, then the doctor is not entitled to the legal protection referred to in Article 50 above.

In relation to the doctor's rights listed in Article 50, the patient's obligations arise as recipients of health services as outlined in Article 53 of the Medical Practice Act, which states that when patients receive services in medical practice, they have obligations; (1) provide complete and honest information about their health problems; (2) comply with the advice and instructions of the doctor/dentist; (3) comply with the



provisions that apply in health service facilities; and (4) provide compensation for services provided. Regarding the patient's obligation to provide complete and honest information, there is the doctrine of contributory negligence, which can be translated as the patient's guilt that not only can the doctor or nurse be considered negligent, but the patient can also be guilty, which can make the disease worse.

Patients also have certain obligations towards their doctor and also to themselves. In carrying out their obligations, patients are asked to meet reasonable patient standards. If the patients do not carry out their obligations and this becomes the cause of the injury, then the patient is considered to be also at fault so that the compensation incurred is divided proportionally between the doctor and the patient.

In addition to those listed in the Medical Practice Act, the Indonesian Code of Medical Ethics also mentions patient rights that need attention, including the following; (1) The right to life, the right to one's own body and the right to die naturally; (2) The right to obtain medical services that are humane in accordance with the standards of the medical profession; (3) The right to obtain an explanation regarding the diagnosis and therapy from the treating doctor; (4) The right to refuse planned diagnostic and therapeutic procedures, can even withdraw from the therapeutic contract; (5) The right to obtain explanations about medical research that will be participated in and to refuse or accept participation in said medical research; (6) The right to be referred to a specialist doctor if necessary, and to be returned to the referring doctor after the consultation or treatment is completed for treatment or follow-up; (7) The right to secrecy or personal medical records; (8) The right to obtain an explanation of hospital regulations; (9) The right to have contact with family, counselors or clergy and others needed during hospital treatment; (10) The right to obtain an explanation regarding the details of hospitalization costs, drugs, laboratory examinations, X-ray examinations, Ultrasonography (USG), CT-Scan,

magnetic resonance imaging (MRI), and so on, (if carried out) operating room costs, delivery rooms, compensation doctor services and others.

Regarding the doctor not providing services in accordance with professional standards, which then results in disability or death of the patient, this doctor has violated the patient's right to obtain such humane service, so the patient has the right to sue the doctor concerned. The right to obtain this explanation is the right to information. The essence of the right to information is the patient's right to obtain information as clearly as possible about matters related to his illness. In the event of a doctor-patient relationship, the patient's right to this information automatically becomes the doctor's obligation to carry out whether requested or not by the patient.

Malpractice

Malpractice comes from "malpractice," which is essentially a mistake in carrying out the profession that arises as a result of obligations that must be carried out by a doctor. In another sense, malpractice is an error in carrying out the medical profession that is not in accordance with the standards of the medical profession in carrying out their profession. However, sometimes malpractice is associated with misuse of circumstances because of the desire to seek personal gain. Not infrequently, using the excuse of the absence of informed consent, patients sue or demand compensation from doctors with allegations of malpractice. Malpractice is defined as a form of professional negligence in the form of measurable injuries or defects that occur to patients so that patients file lawsuits or demands for compensation as a direct result of the doctor's actions (Fogel et al., 2019).

Health services basically aim to carry out efforts to prevent and treat a disease, including medical services based on the basis of individual relationships between doctors and patients who need healing for their illnesses. Doctors are parties who have expertise in the



medical or medical field and are considered to have the ability and expertise to carry out medical procedures. Meanwhile, patients are sick people who are unfamiliar with their illness and entrust themselves to be treated and cured by doctors. Therefore, doctors are obliged to provide the best possible medical services for patients. This medical service can be in the form of making a diagnosis correctly according to procedures, giving therapy, carrying out medical actions according to medical service standards, and providing reasonable actions that are really needed to cure the patient's illness.

In the relationship between doctor and patient, each party has rights and obligations. Doctors are obliged to provide medical services starting with question and answer (anamnesis), then a physical examination is carried out by the doctor on the patient. The doctor will determine the diagnosis of the patient's disease. After the diagnosis is established, the doctor decides on the type of therapy or medical action to be performed on the patient.

In the field of medicine, doctors and patients realize that it is impossible for doctors to guarantee that treatment efforts will always be successful according to the wishes of the patients or their families. Doctors only do their best to be careful and careful based on their knowledge and experience in dealing with diseases in order to try to cure their patients' illnesses. Meanwhile, patients have an obligation to check themselves as early as possible about their illness by providing correct and complete information regarding their disease. Patients are also required to comply with the instructions and advice recommended by the doctor regarding eating, drinking, and getting enough rest. In addition, the patient must feel confident that the doctors will try their best to treat the disease, so the patient must be cooperative and not refuse to be examined by a doctor (Fogel et al., 2019).

In their procedures, doctors sometimes have to intentionally hurt or cause injury to the patient's body. For example, a surgeon performs surgery on a

patient's organs. Therefore, in every surgery, the doctor must be careful so that the resulting wound does not cause problems in the future, such as the occurrence of nosocomial infections. In addition, there are also frequent occurrences of negligence, which is a form of error that is not intentional but also not something that happens by chance. So in this negligence, there is no malicious intent of the perpetrator or the prosecuting (de Santana Lemos et al., 2019).

Negligence and errors in carrying out medical procedures lead to patient dissatisfaction with doctors in carrying out treatment efforts, according to the medical profession. These mistakes and errors cause harm to the patient. From a legal point of view, negligence or error will be related to the nature of the unlawful act committed by a person who is capable of being held responsible. A person is said to be able to be responsible if he can realize the true meaning of his actions. An act is categorized as "criminal malpractice" if it fulfills the formulation of a criminal offense, namely that the act must be a disgraceful act and the wrong mental attitude is carried out in the form of intentionality, carelessness, or negligence (Bielen et al., 2020).

The definition of malpractice is the negligence of a doctor or nurse to use the level of intelligence and knowledge in treating and caring for patients, which is commonly used against patients or people who are injured according to the standard in the same environment. From this definition of malpractice, it must be proven whether it is true that there has been negligence by health workers in applying knowledge and skills which are commonly used in that area. If the unwanted result occurs, is it not an inherent risk of a medical action (risk of treatment) because the alliance in the therapeutic transaction between the health worker and the patient is an alliance or agreement type of effort (inspanning verbintenis) and not an agreement or an agreement on the outcome (resultaa verbintenis).



From the several understandings and opinions of the medical law experts above, it appears that there is a difference in viewing the meaning of malpractice and negligence of the medical profession. However, regardless of whether medical malpractice or medical negligence is a different meaning, basically, these meanings are the same, namely a doctor's mistake in carrying out a medical action against his patient, intentionally or unintentionally.

Forms of doctor's responsibility for malpractice in medical practice

Malpractice is carrying out a profession wrongly or wrongly, which can only form legal responsibility for the maker if it results in a loss determined or regulated by law. Malpractice can occur in carrying out all kinds of professions, including the medical profession. Mistakes in carrying out the medical profession will form criminal or civil legal liability (depending on the nature of the consequences of the losses incurred) containing three main aspects as an inseparable unit, namely treatment that is not according to the norm, done with culpa and causing losses in law. Loss in law is a loss stated by law and may be recovered by imposing legal responsibility on the maker and those involved in a legal way. The medical treatment of medical malpractice can be found in examinations, tools and methods used in examinations, acquisition of wrong medical facts, diagnoses drawn from the acquisition of facts, therapeutic treatment, as well as treatment to avoid the consequences of harm from wrong diagnosis or wrong therapy. The imposition of legal responsibility to guarantee the recovery of the rights of the aggrieved patient is also determined by law. The right to legal guarantees between health service providers (especially doctors) and community rights (patients) must be balanced. Both parties are subjects. Not one is an object in medical services. Both receive guarantees and legal protection (Garon-Sayegh, 2019).

Malpractice in a literal sense in the form of deviations in carrying out a profession from causes of negligence (mistakes in the narrow sense) can occur in any professional field, such as advocates, accountants, and possibly in the journalist profession. There are general standards for malpractice behavior, especially medical malpractice, from a legal standpoint that can shape legal responsibility, especially criminal law. The general standard concerns three aspects as an inseparable whole, namely aspects of medical treatment, aspects of the maker's mental attitude, and aspects of the consequences of treatment.

The diversity of understandings is also caused by the absence of specific laws regarding practicing the medical profession, which of course, regulates malpractice in a perfect manner. Meanwhile, legal teachings or legal theories regarding errors and causality also seem to vary, and in certain respects, it is sometimes difficult for some people to understand. This situation leads to the consequence of inequality in legal practice.

Medical treatment that can occur in medical malpractice can be in the examination, examination methods, tools used in examinations, withdrawing diagnoses on the facts of the examination results, forms of therapeutic treatment, as well as treatment to avoid the consequences of losses from misdiagnosis and wrong therapy (treatment after therapy). The aspect of the inner attitude here, which describes the maker's inner relationship with the form of the act as well as the consequences of the act, is a mistake in the narrow sense, which in criminal law is called culpa, especially in the sense culpa lata. Such an inner attitude is the basis for forming criminal responsibility. The consequence aspect must be a result that is detrimental to the patient, both in terms of physical or mental health or the patient's life. This effect must be an unwanted result. This is the characteristic effect of a culpa treatment.



From the point of view of criminal law, at this time, measuring a medical treatment of a health worker, whether it has entered into malpractice that forms legal responsibility, is still conventional in two articles, namely 359 and 360 of the Criminal Code. Both aspects of the form of treatment, the mental attitude of the maker, and the consequences must be measured from the elements of the two articles. With the development of health technology, medical malpractice must also be adapted to these two articles. It seems that the criminal law criteria in the two articles remain a guideline for legal practitioners in resolving cases of alleged medical malpractice from a criminal law perspective.

From the standpoint of civil law, medical treatment by doctors for patients is based on a bond or relationship in the so-called *inspanning verbentenis*. The legal obligation of a doctor is in the form of an obligation to try as hard as possible and earnestly to carry out treatment or healing or restoration of the patient's health, which in that serious obligation contains at the same time the obligation of correct treatment from the standpoint of medical discipline, a normal custom among doctor and propriety. The improper treatment makes a violation of the agreement (default), and if it causes loss, it is an unlawful act (*onrechtmatige daad*). Because this relationship is within a framework of legal (civil) engagement, the doctor's treatment of patients forms civil liability.

The legal relationship between doctor and patient from a civil perspective is in a legal agreement. A legal agreement is a bond between two or more legal subjects to do or not do something or give something (1313 jo 1234 Civil Code). Something called performance. To fulfill the performance, which is basically a legal obligation for the parties who make a legal agreement (in a reciprocal legal agreement). For the doctor, the performance of doing something is a legal obligation to do as well and optimally (medical treatment) for the benefit of the patient's health, and a legal obligation not to make a mistake or make a

mistake in medical treatment, In the sense of the word obligation to best serve the patient's health.

Medical malpractice from a civil point of view occurs when the doctor's misconduct in relation to performance results in civil losses (regulated in civil law). Legal agreements were born by two causes or sources, one by an agreement (1313 Civil Code) and the other by law (1352 Civil Code). The doctor-patient legal relationship is in both types of legal engagements. Violation of the doctor's legal obligations in a legal agreement because the agreement brings a state of default.

Doctor's law violation of the doctor's legal obligations because the law brings a state of an unlawful act (*onrechtmatige daad*) to a doctor where both of them burden the liability for compensation. The burden of responsibility for doctors due to default is wider than acts against the law because, from article 1236 jo 1239 of the Civil Code, in addition to compensation for losses, patients can also demand costs and interest.

Healing or recovery of health is not a doctor's legal obligation but a mere moral and ethical obligation, the consequences of which are not legal sanctions but moral and social sanctions. So, as long as the medical treatment of patients has been carried out correctly and properly according to medical discipline, without the expected healing results, it does not give birth to medical malpractice from a legal standpoint. However, if after medical treatment, there is a condition without the expected results (without healing) or the nature of the disease may get worse due to the doctor's medical treatment, which medical treatment violates medical discipline or deviates from standards, then the doctor may be in a state of medical malpractice. Of course, with conditions, that is, the patient's illness is not cured or the patient's disease is more severe after medical treatment, and from the point of view of medical discipline, the two conditions are really the result (*causal verband*) from medical mistreatment by doctors. If this condition exists, then the doctor is



already in medical malpractice. Therefore the patient also has the right to demand compensation (material and moral) for the doctor's medical treatment error. In the event that the consequences are more severe, the disease reaches certain consequences that meet the criteria of criminal law (359 or 360 of the Criminal Code), it may form criminal liability, the form of which is not just compensation for (civil) losses, but may become a punishment.

Article 359 of the Criminal Code stipulates, "Anyone who, because of his negligence, causes the death of another person, is threatened with imprisonment for a maximum of five years or imprisonment for a maximum of one year." Article 360 of the Criminal Code stipulates, "Anyone who, because of his negligence, causes another person to be seriously injured, is threatened with imprisonment for a maximum of five years or imprisonment for a maximum of one year."

It is different in nature in the case of a violation of a legal agreement that was born because of a law (1352 Civil Code). If in the doctor's medical treatment, there is a mistake by causing a loss, then the patient has the right to demand compensation based on an unlawful act (1365 Civil Code) (Sutarno et al., 2021).

Article 1365 of the Civil Code stipulates, "Every unlawful act, which causes harm to another person, obliges the person who caused the loss because of his/her fault to compensate for the loss." Due to wrongdoing, in the case of a doctor's medical treatment that causes harm to the patient, it can be included in the category of unlawful acts, according to this article. The fault here may be in the form of intentional or negligent doctors, both in terms of acting (active) and not doing (passive) in the medical treatment of patients. The loss must really be caused by a doctor's wrong medical treatment and must be proven both from the point of view of medical science (especially in terms of adverse health and mental consequences) and the point of view of the law or other sciences such as psychology or decency (in terms of

material and moral loss).

Basically, the legal relationship between a doctor and a patient is a civil relationship, which in terms of medical mistreatment, is included in the civil field if the wrong treatment is in the form of default or unlawful act. Entering into default if the doctor does not carry out medical treatment obligations as well as possible and optimally (for example, because patients do not have enough money to pay for their treatment) or carries out obligations that are not in accordance with medical standards.

Service according to medical standards, even though the procedure and form are not known by the patient, is a performance that must be done by a doctor. If the doctor's medical services are outside medical standards (procedures, methods, and tools), it is tantamount to not carrying out their performance (default), and in terms of causing harm to the patient, malpractice occurs, which forms civil liability.

Malpractice is included in the civil or criminal field, and the determining point is in the consequences. The nature of the consequences and the legal location of the regulation determines the category of medical malpractice between criminal and civil malpractice. From the perspective of criminal law, adverse consequences are included in the criminal field if the type of loss is mentioned in the formulation of a crime. As a result of death or injury is an element of crime in Articles 359 and 360 of the Criminal Code, so if negligence or medical treatment occurs and results in death or injury, the type as specified in this article, then medical treatment is included in the category of criminal malpractice.

2. Conclusion

Medical malpractice basically falls into two fields of law, namely civil and criminal. Entered into civil law as a default or unlawful act that imposes responsibility for recovery of losses. Entering the field of criminal law as a crime imposes criminal responsibility. Criminal malpractice basically also enters the civil field through



an unlawful act. Conventionally at the level of criminal malpractice practices are resolved through articles 359 and 360 of the Criminal Code. In civil terms, malpractice is resolved through the unlawful act for compensation through default law (Article 1236 jo Article 1239 of the Civil Code) and unlawful act (Article 1365 of the Civil Code).

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