JUSTICE Voice

Vol. 2 | No. 2 | December 2023 | pp. 79-87
https://ejournal.hukumunkris.id/index.php/justicevoice

Law Enforcement in Medical Malpractice Cases in The Protection of Doctors' Rights: Case Study Tonsil Surgery Causing Brainstem Death in a Child Patient

Anggya Nurmala Putri*, Bagas Pratama Sigalingging, Ummi Yusnita
Universitas Krisnadwipayana, Jakarta, Indonesia
corresponding author: anggyanurmalap@gmail.com

DOI: 10.37893/jv.v2i2.824

Keywords:

Accountability;
Doctors Rights;
Medical Malpractice.

ABSTRACT

This study aims to determine the regulations related to the protection of the professional rights of a doctor who is often suspected of committing medical malpractice in carrying out health services. In this study, the author analyzes the rules of malpractice based on positive law in Indonesia, then the author analyzes the liability carried out by the doctor's profession in suspected malpractice in this study the author takes a case study related to tonsil surgery which caused BA's child patient to experience brain death at the Kartika Husada, Bekasi Hospital. The method used by the author in this research uses normative or dogmatic research methods, which use documents laws, and regulations related to the issues studied and secondary data sources in the form of books and related journals. The results of the research in this case study conclude that there is no single rule that protects the rights of a doctor who is accused of committing malpractice, neglecting these rules only protects the interests of the patient, then the responsibility for the accusation of malpractice must go through the process of proof first, by the provisions of the elements of malpractice both in terms of criminal and civil law, and based on the case study that has been researched by the author, it is concluded that the efforts in dispute resolution made by the family of BA's child patient who has died, are appropriate with the family by withdrawing the police report and carrying out peaceful efforts in the form of mediation with the hospital.

A. INTRODUCTION

Medical malpractice is one of the endless issues in the health sector, which involves medical actions that are considered not by professional standards and have the potential to cause harm or injury to patients. In handling medical malpractice cases, health law enforcement has an important role in maintaining justice for all parties involved, including doctors involved in the case. Doctors are health workers who must provide health services to someone known as a patient, based on good procedures, according to existing legal regulations and professional ethics (Stanford and Connor 2014). A doctor has a responsibility in every action he takes, to handle and fight for the health of his patients as it should be. The doctor's profession is vital in Indonesian legislation

(Sulistyaningrum, Afrilia, and Murty 2022).

Malpractice or medical error is an integral part of the world of health, especially health law. According to Robert J. Blendon (Blendon et al. 2002), it means that malpractice or medical error is an event where a person when sick and getting medical services, due to mistakes made by doctors or institutions, experiences death, disability, or additional/extended treatment. In medical error, according to J.B Suharjo B. Cahyono, describes medical errors, as follows: a) Errors or delays in diagnosis; b) Failure or delay in taking the test; c) Using outdated tests; d) Failure to follow up on test results; e) Surgical or other medical procedure errors; f) Mistakes in therapy; g) Errors in prescribing medication; and h) Delay in treating or responding to test results with abnormal values (J. B. S. B. Cahyono 2013).

In Indonesia, several rules seek to protect the medical profession, if there is a result of actions that are beyond the expectations of a doctor. These rules are contained in Article 50 of Law Number 29 of 2004 concerning Medical Practice (Indonesia 2004), Article 27 paragraph (1) and Article 29 of Law Number 36 of 2009 concerning Health (Indonesia 2009), and Minister of Health Regulation Number 75 of 2019 concerning Malpractice Case Handling System (Minister of Health 2019). Doctors are always faced with a dilemma, because in fact in Indonesia there are several actions that doctors should be able to do, but there are absolute prohibitions by law, one example is *euthanasia*. *Euthanasia* sometimes occurs because doctors have no other choice but to act, what often happens is the type of passive *euthanasia*. However, this is not able to be accommodated by the prevailing laws and regulations in Indonesia in protecting the professional rights of a doctor. Based on criminal law, the responsibility of a doctor is closely related to several provisions in the Indonesian Criminal Code (Sandra and Panji 2022), including:

a) Duty to render assistance (Article 304 of the Indonesian Criminal Code);
b) Negligence resulting in the loss of life of another person (Article 359 of the Indonesian Criminal Code);
c) Actions causing serious injury (Article 361 of the Indonesian Criminal Code);
d) If the act is committed by a health worker (Article 361 of the Indonesian Criminal Code);
e) The emergency relates to the safety of life (Article 531 of the Indonesian Criminal Code).

There is a legal adage, namely *voluntie non fit injura* or assumption of risk (if a person puts himself in a known danger, then he cannot claim responsibility for others. This is certainly related to the professional responsibility of doctors or other health workers, who are in control of the risk to a patient. Herkutanto explains that medical risk or what can be called an untoward result is an incident of injury/risk that occurs as a result of medical action due to something that cannot be predicted in advance and not as a result of incompetence or ignorance, for this medical law cannot be held liable (Herkutanto 2008). On the one hand, doctors have rights that need to be protected in the law enforcement process related to medical malpractice cases. The doctor's rights include the

right to obtain fair and proportional treatment in the investigation and trial process, as well as the right to explain and defend medical actions carried out by professional standards.

Medical practice has always been an endless issue and often raises criticism from various circles. In essence, a doctor is never free from negligence (*culpa lata*). Negligence that occurs beyond the expectation or prediction of a doctor after determining the appropriate action for his patient is often suspected of medical malpractice. A doctor who has worked professionally and by applicable standards is still often accused of alleged malpractice. Based on *Memorie van Toelichting (MvT)*, explains that in negligence (*culpa lata*), three things can be categorized as malpractice in the perpetrator, including a) Lack of thinking; b) Lack of necessary knowledge; or c) Lack of necessary wisdom (Mubarok 2023).

There have been many studies in the form of articles and journals that only protect the interests of a patient, but rarely found research that prioritizes or protects the rights of a doctor. Therefore, in this study, the author considers that there is a need for legal protection for the profession of doctors and other health workers, intending to protect the interests of doctors and other health workers in ensuring that medical practices carried out are by standards and by ethical principles and applicable law. Therefore, health law enforcement must be able to find a balance between the protection of doctors' rights and the protection of the public from unsafe or unethical medical practices. In this context, research on health law enforcement in medical malpractice cases is important to explore how existing legal mechanisms can be used to protect doctors' rights and ensure justice in the law enforcement process, while still paying attention to the public's interest in obtaining safe and quality health services.

In this study, the author analyzes a case that recently occurred at Kartika Husada, Bekasi Hospital, regarding a 7-year-old BA child patient who was declared dead, after experiencing brain death due to respiratory failure and heart failure. This raises the suspicion of the family of Child Patient BA for malpractice committed by the team of doctors in performing tonsil removal surgery on Child Patient BA.

B. METHOD

The author uses normative or dogmatic research methods, which use documents laws, and regulations related to the problems studied by the author. The source data that the author uses in completing this research, is sourced from secondary data derived from literature studies, based on documents and books or related regulations related to the research.

C. RESULTS AND DISCUSSION

Legal Rules of Medical Malpractice

Medical malpractice is also known as medical negligence. According to some experts, medical malpractice can be defined as follows:

a) Wu A. W (American Health Expert). Medical malpractice is a situation where a

doctor has committed a medical error when he/she performs or does not perform a medical effort that has the potential to harm the patient.

b) Zhang. Medical malpractice or medical error is a human error in health care.

c) Soekidjo Notoatmodjo. Malpractice comes from two words, "mal" which means improper, and "practice" which means a procedure in handling patients, so malpractice is an action or practice that is wrong and deviates from standard medical provisions or procedures (J. B. Cahyono and Suharjo 2008).

According to J. Guwandi, malpractice can be said it have fulfilled the elements:

a) Doctor's actions, such as: contrary to ethics or morals; contrary to the law; contrary to the standards of the medical profession; and contrary to knowledge.

b) Neglect, negligence, lack of care, and mistakes.

In general, it can be concluded that medical malpractice is the mistake of a health professional in carrying out his duties. The form of error can be in the form of negligence, negligence, or intentionality that harms a person's health, in this case, the patient. In the development of Health law in Indonesia, several legal rules further explain medical malpractice, as contained in Law Number 36 of 2009 concerning Health, Article 29 states, "If a Health worker is suspected of negligence in carrying out his profession, the negligence must first be resolved by mediation" (Indonesia 2009). While in Article 58 paragraph (1) of Law Number 36 of 2009 concerning Health states, "Everyone has the right to claim compensation against a person, health worker, and/or health provider who causes losses due to errors or negligence in the health services he receives" (Indonesia 2009)

Then Article 32 letter of Law Number 44 of 2009 concerning Hospitals states, "Every patient has the right to sue and/or sue the Hospital if the Hospital is suspected of providing services that are not by standards both civilly and criminally" (Indonesia 2009). Then in the same regulation Article 46 states that, "Hospitals are legally responsible for all losses caused by negligence committed by health workers in hospitals" (Indonesia 2009)

In addition, the Indonesian Criminal Code (KUHP) implicitly regulates the legal provisions due to medical malpractice, among others;

a) Article 359 of the Indonesian Criminal Code states, "Any person who through his fault (negligence) causes someone to die, shall be punished with a maximum imprisonment of 5 (five) years or a maximum light imprisonment of 1 (one) year"

b) Article 360 paragraph (1) states, "Whoever through his fault (negligence) causes serious injury to a person shall be punished with imprisonment for a term not exceeding 5 (five) years or light imprisonment for a term not exceeding 1 (one) year" and

c) Article 360 paragraph (2) states, "Any person who through negligence causes injury to a person in such a manner that the person becomes temporarily ill or temporarily incapacitated from exercising his office or occupation, shall be punished by a maximum imprisonment of 9 (nine) months or a maximum light

imprisonment of 6 (six) months or a maximum fine of IDR 4,000.00 (four thousand rupiahs)" (Moeljatno 2007).

Professional Liability of Doctors in Alleged Medical Malpractice

1) Liability in Criminal Law

Moeljatno argues that a person cannot be held accountable if the person does not commit a criminal act, but if there is a criminal act, he does not have to get a criminal punishment (Moeljatno 2015). From the viewpoint of criminal medical law (criminal medical error), if a criminal act is in the form of intent (*schuld*), or negligence (*culpa/culpa lata*) then the act must be related to the provisions in the Indonesian Criminal Code, including:

a) Duty to render assistance (Article 304 of the Indonesian Criminal Code);
b) Negligence resulting in the loss of life of another person (Article 359 of the Indonesian Criminal Code);
c) Act causing serious injury (Article 360 of the Indonesian Criminal Code);
d) The act is committed by a health worker (Article 361 of the Indonesian Criminal Code);
e) Emergency related to life safety (Article 531 of the Indonesian Criminal Code).

According to Adami Chazawi, an act of medical malpractice, when related to criminal law, must fulfill the following elements:

a) The inner requirements of a doctor;
b) Conditions in medical treatment;
c) Conditions regarding consequences (Chazawi 2010).

In a medical action that is inseparable from medical risks (untoward results), medical actions cannot be predicted due to the inability or ignorance of doctors to carry out a risk prediction. So a doctor who performs medical actions is his main task in health services, for this legally a doctor cannot be held criminally liable. In the criminal liability of the doctor's profession, the actions taken must fulfill the elements of intent or negligence in the knowledge of taking actions that are not by the condition of a patient, resulting in the patient's condition suffering, then it can be held criminally liable.

2) Liability in Civil Law

From the perspective of civil law, it can be said to be a civil medical error if a doctor or other health worker violates a therapeutic contract that has been agreed upon with the patient, this can be called a medical default:

a) Not doing what the agreement says must be done;
b) Doing what the agreement says must be done but being late;
c) Doing what the agreement says must be done but not perfectly;

d) Do what the agreement says should not be done (Aini and Suryono 2020).

The civil liability of a doctor in a *medical* malpractice case is closely related to Article 1366 of the Indonesian Civil Code, which includes:

a) The patient must suffer a loss;

b) The existence of errors or omissions;

c) There is a causal link between the loss and the fault;

d) Such actions are against the law.

Evidence carried out by the patient tends to be difficult to prove due to the lack of information that can be obtained from the medical action. according to civil law, the difficulty of proving the doctor's fault in default is difficult to measure compared to the doctor's performance in carrying out his obligations. In civil law, there is a well-known principle that reads *actori incumbit onus probandi*, which means that who claims his rights must be proven first. if the doctor's actions do not meet this description, it cannot be proven by the patient, but only in the form of allegations, then the doctor cannot be held liable civilly.

Case Study Analysis of a Pediatric Patient Who Experienced Brain Stem Death After Tonsil Surgery at Kartika Husada, Bekasi Hospital

A child patient with the initials BA, 7 years old, was declared dead, after experiencing brain death after undergoing tonsil surgery. Based on Dr. Nidya's testimony, BA's child patient came to the hospital with his family and BA's brother who was about to undergo tonsil surgery as well. The BA child patient was scheduled to undergo tonsil removal surgery first at 12.00 PM, while the brother would undergo surgery at 3.00 PM after the doctor handled the BA child patient. Doctor Nidya said that the condition of the BA child patient before the operation was very stable and the operation was carried out smoothly, seeing the condition of the BA child patient who was stable after the operation, the doctor immediately moved the BA child patient to the treatment room. However, after some time the patient was moved to the treatment room, suddenly the patient had a seizure so the doctor decided to move the patient to the ICU room.

After seeing the condition of the BA child patient who had a seizure, the doctor also asked the patient's family again, "Does the brother want to continue to carry out the operation seeing the condition of the younger brother who has entered the ICU?" the patient's parents still allowed by saying "yes doc, it's okay" said Doctor Nidya, after the brother operated his condition was much more stable than his younger brother who was still in the ICU room. After several days the BA child patient was in the ICU room, the doctor also stated that the BA child patient had a brain stem death and to find out the exact cause, the hospital tried to refer the BA child patient to a hospital that had more adequate facilities, Doctor Nidya stated that he had looked for more than 80 hospitals to refer the BA child patient, but because the BA child patient's condition was very critical, none of the hospitals wanted to accept the referral, until the BA child patient was declared dead at the Kartika Husada, Bekasi Hospital.

Based on the author's analysis of the case study, supported by several sources of information, the author considers that there were no malpractices committed by doctors at the Kartika Husada, Bekasi Hospital. The arguments presented by the author are supported by the results of an audit by the Ministry of Health of the Republic of Indonesia (Kemenkes RI), which states that there were no malpractices or malprocedures in the operation, the Ministry of Health only found that there was one doctor involved in the operation, but his license to practice was inactive and needed to be extended again. However, this is not the cause of the death of the BA child patient, rather this is just a Standard Operating Procedure (SOP) error that must be corrected by the Kartika Husada, Bekasi Hospital.

Then based on the testimony of the BA child's patient's father who stated that when the family wanted to ask for the BA child's patient's medical records, the hospital did not allow this, because medical records are confidential, making the BA patient's family feel odd, thus strengthening the allegations of the BA child's patient's family to the Kartika Husada, Bekasi Hospital Doctor who had caused his son to die, due to medical malpractice. In this case, the author analyzes that medical records are indeed confidential because based on Article 70 paragraph (4) of Law Number 36 of 2014 concerning Health Workers, it states "Medical records of Health Service Recipients as referred to in paragraph (3) must be stored and kept confidential by Health Workers and the leadership of Health Service Facilities" (Indonesia 2014) and this has been strengthened by Article 32 of the Minister of Health Regulation Number 24 of 2022 concerning Medical Records, which states, "The contents of the Medical Record must be kept confidential by all parties involved in health services at Health Service Facilities even though the patient has died" (Minister of Health 2022). Based on the sources that the author has analyzed, the hospital did say that the medical records of BA pediatric patients could not be fully provided because they were confidential, but Doctor Nidya explained that the doctor had explained in detail about the condition of BA pediatric patients and provided several copies of BA pediatric patients' medical documents.

On October 29, 2023, the family of patient BA stated that they had reached a settlement with the Kartika Husada, Bekasi Hospital and had revoked the report on the malpractice of the team of doctors at the Kartika Husada, Bekasi Hospital. The author analyzes that there are three dispute resolution efforts in medical malpractice cases, namely:

1) File criminal charges, requesting that the perpetrator of the malpractice be sentenced to imprisonment or pay a specified fine;
2) File a civil lawsuit to seek material and immaterial damages for victims of medical malpractice; and
3) Conduct family mediation as a peaceful effort.

The settlement made by the family of the BA child patient with the Kartika Husada, Bekasi Hospital was very appropriate because based on the results of the investigation conducted by the Ministry of Health, the respiratory failure and heart failure experienced

by the BA Child Patient did not come from the side effects of the surgical procedure, but it occurred due to complications in the BA Child Patient's body. Based on the principle of *actori incumbit onus probandi*, which means that who claims his rights must be proven first. In this case, the family of the BA child patient cannot prove that malpractice has occurred to their child, but only an allegation, so the doctor at the Kartika Husada, Bekasi Hospital cannot be held liable either criminally or civilly.

D. CONCLUSION

The rules regarding medical malpractice are legally contained in the Indonesian Criminal Code, Law Number 36 of 2009 concerning Health and Law Number 44 of 2014 concerning Hospitals, but these rules, it is very unfortunate because there is not a single rule that protects the rights of a doctor who is accused of committing malpractice, neglecting these rules to protect the interests of patients.

In the liability of a doctor in a malpractice case, criminal and civil liability can be carried out, but before a doctor is held liable for the accusation, it must go through the evidentiary process first, by the provisions of the elements of malpractice both in terms of criminal and civil law.

The dispute settlement carried out by the family of the BA child patient who had died, at the Kartika Husada, Bekasi Hospital was appropriate with the family withdrawing the police report and carrying out peaceful efforts in the form of mediation with the hospital. Because the allegations of medical malpractice are only allegations and cannot be fully proven what caused the BA child patient to die due to respiratory failure and heart failure after undergoing tonsil surgery.

REFERENCES

Aini, Mutia Sezia Nur, and Arief Suryono. 2020. "Akibat Hukum Malpraktik Terhadap Dokter Ditinjau Dari Hukum Perdata." *Jurnal Privat Law* 8 (2): 287–94. https://doi.org/10.20961/privat.v8i2.48422.

Blendon, Robert J., Catherine M. DesRoches, Mollyann Mollyann Brodie, John M. Benson, Allison B. Rosen, Eric Schneider, Drew E. Altman, Kinga Zapert, Melissa J. Herrmann, and Annie E. Steffenson. 2002. "Views of Practicing Physicians and the Public on Medical Errors." *The New England Journal of Medicine* 347 (24): 1933–40. https://doi.org/10.1056/NEJMsa022151.

Cahyono, J. B., and B. Suharjo. 2008. *Membangun Budaya Keselamatan Pasien Dalam Praktik Kedokteran*. Yogyakarta: Kanisius.

Cahyono, J B Suharjo B. 2013. *Menjadi Pasien Cerdas*. Jakarta: Gramedia Pustaka Utama.

Chazawi, Adami. 2010. *Kejahatan Terhadap Tubuh Dan Nyawa*. Jakarta: Rajawali Pers.

Herkutanto, Herkutanto. 2008. "Dimensi Hukum Dalam Pelayanan Kesehatan." In *Lokakarya Nasional Hukum Dan Etika Kedokteran*. Makassar.

Law Number 36 of 2009 Concerning Health.

Law Number 44 of 2009 Concerning Hospitals.

Law Number 36 of 2014 Concerning Health Workers.

Law Number 29 of 2004 concerning Medical Practice.

Minister of Health Regulation Number 75 of 2019 on Health Crisis Management.

Minister of Health Regulation Number 24 of 2022 on Medical Records.

Moeljatno. 2007. *Kitab Undang-Undang Hukum Pidana (KUHP)*. Yogyakarta: Sinar Grafika Offset.

———. 2015. *Asas-Asas Hukum Pidana*. Jakarta: Rineka Cipta.

Mubarok, Rizki. 2023. "Pertanggungjawaban Pidana Dokter yang Melakukan Tindak Pidana Malpraktik di Indonesia." Skripsi, Semarang: Universitas Islam Sultan Agung Semarang.

Sandra, Gustika, and Andi Panji. 2022. "Judicial Review of Criminal Liability of Doctors for Malpractice." *Journal of Indonesian Scholars for Social Research* 2 (2): 98–106. https://doi.org/10.59065/jissr.v2i2.38.

Stanford, Carla Caldwell, and Valerie J Connor. 2014. *Ethics for Health Professionals*. Jones & Bartlett Publishers.

Sulistyaningrum, Helena Primadianti, Dian Afrilia, and Theta Murty. 2022. "Doctor's Legal Protection in Health Services for Covid-19 Patients." *International Journal of Research in Community Services* 3 (1): 21–34. https://doi.org/10.46336/ijrcs.v3i1.181.