



IUS POENALE

Volume 2 Issue 1, Januari-Juni 2021: pp. 63-74.

Faculty of Law, Universitas Lampung, Bandar Lampung, Indonesia.

<http://jurnal.fh.unila.ac.id/index.php/ip>

P-ISSN: 2723-2638 E-ISSN: 2745-9314

Implementation Of Criminal Actions Against Malpractice By Medical Personnel

Zara Shelli Meirosa

zarashellimeirosa@yahoo.com

Klinik Jaya Agung Medical Center Lampung Timur

Submitted: 11 January 2021, Reviewed: 27 January 2021; Accepted: 19 February 2021

Article's Information	Abstract
<p>Key Word: Criminal; Sanctions; Malpractice.</p> <p>DOI: https://doi.org/10.25041/ip.v2i1.2210</p>	<p>Providing health services to the community is very important, where every community must get proper health services and according to permission from the government. However, in terms of providing services to the community, things that are not supposed to be done by medical personnel are not uncommon, such as malpractice. Malpractice in the provision of health services by medical personnel is a legal problem that must be addressed immediately. One way is through criminal threats for the perpetrators. In Law Number 36 of 2009 concerning Health, there have been many provisions regarding criminal sanctions for medical personnel who make mistakes in carrying out their health practices. This action must be assessed in terms of criminal law to impose sanctions on perpetrators who have committed malpractice. The research method used in this study uses a normative approach method. Normative research is legal research, carried out by examining library materials or secondary data as the necessary material to be studied by searching for the regulations and literature related to the problem under study. The approach to the problem used is the statutory approach. The results of this study answer that the types of malpractice committed by medical personnel are when in malpractice, in addition to actions that are considered</p>



negligence, some actions are included in the category of deliberate action and violating the law, the existence of an act, due to serious injury, the causal relationship between severe injuries and forms of action, the existence of forms of actions and the existence of consequences: wounds that cause disease; and injuries which prevent him from carrying out occupational work, or searching for a specified time. Malpractice that is done intentionally is a form of pure malpractice, including in criminal malpractice. Furthermore, the legal consequence of malpractice committed by medical personnel is the emergence of criminal liability for medical personnel as legal subjects which are closely related to proving someone's actions (medical personnel) to be included in the criminal malpractice category if the act fulfills the formulation of criminal offenses. Therefore, the imposition of criminal sanctions against medical personnel who commit malpractice can be punished. This research suggests that law enforcement officials should take an active role in handling malpractice cases in health services.

A. Introduction

Starting this paper the author would like to quote an *adage facinus Quos Inquinat Aequat* which means that mistakes will be attached to those who have done mistakes.¹ Thus, the criminal law in its responsibility does not only impose a legal punishment against the person concerned but also should be fully believed that this person is indeed someone who can be held accountable for a criminal act he has committed in the context of a conviction.² Discussion about punishment, of course, cannot be separated from the purpose of the crime. The purpose of the crime itself is different from the objectives of criminal law. However, these two issues are still interrelated and mutually sustainable. In fact, crime is relatively ineffective in educating the public. Instead, it becomes a frightening factor where there are still many gaps in violations. One example of loopholes that can be exploited by irresponsible individuals such as happened in the handling of the PT Brantas Abipraya case which is one of the State Owned Enterprises in the irrigation construction sector. In this case, PT Brantas Adipraya made an attempt to bribe the prosecutor by mutually closing or stopping the investigation case.³

¹ Sudarto, *Hukum dan Hukum Pidana*, (Bandung: Alumni, 2008), 88.

² Septa Candra, "Pembaharuan Hukum Pidana; Konsep Pertanggungjawaban Pidana Dalam Hukum Pidana Nasional Yang Akan Datang," *JURNAL CITA HUKUM* 1, no. 1 (June 4, 2013): 95895, <https://doi.org/10.15408/jch.v1i1.2979>.

³ Abba Gabrillin, "KPK Tak Temukan Bukti Penerima Di Kasus Suap PT Brantas Abipraya," n.d., accessed April 20, 2020, <https://nasional.kompas.com/read/2016/10/27/17315241/kpk.tak.temukan.bukti.penerima.di.kasus.suap.pt.brantas.abipraya>.

Criminalization can be very useful if it is able to provide self-improvement and improvement to the perpetrators of crime.⁴ Of course this is in line with the educational theory which is the focus of the author's research, it is hoped that the convictions of criminal offenders can be used as lessons for the perpetrators themselves in particular and lessons for the wider community in general. Referring to Article 1 paragraph (7) of Law Number 12 of 1995 concerning Corrections (Correctional Law), "The convict is a convict who has undergone a criminal loss of independence in a correctional institution", the person is deprived of liberty as a result of punishment and is currently serving his sentence in a Penitentiary.⁵

As reported on the website of the Institute For Criminal Justice Reform (ICJR), it is suspected that there were inhuman acts committed by prison officers while carrying out activities of transferring prisoners, against 26 (twenty six) convicted persons, namely dragging and beatings. The convict is a convict of Narcotics Crime who comes from the Narcotics Prison in Bali.⁶ In this context, it does not rule out that the convict with special expertise can still contribute to the advancement of Science and Technology in accordance with their respective fields of expertise even though the person concerned is currently serving a sentence in a correctional facility. In relation to the convict with special expertise, the author takes the example of Siti. Fadilah Supari Convicted of suspected corruption of medical devices convicted based on a court decision with case number: 219/PK/Pid.Sus/2018⁷ has a Doctoral degree in medical science from the Universitas Indonesia (UI).

The Academic Paper on the Draft Criminal Code (*Naskah Akademik RKUHP*) reveals the existence of a new type of crime known in the world that is in line with educational theory, namely supervision and social work crimes. Referring to the Academic Paper, these two types of punishment will be developed as alternative types of punishment for the short-term deprivation of liberty.⁸ This special skill can be utilized through the social work criminal application system. Social work referred to in this research is social work as teaching staff or researchers in certain disciplines. In a punishment, it is possible for judges to be obliged to pay attention to several factors in their decisions, including motives, mental attitudes, and the perpetrators' mistakes, methods. The perpetrator commits a criminal act, his life history and socio-economic condition as well as how the crime affects the future of the criminal offender, the effect of the crime on the victim and his family, forgiveness by the victim and / or his family, and the public's view of the criminal act he has committed.⁹ The purpose and guidelines for sentencing are intended so that there is no parity of sentencing but rational sentencing.¹⁰

Based on the results of the author's search, there are several studies that have similarities with the research conducted by the author, namely the first research by Marcus Priyo Gunarto in 2009 entitled Criminal Attitudes Oriented to the Purpose of Criminality, Gunarto's research focus is on the attitude of punishing through criminal deprivation of liberty by law enforcement officials whether they have considered the period front of the convicted person

⁴Hiariej, *Prinsip-Prinsip Hukum Pidana*, 30.

⁵Article 7 (1) of Law No. 12 of 1995 concerning Correctional.

⁶ICJR, "Perlakuan Tidak Manusiawi Petugas Lapas Harus Jadi Momentum Reformasi Kebijakan Pidana Lapas Termasuk Soal Reformasi Kebijakan Narkotika," n.d., accessed April 20, 2020, <https://icjr.or.id/perlakuan-tidak-manusiawi-petugas-lapas-harus-jadi-momentum-reformasi-kebijakan-pidana-lapas-termasuk-soal-reformasi-kebijakan-narkotika/>.

⁷"Court Judgment No. 219/PK/Pid.Sus/2018," 2018.

⁸BPHN, "Naskah Akademik RUU KUHP" (Jakarta, 2015), 176.

⁹BPHN, "Naskah Akademik RUU KUHP," 37.

¹⁰BPHN, "Naskah Akademik RUU KUHP," 57.

and what is the purpose of punishment.¹¹ Secondly, researches of A.A, Ngurah Oka Yudistira, Darmadi in 2013 entitled the Concept of Criminal Reform in the Draft Criminal Code Darmadi's research focus is on the underlying understanding in designing criminal law reform in Indonesia as well as solutions for imposing criminal sanctions on the accused that will be included in the draft for criminal law reform.¹²

Thirdly, research of Cipi Perdana 2016 is entitled Reconstruction of Criminal Acts of Terrorism in Indonesia. The focus of the criminal's research is on the basis of justifying policies on the existence of sanctions in the punishment of perpetrators of Criminal Acts of Terrorism, formulation of appropriate action sanctions for perpetrators of Criminal Acts of Terrorism in Indonesia's positive legal draft and forms of sanctions can be offered as a form of conviction reconstruction as a form of reform of criminal law related to convictions for perpetrators of Criminal Acts of Terrorism.¹³ Haryono's fourth research in 2017 was entitled Policy of Special Treatment of High Risk Convicts in Prisons which became the focus of Haryono's research was on the special treatment of high risk convicts in prisons and the implementation of special treatment policies for high risk convicts in prisons.¹⁴

Based on the four previous studies that have been described above, there is no research that has a focus on what the author did. Therefore, the formulation of the problem in this research is what is the basis for justifying the imposition of sanctions in the criminalization against the perpetrators of special expertise? and What is the ideal punishment for convicts with special skills in the future? The type of research used in this paper is normative research. The approach used is the statutory approach and conceptual approach. The analysis used is descriptive qualitative analysis.

B. Discussion

1. Malpractice in Health Services

Basically, the doctor's negligence error in carrying out the medical profession is an important thing to discuss, this is because the result of this mistake or negligence has a very detrimental impact. Medical negligence can be classified as malpractice, but in malpractice there is not always an element of medical negligence, in other words malpractice has a wider scope than medical negligence. A clearer difference can be seen from the term malpractice which in addition to covering the element of negligence, also includes actions that are carried out deliberately (*dolus*), are conscious, and the consequences that occur are the goal of the action even though the doctor or medical personnel knows or should know that his action is against the applicable law.

According to the law, the relationship between a patient, a doctor, a nurse is a business relationship agreement, which means that medical personnel such as doctors, nurses, and midwives will try their best to provide medical services. The rights and obligations of patients as consumers of health services, in this case, are doctors. The relationship between the patient and the doctor or the hospital is known as bonding (*verbintensis*). Medical malpractice, according to J. Guwandi includes the following actions:

¹¹ Marcus Priyo Gunarto et al., "ASAS KESEIMBANGAN DALAM KONSEP RANCANGAN UNDANG-UNDANG KITAB UNDANG-UNDANG HUKUM PIDANA," *Jurnal Mimbar Hukum* 24, no. 1 (2012): 83–97, <https://doi.org/10.22146/jmh.16143>.

¹² AA Ngurah Oka Yudistira Darmadi, "Konsep Pembaharuan Pidanaan Dalam Rancangan KUHP," *Ocs.Unud.Ac.Id* 02, no. 02 (2013), <https://ocs.unud.ac.id/index.php/jmhu/article/download/5935/4423>.

¹³ Cipi Perdana, "Rekonstruksi Pidanaan Pelaku Tindak Pidana Terorisme Di Indonesia," *Jurnal Hukum IUS QUIA IUSTUM* 23, no. 4 (2016): 672–700, <https://doi.org/10.20885/iustum.vol23.iss4.art8>.

¹⁴ Haryono Haryono, "KEBIJAKAN PERLAKUAN KHUSUS TERHADAP NARAPIDANA RISIKO TINGGI DI LEMBAGA PEMASYARAKATAN (STUDI KASUS DI LEMBAGA PEMASYARAKATAN KLS III GN. SINDUR) ," *Ilmiah Kebijakan Hukum* 11, no. 03 (November 22, 2017): 231–47, <https://doi.org/10.30641/KEBIJAKAN.2017.V11.231-247>.

- a. Something a healthcare professional shouldn't do;
- b. It doesn't do what needs to be done or neglect obligations;
- c. Violation of provisions following the law.¹⁵

Medical transactions occur in a doctor-patient relationship. That is, each party has its respective rights and responsibilities. The doctor must provide the best medical care for the patient. Medical services will provide the correct diagnosis according to the procedure, provide therapy, carry out medical procedures under medical care standards, and provide what is needed for patient recovery.

This doctor's most significant efforts will enable patients to receive what is expected from a healthy relationship, in particular, to restore or restore health.¹⁶

The inability of medical personnel can enter the field of criminal law if they meet certain conditions in three ways, as follow:

1. Requirements in the mental attitude of health workers;

Mental attitude is something in the heart before anyone else does it. Anything in this inner world can be in the will, knowledge, thoughts, feelings, and everything else from a person that involves and describes such an inner state of attitude. Every average person has such an inner attitude. Under normal circumstances, everyone has the opportunity to direct and express their inner attitude in action. If the ability to direct and manifest the inner nature of a particular action is prohibited, it is called willful. However, if the will to think and feel cannot carry out a prohibited action, then the mental attitude is called neglect. So, the difference between will and negligence is only in terms of level (gradualization). The target level is more significant or greater than the error.

Before treatment, care is carried out by health service providers such as doctors, nurses, and midwives. There are three directions of a doctor's mental attitude, which are:

- a. Internal attitude towards therapeutic action;
- b. Internal stance on the nature of breaking the law today
- c. The mental attitude towards the results of the action.¹⁷

In general, medical malpractice's internal attitude is a mental attitude of neglect (error in the narrow sense), which is deliberately opposed in doctrine (sincere or obsessed), which is always misspelled in the form of legal crimes. Although the legal doctrines of negligence differ, it is possible that the breadth and breadth of the subject can be summed up in two teachings, namely, the teaching of emotional neglect and the objective teaching of the culpa and the teaching of the objective culpa.

Kalpa's view of personal teaching is an explanation of experience, which begins with creating subjective conditions. Assessing people's inner attitudes to measure Calca's existence, negligence can be seen in several elements of action or action, namely, it can be in terms of:

- 1) Categories of work, work methods, and tools;
- 2) Nature of Abuse;
- 3) Action object;
- 4) Consequences of actions.¹⁸

¹⁵ Selly Ismi Qomariyah, Y.A Triana Ohoiwutun, and Sapti Prihatmini, "Tindak Pidana Kelalaian Menyebabkan Luka Yang Dilakukan Oleh Dokter Gigi: Analisis Putusan Nomor: 257/Pid.B/2015/PN.Dps," *Lentera Hukum* 5, no. 3 (December 31, 2018): 465, <https://doi.org/10.19184/ejrh.v5i1.6761>.

¹⁶ M. Jusuf Hanafiah dan Amri Amir, *Etika Kedokteran dan Hukum Kesehatan*, EGC, Jakarta, (1999),pg. 87

¹⁷The author's interview with Aldo Aprizo as the Doctor of Jaya Agung Medical Center, Jaya Agung Sub-Village, Jembrana Village, Waway Karya District, East Lampung Regency, on July 1, 2020.

¹⁸ Setyo Trisnadi, "PERLINDUNGAN HUKUM PROFESI DOKTER DALAM PENYELESAIAN SENGKETA MEDIS," *Jurnal Pembaharuan Hukum* 4, no. 1 (April 15, 2017): 24, <https://doi.org/10.26532/jph.v4i1.1656>.

b. Objective Culpa Concept

The objective view that defines the conditions for negligent action is based on generally accepted habits of justice. If under certain conditions, in certain situations, if some conditions are the same, a person makes choices for specific actions, just as he generally chooses the same choices for others. In such conditions, the situation is not neglected.

Conversely, if you do not choose an action that has become someone's choice in a situation that is generally for the same person under the same conditions, then this action contains negligence when making a choice. In essence, error in the broad and narrow sense refers to the person's inner state, which refers to the consequences of the action, as well as all the conditions that exist around the action, the object of the action, the consequences of the action. Therefore, there are at least four new attitudes of doctors contained in the culpa of medical malpractice, following:

- a. In the form of a case;
- b. By the nature of an illegal act.
- c. Patient (object of the action),
- d. As a result of the action, along with the elements that accompany it.

As the subject of the action, the patient must be informed about everything in the patient, especially those related to the disease (history of disease and causes of disease). However, due to negligence, doctors are not interested in knowing everything about the patient's illness. Everything he needs to know shouldn't be ignored or overlooked, which turns out to be ignored. Ignorance, the effect of which will be decisive on what doctors do with patients, the consequences:

1. Conditions in medical treatment and care, particularly:

The tools used in examinations include medical data to obtain medical data from medical instruments, diagnoses, methods, or procedures, even in postoperative care.¹⁹ From this point of view, another requirement is to whom medical workers, such as doctors, nurses, and midwives, provide medical care. This means that other conditions are sometimes required for certain specific cases, as is valid and justified from general logic. For example, a misdiagnosis (misdiagnosis) is incorrect. However, surgery can be justified if there are good reasons, such as existing medical facts (standardized examination results), are justified in compliance with the diagnosis.

2. Terms Regarding Consequences

The impact that can be felt in the dishonesty of health care workers should have a detrimental effect on legal parties with health workers such as doctors, nurses, and midwives. The crux of this regulation's consequence is that "legal status is determined by the category of illegality by health workers among criminals or civilian illegality". Not profitable from the point of view of criminal law, criminal offenses enter the criminal field. Suppose the type of loss mentioned in the formulation of crime becomes an element of the crime. In that case, the cause of death or injury is an element of the crime under Articles 359 and 360 of the Criminal Code. If medical negligence/treatment occurs, it results in death or injury according to the types specified in this article. Hence the medical treatment is classified as a crime.²⁰

¹⁹The author's interview with Aldo Aprizo as the Doctor of Jaya Agung Medical Center, Jaya Agung Sub-Village, Jembrana Village, Waway Karya District, East Lampung Regency, on July 1, 2020.

²⁰ Heri Setiawan, Devka Octara Putera, and Nicolaas Sugiharta, "PELANGGARAN KODE ETIK KEDOKTERAN PADA KASUS PENGANGKATAN INDUNG TELUR PASIEN SECARA SEPIHAK DI RS. GRHA KEDOYA JAKARTA BARAT," *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 5, no. 2 (December 30, 2018): 99, <https://doi.org/10.24252/jurisprudentie.v5i2.6284>.

Medical malpractice has recently become more and more reported in the media, as community-based medical services are increasingly critical of patients and doctors, among doctors.²¹ And patients have their rights and responsibilities protected by law so that their position is balanced. It is assumed that the dishonesty cases that have occurred so far are only over a hundred criminal cases, perhaps only ten that have been registered. The incident, which has so far been found to be a charge of medical malpractice, did not end in a court ruling and has remained afloat without due process.

While all of the above could be considered medical malpractice, remembering a doctor's mistake is a professional mistake.²² It is not easy for someone (including law enforcement) who does not have a profession to prove it in court, even in that case. This doesn't mean that doctors cannot make mistakes. Thus, in the case of accusations of medical negligence resulting in deaths or serious injuries. Medical negligence must be proven that it is an act of default (wrong) reprehensible in the form of negligence. Internal attitudes towards the illegal nature of the action to be taken may be intentional and may also be negligence/accusation. A measure of whether treatment is based on professional standard operating procedures or common sense is based on medical services, legal norms, and general courtesy.²³

For example, a resident of Bandar Lampung who is suspected of being a victim of malpractice is suspected of mistakenly prescribing drugs by medical personnel, which causes the patient to experience peeling skin and a burning sensation all over the body. As a result, the patient has to lie down with pain due to the suspected malpractice while being treated at the Satellite Inpatient Community Health Center or *Puskesmas Rawat Inap Satelit*. The victim experienced peeling skin with a burning sensation all over the body after consuming the medicine given by the clinic/Puskesmas officer. The next day the victim was referred to the Graha Husada Private Hospital with a peeling skin condition and a burning sensation on the skin. According to the doctor in charge, the victim had an error in taking the drug so that the victim had blisters all over her body.

In the aspect of criminal law, the result of malpractice of medical personnel mentioned above, which may constitute a criminal act (dishonest crime), must be in the form of retribution under legal provisions. This is caused by a violation of the criminal law, which can only occur in a material crime. The consequences are a condition for solving the crime (death, serious injury, and others).²⁴ The policy of managing medical malpractice in the health care sector was previously regulated by Health Law No. 23 of 1992. However, because Law 23 of 1992 is no longer following society's development, considerations, and legal needs, the law has been repealed and replaced by a new health law.

Besides, protection for health recipients, such as doctors, to ensure legal certainty, it is necessary to regulate the implementation of medical practice, particularly Law Number 29 of 2004 concerning medical practice and Law Number 36 of 2009 concerning Health.²⁵ The adoption of both laws had principles that had a positive effect on the law. This means that the

²¹ I Gusti Ayu Apsari Hadi, "PERBUATAN MELAWAN HUKUM DALAM PERTANGGUNGJAWABAN DOKTER TERHADAP TINDAKAN MALPRAKTIK MEDIS," *Jurnal Yuridis* 5, no. 1 (August 2, 2018): 98, <https://doi.org/10.35586/v5i1.318>.

²² Muh Endriyo Susila and Dirwan Suryo Soularto, "IMPLIKASI SOSIO YURIDIS TUNTUTAN PIDANA TERHADAP DOKTER TERKAIT DUGAAN MALPRAKTIK MEDIK," *Jurnal Ilmiah Dunia Hukum* 1, no. 1 (October 30, 2016): 61, <https://doi.org/10.35973/jidh.v1i1.607>.

²³ Riza Alifianto Kurniawan, "RISIKO MEDIS DAN KELALAIAN TERHADAP DUGAAN MALPRAKTIK MEDIS DI INDONESIA," *Perspektif* 18, no. 3 (September 1, 2013): 148, <https://doi.org/10.30742/perspektif.v18i3.26>.

²⁴ Erdiansyah, "Pertanggungjawaban Pidana Terhadap Dokter Atas Kesalahan Dan Kelalaian Dalam Memberikan Pelayanan Medis Di Rumah Sakit", *Jurnal Ilmu Hukum*, Volume 3 No. 2 (2012), pg.5

²⁵The author's interview with Aldo Aprizo as the Doctor of Jaya Agung Medical Center, Jaya Agung Sub-Village, Jembrana Village, Waway Karya District, East Lampung Regency, on July 1, 2020.

law can achieve its objectives, so it can be said to be effective. The enforcement of anti-action laws is a matter of concern for criminal law. The following is a description of the criminal law in the criminal process or criminal process in Law 29 of 2004 concerning Medical Practice and Law Number 36 of 2009 concerning Health.

Departing from the above elaboration of medical personnel classification such as doctors and nurses, from a professional point of view, from a legal point of view, the types of dishonesty can be divided into two types: in particular, moral incapacity and legal incapacity. Criminal malpractice occurs when a patient dies or has a disability due to improper health care or caring for a patient with a disability. There are three forms of criminal malpractice:

- (a) Criminal malpractice on purpose (intentionally), the medical staff does not assist in critical cases, even though it is known that no one else can help make statements without including these professions. For example, having an abortion without medical treatment.
- (b) Criminal malpractice is due to recklessness, for example, taking action that is not legal or does not meet professional standards: taking action without a medical procedure's consent. For instance, the nurse is not present when the IV is placed, making the patient swell on support.
- (c) Criminal malpractice due to negligence, such as disability or death occurs in patients due to careless medical treatment. Contoh : Seorang bayi berusia 3 bulan yang jarinya diamputasi ketika seorang perawat mengeluarkan dahan yang digunakan untuk mengembalikan infus. For an instance, a three month old baby's finger was amputated when a nurse removed a branch that was used to return an IV falsely.

2. Legal Consequences for Malpractice by Medical Personnel

The rules regarding malpractice are currently unclear or still vague. This is because the rules regarding malpractice qualifications are not clearly stated in laws or other regulations. Malpractice cannot be understood with only one scientific side but from a legal perspective. Malpractice contains criminal and civil elements. This should be considered so that each party does not give their interpretation according to their respective knowledge.²⁶ In the Indonesian legal system, where one of the components is one of the substantive laws, there is no known form of malpractice among the prevailing Indonesian favorable laws, both in the health law and medical practice. However, this is contained in Article 54 and Article 55 of Law Number 23 of 1992. These Articles refer to malpractice as a doctor's error or negligence, while in Article 84 of Law Number 29 of 2004, malpractice is a violation of a doctor's discipline.

The main principles used to determine malpractice are quite evident with the professional mistakes during treatment and other parties who are harmed by the doctor's actions. The factors causing this malpractice crime are still confusing. On the one hand, the perpetrator of malpractice cannot be blamed considering that his actions were committed to solving a problem. However, his actions did not guarantee the problem's completion.²⁷ On the other hand, the lack of professionalism in carrying out the profession has resulted in malpractice. This is what the authors make the factors causing the study of this study.

Broader problems that occur in the field of health law include malpractice activities. Malpractice is performing a profession wrongly or falsely, which can only form legal liability for the maker if it results in a loss that is determined or regulated in law. Malpractice can occur in carrying out all kinds of professions, including the medical profession. Errors in

²⁶ Wahyu Wiriadinata, *Dokter, Pasien Dan Malpraktik*, Mimbar Hukum, Volume 26, Nomor 1, Februari, (2014), Balai Pendidikan dan Latihan Kejaksaan Agung RI, pg. 5

²⁷ Sumartini Dewi, "PENYELESAIAN HUKUM DALAM MALPRAKTIK MEDIK," *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat* 12, no. 1 (November 11, 2016), <https://doi.org/10.36356/HDM.V12I1.343>.

carrying out the medical profession will form criminal or civil legal liability (depending on the nature of the resulting losses) containing three main aspects as an inseparable unit:

- (1) Treatment that is not following the norms;
- (2) Performed by negligence (culpa), and;
- (3) Contain the consequences of loss in law.²⁸

Losses are stated in the law and may be recovered by imposing legal responsibility on the perpetrators and those involved by legal means. Medical treatment of medical malpractice consists of examining the tools and methods used in the examination, obtaining incorrect medical facts, diagnoses drawn from obtaining facts, treatment, and avoiding the consequences of losses from misdiagnosis or wrong therapy.²⁹ Negligence/culpa is legal, meaning that the level of application in medical malpractice is not uniform, which creates legal uncertainty. The determining point of legal liability in the medical treatment of medical malpractice lies in the consequences that result in the form of legal harm.

In the following, the author will describe the consequences of criminal law, in this case, positive law related to or in contact with the handling of malpractice by medical personnel in the Perspective of the Criminal Code or the *Kitab Undang-Undang Hukum Pidana* (KUHP). Some legal practitioners argue that the health sector's legal problem, in this case, the nurse and doctor profession, is not a complaint offense, but an ordinary offense so that the investigator can immediately investigate without waiting for the party (family) to report or complain. In formal juridical terms, this is indeed true because Article 102 of the KUHP states, among other things that, "an investigator who knows, receives a report or complaint about an event that is reasonably suspected of being a criminal act, the investigator is obliged to carry out the necessary investigation immediately".

Aspects of criminal law in health service efforts by health workers are related to nurses' responsibilities in health care efforts in hospitals. The ability to be responsible is closely related to criminal acts. A criminal act is a human act that is meant in the offense, is against the law, and can be reproached.

Based on the Criminal Code, a person is considered capable of being responsible for an act committed if:

- a. At the time of doing the deed, the individual was 16 years old (Article 45 of KUHP)
- b. Has not to experience mental disorders (Article 44 of KUHP)
- c. Not in a state of coercion (overmach) (Article 48 of KUHP).
- d. Not because of something forced (Article 49 of KUHP).
- e. Not to enforce statutory provisions (Article 50 of KUHP).
- f. Not because of a position order (Article 51 of KUHP).³⁰

In carrying out their duties, if there are an error and negligence that causes the patient to suffer or suffer severe injuries to the point of death, the nurse can be subject to criminal sanctions or, in this case, can be subject to Article 359 of the Criminal Code/KUHP in Chapter XXI which states that "it causes death or injury by negligence". Based on the formulation of Article 359, the elements are:

1. The perpetrator has been negligent so that the negligence can be brought to account against the perpetrator.
2. This resulted in the loss of the lives of others.

²⁸ Bambang Heryanto, "MALPRAKTIK DOKTER DALAM PERSPEKTIF HUKUM," *Jurnal Dinamika Hukum* 10, no. 2 (May 15, 2010): 183–91, <https://doi.org/10.20884/1.jdh.2010.10.2.151>.

²⁹ Marjan Miharja, "Sanksi Administratif Malpraktik Bagi Dokter Dan Rumah Sakit Di Indonesia," *DE LEGA LATA: Jurnal Ilmu Hukum* 5, no. 1 (January 30, 2020): 51–56, <https://doi.org/10.30596/dll.v5i1.3445>.

³⁰ A A Ngr Dwi Dananjaya et al., "Sanksi Malpraktik Dan Resiko Medik Yang Dilakukan Oleh Dokter," *Jurnal Analogi Hukum* 1, no. 1 (December 17, 2019): 6–10, <https://doi.org/10.22225/1.1.1451.6-10>.

3. There must be a causal relationship between the two things mentioned above, namely negligence and the loss of another person's life.

If you compare Article 338 of the Criminal Code with Article 359, Article 359 is the direct opposite of Article 338 onwards for someone else's death. This means that if in Article 338 the intention is appointed for another person's death, then in Article 359, one must still feel a lighter form of that will (*dolus*), which in this case is negligence. Article 360 of the Criminal Code/KUHP, which in essence states that any person who commits a mistake or because of his negligence causes another person to be seriously injured, causes illness or obstruction to carry out his job, can be punished with the threat of criminal punishment.

Based on the description above, in this case, it can be understood that a nurse in carrying out her duties commits a criminal act of negligence which results in serious injury. This result is a criminal act due to a lack of vigilance or an unwanted action by the perpetrator or the criminal but causing serious injury to a person or patient. Also, for the existence of illness with such a condition, it can only be considered to exist if the perpetrator's act has caused a disturbance to the work of the organs in the body so that they cannot work as usual. The last article is Article 361, which reads: "If the crime applied in this chapter is committed while carrying out a position or job, then the punishment may be increased by one third and can be deprived of the right to do the work used to carry out the crime, and the judge can order the announcement of his decision".

The sound of the article above is a weighting of the penalties of Article 359 and Article 360 and paragraphs (1) and (2) of the Criminal Code/KUHP, which are used only for specific medical personnel such as doctors, nurses, pharmacists, who as experts in their respective jobs are considered to be more careful in doing their job. Suppose the medical personnel does not consider these rules important (neglect) the regulations or obligations demanded by their work, causing the death of people (Article 359) or causing people to get serious injuries (Article 360). Their right to do the job and the verdict is notified.

The causes that determine the nurse's responsibility are the benchmarks for a person's actions. A person's inability to take responsibility is a reason to eradicate mistakes or reasons for justification and forgiveness, meaning that even though a criminal act has been committed, an act is committed by someone who is himself contains one of the six things that determine a person's ability to be responsible, as stipulated in the book I chapter III of the Criminal Code/KUHP, the perpetrator of a criminal act is not sentenced. Criminal action and responsibility are elements that must be fulfilled so that a person who commits an error in the form of deliberate or negligence can be held responsible for a criminal or is subject to criminal law.

C. Closing

1. Conclusion

The concept of malpractice in health services are when there is negligence, there is a form of action, there is a result of serious injury, there is a causal relationship between severe injury and the form of action, there is a form of action, and the result is a wound that causes a disease; and injuries which prevent him from carrying out occupational work, or searching for a specified period. Medical personnel's legal consequence of malpractice is the emergence of criminal, civil, and administrative liability by medical personnel as legal subjects, which are near related to evidence of a person's actions (medical staff) who will be included in the criminal malpractice category.

BIBLIOGRAPHY

A. Book

- Gosita, Arif, 1983. *Masalah Korban Kejahatan*, Jakarta: Akademika Pressido.
- Hanafiah, M. Jusuf dan Amri, Amir, 1999. *Etika Kedokteran dan Hukum Kesehatan*, Jakarta: EGC.

B. Journal

- Candra, Septa. "Pembaharuan Hukum Pidana; Konsep Pertanggungjawaban Pidana Dalam Hukum Pidana Nasional Yang Akan Datang." *JURNAL CITA HUKUM* 1, no. 1 (June 4, 2013): 95895. <https://doi.org/10.15408/jch.v1i1.2979>.
- Dewi, Sumartini. "PENYELESAIAN HUKUM DALAM MALPRAKTIK MEDIK." *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat* 12, no. 1 (November 11, 2016). <https://doi.org/10.36356/HDM.V12I1.343>.
- Dwi Dananjaya, A A Ngr, A A Sagung, Laksmi Dewi, Dan Luh, and Putu Suryani. "Sanksi Malpraktik Dan Resiko Medik Yang Dilakukan Oleh Dokter." *Jurnal Analogi Hukum* 1, no. 1 (December 17, 2019): 6–10. <https://doi.org/10.22225/.1.1.1451.6-10>.
- Hadi, I Gusti Ayu Apsari. "PERBUATAN MELAWAN HUKUM DALAM PERTANGGUNGJAWABAN DOKTER TERHADAP TINDAKAN MALPRAKTIK MEDIS." *Jurnal Yuridis* 5, no. 1 (August 2, 2018): 98. <https://doi.org/10.35586/.v5i1.318>.
- Haryono, Haryono. "KEBIJAKAN PERLAKUAN KHUSUS TERHADAP NARAPIDANA RISIKO TINGGI DI LEMBAGA PEMASYARAKATAN (STUDI KASUS DI LEMBAGA PEMASYARAKATAN KLS III GN. SINDUR)." *Ilmiah Kebijakan Hukum* 11, no. 03 (November 22, 2017): 231–47. <https://doi.org/10.30641/KEBIJAKAN.2017.V11.231-247>.
- Heryanto, Bambang. "MALPRAKTIK DOKTER DALAM PERSPEKTIF HUKUM." *Jurnal Dinamika Hukum* 10, no. 2 (May 15, 2010): 183–91. <https://doi.org/10.20884/1.jdh.2010.10.2.151>.
- Kurniawan, Riza Alifianto. "RISIKO MEDIS DAN KELALAIAN TERHADAP DUGAAN MALPRAKTIK MEDIS DI INDONESIA." *Perspektif* 18, no. 3 (September 1, 2013): 148. <https://doi.org/10.30742/perspektif.v18i3.26>.
- Miharja, Marjan. "Sanksi Administratif Malpraktik Bagi Dokter Dan Rumah Sakit Di Indonesia." *DE LEGA LATA: Jurnal Ilmu Hukum* 5, no. 1 (January 30, 2020): 51–56. <https://doi.org/10.30596/dll.v5i1.3445>.
- Ngurah Oka Yudistira Darmadi, AA. "Konsep Pembaharuan Pidanaan Dalam Rancangan KUHP." *Ocs.Unud.Ac.Id* 02, no. 02 (2013). <https://ocs.unud.ac.id/index.php/jmhu/article/download/5935/4423>.
- Perdana, Cipi. "Rekonstruksi Pidanaan Pelaku Tindak Pidana Terorisme Di Indonesia." *Jurnal Hukum IUS QUIA IUSTUM* 23, no. 4 (2016): 672–700. <https://doi.org/10.20885/iustum.vol23.iss4.art8>.
- Priyo Gunarto, Marcus, Bagian Hukum Pidana, Fakultas Hukum Universitas Gadjah Mada, Yogyakarta Jalan Sosio Justicia Nomor, and Di Yogyakarta. "ASAS KESEIMBANGAN DALAM KONSEP RANCANGAN UNDANG-UNDANG KITAB UNDANG-UNDANG HUKUM PIDANA." *Jurnal Mimbar Hukum* 24, no. 1 (2012): 83–97. <https://doi.org/10.22146/jmh.16143>.
- Qomariyah, Selly Ismi, Y.A Triana Ohoiwutun, and Sapti Prihatmini. "Tindak Pidana

- Kelalaian Menyebabkan Luka Yang Dilakukan Oleh Dokter Gigi: Analisis Putusan Nomor: 257/Pid.B/2015/PN.Dps.” *Lentera Hukum* 5, no. 3 (December 31, 2018): 465. <https://doi.org/10.19184/ejlh.v5i1.6761>.
- Setiawan, Heri, Devka Octara Putera, and Nicolaas Sugiharta. “PELANGGARAN KODE ETIK KEDOKTERAN PADA KASUS PENGANGKATAN INDUNG TELUR PASIEN SECARA SEPIHAK DI RS. GRHA KEDOYA JAKARTA BARAT.” *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 5, no. 2 (December 30, 2018): 99. <https://doi.org/10.24252/jurisprudentie.v5i2.6284>.
- Susila, Muh Endriyo, and Dirwan Suryo Soularto. “IMPLIKASI SOSIO YURIDIS TUNTUTAN PIDANA TERHADAP DOKTER TERKAIT DUGAAN MALPRAKTIK MEDIK.” *Jurnal Ilmiah Dunia Hukum* 1, no. 1 (October 30, 2016): 61. <https://doi.org/10.35973/jidh.v1i1.607>.
- Trisnadi, Setyo. “PERLINDUNGAN HUKUM PROFESI DOKTER DALAM PENYELESAIAN SENGKETA MEDIS.” *Jurnal Pembaharuan Hukum* 4, no. 1 (April 15, 2017): 24. <https://doi.org/10.26532/jph.v4i1.1656>.