

CHAPTER ONE

INTRODUCTION

A. BACKGROUND OF RESEARCH

From 2003 to 2006, LBH Kesehatan¹ has received 373 medical cases from all areas in Indonesia, among others 90 were medical malpractice cases. Based on the data from LBH Kesehatan, it is found that the cases which were settled by them are increasing up to 80 percent.²

In 2006 until 2012, there were 183 medical malpractice cases which were reported to Medical Disciplinary Tribunal (the MKDKI)³. Based on the data, those cases consist of 171 cases which were reported by the people, seven cases reported by institutions, and five cases reported by the other healthcare professionals.⁴

From the data above, it is found that medical malpractice cases increased in the beginning of 2006. There are some reasons for the growth in the medical malpractice claims; the main ones are the greater

¹ *Lembaga Bantuan Hukum Kesehatan* (Legal Aid Institution in Health) is established in order to uphold the rights of the society in the field of health. LBH Kesehatan is recognized by government.

² Angga Aditya Dewa Gede, *Malpraktek di Indonesia*, 8 Oktober 2012, <http://aditpoky.blogspot.co.id/2012/12/kasus-malpraktek-saat-ini.html>, accessed on September 14, 2015 at 10:54 am.

³ *Majelis Kehormatan Disiplin Kedokteran Indonesia* (the MKDKI) is a tribunal which has authority to examine, give decision in case of violation of discipline in medical practice.

⁴ Nur Alim, "*Putusan Majelis Kehormatan Disiplin Kedokteran Indonesia (MKDKI) Sebagai Alat Bukti Awal Dalam Penegakan Hukum Kesehatan*", Universitas Hasanuddin journal, downloaded from <http://pasca.unhas.ac.id/jurnal/files/bfaf75c2e6da88787575bf63e38fa2e4.pdf> accessed on Monday, January 4, 2016 at 02:48 pm.

awareness among people that they have the right to claim as patient, the desire of people to blame someone if something should go wrong and the belief of people that doctors and hospitals should be able to ‘cure’ patients.⁵ This right of patient is protected by the law, state, and related institutions including individuals who conduct medical treatment. Anyone who is against the right of patient will bear consequences before those laws, state, institution, and individual.⁶

The court shall not refuse to examine, hear, and decide on any case which is brought with reason that there is no regulation or no clear regulation applicable to the case. In such a case, the court is obliged to examine.⁷

There is no specific legislation governing medical malpractice then, medical malpractice cases should be interpreted based on the existing legislations. Thus, the rules on negligence either in the Civil Code or the Penal Code will be employed in relation to medical malpractice cases.⁸ Under the Indonesian legal system, negligence constitutes a cause of action that can trigger both civil litigation as well as criminal litigation.⁹

⁵ Brendan Greene, 2005, *Understanding Medical Law*, London, Cavendish Publishing, p. 53.

⁶ Mudakir Iskandar Syah, 2011, *Tuntutan Pidana dan Perdata Malpraktik*, Jakarta, Permata Aksara, p.11.

⁷ The Judicial Power Act 2009 (*Undang-Undang No. 48 Tahun 2009 tentang Kekuasaan Kehakiman Pasal 10 Ayat (1)*).

⁸ Muh. Endrio Susila, “Criminal Prosecution of Doctors in Indonesia Issues and Problems”, *IIUM LAW JOURNAL*, Vol. 23 No.3. 2015, p. 448.

⁹ *Ibid.*

Thus medical malpractice cases may bring about both civil and criminal liability.¹⁰ This distinction between civil and criminal is reflected in the court structure, and medical staff may need to attend proceeding in both civil and criminal court.¹¹

The cases of medical malpractice which are settled in civil courts cannot bring justice easily because generally the burden of proof is on the plaintiff i.e. the patient. This means that the patients must prove that the doctors are guilty.¹²

To prove something is not easy, especially in medical malpractice cases. There are many detailed things which have to be proven related to the medical procedures, disciplines, and related matters. In these respects, doctors know better about these matters as opposite to patients. The patients may have a doctor as an expert witness for solution, but it is not easy to have a doctor to be an expert witness against another doctor, it is almost impossible to happen.

According to LBH Kesehatan, out of 120 cases that were reported to the police, not even a single case that can be settled in the court because when the patients need expert witness, only a few doctors are willing to give their testimony. As dr. Kartono Mohamad said no doctors are willing to make the other doctors, as their friends, suffering

¹⁰ *Ibid.*

¹¹ Brendan Greene, *Op. Cit.*, p. 4.

¹² S. Soetrisno, 2010, "*Malpraktek Medik dan Mediasi Sebagai Alternatif Penyelesaian Sengketa*", Tangerang, PT Telaga Ilmu Indonesia, p. 39.

because of lawsuit.¹³ It is clear that to find a doctor who is willing to help patients against another doctor is difficult because they tend to protect each other.

It is possible for the doctors to be charged with criminal offences arising out of their work. These criminal offences may range from minor criminal assaults to grievous bodily harm and even murder.¹⁴ Criminal proceedings have also been opted by medical malpractice lawyers to avoid the difficulty in proving a doctor's negligence if the case is brought to the civil court.¹⁵

In a criminal procedure, only prosecutor is given the authority to conduct prosecution in the court, no one else.¹⁶ This means that the burden of proof is on the hand of prosecutors. However the difficulty to prove that the suspect is guilty arises because normally prosecutor only has basic knowledge about medical matters and in the fact, the knowledge in that area is urgently needed.

¹³ Tempo, edition Mei 31 – June 6 2010, p. 46 cited from S. Soetrisno, 2010, *Malpraktek dan Mediasi Sebagai Alternatif Penyelesaian Sengketa*, Tangerang, PT Telaga Ilmu Indonesia, p.42. See also S. Soetrisno, 2010, *Malpraktek Medik dan Mediasi Sebagai Alternatif Penyelesaian Sengketa*, Tangerang, PT Telaga Ilmu Indonesia, p.41.

¹⁴ Brendan Greene, *Op. Cit.*, p. 24.

¹⁵ Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3. 2015, p. 449.

¹⁶ Andi Hamzah, 2008, *Hukum Acara Pidana Indonesia Edisi Kedua*, Jakarta, Sinar Grafika, p. 16.

Sometimes the decision which is made by the legal professionals harms the doctors and, as consequences, other disputes may arise. The truth of the statement is supported by the big demonstration of thousands of doctors in Indonesia due to the Supreme Court decision in the case of dr. Dewa Ayu Sasiary Prawani, dr. Hendry Simanjuntak, and dr. Hendy Siagian. In the case, doctors were punished with ten month imprisonment due to a medical malpractice which caused a patient; Julia Fransiska Makatey passing away on April 10, 2010.¹⁷

The doctors claimed that the decision of the court was unfair. According to Medical Ethic Tribunal (the MKEK)¹⁸, those doctors have already executed the right procedure.¹⁹ It can be seen that the decision of Supreme Court was in contradictory to the opinion of Medical Ethic Tribunal which is consisted of the doctors who understand well the right procedures that should be followed and know well whether there is a damage which may be caused by an error. Such things cannot be easily understood by law enforcement officers like polices, prosecutors, lawyers, or judges.

¹⁷ Koran SINDO, "Demo Dokter", 27 November 2013, <http://nasional.sindonews.com/read/810501/16/demo-dokter-1385507699>, accessed on October 23, 2015 at 11:52 am. See also Supreme Court Decision No. 365 K/Pid/2012.

¹⁸ *Majelis Kehormatan Kode Etik Kedokteran* (Medical Ethic Tribunal) is a tribunal which has authority to examine and give decision in case of violation of ethic in medical practice. See also Syahrul Machmud, 2008, "Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek", Bandung, Mandar Maju, p. 179.

¹⁹ Koran SINDO, "Demo Dokter", 27 November 2013, <http://nasional.sindonews.com/read/810501/16/demo-dokter-1385507699>, accessed on October 23, 2015 at 11:52 am.

Beside court, actually, there is a tribunal called Medical Disciplinary Tribunal (the MKDKI)²⁰ which consists of some doctors. Medical Discipline Tribunal has the authority to receive report, examine, and give decision in case of violation of discipline in medical practices.²¹ The patients can bring their complaint to this tribunal beside court. However, the tribunal has weaknesses.

Based on the data and phenomenon above, it is urgent to establish a special court. This research has aim to study the urgency of medical malpractice court for resolving medical malpractice cases in Indonesia. The existence of medical malpractice court may answer the weakness of resolving medical malpractice cases through civil, criminal court and tribunal.

²⁰ The Medical Practice Act 2004. (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 55*).

The Medical Practice Act 2004 not only regulates criminal action in medical practice but also regulates disciplines against medical practice which are under the authority of the special institution i.e. Medical Disciplinary Tribunal (the MKDKI).

²¹ Rinanto Suryadhimirtha, 2011, *Hukum Malapraktik Kedokteran*, Yogyakarta, Total Media, p. 20.

B. Research Problem

1. What are the weaknesses of the current mechanism of resolving medical malpractice cases?
2. What is the urgency of the establishment of medical malpractice court in resolving medical malpractice cases in Indonesia?

C. Objective of Research

1. To collect data on medical malpractice cases in Indonesia.
2. To highlight and discuss the weaknesses of current mechanism of resolving medical malpractice cases.
3. To propose the urgency of establishment of the medical malpractice court in resolving medical malpractice cases in Indonesia.

D. Benefit of Research

The benefits of this research are:

1. Theoretical Benefit.

This research will provide understanding to the society especially as the patients and doctors on the necessity of medical malpractice court for resolving medical malpractice cases in Indonesia.

2. Practical Benefit.

This research will contribute valuable information to the healthcare professionals, legal experts, and especially the government for the purpose of establishing medical malpractice court in Indonesia.