

CHAPTER TWO

LITERATURE REVIEW

A. Medical Practice

The meaning of medical is pertaining, relating or belonging to the study and practice of medicine, or the science and art of the investigation, prevention, cure and alleviation of disease.¹ Practice means the real implementation of theory, or the act of applying the theory.²

Medical practice is a set of activities which are executed by doctors and dentists on patient i.e. medical treatment.³ Medical practice is executed by the doctors on patients to fulfill the rights and obligations of the doctors and also the patients.⁴ Medical practice is executed based on Pancasila, and the value of science, benefit, justice, humanity, balance, and protection, and the safety of patient.⁵

¹ Henry Campbell Black M. A., 1990, "Black's Law Dictionary; Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern", 6th Edition, The Publisher's Editorial Staff.

² Departemen Pendidikan Nasional, "Kamus Besar Bahasa Indonesia Pusat Bahasa Edisi Keempat", (Jakarta: Percetakan PT Gramedia, 2011).

³ The Medical Practice Act 2004. (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 1 Ayat (1)*).

⁴ Adami Chazawi, 2007, "Malpraktik Kedokteran Tinjauan Norma dan Doktrin Hukum", Malang, Bayumedia Publishing, p. 15.

⁵ The Medical Practice Act 2004. (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 2*).

Medical practice is carried out based on the agreement between the doctors or dentists and patients to fulfill the effort for health maintenance, prophylaxis, health improvement, disease treatment, and health rehabilitation.⁶

The regulation on medical practice is proposed to:⁷

1. Give protection to the patients.
2. Maintain and increase the quality of medical service that given by the doctors and dentists; and
3. Give legal certainty for the society, doctor, and dentist.

In implementing medical treatment there must be consideration on the moral, ethics, and the others.⁸ Then, medical practice is related to the moral, and ethics also.

To make medical practice better, medical science is necessary. By medical science, ways to help people can be improved and as a result people can enjoy better health.⁹ By the guidance of medical science and medical ethics, medical practice can be improved.¹⁰

Without medical science and medical ethics there will be no good medical practice because medical practice involves two parties i.e. doctors and patients. Doctors provide medical treatment to the patients

⁶ The Medical Practice Act 2004. (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 39*).

⁷ The Medical Practice Act 2004. (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 3*).

⁸ Sri Siswati, 2013, *Etika dan Hukum Kesehatan dalam Perspektif Undang-Undang Kesehatan*, Jakarta, Rajawali Pers, p. 54.

⁹ Raanan Gillon, "Imagination, Literature, Medical Ethics and Medical Practice", *Journal of Medical Ethics*, 23, (1997), p. 3 – 4.

¹⁰ *Ibid.*

with their medical knowledge skills while patients need good treatment from doctors. In executing good treatment, doctors need good medical knowledge and ethics. The combination of good medical science and medical ethics will create good medical practice.

Lucian L. Leape, M.D., one of the pioneers in health quality research, points out one of the unique aspects of medical litigation that arise out of the culture of medical practice. In everyday practice, the norms of medicine send the clear message that mistakes are unacceptable.¹¹ Medical practice is close to a risk, but in reality the existence of mistake is unacceptable especially mistake which causes a damage, it may drive to medical litigation.

B. Medical Malpractice

Historically, medical malpractice is a new legal issue in Indonesia. This term is used for the first time in academic discourse in 1980s in relation to Dr. Setyaningrum case.¹² However, the issue of medical malpractice attracted public attention, only after the last two decades especially after massive publicity in the media in 2003.¹³

The definition of medical malpractice is not found in any legislation which relates to medical malpractice such as the Medical

¹¹ Philip G. Peters, Jr, "Health Court?", *Boston University Law Review*, Vol. 88:227 (2008), p. 256.

¹² Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 448.

¹³ *Ibid.*

Malpractice Act 2004, the Health Act 2009, the Hospital Act 2009, and the Consumer Protection Act 1999.¹⁴ Since there is no specific legislation governing medical malpractice, it should be interpreted based on existing legislations.¹⁵

Based on Coughlin's Law Dictionary, the definition of malpractice is unprofessional attitude of a professional, such as doctor, nurse, lawyer, accountant, dentist, veterinarian, and others. Malpractice can happen because of the negligence, or lack of skill, or careless in the execution, wrongdoing intentionally or unethical acts.¹⁶

According to Ngesti Lestari, malpractice means wrong execution or wrongdoing.¹⁷ Based on Black Law Dictionary, the meaning of malpractice is any professional misconduct, unreasonable lack of skill or fidelity in professional profession or judicial duties, evil practice, or illegal or immoral conduct.¹⁸

¹⁴ Rinanto Suryadhimirtha, *Op, Cit.*, p. 19.

¹⁵ Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 448.

¹⁶ Cecep Triwibowo, 2014, *Etika dan Hukum Kesehatan*, Yogyakarta, Nusa Medika, p. 261.

¹⁷ Ngesti Lestari, 2001, *Masalah Malpraktek Etik dalam Praktek Dokter* (Jejaring Bioeta dan Humaniora), Malang, Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar, p. 2, 114-115 cited from Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*, Bandung, Mandar Maju, p. 14.

¹⁸ H. M. Soedjatmiko, 2001, *Masalah Medik Dalam Malpraktek Yuridik*, Malang, Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr Saiful Anwar, p. 3 cited from Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*, Bandung, Mandar Maju, p. 14.

Malpractice which is used in a medical term is professional misconduct or lack of ordinary skill in the performance of professional act. A practitioner is liable for a damage or injury caused by malpractice.¹⁹

Malpractice comes from the word wrongdoing or neglect of duty. Therefore, malpractice is a professional misconduct on the part of a professional person such as a physician, a dentist, and a veterinarian. Malpractice may be a result of ignorance, neglect, or lack of skill or fidelity in the performance of professional duties; intentional wrongdoing; or illegal unethical practice.²⁰ Another definition, malpractice means professional misconduct or unreasonable lack of skill. This term is usually applied to such conduct by doctors, lawyers, and accountants.²¹

Apart from the definitions above medical malpractice refers to professional negligence by a health care professional or provider in which treatment provided was substandard, and caused harm, injury or death to a patient.²² According to John D. Blum, medical malpractice is a form of professional negligence in which measurable injury occurs to

¹⁹ *Ibid.*

²⁰ Hornby Cs, *The Advanced Learner's Dictionary of Current English*, 2nd edition, (London: Oxford University Press).

²¹ Henry Campbell Black M. A., 1990, "*Black's Law Dictionary; Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*", 6th edition: The Publisher's Editorial Staff.

²² Christian Nordqvist, *What is Medical Malpractice*, 17 September 2014, downloaded from <http://www.medicalnewstoday.com/articles/248175.php>, accessed on October 29, 2015 at 04:45 pm.

a plaintiff patient as the direct result of an act or omission by the defendant practitioner.²³

According to Junus Hanafiah, medical malpractice is the negligence of a doctor when exercising his skills and knowledges in common treatment to a patient or person causes the patient or the person suffering from injury.²⁴ Medical malpractice or professional misconduct of doctor is an error in carrying out the medical profession which is not in line with the standard of medical profession.²⁵ Medical malpractice is defined as professional negligence of a health care provider who by act or omission causes injury or death to an offence against accepted standards of treatment.²⁶

Another definition, medical malpractice is a professional misconduct of healthcare professional in the medical filed whether in light of the ethical or legal norms.²⁷ In executing medical practice, there are some elements which should be fulfilled by the doctors. Otherwise, the doctors are considered committing medical malpractice. Those

²³ Hermien Hadiati Koeswadji, 1998, *Hukum Kedokteran (Studi tentang Hubungan Hukum dalam mana Dokter Sebagai Salah Satu Pihak)*, Bandung, Citra Aditya Bakti, p. 122-123 cited from Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*, Bandung, Mandar Maju, p. 14.

²⁴ M. Jusuf Hanafiah, Amri Amir, 1999, *Etika Kedokteran dan Hukum Kesehatan*, Jakarta, Penerbit Buku Kedokteran EGC, p. 87 cited from Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*, Bandung, Mandar Maju, p. 22.

²⁵ D. Vironika Komalasari, 1989, *Hukum dan Etika Dalam Praktek Dokter*, Jakarta, Penerbit Pustaka Sinar Harapan, p. 87 cited from Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan Hukum Bagi Dokter yang Diduga Melakukan Medikal Malpraktek*, Bandung, Mandar Maju, p. 13.

²⁶ Santo Davide Ferrara, Rafael Boscolo-Berto, Guido Viel, 2013, *Malpractice and Medical Liability*, London, Sringer-Verlag Berlin Heidelberg, p. v.

²⁷ Ngesti Lestari, *Op. Cit.*, p. 2, 114-115.

elements are known as 4D²⁸; (1) duty of care, (2) dereliction of that duty, (3) direct causation, and (4) damage.²⁹

C. Medical Malpractice Court

The abilities of the doctors are always required to be increased. It is in line with the development of science and medical technology which may drive to the emergence of specialization and sub-specialization. As a result there are changes in healthcare service. The patients are no longer seen as an individual base completely, but only as organs. Moreover, there is the implementation of the principle of economic and health law. It causes that the relationship between the doctors and patients are also changing.³⁰

The relationship between doctors and patients was paternalistic in nature. Now it has changed to be more mechanical and commercial. It seems that the doctors are the sellers of medical services and the patients are the buyers.³¹

For the doctors, the changing really affects the implementation of their profession. If doctors make a mistake or negligence in carrying out

²⁸ 4D; between the people, sometimes there will arise duty of care. The doctors must commit duty of care in carrying the patients. The doctors who did not commit the duty of care, it is the dereliction of the duty of care. If the doctors do not commit his duty of care, and it causes a damage then, it is considered as medical malpractice because there is direct causation i.e. the dereliction of the duty of care which causes a damage. Thus, the doctors must commit the liability.

²⁹ Rinanto Suryadhimirtha, *Op. Cit.*, p. 20.

³⁰ Siska Elvandari, 2015, *Hukum Penyelesaian Sengketa Medis*, Yogyakarta, Thafa Media, p. 111.

³¹ Siska Elvandari, *Loc. Cit.*, p. 112

their knowledge on a patient, and it causes injured or death of a patient, this matter contradicts with the purpose of medical treatment.³²

The relationship between doctors and patients which initially was in order to conduct the recovery efforts can turn into a dispute when the losses experienced by patients due to the negligence or fault of doctors in giving the medical treatment.

Along with the times, the dispute settlement in Indonesia is slowly affected by the western culture which emphasizes that the dispute settlement should be pursued through the courts. Dispute settlement through court is believed may give legal certainty for the parties. The implementation and execution of court decision is easier to be done. As a result, there is a tendency to choose court as mean to resolve the dispute between the parties.³³

Because of the changing, it makes the doctors claimed to be more professional in carrying out their duties. Moreover, people are increasingly aware of the law, make people easily use their right to sue the doctor, bring their cases to the court if doctor's negligence causes injured or death of patient.³⁴

The people who choose court as the mean to settle their dispute, trust that court may give legal certainty. In the other hand, medical malpractice cases are not same with the other cases. Concerning on the

³² *Ibid.*

³³ Siska Elvandari, *Op. Cit.*, p. 104.

³⁴ Siska Elvandari, *Op. Cit.*, p. 113.

lack of knowledge of the law enforcement officers in medical matters, making the establishment of court in health is necessary.

A special chamber in court which only concern on a single matter is believed may give just for both doctors and patients. The special court for resolving medical malpractice cases in Indonesia is becoming the idea to solve the weaknesses of current mechanism. Because it only deals with the medical malpractice cases, it will be, then, known as medical malpractice court. Medical malpractice court here is a kind of the special court. The meaning of special court is a court which has limited jurisdiction that deals with a particular field of law.

The history of special court in Indonesia started from the existence of the Judicial Power Act (*Undang-Undang No. 19 Tahun 1964*). This law describes the meaning of General Court, Special Court, and Administrative Court. General Court consists of Economic Court, Subversion Court, and Corruption Court. Special Court consists of Religious Court, and Military Court. Administrative Court is administrative in nature, hearing cases based on MPR Decree No II/MPRS/1960, and Labor Court hearing cases based on Section 21 of Law No. 18 of 1961 on Main Determinations on Labor.

The Judicial Power Act 1970 (*Undang-Undang No. 14 Tahun 1970*) as an amendment of the Judicial Power Act 1964 (*Undang-Undang No. 19 Tahun 1964*) describes the meaning of four courts which have different jurisdiction and deals with Court Institutions at first and

appeal level. Religious, Military, and Administrative Court are special court because those courts hear only certain cases or deal only with certain people, while General Court is a court which hear cases from all people and in all cases, civil or criminal.

The Judicial Power Act 2004 (*Undang-Undang No. 4 Tahun 2004*) as the amendment of the Judicial Power Act 1970 (*Undang-Undang No. 14 Tahun 1970*) mentions the term of special court. According to the Judicial Power Act 2004 (*Undang-Undang No. 4 Tahun 2004 Pasal 15*), special court can be formed only in one judicial field. The special court based on this law consists of juvenile court, trade court, human right court, corruption court, industrial relation court and tax court.

In the last amendment i.e. the Judicial Power Act 2009 (*Undang-Undang No. 48 Tahun 2009*), the meaning of special court is clearly stated in Section 1 Point (8); it is a court which has authority to examine, hear, and make decision on certain cases which can only be made in one judicial field. The rules on the position of special court is stated more clearly in this law compared to the previous law.

Medical malpractice court as the special court for medical malpractice cases is proposed to specialize in handling medical malpractice claims. The court is distinctive by the use of specially trained adjudicators, independent expert witnesses, predictable damage awards, successful administrative compensation system which is currently

applied in New Zealand and Scandinavia³⁵ and limited programs which is operated in Florida and Virginia.³⁶

The term of medical malpractice court in some other countries is known as health court. In the United States, health court is proposed to change the jurist system.³⁷ The nonpartisan coalition Common Good, led by Philip K. Howard³⁸ and the Harvard School of Public Health have advocated implementing health courts on a wider scale in the U.S.³⁹

³⁵ Martin Keith “Can Health Courts Cure the Malpractice System?”, *Physicians Practice Journal*, volume 20 issue 1 (January 2010).

³⁶ Florida’s Innovative Alternative to Costly Litigation. See also Virginia Birth-Related Neurological Injury Compensation Program.

³⁷ Frank A. Sloan, Lindsey M. Chepke, 2008, *Medical Malpractice*, London, the MIT Press, p. 163.

Juries are ill-equipped to decide complicated issues of causation and duty of care. The jurors are often said to be sympathetic to plaintiffs. Since there are no minimum educational requirements for individuals to serve on juries, there is a general distrust of juries, especially by groups likely to be adversely affected by their decisions. In addition, there are concerns about the inadequacies of juries to decide technical matters common in medical malpractice litigation, and the inexperience of judges in the mainstream judiciary in medical matters. From that reasons, a solution is needed. An alternative specialty courts for medical malpractice are receiving a great deal of public attention in the first decade of the twenty-first century in the United States. The Common Good and the Public Policy Institute are driving the campaign in both public and private spheres, garnering support along the way from health policy scholars, physicians, attorneys, leaders of universities and medical schools, and directors and heads of consumer organizations, among many others. A decade and a half earlier, the American Medical Association (AMA) introduced a proposal utilizing a specialized administrative health court system 1998. The Public Policy Institute and the Common Good’s proposals share essentially the same features as the AMA proposal albeit with a simplified design. However, unlike the current health court proposal, the AMA proposal received little publicity or support.

³⁸ Philip K. Howard is well-known leader of government and legal reform in America, an American lawyer and writer. He is a noted commentator on the effects of modern law and bureaucracy on human behavior and the workings of society. He is the Founder and the Chair of Common Good, a nonpartisan, nonprofit legal reform coalition which is proposing a broad overhaul of American law and government. In 2002, Philip K. Howard formed Common Good which rebuilding legal structures that permit Americans to use common sense.

Reforms championed by Common Good include: creating special health courts. Health court would have judges dedicated full-time to resolve health care disputes. The health court concept is supported by a broad spectrum of health care constituents, including American Medical Association, American Association of Retired Persons, and patient safety experts.

³⁹ Philip Howard, “Special Health Courts: The Cure for Defensive Medicine”, the Atlantic, February 24.

Health court proposals in the U.S define that health court removes the juries and decision-making power is placed with a special judiciary that has scientific training.⁴⁰ In addition, to preserve the neutrality of expert opinions, experts are selected and compensated by the court, not the parties. Also, decisions about standards of care are made as a matter of law by the judge. Compensation schedules are set by an independent body, and reviewed periodically to account for inflation and changing costs specific to medical malpractice injuries.⁴¹

By using trained judges and independent experts, health court advocates hope to achieve more fair decision at lower costs.⁴² Critics of the health court concept contend, that is the concept misconceived, that it would be unfair to patient, that it would be unlikely to achieve its objectives and that such goals can be achieved more fairly and with greater efficiency under the existing civil justice system.⁴³ Beside the contention of the above critics, experts also suggest that health courts would be inevitably biased towards physicians and that the bureaucracy needs to introduce safeguards against such bias would negate any cost savings.⁴⁴

⁴⁰ Frank A. Sloan, Lindsey M. Chepke, 2008, *Medical Malpractice*, London, the MIT Press, p. 177.

⁴¹ Frank A. Sloan, Lindsey M. Chepke, *Op, Cit.*, p. 178.

⁴² Philip Howard, Windows of Opportunity; State-Based Ideas for Improving Medical Injury Compensation and Enhancing Patient Safety, a Common Good report, downloaded from www.commongood.org, accessed on October 29, 2015, (04:52 pm).

⁴³ Maxwell Mehlman, Dale Nance, The Case against Health Courts, April 1, 2007, downloaded from <http://ssrn.com/delivery.php.pdf>, accessed on October 29, 2015 (04:55 pm).

⁴⁴ Philip G. Peters, Jr, "Health Court?", *Boston University Law Review*, Vol. 88:227 (2008).

For the United States as common law country, the existence of the jurist⁴⁵ in the trial process is a must. It cannot be expected that the jurist system has no weaknesses. The problem arises when the case is a complex matter like medical malpractice case. Then, the health court is proposed by its proponents to the government.

Compare to the United States which need to remove the jurist system and have trained law enforcement officers to establish the health court, Indonesia only needs to make a better law enforcement officers in examining medical malpractice cases. It can be seen that the concept of the medical malpractice court is quite similar to the health court, even it is simpler.

The medical malpractice court had ever been proposed by IDI⁴⁶ in form of *Pengadilan Disiplin Profesi Tenaga Medis* in the bill of the Medical Practice Act 2004 (the MPA 2004). It means that the definition of medical malpractice court refers to the court which have ever been proposed by IDI.

IDI proposed that the court would be like Anti-Corruption Court. This court is a special court. Since it is a kind of special court,⁴⁷ the

⁴⁵ The juries are consisted of ten common people, it could be a post man, a house wife and the others as long as they never committed a crime. The country which implement the common law system trust that the decision which is made by common people is better than the people who have position, considering that it is the voice of the society.

⁴⁶ IDI (*Ikatan Dokter Indonesia* (Indonesian Medical Association)) is a medical association in Indonesia. It was established on 1943 and recognized by the state.

⁴⁷ Judicial Power Act 2009 (*Undang-Undang No. 48 Tahun 2009 Pasal 1 Ayat 8*). According to the Judicial Act 2009 Section 1 Point (8); the definition of special court is a court which has authority to examine, hear, and make decision on certain cases which can only be made in one judicial field.

meaning of the medical malpractice court is a court which has authority to examine, hear, and make decision on certain cases (medical malpractice cases) which can only be made in one judicial field.

The court would be put under the General Court, and established in each District Court of Indonesia. Beside the format, IDI also proposed the training mechanism for the law enforcement officers. Every district in Indonesia would have at least two trained judges, and certain number of prosecutors, and police who would get the training.⁴⁸ The law enforcement officers will specialize exclusively in medical malpractice cases and will receive guidance from a neutral medical expert whom he or she appoints.

⁴⁸ Sunarto (*Bagian Hukum, Pembinaan dan Pembelaan di Perhimpunan Klinik & Fasilitas Pelayanan Kesehatan Primer Indonesia*. (Legal Affairs, Development and Advocacy at Indonesian Association of Clinics and Primary Health Care Facilities)), said that the court will be like Anti-Corruption Court, and there will be at least two judges, prosecutors, police who will be trained (Based on an interview held on March 16th, 2016 at IDI – Yogyakarta).