

## **CHAPTER FOUR**

### **FINDING AND ANALYSIS**

#### **A. The Weaknesses of the Current Mechanism of Resolving Medical Malpractice Cases.**

Medical malpractice cases may be settled through both civil and criminal courts. But those settlements have some weaknesses. The weaknesses of the court system drive to the difficulty in settling the cases both civil and criminal. Even for general cases, dispute settlement through court has already obtained bad reputation. It cannot be denied that the settlement of medical malpractice cases through court may also drive to the difficulty. Considering that medical malpractice cases is definitely different from general cases. Medical malpractice cases are complex cases which need a deep and careful analysis.

One of the weaknesses of the court system is the litigation process in the court which generally takes a long time. Because the dispute settlement through court must obey the requirements and procedures of court, as a result the period to solve a dispute is long.<sup>1</sup> For a complex case like a medical malpractice case, careful and comprehensive analyses are needed by the judges in examining the case. It means that the medical

---

<sup>1</sup> Siska Elvandari, *Op. Cit.*, p. 185.

malpractice cases take longer litigation process compared to the other general cases.

Moreover, the longer litigation process of medical malpractice cases requires the parties to pay more because generally litigation process through court use the service of lawyers. High cost is also becoming the weaknesses of the court system.<sup>2</sup> Considering that the litigation process takes long time and spends the high cost, the settlement of the medical malpractice cases through court is not simple anymore.

The above weaknesses are against a principle which is stated by the Judicial Power Act 2009 (*Undang-Undang No. 48 Tahun 2009*). According to Section 2 Point (4) of the Judicial Act 2009; the dispute settlement through court must be settled by simple, fast, and low cost. Even though medical malpractice cases are concluded as complex cases, that principle should be also implemented.

The weaknesses of the current mechanism of resolving medical malpractice cases harm the parties, both doctors and patients. Beside the weaknesses of the current mechanism, the settlement of the medical malpractice cases through court may trigger media judgement. It cannot be denied that medical malpractice case will invite huge attention of the people. It is a kind of important news that has to be separated fast.

The influence of media may bring advantages and also disadvantages. The disadvantage strongly affect for the doctor as the

---

<sup>2</sup> *Ibid.*

suspected in the medical malpractice cases. The people may directly judge the doctors as guilty even though the final decision is not imposed yet. Besides, the principle of presumption of innocence should be applied. This disadvantage incriminates the doctors away before the litigation process starts.

In additional, the current mechanism of resolving medical malpractice cases has also disadvantages in both civil and criminal court. The disadvantages make the current mechanism which has already been weak becoming worse. The disadvantage of the settlement through civil court is the difficulty of the plaintiff i.e. the patients to prove that the doctors are guilty. There are many detailed things which have to be proven related to the medical procedures, disciplines, and other similar things. More importantly, doctors know better about these matters as opposite to patients.

A patient 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 clear that to find a doctor who is willing to help patient against another doctor is difficult because doctors tend to protect each other.

According to Bambang Purnomo<sup>3</sup> to decide on an action which is categorized as medical malpractice is difficult. The lacking of capacity

---

<sup>3</sup> Bambang Purnomo, tanpa tahun, *Hukum Kesehatan*, Program Pendidikan Pasca Sarjana, Fakultas Kedokteran, Magister Manajemen Rumah Sakit, Universitas Gadjah Mada, p. 130 cited from Rinanto Suryadhimirtha, 2011, *Hukum Malpraktik Kedokteran*, Yogyakarta, Total Media, p. 10.

of law enforcement officer in the field of health makes the establishment of court in health is necessary. The weakness of the criminal court is in the law enforcement officers. They do not understand well about medical matters.

Beside court, actually, the patients can bring their complaint to the MKDKI. The MKDKI is an independent body which has task to receive report, examine, and give decision in case of violation of discipline in medical practice.<sup>4</sup> In line with its task, the MKDKI has some authorities. Its authorities are to decide whether there is negligence committed by the doctors and dentists in executing their disciplines of medicine and dentistry, and determine the sanctions.

This body will examine and decide whether a particular medical malpractice case may proceed to criminal prosecution or not, and also identify whether a particular case is under the jurisdiction of the ethical tribunal, or the disciplinary tribunal or the court of justice.<sup>5</sup> The existence of the MKDKI was expected to solve the medical matters especially the medical malpractice cases with a minimum budget compared to the medical malpractice court which was proposed by IDI. This body is also expected to minimize the misinterpretation in part of investigations.<sup>6</sup>

---

<sup>4</sup> Rinanto Suryadhimirtha, 2011, *Hukum Malapraktik Kedokteran*, Yogyakarta, Total Media, p. 20.

<sup>5</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 457.

<sup>6</sup> *Ibid.*

This body is ideal enough to solve the medical malpractice cases in Indonesia, considering the budget owned by Indonesia as a developing state. Having some doctors, the examination process of medical malpractice cases is believed to be more accurate compared to the other means. Then, it will minimize injustice decision. It is established in order to avoid injustice decision made by court and also expected to become an ideal mean to solve medical malpractice cases due to minimum budget owned by the government. In fact, the MKDKI cannot reach the expectation due to some obstacles.

The problems come from the lacking of access to reach this body because the location in the capital city of Indonesia i.e. Jakarta, whereas Indonesia has 34 provinces with 412 districts and 93 cities.<sup>7</sup> The comparison between the number of the possibility of cases and the body which may examine the cases is unrealistic. It is also becoming the main cause why the MKDKI needs long duration for giving decision on disciplinary violation committed by the doctors or dentists.

It needs approximately one year to get decision from the MKDKI whether those particular cases under the jurisdiction of the ethical tribunal, or the disciplinary tribunal or the court of justice.<sup>8</sup> This situation obstructs some people for reporting those particular cases to this body.

---

<sup>7</sup> Direktorat Jenderal Otonomi Daerah, Kementerian Dalam Negeri, <http://www.otda.kemendagri.go.id/index.php/berita-210/300-daftar-jumlah-provinsi-kabupaten-dan-kota-se-indonesia>, accessed on April 27, 2016, at 16:38 p.m.

<sup>8</sup> 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

Besides taking a long time to give the decision, this body is also not famous. Only particular people know this body.<sup>9</sup> The lacking of access, long decision-making, and also known by particular people only are the obstacles faced by the MKDKI in settling the medical malpractice cases.

Beside the obstacles as discussed previously, the point that requires greater awareness is section 66 point (3) of the Medical Practice Act 2004 (the MPA 2004). According to the section, it needs to be considered that the permission to patient to report a violation of discipline in medical practice by doctor to the MKDKI should not deny the right of the patient to bring the case to criminal or civil court.<sup>10</sup> Once again, the role of law enforcement officers are important in settling the medical malpractice cases in Indonesia.

---

that it's taking a long time to get decision from the Medical Disciplinary Tribunal whether the reported medical malpractice case is under jurisdiction of court of justice or not. It could be one year, even more. The Medical Disciplinary Tribunal is taking a long time to give decision because there is only one MKDKI which examines the reported cases. Moreover, the medical malpractice cases are complex cases which need high analysis, meaning to say extra time is needed (Based on an interview held on March 16<sup>th</sup>, 2016 at IDI – Yogyakarta).

<sup>9</sup> 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 few people report the case of medical malpractice to the MKDKI because this body is not famous enough to be known as a body which may examine the medical malpractice cases in Indonesia (Based on an interview held on March 16<sup>th</sup>, 2016 at IDI – Yogyakarta).

<sup>10</sup> The Medical Practice Act 2004 (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 66 Ayat (3).*) *Pengaduan sebagaimana pada ayat (1) dan ayat (2) tidak menghilangkan hak setiap orang untuk melaporkan adanya dugaan tindak pidana kepada pihak yang berwenang dan/atau menggugat kerugian perdata ke pengadilan.*

## **B. The Urgency of the Establishment of the Medical Malpractice Court in Resolving Medical Malpractice Cases in Indonesia.**

The idea of establishing the medical malpractice court was in the framework of strengthening the aim of law i.e. to create benefit, justice and legal certainty. Several factors have led to propose the establishment of the medical malpractice court in Indonesia. For instance, there is a concern about the inexperience of law enforcement officers in medical matters.

Nevertheless, the concept of special court is not new in Indonesia. There are special court for juvenile, corruption, tax and the others. No longer as a new concept, the idea of the establishment of the medical malpractice court is expected to become a reality. In line with that, this court will reach its successful as like as the more recent success of special courts in the other areas of the law. This chapter will provide the urgency of the establishment of the medical malpractice court for resolving medical malpractice cases in Indonesia.

If a medical malpractice case appears, there will be two possibilities. The liability and settlement. Since there is no legislation governing medical malpractice, the cases of medical malpractice should be interpreted based on existing legislation. Based on the existing legislation, medical malpractice case can be approached from both civil liability and criminal liability.

As mentioned before medical malpractice cases may be settled through litigation process inside of the court, whether it is civil or criminal. The doctors may be trapped into criminal prosecution due to their involvement in various criminal offences. There are many offences which are relevant to the medical profession. These can be seen in various legislations such as the Indonesian Penal Code, the Medical Practice Act 2004 and Health Act 2009. Those offences may be called medical-related offences or simply medical offences (*tindak pidana medik*).<sup>11</sup>

The example of those medical offences are disclosing confidential information,<sup>12</sup> being involved in illegal abortion,<sup>13</sup> absence of a registration letter (*STR*),<sup>14</sup> absence of a practicing license (*SIP*),<sup>15</sup> being involved in trade of body organs or body tissues,<sup>16</sup> and the other offences mentioned in related regulations. Those medical offences are clear enough to be understood. For example, the doctors who disclose their patient's confidential information which the law requires to be protected, will be punished.

---

<sup>11</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 447.

<sup>12</sup> The Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana Pasal 322*).

<sup>13</sup> The Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana Pasal 348 (1)*).

<sup>14</sup> The Medical Practice Act 2004 (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 75*).

<sup>15</sup> The Medical Practice Act 2004 (*Undang-Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasal 76*).

<sup>16</sup> The Health Act 2009 (*Undang-Undang No. 36 Tahun 2009 Tentang Kesehatan Pasal 192*).



The thing will be different if the case is medical malpractice. The medical malpractice cases need special treatment because there is a distinction between medical offences and general offences. Intentionally murder a person is a crime, causing the death of the patient intentionally is a crime, not a medical malpractice. The essence of medical malpractice is negligence of medical practitioners.<sup>17</sup>

Criminal act can be classified based on some considerations, one of them is based on the intention of the offender. Based on the intention of the offender criminal act is classified into:

1. *Dolus Delicten*; criminal act which is done intentionally/intentionally act.
2. *Culpus/Culpa Delicten*; criminal act which is done unintentionally. It is usually caused by the negligence. It is enough to punish the offender by the existence of that element i.e. negligence.<sup>18</sup>

It can be seen that even though the action is unintentionally, when the result of the action is causing injury or death of someone, it is punishable. Criminal law recognizes that *culpa* or unintentionally act as a mistake reflected as one of the requirements of sentencing.

As mentioned before, the unintentionally act is usually caused by the negligence. The essence of medical malpractice is negligence of

---

<sup>17</sup> Hendrojono, 2014, *Batas Pertanggungjawaban Pidana Dokter dalam Malpraktik Medik di Rumah Sakit*, Yogyakarta, Rangkang Education, p.7, cited from Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 450.

<sup>18</sup> Yeni Widowaty et al, 2007, *Hukum Pidana*, Yogyakarta, Lab Hukum UMY, p. 25-26.

medical practitioners. When dealing with the issue of a doctor's negligence has resulted in injury or death, section 359 and 360 of the Indonesian Penal Code will be the main reference used by the prosecutor in making a prosecution.

Section 359 states:

*Barangsiapa karena kesalahannya (kealpaannya) menyebabkan orang lain mati, diancam dengan pidana penjara paling lama lima tahun atau pidana kurungan paling lama satu tahun.* (Any person by whose negligence the death of another person is caused, shall be punished by a maximum of five years imprisonment or a maximum of one year detention.)<sup>19</sup>

Section 360 (1) states:

*Barangsiapa karena kesalahannya (kealpaannya) menyebabkan orang lain mendapat luka-luka berat, diancam dengan pidana penjara paling lama lima tahun atau pidana kurungan paling lama satu tahun.* (Any person who through whose fault a serious physical injury is caused to another person, shall be punished with a maximum of five years imprisonment or a maximum of one year detention.)<sup>20</sup>

Section 360 (2) states:

*Barangsiapa karena kelalaiannya (kealpaannya) menyebabkan orang lain luka-luka sedemikian rupa sehingga timbul penyakit atau halangan menjalankan pekerjaan jabatan atau pencarian selama waktu tertentu, diancam dengan pidana penjara paling lama sembilan bulan atau pidana kurungan paling lama enam bulan atau pidana denda paling tinggi empat ribu lima ratus rupiah.* (Any person through whose negligence is caused the serious physical injury of another person, or such a physical injury that temporary illness or an obstacle arises in exercising his official

---

<sup>19</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 454. See also the Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana Pasal 359*).

<sup>20</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 455. See also the Indonesia Penal Code (*Kitab Undang-Undang Hukum Pidana Pasal 360 (1)*).

or professional activities, shall be punished by a maximum imprisonment of nine months or a maximum detention of nine months or a maximum fine of three hundred rupiahs.)<sup>21</sup>

Dealing with the medical malpractice cases, it can be concluded that the doctors may be trapped in criminal prosecution because the existence of section 359 and 360 of the Indonesian Penal Code. Those sections always be the main reference for the prosecutor to prosecute the doctors. From the *delik* (offence) of section 359 and 360 of the Indonesian Penal Code, it can be seen that the term of negligence is the reason why medical malpractice cases may be brought to the criminal court.

Due to the existence of the Health Act 2009, the use of section 359 and 360 for medical malpractice cases is limited. Section 29 of the Health Act 2009 provides that disputes arising in the health services are to be first settled through the mechanism of mediation.<sup>22</sup> Mediation process is always offered to the parties before the litigation process. Having many advantages, mediation as one of alternative dispute resolution is better than litigation process inside of court. However if the decision is not agreed, the parties may proceed the settlement to the court. Still, the litigation process inside of court is unpredictable.

---

<sup>21</sup> The Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana Pasal 360 (2)*).

<sup>22</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 456. See also the Health Act 2009 (*Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan Pasal 29: Dalam hal tenaga kesehatan diduga melakukan kelalaian dalam menjalankan profesinya, kelalaian tersebut harus diselesaikan terlebih dahulu melalui mediasi.*).

The use of section 359 and 360 is no longer appropriate for medical malpractice cases because of the existence of the Healthcare Professionals Act 2014. The Healthcare Professionals Act 2014 has specifically governed the issue of medical negligence amounting to criminal liability.<sup>23</sup>

Section 84 (1) states:

*Setiap Tenaga Kesehatan yang melakukan kelalaian berat yang mengakibatkan Penerima Pelayanan Kesehatan luka berat dipidana dengan pidana penjara paling lama 3 (tiga) tahun. (Any healthcare professional who commits gross negligence and causes serious injury to the healthcare receiver, is subjected to a maximum of three years imprisonment).<sup>24</sup>*

Section 84 (2) states:

*Jika kelalaian berat sebagaimana dimaksud pada ayat (1) mengakibatkan kematian, setiap Tenaga Kesehatan dipidana dengan pidana penjara paling lama 5 (lima) tahun. (If the mentioned gross negligence has resulted in the death of the healthcare receiver, the healthcare provider in question is punishable with a maximum of five years imprisonment).<sup>25</sup>*

Even though section 359 and 360 of the Penal Code are no more applicable for medical malpractice cases due to the existence of section 84 of the Healthcare Professionals 2014, the threat of their application by police investigators still exists.<sup>26</sup> This due to the lack of

---

<sup>23</sup> *Ibid.*

<sup>24</sup> The Healthcare Professionals Act 2014 (*Undang-Undang Nomor 36 Tahun 2014 Tentang Tenaga Kesehatan Pasal 84 Ayat (1)*).

<sup>25</sup> The Healthcare Professionals Act 2014 (*Undang-Undang Nomor 36 Tahun 2014 Tentang Tenaga Kesehatan Pasal 84 Ayat (2)*).

<sup>26</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 456.

understanding of police investigators on the issue of medical malpractice and the development of the law relating to medical malpractice.<sup>27</sup>

According to section 84 (1) and 84 (2), the use of term negligence still exists. There is no specific difference between the regulations in Indonesian Penal Code and the Healthcare Professionals Act 2014 for medical malpractice cases, except the punishment. The existence of section 84 (1) and 84 (2) of the Healthcare Professionals Act 2014 which prevails section 359 and 360 of Indonesian Penal Code cannot alienate the doctors from criminal prosecution.

The law enforcement officers still have significant roles in handling the medical malpractice cases. To decide a medical treatment resulting in injury or death caused by a negligence is not easy even definitely difficult.

If the case is general offence, there will be no question. It will be different if the case is medical malpractice. If the medical malpractice is concluded as a complex case, the law enforcement officers need to know the medical matters including the Standard Operating Procedures to know whether the injury or death of patient caused by doctor's negligence.

In nature, no doctor wants to injure the patient intentionally. When executing the treatment, doctors are burdened by the existence of

---

<sup>27</sup> *Ibid.*

the risk. Sometimes, the risk arises in form of damage even though the procedures have already been executed right. The medical risk will always exist, but the doctors according to the oath have to take care and release the patients suffering from the hurt and damage.

From the reality as explained before, in criminal proceeding both patients and doctors need a truth whether the doctors are guilty or not. The decision is important because the consequences for both parties is not meaningless. For thus important decision, it is needed a good examining process conducted by the law enforcement officers.

Basically the relationship between the doctors and patients is contractual in nature. This relationship under the Indonesian medical jurisprudence is often called as “*transaksi tarapeutik*.”<sup>28</sup> The validity of the contract is subject to several requirements as intended in section 1320 of the Indonesian Civil Code.

Section 1320<sup>29</sup> states:

*Syarat terjadi persetujuan yang sah, perlu dipenuhi empat syarat;* (The validity of the contract is subject to four requirements)

1. *Kesepakatan mereka yang mengikat dirinya;* (There must be consent of the individuals who are bound thereby ;)
2. *Kecakapan untuk membuat suatu perikatan;* (There must be capacity to conclude an agreement ;)
3. *Suatu pokok persoalan tertentu;* (There must be a specific subject ;)
4. *Suatu sebab yang tidak terlarang.* (There must be an admissible cause.)

---

<sup>28</sup> M. Endrio Susila, *Health Law*, Bahan Kuliah UMY, Ilmu Hukum S1, 2015.

<sup>29</sup> The Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata Pasal 1320*).

The contract emerges when an offer meets the acceptance. The contract between the doctors and patient exist when the patients accept the contract offered by the doctors. When a valid contract exists, it rises contractual obligation.

It is the obligation for the doctors to fulfill the material of the contract offered to the patients. It refers to the carrying out of the medical treatment. When a contractual obligation is violated, it will give rise a contractual liability.<sup>30</sup>

Thus, in civil law section 1239 of the Indonesian Civil Code may be used by the defendant against the doctors in accordance with the absence of the fulfillment of the contractual obligation. Another legal basis usually used in civil law related to the medical malpractice cases is section 1365 of the Indonesian Civil Code on tort. All damage outside breach of contract are included into tortuous liability.

For further explanation medical malpractice is from the name of wrongdoing or wrong. Wrongdoing consists of civil wrong, administrative wrong and criminal wrong. If a civil wrong arises, there will be civil liability. The medical malpractice cases may be concluded into two civil cases:

---

<sup>30</sup> M. Endrio Susila, *Health Law*, Bahan Kuliah UMY, Ilmu Hukum S1, 2015.

## 1. Breach of contract.

Breach of contract is related to the contractual liability. The legal basis of contractual liability is section 1239 Indonesian Civil Code.

Section 1239 states:

*Tiap perikatan untuk berbuat sesuatu, atau untuk tidak berbuat sesuatu, wajib diselesaikan dengan memberikan pengantian biaya, kerugian, dan bunga, bila debitur tidak memenuhi kewajibannya. (Every obligation to do something, or not to do something, if the debtor fails to meet his obligations, is settled by way of compensation of costs, damages and interest.)<sup>31</sup>*

## 2. Tort.

The word tort derives from the French word for wrong, in legal sense tort is common law term which does not have a true parallel in continental legal system.<sup>32</sup> But currently the terminology tort has become common parlance.<sup>33</sup>

Tort is defined as certain of the consequences of such conduct in respect of which the law allows a civil action for unliquidated damages.<sup>34</sup> Thus, tort is civil wrong that unfairly causes someone

---

<sup>31</sup> The Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata Pasal 1239*).

<sup>32</sup> Cees Van Dam, 2013, *European Tort Law: Second Edition*, Oxford, Oxford University Press, p. 5 – 6.

Tort law is not only governed by national law but also by global international treaties which govern liability for risks having an international impact. An obvious example of a risk having an international dimension is the liability for damage caused by nuclear accidents. The first treaties on this matter date from the early 1960s, shortly after the first nuclear power stations were opened.

<sup>33</sup> *Ibid.*

<sup>34</sup> J. S. Colyer and W. A. J. Farndale, 1996, *A Modern View of the Law of Torts*, London, Pergamon Press London, p. 2.



else to suffer loss or harm resulting in legal liability. Although crimes may be torts, the cause of legal action is not necessarily a crime, as the harm may be due to negligence which does not amount to criminal negligence. The victim of the harm can recover their loss as damages in lawsuit.

In Indonesia tort is regulated in section 1365 Indonesian Civil Code.

Section 1365 states:

*Tiap perbuatan yang melanggar hukum dan membawa kerugian kepada orang lain, mewajibkan orang yang menimbulkan kerugian itu karena kesalahannya untuk menggantikan kerugian tersebut. (Every unlawful act that causes a damage onto another person obliges the wrongdoer to compensate such a damage.)<sup>35</sup>*

Section 1365 of Indonesian Civil Code mentioned that if there is unlawful act that causes a damage there will be compensation. This section is supported by section 1366 and 1367 of Indonesian Civil Code also. Section 1366 mentioned that a person is responsible, not only for the damage which he has caused by his act, but also for that caused by his negligence or recklessness.<sup>36</sup> Section 1367 mentioned that a person is responsible not only for the damage which was caused by his own,

---

The victim can only sue if he has suffered some actual loss as a result of the consequences of the defendant's conduct. The purpose of the law of tort is to compensate the victim. The law seeks to put a money value upon his loss and by an award of damages of that amount to put the victim back in the same economic position which he would have been in if the tort had never been committed. Theoretically, the court even has to value such injuries as loss of life, physical injuries in terms of money. In tort, the plaintiff claims compensation, but leaves the amount to be assessed by the court.

<sup>35</sup> The Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata Pasal 1365*)

<sup>36</sup> The Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata Pasal 1366*)

but also caused by the acts of individuals under his supervision.<sup>37</sup> The damage caused by doctor's negligence or recklessness must be compensated.

Based on the explanation, both criminal and civil law are applicable to settle the medical malpractice cases since those legislations applicable for medical malpractice cases. It depends on the content or the aspect whether the medical malpractice or for instance the wrongdoing that is done in form of breach of contract or tort or criminal wrong. If it is breach of contract, there will be civil liability which is usually reflected in form of damages, and if it is criminal wrong then, there will be criminal liability which is reflected in form of imprisonment or detention.

To receive whether the liability is civil or criminal, the litigation process inside of the court is unavoidable. It has been commonly understood that in dealing with social problems, criminal law should be used as the last resort. Being characterized as the ultimate remedy (*ultimum remedium*), the application of criminal law should be put in the last priority.<sup>38</sup> In line with that, the way to solve the problems through court should be put in the last priority, but sometimes the litigation process inside of the court is unavoidable be it civil or criminal cases.

---

<sup>37</sup> The Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata Pasal 1367*)

<sup>38</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IIUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 452.

For those unavoidable cases especially medical malpractice cases, if the matters can only be settled by careful, thoughtful, and comprehensive analysis, the justice should be promoted well. The lacking of capacity of law enforcement officers in the field of health makes the establishment of court in health necessary.<sup>39</sup>

The establishment of court in health is reflected in the idea of the establishment of the medical malpractice court. The establishment of the medical malpractice court in Indonesia had ever been proposed in the bill of the MPA 2004 by IDI in form of *Pengadilan Disiplin Profesi Tenaga Medis*. IDI proposed the court would be like *Pengadilan TIPIKOR* (Corruption Court), put under the General Court, and established in each District Court of Indonesia.

Besides this format, IDI also proposed the training mechanism for the law enforcement officers. For each district, there will be at least two judges who would be trained about medical matters. For the other law enforcement officers like the prosecutors and the police, there would be certain numbers to be trained about medical matters also. Thus, for every district in Indonesia there will be some law enforcement officers who know the basic knowledge of medical matters. The medical malpractice cases may be examined by more proper law enforcement officers.

---

<sup>39</sup> Bambang Purnomo, tanpa tahun, *Hukum Kesehatan*, Program Pendidikan Pasca Sarjana, Fakultas Kedokteran, Magister Manajemen Rumah Sakit, Universitas Gadjah Mada, p. 130 cited from Rinanto Suryadhimirtha, 2011, *Hukum Malpraktik Kedokteran*, Yogyakarta, Total Media, p. 10.

As mentioned before that the misconceived of medical malpractice cases by police investigators may led the medical malpractice cases are processed in wrong chamber. By the establishment of the medical malpractice court then, the medical malpractice cases may be examined more proper processes by the police investigators because the law enforcement officers, including the police, have been trained.

Since there is no trained police investigators and supervision in handling of reported medical malpractice cases, there will be concern about the misuse of power by the police investigators. The use of mediation process which is becoming the first stage before court may be missed.

The misconceived of medical matters especially medical malpractice may led to horrible result whether in investigations level or litigation process. The need of trained law enforcement officers in handling medical malpractice cases is urgent. In line with that, special court which has authority to examine, hear, and make decision on certain case is the most suitable chamber to accommodate the litigation process on medical malpractice cases. By only examining the medical malpractice cases and the existence of trained adjudicators, the medical malpractice court as special court is suitable and necessary.

The establishment of the medical malpractice court will be necessary as long as there is no specific regulation which regulates the medical malpractice. Since there is no specific regulation about medical malpractice, it will refer to the existing regulation. Considering the existing regulation which may cover medical matters especially medical malpractice, the settlement of the medical malpractice cases could be settled through civil or criminal court. The establishment of medical malpractice court is for avoiding the undesirable things due to injustice decision caused by inexperienced law enforcement officers about medical matters.

Beside the urgency of the medical malpractice court, this chapter will also provide the potential benefits of the medical malpractice court in order to strengthen the idea of the establishment of the medical malpractice court. It is also to show and ensure the readers especially the government that this special court is considerable to be established in Indonesia.

Proponents of medical malpractice court contend that these special court would offer several potential advantages compared to the existing system. The advantages of the medical malpractice court are:

1. The medical malpractice court may promote more justice and legal certainty for both parties.<sup>40</sup>

---

<sup>40</sup> 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 one of advantage that can be accepted by the existence of medical malpractice court is

As mentioned before that the aim of law is to create justice and legal certainty. The government has a big role in realizing those things. When the people are comfortable with the services provided by the government in form of justice and legal certainty which are reflected in law, the government successfully provides the welfare for the people as the most important task of the government.

Considering dr. Ayu case, the doctors claimed that the decision of the court was unfair. The court is established as a mean to solve cases, to find the truth, justice and legal certainty. In reality, the court decision may harm the other parties and trigger another dispute, and make it more complicated.

Based on the phenomenon of dr. Ayu case, the existing system of medical malpractice adjudication reaches irrational and unjust outcomes. Indonesia needs to redesign the system for resolving medical malpractice cases with more rational and fair outcomes. The existence of medical malpractice court may bring more justice and legal certainty for both patients and doctors.

By establishment of the medical malpractice court, the verdict and settlements will be more rational and fair because the medical malpractice court will rely on specialized judges.<sup>41</sup> Actually the problem of the existing system is the law enforcement officers

---

it can promote the aim of law i.e. benefit, justice and legal certainty. (Based on an interview held on March 16<sup>th</sup>, 2016 at IDI – Yogyakarta).

<sup>41</sup> Philip G. Peters, Jr, "Health Court?", *Boston University Law Review*, Vol. 88:227 (2008), p. 231.

including the judges who cannot be expected to be highly knowledgeable on the technical issues in the medical malpractice cases. Therefore, it creates a more difficult litigation process. Having specialization in the area, judges could become more knowledgeable about medical issues.

It is believed that medical malpractice court will alienate doctors from criminalization process and the patient may get easiness in litigation process because medical malpractice cases will be examined by law enforcement officers who have already known medical matters. The justice as the subject that must be provided by the law. The main issue which is becoming debatable among people or the justice seekers – the doctors and patients, can be resolved by the existence of the medical malpractice court.

Moreover, the decision of the court brings legal certainty compared to the other means of dispute resolution. The binding force of the court can bind the parties to obey the decision. This nature is very strong and it becomes advantage for both parties if the parties do not have good faith – the main required thing in dispute resolution outside of the court, to solve the case. The truth which is reflected as the court decision protected by the law and it cannot be denied or ignored by the parties because there will be punishment if the parties do not obey the final decision.

Thus, if the medical malpractice court is established, the medical malpractice cases would be examined by trained adjudicators. The process and the result of the litigation are believed to bring justice compared to the litigation process in general court. The decision which is believed bring justice will be protected by the law and it must be obeyed by the parties then, if the doctors are not guilty, there will be legal certainty because it is court decision.

An accurate decision making in complex cases like in medical malpractice requires deep analyses by judges. A medical expert who can give guidelines on knowledge of medical matters is also needed. These trained judges are the real advantages of the medical malpractice court compared to general court. By having a deeper analysis on these complex cases, it can be concluded that medical malpractice court will produce more accurate outcomes in medical malpractice dispute.

2. The medical malpractice court may give more advantages for both doctors and patients.

Having more trained judges, the medical malpractice court will give more advantages for both doctors and patients. The litigation process will run effectively because the law enforcement officers including the judges understand the basic knowledge of medical matters. This also will help doctors in the process of litigation because they may defense to competence judges.



Accordingly, the doctors do not need to be worried that the decision will be unfair.

In line with that, the patients also do not need to be worried that the case handled by improper judges. Moreover in the process of proving that the doctors are guilty, the patients are helped by the existence of the medical malpractice court in resolving medical malpractice cases.

Considering the litigation process at civil court, the burden of proof which is owned by the plaintiff or the patients, the difficulties come from the minimum knowledge in medical matters and process of finding expert witness for supporting the patients against the doctors. By having medical malpractice court, the litigation process will be easier because the law enforcement officers including the judges could become more knowledgeable on medical matters and it will decrease the difficulty of litigation process caused by the absence of expert witness.

3. The medical malpractice court can reduce period of litigation process.

The litigation process in the court generally takes long time, while the plaintiffs and defendants may take that time for committing their job. The longer litigation process in the medical malpractice cases makes the parties cannot carry out their job properly. Since they cannot carry out their job properly, it will impact on the income.

Especially for the doctors who need extra time to pay attention in executing their knowledge to their patients in form of medical treatment, the longer process of litigation will disturb them. The litigation process makes the doctors unable to focus on the treatment. In executing the medical treatment, the doctors need to be professional. Therefore, a faster litigation process is needed by the doctors.

By having this special court, the cases will be resolved more quickly.<sup>42</sup> By having a more trained law enforcement officers, it will reduce the time of litigation process because the cases will be examined by terminating unnecessary process, make it more effective and the litigation process will run faster compared to the general court.

4. The medical malpractice court intended to reduce cost by streamlining the process.<sup>43</sup>

The weakness of the court is the high cost. The process which spends a lot of time and high cost makes the people unwilling to propose their cases to the court. Actually litigation process inside of court is the last means to solve the case, but sometimes this process is unavoidable.

---

<sup>42</sup> Philip G. Peters, Jr, "Health Court?", *Boston University Law Review*, Vol. 88:227 (2008), p. 231.

<sup>43</sup> Frank A. Sloan, Lindsey M. Chepke, 2008, *Medical Malpractice*, London, the MIT Press, p. 177.

For the cases which are settled by the court especially medical malpractice cases, the matter can only be settled by careful, thoughtful, and comprehensive analysis. Then, the process will spend a lot of time more than the other cases. In line with that, the costs will be higher also. To reduce the cost of litigation process, the process needs to be streamlined by having a special chamber in general court consisting of law enforcement officers who know medical matters.

The existence of the medical malpractice court will reduce the cost by streamlining the process of litigation. The process will be simplified, because the process runs faster and it is in line with the required cost. As result, the cost will go down. It will make easiness for the justice seekers, both of patients and doctors.

5. The medical malpractice court will encourage the doctors to be more professional.

It cannot be denied that there will be worries from the doctors if the medical malpractice court will be established. Indirectly the doctors are encouraged to be more professional in executing medical treatment for avoiding the medical malpractice and ends in the litigation process.

The worries drive the doctors to execute their knowledge on patients carefully and avoiding some risks that possibly happened. This act will protect the patients from undesirable things, including medical malpractice.

In line with the increasing professional conduct of the doctors, the quality of the health in Indonesia will also increase. The possibility of error will be decreased, and the number of medical malpractice cases will also be decreased. Finally, medical malpractice court will promote better patient safety. In other words, transferring decision-making from ordinary judges to trained judges guided by the expert on medical matters, medical malpractice court will promote patient safety.

The medical malpractice court is believed has several important advantages over the current system. It has potential benefits to support its establishment in Indonesia, but it is unrealistic to expect medical malpractice court to solve all, or even most, of the problems with the existing system.

Having the advantages and the more recent success of special courts in the other areas of the law, medical malpractice court is worth to be established in Indonesia. On the contrary, medical malpractice court may not be established due to some reasons. Beside the contention of the above advantages, critics of the medical malpractice court also exists:

1. It may be hard to find high-quality candidates for judicial position.

By having medical malpractice court, it may be hard to find high-quality candidates for judicial position. The medical malpractice court needs a judge with strong views on medical

malpractice. It also needs a lot of judges with its high-quality. The combination of number and quality of judges or law enforcement officers who are required reflects the difficultness of the establishment of the medical malpractice court.

2. The medical malpractice court needs much budget.

The medical malpractice court needs much budget to be established. As mentioned before that the special court which has ever proposed to be established in Indonesia was rejected by the government because the process of its establishment absolutely will spend a lot of money. It was the main adversity faced by the government of Indonesia in reality.

According to the format proposed before, each judge, prosecutor and police need to send at least two people to be trained about medical matters in accordance with the establishment of the special court at every district in Indonesia. Indonesia consists of more than 400 districts, the establishment of the medical malpractice court will spend a lot of money because it will involve many people and institutions in preparing law enforcement officers with good knowledge in medical matters.

Moreover the trained policemen, of course, will be stuck at the same level because their knowledge will be needed at the same place. It is difficult for them to upgrade their position. This establishment of the medical malpractice court will adverse some

people like the police for example. Based on many considerations before, the government claimed that Indonesia is not ready yet to have the medical malpractice court.

3. The medical malpractice court may trigger the doctors to practice defensive medicine.

Actually for the doctors, being drawn into the process of litigation seems a form of punishment. It is believed that doctor is suffering more from unwarranted lawsuit than the patients. Being involved in litigation process will increase the distrust of people toward the doctors.

The establishment of the medical malpractice court and the number of increasing medical malpractice claims make the doctors significantly more likely think of retiring early, to stop seeing patients whom they perceived to be more likely to sue, and to tell their children not to practice medicine.<sup>44</sup> The doctors will be more concern in anticipating the possible legal suits rather than to exercise the best treatment for the interest of their patients.<sup>45</sup>

Those acts may be an instance known as defensive medicine. It is a treatment design which is oriented to self-protection from lawsuit or risks. It could be avoiding the patient whom might have disease which has big risk in healing, the patients are obliged to

---

<sup>44</sup> Philip G. Peters, Jr, "Health Court?", *Boston University Law Review*, Vol. 88:227 (2008), p. 257.

<sup>45</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia Issues and Problems", *IJUM LAW JOURNAL*, Vol. 23 No. 3 (2015), p. 453.

check the overall condition before receiving the treatment from the doctors. In this condition the patients are loss in term of administrative.

Considering also that the number of the people who need medical treatment are bigger than the number of the doctors, the possibilities of error are bigger also. Those concern and also the establishment of the medical malpractice court become a pressure for the doctors.

The existence of medical malpractice court may bring about advantage or disadvantage for patients. On one hand, it may trigger the doctor to avoid some risks which may end in litigation process which may harm the patient as health receivers. On the other hand, it also becomes an advantage because the doctors are pushed to execute the medical treatment more professional than before.

From some obstacles as mentioned before, it can be seen that the main obstacle of the establishment of the medical malpractice court is that the medical malpractice court needs much budget.<sup>46</sup> This reason was stated by the government for the proposal of medical malpractice court proposed by IDI few years ago.

---

<sup>46</sup> 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 government did not agree for the establishment of special court to settle medical malpractice cases because it will spend high cost (Based on an interview held on March 16<sup>th</sup>, 2016 at IDI – Yogyakarta).

The adversity of the government in providing the medical malpractice court as the one of settlement which was proposed to resolve the medical malpractice cases in Indonesia made the government replaced the medical malpractice court with the establishment of the Medical Disciplinary Tribunal (the MKDKI), located in the capital city of Indonesia.

For developing country, Indonesia is not ready yet to have special court for resolving medical malpractice cases considering the number of budget which is needed. If it is developed country as like the U.S, the proposal of health court is worth to be considered because the number of budget is not the issue.

The establishment of MKDKI is to replace the idea of the establishment of the medical malpractice court which was proposed by IDI. The MKDKI is a mean which may alienate both doctors and patient from criminal and/or civil litigation. But in reality, the means might not be the only one of settlement provided by the government. The litigation process whether it is civil or criminal still exists. For those particular cases which are settled through court of justice, the need of fair outcome or decision is becoming the priority considering that unfair decision might trigger another dispute.

To establish the medical malpractice court in Indonesia, the support from the government is needed. The potential benefits of the medical malpractice court may become the consideration for the



government to establish it. Those potential benefits may defeat the main obstacle faced by its establishment. It is because most of benefit owned by the medical malpractice court is provided to the goodness of the justice seekers i.e. a justice. A justice or fairness is the main thing which is obliged to be provided by the law. The law is close to the government then, the role of government in providing fairness outcome of a settlement is urgently needed.