

THE USE OF AMICABLE SETTLEMENT FOR RESOLVING MEDICAL MALPRACTICE DISPUTES IN INDONESIA

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Abstract Massive publicity on alleged medical malpractice cases has created a hostile environment within the healthcare setting in Indonesia. The unexpected practice of defensive medicine would be possible in response to the rise of medical malpractice litigation. Although having many negative implications, litigating medical malpractice disputes is preferable for many injured patients. Dispute resolution mechanisms should be introduced and promoted in Indonesia as an alternative to the litigation process with hope of providing redress to victims of medical malpractice in a more amicable manner. This paper aims at exploring the use of amicable settlement methods for resolving medical malpractice disputes in Indonesia. Mediation seems to be the most promising method for resolving medical malpractice disputes amicably.

Keywords

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malpractice,
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amicable
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1 Introduction

As one of the oldest professions, the contribution of the medical profession in improving the quality of human life is undeniable. Doctors and patients always have had a relationship based on trust. In Indonesia, this type of relationship has been characterized as a fiduciary relationship (*hubungan kepercayaan*). Patients place trust in their doctors primarily because of the patients' lack of knowledge concerning their illnesses or diseases and medical treatment. Further, doctors quite rightly have been perceived as more superior individuals in terms of their professional expertise. However, the nature of the doctor-patient relationship has significantly changed in Indonesia following an increase in medical malpractice cases.

Since 2003, medical malpractice in Indonesia has been put in the limelight as a consequence of a massive media blitz focusing on alleged medical malpractice cases. Consequently, Indonesian society has become more litigious and these media reports have served to not only undermine the public's trust in doctors but also to impugn their previously pristine reputation. The media's massive, negative publicity campaign has also drastically altered the general public's perception towards the medical profession as a whole. Although medicine is not an exact science, and things may and often go wrong in medical treatment, a fact that always has been true, patients increasingly have become more willing to sue when they suffer adverse events in medical treatment. This more recent willingness can be attributed to the reality that the public has been better educated, through both the traditional and social media, about issues surrounding medical errors and informing the public that they may be potential victims of medical injuries. This situation has not only promoted public awareness regarding public patient safety issues but has also cast a light on injured/damaged patients' right to pursue appropriate legal remedies.

2 The Definition and Scope of Medical Malpractice in Indonesia

The term 'medical malpractice' is borrowed from English. It is commonly used in the United States for describing professional misconduct committed by medical practitioners. Common law countries such as England, Australia, New Zealand, India, Singapore and Malaysia use the term 'medical negligence' instead of 'medical malpractice'. Nevertheless, the term 'medical negligence' tends to be used synonymously with 'medical malpractice' (Mason & McCall Smith, 1986: 339). In

Indonesia, these terms have been used both in societal communications and in academic writing. The term medical malpractice has been translated into *malpraktik medik*, while the term medical negligence has been translated into *kelalaian medik*. The use of both *malpraktik medik* and *kelalaian medik* to some extent has created confusion in the Indonesian community, among jurists as well as academicians. Nevertheless, medical malpractice has a broader connotation than medical negligence since the former includes intentional acts by the physician whereas the latter only includes unintentional acts (Achadiat, 2007: 22). Guwandi, for example, proposed that the term medical malpractice should be distinguished from the term medical negligence as the former is wider in scope and includes medical negligence. Additionally, medical malpractice includes acts or omissions that violate legislative acts⁴ (Guwandi, 2007: 20).

Sofwan Dahlan proposed the term *malpraktik pidana* (criminal malpractice) for a specific type of medical malpractice which involves intentional misconduct (Dahlan, 2002: 60). The term ‘criminal malpractice’ as used by Sofwan Dahlan should not be confused with the common law concept of criminal negligence. Criminal negligence refers to gross negligence amounting to criminal liability, whereas Sofwan’s conception of criminal malpractice refers to particular criminal offenses committed by medical doctors such as euthanasia and illegal abortion as governed in Articles 344 and 349 of the Indonesian Penal Code. The nature of fault in the former is gross negligence (*grove schuld/ culpa lata*), while in the latter includes gross negligence as well as an intent (*opzet*). With respect to illegal abortion and euthanasia, the author’s opinion is that they are more appropriately categorized as ‘*tindak pidana medik* (medical offense)’ rather than ‘*malpraktik pidana* (criminal malpractice).

3 Medical Malpractice Liability under the Indonesia Legal System

Medical malpractice requires the presence of an act of professional misconduct resulting in damage to the patient. The term professional misconduct in this context refers to the failure of the doctor to comply with the appropriate standard of practice (standard of care). This failure is legally constructed as negligence and therefore medical malpractice is also known as medical negligence.

Although the term medical malpractice has been common in Indonesia, it constitutes a sociological rather than a legal term. Indeed, the term medical malpractice is not found either in the Medical Practice Act 2004 or any other legislation (Soewono, 2007: 13; Suryadhimirtha, 2009: 19). In the absence of specific legislation governing medical malpractice, these cases have been interpreted based on the existing legislations. Since the essence of malpractice is a form of negligence, the rules on negligence contained either in the Civil Code or the Penal Code have been employed in relation to medical malpractice cases. Under the Indonesian legal system, negligence constitutes a cause of action that can trigger both civil and criminal litigation. It follows, therefore, that medical malpractice cases can give rise to both civil and criminal liability.

3.1 Civil Liability for Medical Malpractice

Two possible causes of action, namely *wanprestasi* (breach of contract) or *onrechtmatige daad* (comp. Isfandyarie, 2006: 6), which is a Dutch equivalent for the common law concept of ‘tort’ (Guwandi, 2006: 3, 41), can justify the imposition of civil liability. According to Adami Chazawi, a claim for breach of contract arises out of the contractual nature of the doctor-patient relationship (Chazawi, 2007: 54). Nevertheless, the use of breach of contract as the cause of action in medical malpractice litigation is only theoretical. In practice, most civil actions were grounded in tort as governed by Article 1365 of the Indonesian Civil Code. Wila Chandrawila Supriadi stated that tortious liability requires four elements as follows (Supriadi, 2001: 32):

- a. unlawful deed (*onrechtmatige daad*);
- b. fault/negligence;
- c. damage; and
- d. causal link between fault and damage.

Onrechtmatige daad is a general concept encompassing broad areas of ‘wrongs’ giving rise to the action for damages. Any civil wrong other than breach of contract by default falls under the category of *onrechtmatige daad*. *Onrechtmatige daad*, known in local terms as ‘*perbuatan melawan hukum*’, and may cover the following unlawful forms of conduct (Hariyani, 2005: 45):

1. conduct which violates the rights of others;
2. conduct which violates the legal duty;
3. conduct which violates ethical norms; and
4. conduct which violates the duty of care.

Fault (*kesalahan*) as required in tortious liability can be in the form of either intent (*kesengajaan*) or negligence (*kelalaian*). Article 1366 of the Indonesian Civil Code provides that civil liability can be imposed due to unlawful conduct committed either intentionally or as a result of negligence. This rule provides the basis for liability grounded on acts of negligence which is suitable for medical malpractice cases. Article 1367 of the Indonesian Civil Code provides that liability can be imposed not only for one's own conduct but also for conduct committed by persons under one's responsibility (the subordinate person). This rule provides the basis for vicarious liability which may be imposed on the hospital in malpractice cases for acts of negligence by its medical staff members including physicians, nurses and potentially others. This doctrine is known as *respondeat superior* in the United States of America.

3.2 Criminal Liability for Medical Malpractice

Even though the relationship between doctor and patient is civil in nature, the failure of a doctor to comply with the standard of practice may in some cases also give rise to criminal liability. This is so when the nature of damage stemming from that failure satisfies the requirements of the criminal offense such as death or serious injury as governed respectively under Articles 359 and 360 of the Indonesian Penal Code (Chazawi, 2007: 55). To be applicable, so as to give rise to criminal liability, either death or serious injury must be the result of the doctor's negligence.

In most cases, doctors in the past were charged under either Article 359 or 360 of the Indonesian Penal Code. The former deals with negligent manslaughter while the latter deals with negligence that causes serious injury. Following enactment of the Health Professional Act 2014 (*Undang-undang Nomor 36 Tahun 2014 tentang Tenaga Kesehatan*), criminal actions against doctors should refer to this Act. Section 84 of the Health Professional Act 2014 provides the legal basis for prosecuting health professionals, including doctors, whose negligence leads to either their patients' death or causes serious injuries.

4 Litigating Medical Malpractice Cases in Indonesia

Medical malpractice cases can be litigated through either criminal or civil proceedings, both of which have their own advantages. Criminal litigation has a significant deterrence element and of course conviction leads to the imposition of criminal penalties. Civil litigation can provide the victims of medical negligence with monetary compensation. Nevertheless, any form of litigation has some inherent problems, particularly in terms of being unreasonably lengthy, expensive and unpredictable. Litigation takes an emotional toll, and sometimes a physical toll, on those participating in the process; health care professionals and patients alike. The litigation process also places burdens on law enforcement agencies.

The burden of proof in civil litigation rests upon the plaintiff (patient). While proving a doctor's negligence is always a difficult task for the plaintiff, even plaintiffs that are successful in doing so often come away from the civil litigation process dissatisfied with the amount of damages granted by the judges and, often, overwhelmed emotionally from having to endure the rigors of the process. Similarly, law enforcement agencies confronted with medical malpractice cases often are confronted with difficult challenges in investigating them. For example, it often is not easy to identify the nature of the wrongful conduct and to make an appropriate criminal charge against the reported doctors.

From the perspective of doctors, there certainly is no upside to medical malpractice litigation, especially criminal litigation. Criminal proceedings give rise to more psychological pressure and doctors tend to be more intimidated and stressed. Their personal and professional reputations are on the line and in the public spotlight. In criminal litigation, doctors have to attend a series of time-consuming and stressful examinations by the police officers during the investigation process. Pressure continues during examinations in the court trial. Unlike civil trials, where their presence in the court room can be represented by their legal counsels, in criminal trials a doctor sits alone before the panel of judges as the accused person. This situation is extremely stressful for every doctor placed in this position and probably constitutes the worst experience ever faced. Even a doctor who is exonerated of criminal liability retains the stigma of having been charged and has to cope with ongoing negative publicity. In short, even a not guilty verdict can forever stigmatize

a doctor and cause irreparable harm to his or her reputation. This, in turn, has adverse emotional, physical and economic consequences.

5 Problems in Using Criminal Proceedings to Deal with Medical Malpractice Cases

Medical malpractice litigation has numerous undesirable consequences not only for the individual doctors being accused of wrongdoing but for society at large. Practicing (almost always) in good faith for the benefit of their patients, accused doctors instead find themselves entwined in time-consuming, expensive, lengthy, and emotionally charged litigation. Medical malpractice pressure may trigger doctors to practice defensive medicine (Dahlan, 2002: 66-67). In this setting, doctors, subconsciously or not, find themselves in the situation where they become more concerned with anticipating possible legal action against them (and accordingly make unnecessary tests and referrals, for example) instead of simply exercising their best judgment and treating their patients accordingly.

Most medical malpractice cases reported in the media involved bodily injury and many of these injured patients have brought their cases under criminal litigation. From a psychological perspective, criminal litigation may allow the injured patients to express their disappointments with the accidents. The possibility of criminal prosecution/liability is also socially important because of its deterrent effect to help prevent future accidents. Despite these psychological and social considerations, criminal litigation often has been the preferred avenue of litigation for the practical reasons that establishing a doctor's negligence (including the often thorny issue of proximate causation) in civil court can be a difficult proposition. Law enforcement agencies shoulder the burden of proof in criminal cases. The police investigators are tasked with gathering relevant evidence during the investigative phase and the public prosecutors then present that evidence in the criminal court trial in order to prove the allegations. The fact that Indonesian law allows criminal actions, coupled with the fact that many victims of medical injuries in the first instance go to the police to seek justice, have often stimulated the public in Indonesia to pursue medical malpractice cases as criminal rather than civil matters.

The excessive use of the criminal law for dealing with medical malpractice cases has in fact created injustice. The fact law enforcement agencies often lack the understanding of important facets of medical malpractice may expose doctors in Indonesia to unwarranted/unjustified criminal prosecution. This unfortunate situation was experienced by three obstetricians in a criminal case commonly referred to as Dr. Ayus' case. Three obstetricians, namely Dr. Dewa Ayu Sasiary Prawani, Dr. Hendry Simanjuntak, and Dr. Hendy Siagian were prosecuted for negligent manslaughter. They were accused of negligence during the course of a cesarian operation that ultimately led to the death of their patient, Mrs. Sisca Makatay, in 2010. In 2013, the court of cassation decided upon ten months of imprisonment as the appropriate punishment in its judgment. Through a review process, that decision was later revised by the Supreme Court and the convicted persons were acquitted, but not until after having served three months of imprisonment.

Dr. Ayu's case was probably the most phenomenal case within the Indonesian healthcare setting ever. Imprisoning the obstetricians harvested a deep sympathy from their fellow doctors. The case has prompted massive protest from doctors throughout the country and national strike action was taken on 27th November 2013. This controversial case has led doctors in Indonesia to be highly skeptical regarding the law and its enforcement. They presume that the law, when dealing with medical malpractice issues, will focus more on protecting patients rather than viewing doctors as equals under the law, and being presumed innocent until proven guilty. Consequently, doctors in Indonesia have started to engage in defensive medicine as a method of self-preservation.

Another negative impact arising from criminal litigation is the exploitation against the reported doctors. The vulnerability of doctors when dealing with criminal cases, according to Nusye Kusuma Indah Jayantie, has sometimes been exploited by the law enforcement agencies, especially the investigators,¹ who sometimes misuse the police power for personal gain. Nusye identified two particular methods some investigators have used in this regard. The first consists of reporting the doctor as a suspect and the second consists of utilizing pretrial detention solely for intimidation

¹ Interview with Nusye Kusuma Indah Jayanti on Tuesday, 17th June 2014, at 19.30.

purposes. The obvious goal is to use these methods of intimidation solely to extort money from the stressed suspect.²

6 Resolving Medical Malpractice Cases through Alternatives to Litigation

Other than resorting to litigation, medical malpractice cases can also be resolved through other avenues including the medical disciplinary tribunal, the consumer dispute tribunal, and Alternative Dispute Resolution (ADR). The following section briefly analyzes each alternative.

6.1 Medical Disciplinary Tribunal (MKDKI)

After the enactment of the Medical Practice Act 2004 (*Undang-undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran*), anyone involved in a medical malpractice case should consider the possibility of utilizing the medical disciplinary tribunal known as *Majlis Kebormatan Disiplin Kedokteran Indonesia (MKDKI)*.³ MKDKI is administered by the Indonesian Medical Council (*Konsil Kedokteran Indonesia/KKI*) and is authorized to examine professional misconduct committed by doctors and dentists. MKDKI complements the existing medical ethics tribunal known as *Majlis Kebormatan Etika Kedokteran (MKEK)* which is administered by the Indonesian Medical Association (*Ikatan Dokter Indonesia/IDI*). The former deals with the violation of medical disciplinary rules while the latter deals with the violation of medical ethics.

MKDKI is the first avenue of relief for those seeking justice due to medical malpractice. MKDKI receives reports and complaints from patients and following investigation determines whether the nature of the dispute implicates disciplinary or ethical issues. If the MKDKI determines the dispute implicates the possible violation of disciplinary rules,⁴ it will summon the doctor in question for a hearing. If, following the hearing, the MKDKI concludes that the reported doctor(s) in fact violated disciplinary rules, it may impose an administrative sanction ranging from

² Interview with Nusye Kusuma Indah Jayanti on Tuesday, 17th June 2014, at 19.30.

³ During the rise of public debate on medical malpractice cases in 2003, those from medical professions were resistant against the litigation system, and instead expected the presence of a special tribunal authorized to settle medical malpractice cases. This led to the formation of MKDKI.

⁴ Disciplinary rules are rules of conduct provided by the Indonesian Medical Council which guides the doctor to comply with the standard of practice.

written probation to a recommendation that the doctor(s) receive further medical education⁵. If the examiners conclude there was a violation of ethical rules,⁶ the *MKDKI* will forward its report or complaint to *MKEK*. Section 66 (3) of the Medical Practice Act 2004 allows the injured party to proceed with a legal action (either criminal or civil proceeding) if necessary.

Although some claim that disciplinary liability has been a sufficient deterrent for minimizing medical errors, one of *MKDKI*'s severe limitations is that it lacks the competence to award the injured/damaged patients' compensation. As a result, while being very useful, at the same time *MKDKI* fails to satisfy the Indonesia public's expectation of being an effective mechanism for resolving medical malpractice disputes. Furthermore, as *MKDKI* is located in Jakarta, it is not readily accessible (i.e., convenient) for those living in different cities or islands.

6.2 Consumer Dispute Tribunal (BPSK)

The Consumer Dispute Tribunal in Indonesia is run by the Consumer Dispute Settlement Body (*Badan Penyelesaian Sengketa Konsumen/BPSK*). *BPSK* was established based on the Consumer Protection Act 1999 (*Undang-undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen*). As the name implies, *BPSK* has autonomy only over consumer disputes. Assuming that the doctor-patient relationship comprises a producer-consumer relationship, some argue that *BPSK* is also a suitable forum for resolving medical malpractice disputes. Although the commercial nature of the doctor-patient relationship is still debatable, some disputes relating to healthcare services have in fact been brought into *BSPK* for resolution.

6.3 Alternative Dispute Resolution (ADR)

ADR is an umbrella term that refers generally to alternatives to the court adjudication of disputes and as such includes mechanisms including negotiation, mediation, arbitration, mini-trials, and summary jury trials (Nolan, 2001: 2). Negotiation may be generally defined as a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter

⁵ See Section 69 (3) of the Indonesian Medical Practice Act 2004.

⁶ Ethical rule refers to the Indonesian Code of Medical Ethics.

(Nolan, 2001: 15). Mediation is an extension of the negotiation process in which parties who have been unable to resolve a dispute or conflict use an impartial third party to assist them in reaching a resolution (Nolan, 2001: 60). Arbitration is the most formalized alternative to the court adjudication of a dispute. In arbitration, disputing parties present their case to one or more impartial third persons who are empowered to render a decision (Nolan, 2001: 138).

ADR, especially arbitration, negotiation and mediation, is desirable for resolving medical malpractice cases in Indonesia. ADR has been translated into several terms such as *Alternatif Penyelesaian Sengketa (APS)*, *Pilihan Penyelesaian Sengketa (PPS)*, and *Penyelesaian Sengketa Alternatif (PSA)* (comp. with Usman, 2013: 8). The term ADR has been popular in Indonesia since 1999 when the government enacted the Arbitration and Alternative Dispute Resolution Act 1999 (*Undang-undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa*). However, arbitration had been used even before this Act came into force. The practice of arbitration before 1999 was based on section 615 – 651 of *Reglement op de Burgerlijke Rechtvoordering/Rv*-State Gazette Number 52 of 1847, section 705 of *Reglement voor de Buitengewesten/RBg*-State Gazette Number 227 of 1927, and section 377 of *Het Herzijene Indonesisch Reglement/HIR*-State Gazette Number 44 of 1947 (Codes of Civil Procedure) (Usman, 2013: 42). Arbitration can be used either in arbitration institution (institutional arbitration) or outside of the arbitration institution (ad-hoc arbitration). Institutional arbitration in Indonesia is served by the National Arbitration Board of Indonesia (*Badan Arbitrase Nasional Indonesia/BANI*).

Theoretically, disputes arising between doctor and patient can be resolved through simple negotiations, which are direct communications between the parties to the dispute to reach a consensual agreement. The opportunity to engage in negotiations arises when the injured patient goes to the doctor with either a complaint or to seek clarifying information relating to treatment rendered. When the patient accepts the doctor's explanation and/or apology, with or without monetary compensation, the dispute is considered resolved.

The use of negotiation in medical malpractice cases can be more challenging in practice. Factors that may discourage the use of negotiation include the following:

- Doctors often are reluctant to offer their aggrieved patient financial compensation, fearing that doing so will be perceived as an admission of guilt and will be used as evidence in a subsequent civil action.
- Doctors usually refuse to admit that they have caused harm to the patient, arguing instead that they fully complied with the applicable standard of practice. Concerning the harm sustained by the patient, doctors frequently argue that patient symptoms are the natural result of treatment rendered or due to unpredictable causes. Dissatisfied, the patient often seeks help from lawyers. When lawyers become involved, negotiations often stall; doctors tend to feel intimidated and become even more defensive.

Medical disputes can also be resolved through mediation, where an impartial third party works with the disputing parties to reach a consensual agreement. The mediator's involvement can be based either on the initiative of the parties or the court. Basically, the parties can consensually agree to retain a third party to assist in mediating their dispute, or a panel of judges in civil court, in which the patient plaintiff filed his/her civil suit, can order mediation. A court-mandated mediation is facilitated by a certified mediator registered in that court. When the parties consensually agree to mediate, this is called either an out-of-court mediation or a court-annexed mediation. As ruled in the Supreme Court Decree Number 1 of 2008 on the Procedure of Court-annexed Mediation, the panel of judges in the civil court is obliged to command the disputing parties to initially employ the court-annexed mediation as a condition precedent to hearing the case. Civil trial can only be carried out by the panel of judges after the disputing parties fail to reach consensual agreement through the commanded mediation.

7 Promoting Amicable Settlement by Way of Mediation

Mediation is advantageous for both doctor and patient. Mediation saves the doctor from possible negative publicity in the media since mediation is confidential. Mediation relieves the parties from the stresses, expenses and uncertainties associated with legal proceedings. Mediation may also serve to salvage the doctor-patient relationship between the parties.

As a prospective and promising dispute resolution mechanism, mediation has been institutionalized in Indonesia. It is acknowledged as one of the alternative dispute resolutions in the Arbitration and Alternative Dispute Resolution Act 1999 (*Undang-undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa*). The Supreme Court of the Republic of Indonesia has urged parties in disputes to utilize mediation prior to civil trial through The Supreme Court Decree Number 1 of 2008 on Court-Annexed Mediation (amended by with the Supreme Court Decree Nomor 1 of 2016).

Mediation has also been promoted by the Health Act 2009 (*Undang-undang Nomor 36 Tahun 2009 tentang Kesehatan*). Pursuant to section 29 of the Health Act 2009, disputes stemming from alleged negligence and arising from the administration of health services, should be primarily resolved through mediation. In addition, section 58 (1) of the Health Act 2009 provides that any person suffering from damage resulting from the negligence of a healthcare provider is entitled to pursue a claim for damages. Unfortunately, Section 58(1) provides no further explanation on the precise procedure for pursuing a claim for damages, whether it is made through mediation or a civil suit. When the parties opt for civil litigation, mediation remains an option assuming the panel of judges orders it (court-annexed mediation).

Mediation sometimes has been used in criminal cases. Known as penal mediation, this form of mediation in Indonesia is still in its infancy. However, it is gaining in popularity and has been used for resolving some forms of criminal cases, especially those involving violent crimes. Penal mediation likely will be used in the future for settling medical injury cases. As a matter of fact, medical injury cases are usually presumed as criminal cases. Mediators in these cases will be either police investigators or professional mediators.

8 Conclusion

Litigating medical malpractice cases, especially in criminal courts, has many negative consequences not only for doctors, but also to their patients and even to the society as a whole. There is an urgent need to consider alternatives to traditional litigation. Mediation, which is not hostile, time consuming, unpredictable, emotionally charged or nearly as expensive as is litigation, is the most suitable forum for resolving medical malpractice cases. Mediation provides numerous advantages for both doctor and

patient. Mediation saves the doctor from possible negative media as it is a confidential process. Mediation unchains both parties from the harsh consequences of the hardened legal process. Mediation obviates the patient from shouldering the high civil burden of proof and also releases the doctor from the anxiety and stress of the courtroom, either as a civil or criminal defendant. Mediation will also protect the future doctor-patient relationship.

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