

## CHAPTER TWO

### LITERATURE REVIEW

#### A. Legal Protection

Legal protection is the protection provided to subjects of law in the form of legal instruments - both preventive and repressive, both written and unwritten. In other words, the legal protection as a description of the function of law means that law can give justice, discipline, certainty, usability, peace, tranquility for all human interests in social life.<sup>1</sup> Besides, the law provides certainty and protection for human interests, the law also has to be able to restore the balance of disturbed social order to its original state.<sup>2</sup>

The law should respect human rights, provide legal certainty and produce justice for all people because the law is a form of protection which would protect the rights of the people.<sup>3</sup> Is the protection of the law fair? Is the agreement between the countries that handed villains useful?<sup>4</sup> Points for punishment can certainly not be out of place for their crimes. This is because of the need to punish an individual for the sake of the common good.<sup>5</sup> But a person should not be punished formally based on the rule of law which is only

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<sup>1</sup>Waluyadi, 2009, *Hukum Perlindungan Anak*, Mandar Maju, Bandung, p. 4

<sup>2</sup> Anny Isfandyarie, 2006, *Tanggung Jawab Hukum dan Sanksi bagi Dokter Buku 1*, Prestasi Pustaka, Jakarta, p. 77

<sup>3</sup>Frederic Bastiat, 2010, *Hukum Rancangan Klasik untuk Membangun Masyarakat Merdeka*, Jakarta, cet.1, p. 25

<sup>4</sup>Cesare Beccaria, 2011, *Perihal Kejahatan dan Hukuman*, Yogyakarta; Genta, cet.1, p.

<sup>5</sup>*Ibid* p. 129

intended to preserve the interests of social consensus and not to punish.<sup>6</sup> That punishment is the last resort. It is not expected to impose a harsher punishment than the crime that has been committed.<sup>7</sup>

According to Mertokusumo, justice in general is highly subjective and is viewed from parties who received treatments only. In relation to medical services, justice is close to cases because it is related to the allocation of resources in health care.<sup>8</sup>

## **B. Doctor**

According to The MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran*), doctors and dentists are doctors, specialists, dentists and dental specialists who graduated from medical or dentistry education in education institutions both Indonesia and abroad that are recognized by the Government of the Republic of Indonesia in accordance with the legislation.<sup>9</sup> Doctors are health workers or medical personnel who are licensed to practice medicine as a doctor, surgeon, dentist, or veterinarian.

Chapter I (General Provisions 1.11) of The MPA 2004<sup>10</sup> mentioned that the notion of the medical profession is as follows:

"Profession of medicine or dentistry is a medical or dental profession carried out by a scientific, educational competencies acquired through a continuous education, and a code of ethics that is serving the community".

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<sup>6</sup>*Ibid* p.130

<sup>7</sup> Siska Elvandari, 2015, *Hukum Penyelesaian Sengketa Medis*, Penerbit Thafa Media, Yogyakarta, p. 256

<sup>8</sup> Anny Isfandyarie, *Opcit*, p. 78

<sup>9</sup>Section 1 (2) of the MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran pasal. 1 (2)*)

<sup>10</sup>*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran*

From the formulation contained in the MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran*), it is clear that the doctor is a carrier of the medical profession which must also have the characteristics of a profession as a carrier of the profession in general.<sup>11</sup>

A doctor is someone whose job is to treat people who are ill or injured. When written as a title, the abbreviation of doctor is “Dr”. A doctor who performs medical operations is called a surgeon. The most senior type of doctor in a hospital is called a consultant. Someone being treated by a doctor or nurse is called a patient.<sup>12</sup>

According to Black’s Law Dictionary, a doctor means to prescribe or treat medically or to treat as a doctor or physician.<sup>13</sup> Doctor can also be a learned man; one qualified to give instruction of the higher order in a science or art, particularly, his art of faculty, as a doctor of laws, medicine, or theology. In colloquial language, however, the term is practically restricted to practitioners of medicine; i.e. physicians, surgeons.<sup>14</sup>

From the above description, we may arrive at conclusions that as the carrier of the profession, the doctor is the one who holds expertise and skills in medical science that is independently capable of meeting the needs of people who require services. In addition, doctors should also be able to decide for

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<sup>11</sup> Anny Isfandyarie, 2006, *Opcit*, p. 23

<sup>12</sup> Macmillan Dictionary, [http://www.macmillandictionary.com/dictionary/british/doctor\\_1](http://www.macmillandictionary.com/dictionary/british/doctor_1) accessed on monday, 25<sup>th</sup> May 2015. at 04:00

<sup>13</sup> Henry Campbell Black, 1990, *Black’s Law Dictionary*, the United State of America, West Publishing Co, p. 481

<sup>14</sup> *Ibid*

themselves what action to do in carrying out his profession and personally responsible for the quality of given services.<sup>15</sup>

Doctors are those who run health practices that hold authority under applicable regulations.<sup>16</sup> Doctors have a duty to attempt to treat the patient and not guaranteed to cure the patient. When a patient comes to a doctor for treatment, but then his condition is worse, it would make sense that doctors are not doing well in the treatment or they may have been negligence in the practice. The Indonesian Medical Association (IDI)<sup>17</sup> as the main association of doctors in Indonesia does not agree if any treatment which results in a negative outcome is simply considered as a malpractice and as a criminal or civil violation.<sup>18</sup> The doctors are really easy to be trapped and be sued in a medical malpractice. In this problem the doctor is one of the medical professions who were harmed by the lack of regulation related to medical malpractice.<sup>19</sup>

### C. Medical Practice

According to Black's Law Dictionary, the term medical is defined as; pertaining, relating or belonging to the study and practice of medicine, or the science and art of the investigation, prevention, cure, and alleviation of

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<sup>15</sup> Anny Isfandyarie, *Opcit*, p. 25

<sup>16</sup> Syahrul Machmud, 2008, *Penegakan Hukum dan Perlindungan Hukum bagi dokter yang diduga melakukan Medikal Malpraktek*, Mandar Maju, Bandung p.10

<sup>17</sup> *Ikatan Dokter Indonesia*

<sup>18</sup> Hendro Soewono, 2005, *Malpraktik Dokter*, Surabaya; Srikandi, p.22

<sup>19</sup> *Ibid* p.23

disease.<sup>20</sup> Medical personnel broadly defined in the Internal Revenue Code (IRC 213) and more comprehensive in regulation.<sup>21</sup> While according to The MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran*), medical practice is a set of activities carried out by doctors and dentists to patients in carrying out treatment.<sup>22</sup> While Section 39 of the MPA 2004 states that:

"The medical practice is held based on an agreement between the doctor and patient in efforts of health maintenance, disease prevention, health improvement, treatment of illness and rehabilitation of health ".

The agreement between a doctor and patient in health services or medical services is commonly known as informed consent. It is the first step of the medical profession to take action of medical or health services. A doctor must fulfill administrative requirements first before performing the medical treatment, such as registered in the Indonesia Medical Council (*Konsil Kedokteran Indonesia*) and get a license in the practice.<sup>23</sup>

Medical practice is guided by medical ethics and medical science. Medical ethics require medical personnel or doctors to consider properly the specific situation of each patient, possible implications for patients in certain situations and provide alternative options.<sup>24</sup> Medical ethics

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<sup>20</sup>Henry Campbell Black, *Black Law Dictionary*, 1990, Negara Serikat, West Published Co, P. 982

<sup>21</sup>*ibid*

<sup>22</sup>part 1 (1) of the MPA 2004 (*Undang-Undang No.29 Tahun 2004 tentang Praktik Kedokteran, bagian 1 ayat 1*)

<sup>23</sup> Syahrul Machmud, *Opcit*, p. 25

<sup>24</sup>see Raanan Gillon, "Imagination, Literature, Medical Ethics and Medical Practice", *Journal of Medical Ethics* 1997; 23: p. 3-4

regulate the relationship between doctors and patients.<sup>25</sup> In addition to medical ethics, there is also medical science which has an important function in the medical practice. Medical science is the main function to make medical practice better, by improving existing ways of helping people – especially, but not limited to, sick people – to better health, then the objective of helping individual people, become embedded within the very purpose of medical science.<sup>26</sup> Thus to achieve a good medical practice, it needs the guidance of medical science and medical ethics.<sup>27</sup>

#### **D. Medical Malpractice**

According to John D. Blum, medical malpractice is a form of professional negligence in which measurable injury occurs to a plaintiff patient as the direct result of an act or omission by the defendant practitioner.<sup>28</sup> While, according to Stedman's Medical Dictionary, a malpractice is a mistreatment of a disease or injury through ignorance, carelessness or criminal intent.<sup>29</sup>

According to Coughlin's Dictionary of law, a malpractice is a professional misconduct on the part of a professional person, such as a physician, engineer, lawyer, accountant, dentist, and veterinarian etc. Malpractice may be the result of ignorance, neglect, or lack of skill or fidelity

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<sup>25</sup>Cecep Triwibowo, 2014, *Etika dan Hukum Kesehatan*, Yogyakarta, Nuha Medika, p.29

<sup>26</sup>Raanan Gillon, *Op cit*

<sup>27</sup>*ibid*

<sup>28</sup>Syahrul Machmud, *Opcit*, p. 14.

<sup>29</sup>*Ibid* p. 23

in the performance of professional duties; intentional wrongdoing; or unethical practice.<sup>30</sup>

Definition of malpractice by WMA (World Medical Association):

“Medical malpractice involves the physician's failure to conform to the standard of care for treatment of the patient's condition, or a lack of skill, or negligence in providing care to the patient, which is the direct cause of an injury to the patient.”<sup>31</sup>

A medical malpractice is a medical negligence. A malpractice according to the Anglo Saxon concept, has given yardsticks of negligence known as the "4-D" of Negligence, which is composed of the following elements: *Duty; Dereliction of that duty; Direct causation; and Damage.*<sup>32</sup>

The task of the doctors comes from the fact that there is a relationship between doctors and patients.

In that connection, if the doctors made a mistake and could cause in disability or death or anything else that is harmful to the patient then it is called a malpractice, if the error did not result in adverse effects on the patient then it is not a malpractice. A simple example is a doctor who prescribes the wrong dosages to certain drugs. If the error is revealed before the patient actually took the medication, no losses. According to the MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran*) section 51 (b) Doctors and Dentists have the right on legal protection in carrying out the

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<sup>30</sup>Guwandi, 2004, *Hukum Kedokteran*, Jakarta; Balai Penerbit FKUI, p. 23

<sup>31</sup>WMA, “*World Medical Association Statement on Medical Malpractice*”, 2016, <http://www.wma.net/en/30publications/10policies/20archives/m2/>, accessed Friday, 19<sup>th</sup> August 2016 at 09.20PM

<sup>32</sup>Guwandi, 2010, *Hukum Medik (Medical Law)*, Jakarta; Balai Penerbit FKUI, p. 44

medical practice, according to professional standards and standard operating procedures.<sup>33</sup> Based on this section, medical personnel provide treatment based on professional standards and the standard operating procedures (SOP).<sup>34</sup> If they do not follow that and cause disability and death, it will probably lead to the occurrence of malpractice.

Malpractice is not a legal term, this term is not used in the legislation. Not only malpractice but also other medical cases are difficult to determine in the Act and section which are arranged on the matter. If there is uncertainty terms on that matter, the problem in the protection to doctors are not solved yet.

Malpractice is a term that has a bad connotation, is stigmatic, bad practice of a person who holds a profession in a general sense. Not only it is addressed to the medical profession but also it is addressed to other professions. If it is addressed to the medical profession, it should also be referred as a medical malpractice. But somehow especially in overseas malpractice is always associated to the medical profession.<sup>35</sup>

#### 1. The Causes of Medical Malpractice

Based on the understanding of experts about malpractice above, the main factors of malpractice are their fault element in the form of

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<sup>33</sup> Section 51 (a) of the MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran pasal 51 (a)*)

<sup>34</sup> Safrowi 2010, "Perlindungan Hukum Terhadap Profesi Dokter Terkait Dugaan malpraktek Medik", Skripsi, UIN Syarif Hidayatullah, Jakarta, 2<sup>nd</sup> September 2010, p. 2

<sup>35</sup> Guwandi, *Op Cit*, p. 20



negligence or culpa. Culpa is an assortment of errors as a result of less cautious so that inadvertently a malpractice occurs by medical personnel. While careful action according to its levels is divided in 4 (four) levels, namely:

- a. Very careful;
- b. Not so careful;
- c. Less careful;
- d. Careless.

In the criminal law theories of negligence or culpa itself, it is divided into 2 (two) categories, namely:

- a. *Culpa Levissima*, means a light negligence;
- b. *Culpa Lata*, means a gross negligence.<sup>36</sup>

According to experts, negligence has several elements. Vos and Van Hammel found culpa has two (2) elements, namely (1) the possibility of estimations of the effect; (2) Not to be careful about what is done or not done.<sup>37</sup>

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<sup>36</sup>Mustafa Abdullah dan Rubben Ahmad, 1983, *Intisari Hukum Pidana*, Jakarta: PT. Ghilma Indonesia, p. 43

<sup>37</sup>Suwari Akhmaddhian, Analysis of accountability Answers Health Workers Who do Crime malpractice \* According to the Law on Criminal Law and Law No. 36 Year 2009 on Health", ("Analisis pertanggung Jawaban Tenaga Kesehatan Yang melakukan Tindak Pidana malpraktek \* Menurut Kitab Undang-Undang Hukum Pidana Dan Undang-Undang Nomor 36 Tahun 2009 tentang Kesehatan"), *Jurnal unifikasi*, ISSN 2354-5976, 2013, Vol. 1 No. 1, hal. 41 <http://journal.uniku.ac.id/index.php/unifikasi/article/viewFile/33/18> accessed on monday 11 May 2015. at 11:15

## 2. The Theory of Malpractice

Lately, there is a widespread concern of the public about the problem of criminal acts committed by medical personnel (often called and known as malpractice). The issue of malpractice was originated from the cases of dr Setyaningrum in 1979,<sup>38</sup> dr. Setyaningrum, a general practitioner, had been prosecuted in criminal trial for causing the death of her patient, Mrs. Rusmini, due to anaphylactic shock after being given several injections. In 1982 the Supreme Court decided that the accused was not guilty and she was released accordingly.<sup>39</sup>

It should be recognized that medical malpractice cases which is purely intentional (criminal malpractice) cannot be found in criminal court as much as regular criminal cases. So it can be concluded that medical

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<sup>38</sup> In the afternoon, doctor Setyaningrum accepted patients, Mrs. Rusmini (28 years old). Mrs. Rusmini was the wife of Captain Kartono (a member of the Indonesian National Army). Mrs. Rusmini was suffering from *pharyngitis* (sore throat). "The ancients" if they had not been injected, they did not feel recovered. So, in ancient times many people had any pain or illness, they asked doctors to give an injection both in light or severe illness.

At that time, doctor Setyaningrum directly injected the patient (Mrs Rusmini) with *streptomycin*. *Streptomycin* is the drug that includes a group of *aminoglycoside*. *Streptomycin* works by turning off sensitive bacteria, by stopping production of essential proteins that bacteria need to survive. *Streptomycin* is useful to treat *tuberculosis* (TB) and infections caused by certain bacteria. a few minutes later after injection, Rusmini felt nausea and then vomited. Doctor Setyaningrum was aware that the patient was allergic to *penicillin*. Therefore, she immediately injected Mrs. Rusmini with *cortisone*. *Cortisone* is an allergy medication. But, it did not make any changes. The action was actually worsening the condition of Mrs. Rusmini. In emergency situations, doctor Setyaningrum gave coffee to Mrs. Rusmini, but there was any positive change. Therefore, the doctor gave him an injection of *delladryl* (also allergy medications).

Mrs Rusmini's condition was increasingly weak, and blood pressure was increasingly low. In an emergency, the doctor Setyaningrum immediately sent the patient to the RSU RAA Soewondo, Pati, about 5 km from the village for treatment. At that time, the vehicle to drive to the hospital is not as easy as the vehicle now. To get a vehicle, it took a few minutes. After fifteen minutes they arrived in RSU Pati, the patient did not survive longer. Mrs. Rusmini died. Kartono captain later reported the incident to the police.

<sup>39</sup> Muh. Endrio Susila, "Criminal Prosecution of Doctors in Indonesia: *Law Journal*, 23 (3) 2015 IIUMLJ 439-458, p. 448

malpractice in a broad sense, can be distinguished in the following actions:<sup>40</sup>

a. Intentionally (*dolus, Vorsatz, Willens en wetens handelen, intentional*)

Intentionally is prohibited by legislation. In other words: medical malpractice in the narrow sense, for example by deliberately abortion without medical indication, performing euthanasia, providing medical letter which contents are not correct, and so on.

b. Unintentionally (Negligence, *culpa*)

The examples are abandoning the treatment of patients, due to the negligence of doctors, and it causes the patient's disease getting worse and then dies.

The differences are more visible if we look at the motives to do, for example:

a. In medical malpractice (in the narrow sense): the action is done consciously, and the purpose of the actions had been directed to the result to be brought about or do not care about the result, although the doctors knew or should have known that their actions are contrary to the law, whereas;

b. At negligence: there is no motive or purpose for causing the bad consequences. The effect could be caused by negligence which is actually happening out of intention.

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<sup>40</sup>Guwandi, 2010, *Hukum Medik (Medical Law)*, Jakarta; Fakultas Kedokteran Universitas Indonesia p.21

Arthur F. Sountwick proposes theories about the source of medical malpractice, namely:

a. Breach of Contract

The first theory explains that the source of medical malpractice actions is due to the breach of contract. It means that, doctors are under no obligation to treat someone when there is no a contractual relationship between doctors and patients. The relationship between doctors and patients occurs if there has been a new contract between the two parties.

In giving the treatment, doctors have to be careful in delivering the promise to the patients and families of patients. Because if the doctors may not fulfill the promise offered before then, as consequences, the patients may propose legal action in criminal or civil law. Therefore, the doctor never promised healing, but obliged to do maximum efforts (*inspaningverbintenis*) in treating the patients.

b. Negligence

The second theory of the source of medical malpractice is negligence. Doctors' negligence must be proved. It is certainly not an easy task for the law enforcement officers to prove that case.

According to Budi Sampurna, medical malpractice cannot be judged based on the outcome of medical treatment, but the process on medical treatment. Allegations of medical malpractice should be explored and analyzed in advance to make sure whether it is medical malpractice or not unless there has been a clear negligence. In such a case, the principle of "*res*

*ispa ioquitur*"(the thing speak for itself) will be employees. The doctors did not like the term of medical malpractice, but they received negligence term".

Section 50 of the MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran*), clearly stated that the doctors have rights to obtain legal protection as long as the medical practice is carried out in accordance with professional standard and operating standard procedures. In line with that, the Health Act 2009 (*Undang-Undang No. 36 Tahun 2009 tentang Kesehatan*) also rules that health workers are entitled to get remuneration and legal protection when they are carrying out their duties. But if there is allegation of negligence committed by the doctors in carrying out their disciplines of medicine then, mediation is the first settlement that should be taken.

In many cases of medical malpractice, the most difficult thing is to prove that the standards of service that should be performed by doctors have been ignored. To prove the negligence of doctors, the courts usually rely on the explanation from expert witnesses. That`s also the case with the actions of the nurse or midwife in negligence of implementing nursing care and midwifery care.<sup>41</sup>

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<sup>41</sup>Sri Siswati, 2013, *Opcit*, p.128-130

