CHAPTER FOUR

FINDING AND ANALYSIS

A. The Importance of Legal Protection for Doctors

In November 2013, almost all doctors involved in a demonstration as a protest on the court decision to dr. Ayu and her two colleagues' case. From Jakarta, Semarang, Klaten, Malang, Manado and Papua, almost all doctors did this demonstration. This demonstration was conducted by doctors because of the unjust and unsuitable punishment given to dr. Ayu and her two colleagues. dr. Gabriel, one of demonstrators stated that "They (society) do not know what is malpractice and we are not angels".[1] dr Ayu's case showed that doctors felt so aggrieved by the process of the trial of dr. Ayu and her two colleagues. They felt that the decision made by the court was not fair. They felt the doctors have been criminalized.

Although a form of legal protection has been granted by the MPA 2004, the protection provided is not comprehensive yet. Therefore, the doctors still consider that there is uncertainty of law in proceeding the doctors. Negligence by doctors is very difficult to be proved. In fearing and worrying about the lack of legal protection for doctors, the necessary is legal certainty which is born by the reform the MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran).* Legal certainty

[1] Ika, "Dokter Ayu Dipenjara, Ratusan Dokter Gelar Demo Solidaritas", Wednesday, 27 Nov 2013, http://sidomi.com/240037/dokter-ayu-dipenjara-ratusan-dokter-gelar-demo-solidaritas/, accessed saturday, 20 August 2016 at 10.54AM

is required in determining the appropriate punishment for violations of the code of ethics, crimes, or other medical disputes. Legal protection for doctors will make doctors feel comfort in giving their treatment to the patient. A protection for doctors also helps them gain access to justice and remove fears of legal threats.

In the paragraph below, the researcher will show the importance of legal protection for doctors. There are three reasons why it is important for doctors to have legal protections. They are as follows:

1. The medical malpractice accusations are extremely stressful

Doctor is a very noble and respectable profession in society. A doctor had finished the education and training that is long enough before conducting medical practice or medical services. Related to this, it was widely reported in the national mass media, both printed and electronic, that there were many cases of medical malpractice. This news makes doctor worry and fear. If doctors do not help or give treatment, it is considered wrong according to the law, but if they help their patients they will face the risk of litigation. Patients usually think that negative outcome is a form of medical negligence. Because of that, patients or their families will sue doctors.

For example, Rappahannock hospital in the city of Kilmarnock, Virginia, United States, on March 2003, was forced to reject a pregnant mother and refer her to the Richmond hospital within a half hour drive.

This is done because the Rappahannock hospital is bankrupt because of too many malpractice suits assessed millions of dollars. As a result, 1.5 million people do not get the Kilmarnock obstetric care of the hospital. The hospital losses reached $ 940 million because of huge damage awards in the lawsuit. Four lawsuits were filed between 2000-2002. The court order in one case detailed a settlement of $ 365,000 in a $ 3 million suit filed in 2002 in the case of a baby who suffered an injury during the birth. Such talk should not come to the hospital in Indonesia.[2]

Another example, in Singapore, for anesthesia, the doctors use sophisticated equipment to monitor the patient during anesthesia and the surgery until the patient regained consciousness. That sophisticated tools are not available in many hospitals in Indonesia.[3] If then there is patient dies, the doctors will be sued. Whether the doctor is willing to perform anesthesia without *pulse oximetry* can be said as "unstandardized work" or hospitals should be closed because the facilities are not standard?[4]

The increasing knowledge and awareness of the society responsibility for their own health, is resulting in a shift in the prevailing paradigm. At the first, the focus on the ability of doctors themselves is now shifting toward the science capabilities of the healers. This shift causes the raising of people's awareness to demand their balanced

[2] See Frank Delano, "The free Lance-Star", published Des 21, 2003, https://news.google.com/newspapers?nid=1298&dat=20031221&id=8zMzAAAAIBAJ&sjid=3ggGAAAAIBAJ&pg=6843,5119474&hl=en accessed January 23, 2016, at 08.34AM

[3] Anny Isfandyarie, *Opcit,* p. 198

[4] *Ibid*,p. 199

relationship between doctor and patient, where the patient is no longer fully surrender to the doctor.[5] This causes of increasing a lawsuit against the doctors on malpractice and other medical disputes when patients find treatment from a doctor is not in accordance with the expectations.

In line with that, patients often have a presumption that if they do not heal is a doctor's negligence in performing medical acts. This paradigm is gaining by the increasing reports on medical malpractice. This situation is also worsened by the incompleteness of the legislation about the standards of medical services which gave birth to the legal uncertainty about the level of a doctor's negligence.[6]

Accusations of medical negligence cases against doctors are true if the doctor has violated standard operational procedures and other standards that have been defined. Even the doctors who were very professional and their practice has conducted in accordance with established standards but nonetheless they are still sued for malpractice.[7] Approximately, 80% of the medical malpractice suits against the doctors were not settled through internal mechanism in hospital, but they tend to go to court.[8]

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[5]*Ibid*,p. 90

[6]Bagus Tri Adikarya, "Perlindungan Hukum Bagi Dokter Melalui Reformasi Standar Pelayanan Kedokteran Berdasarkan Prinsip Kepastian Hukum":*hukum student journal ub*, 2015, hlm.1 http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/download/1023/1012accessed Monday, 11 May 2015. at 11.10PM

[7]Safrowi, 2010, Perlindungan Hukum Terhadap Profesi Dokter Terkait Dugaan Malpraktek Medik, *Skripsi*, UIN Syarif Hidayatullah, Jakarta

[8]Guwandi, 2010, *Hukum Medik (Hukum Kedokteran)*, Jakarta; Balai Penerbit Fakultas Kedokteran Universitas Indonesia, cet-4, p. 76

Serious legal threats make doctors should always be successful in carrying out a medical procedure. Doctors must be very careful because an error in operation or errors in other medical action will directly be alleged as medical malpractice[9]. Most people do not know what medical malpractice is.[10] This issue will have an impact on disrespecting of health law itself.[11] It can weaken the performance and image of the doctors.

Accusations of malpractice and other medical practices case would harm doctors and other health professions. Doctors should perform their profession with confidence without the burden of doubt in the treatment of patients in achieving optimal results. But in fact, although doctors have been doing medical practice very carefully and confidently, there is still a possibility of medical risks, which one of them is negligence.[12]

The threat of law that makes the doctors uncomfortable in carrying out their duties will affect the quality of their services and mistakes can happen. Errors occur in health care as well as every other very complex system that involves human beings, because “to err is human”. It is natural to make mistakes. It should not be too harsh with someone who makes a mistake, because all human beings make mistakes. The message in "to err

[9]*Ibid*, p. 244

[10]Anny Isfandyarie dan Fahrizal Afandi, 2006, *Tanggung Jawab Hukum dan Sanksi Bagi Dokter*, Jakarta; Prestasi Pustaka, p. 5

[11]Nusye KI Jayanti, *Penyeselesaian Hukum dalam Malapratik Kedokteran,* Pustaka Yustisia, Yogyakarta

[12]Azrul Azwar, 1990, *Kesehatan Kini dan Esok*, Jakarta; Ikatan Dokter Indonesia, cet-1, p. 20

is human" was that preventing death and injury from medical errors requires dramatic, wide system changes.[13]

Doctors are just professionals who do all they can, in accordance to established standards without guarantees that it would cure the patient, but they have an obligation to do all efforts to try to maximally cure the patients (*inspanningverbintenis).* [14]

A doctor who has knowledge and high skills in the field of specializations actually uses their knowledge for the benefit of patients without being influenced consideration to seek personal gain. However, dissatisfaction of patient on the efforts to be cured by doctors may lead the doctors to court. Although in the end, the claim of the patient is not proven, but the doctor's name was already contaminated.[15]

2. Differences in Perceptions of Medical Malpractice

In Indonesia, in case of dr. Setyaningrum that occurred in January 1979, there are two different expert opinions. One side expressed that dr. Setyaningrum act in accordance with the procedures and standards of medical practice which is well adapted to its term and the area of work in health centers which is far from complete health care center. On the other hand, stated that dr. Setyaningrum has negligently caused the death of her

[13]See Molla Sloane Donaldson, *"An Overview of To Err is Human: Re-emphasizing the Message of Patient Safety"* March 28, 2011, http://www.ncbi.nlm.nih.gov/books/NBK2673/ Accessed January 4, 2016, at 2.57pm

[14]*Inspanningverbintenis* (engagement efforts) is an obligation/effort commitment: contractual obligation that a party must make an effort. There may default case when that party's efforts inadequate, there is no obligation to achieve the result.

[15]Anny Isfandyanrie, *Opcit*, p. 4

patient, due to anaphylactic shock after being given several injections. Thus, in the court of the first instance and the court of appeal, the judges said that dr. Setyaningrum had violated good medical practice standard. But in a cassation examination, the Supreme Court rectified the decisions of the lower courts. The Supreme Court decided that the accused was not guilty and she was released accordingly.[16] The Supreme Court decision was formulated based on the expert opinion which was contrary with the previous decision.

From the brief description above we can see the difference of opinion from several experts about what caused the failure of the medical services that have been performed by doctors, whether it is categorized as medical risk or medical malpractice[17]. Misunderstanding and difference of opinion on outcome of medical malpractice becomes a nightmare of doctors to achieve justice.

The outcome of malpractice is also part of the responsibility of the hospital (*respondeat hospital liability).* In the search for a solution to the problem of negligence or error, it has to do with the approach to medical problems through the law, commonly called *medicolegal.*[18]

There is no definition of medical malpractice in the MPA 2004 *(Undang-Undang No.29 Tahun 2004 tentang Praktik Kedokteran)* as well as in the Health Act 2009 *(Undang-Undang No.36 Tahun 2009 tentang*

[16] Muh. Endrio Susila, *Opcit,* p. 448
[17] Syahrul Machmud, *Opcit,* p. 5
[18] Medicolegal is another term of medical law or health care law whic still searching for his identity to be recognized as a particular scientific field that is related to law and health.

Kesehatan). The meaning of malpractice is found in Section 11b of the Health Act 1963 *(Undang-Undang No.6 Tahun 1963 tentang Tenaga Kesehatan)* which is no longer valid. The Health Act 1963 explains that medical malpractice means neglecting the obligation which means not doing something that should be done.[19]

Malpractice is divided into two categories based on the type of error involved. If the error contains the rules of conduct, it is categorized in *ethical malpractice,* and if it contains elements of the rule of law, it is categorized as *legal malpractice.*[20] Nusye KI in her book found that the medical error is not a criminal offense or breach of contract.[21]

Doctors may not intentionally cause harm to the patient. Problems arise when doctors are prosecuted because of medical malpractice. It has been acknowledged that there are certain forms of medical malpractice which amount to criminal liability. However, in practice, it is not easy to determine which case can be tried criminally and which case cannot. Even though medical malpractice is a common term, many people, including the law enforcement officers. are still confused with this term.[22]

Until now, medical law in Indonesia has not been able to formulate independently, thus the definition on medical malpractice cannot be formulated. Thus, for the contents of the understanding and the limits of

[19]Syahrul Machmud, *Opcit,* p. 22

[21] *Ibid, p.100*

[22] Muh. Endrio Susila, *Opcit,* p. 448

medical malpractice, the expert still have different perspective, it depends on the point of view.[23]

The law should define medical malpractice, thus it will create certainty on the matter. Moreover, regulations on the legal protection of the doctors should be clear, detailed and can be easily understood by the public. This is a very serious issue. If the doctor who is not guilty should be jailed for his alleged violation of medical malpractice, although the sentence may not be harsh, but it will defame the doctor. The obscurity of this Act would also hurt the doctor who always has the instinct to treat patients. It is very unfair if the good will of a doctor should face legal threats that are not suitable.

3. The application of health laws and medical dispute resolutions cannot be implemented properly

Anny Isfandyarie observes some obstacles in relation to the enactment of the MPA 2004 which is then followed by the Minister of Health Regulation No. 1419/Menkes/Per/X/2005 on the Implementation of Medical Practitioners and Dentists as the implementing regulations of the MPA 2004.[24] The MPA 2004 emphasizes only the protection of patient safety and introduces harsh punishment to doctor.[25]

[23]Siska Elvandari, 2015, *Hukum Penyelesaian Sengketa Medis*, Yogyakarta, Thafamedia. p. 137

[24] Anny Isfandyarie, *Loc. cit*

[25]*Ibid*, p. 176

The MPA 2004 regulates the matter of the delegation of authority from doctors to nurses. But that matter has resulted problems. The delegation of authority from doctors to nurses, especially related to the implementation of the surgery in the village that does not have a specialist makes patients and doctors more difficult to receive and give treatments.

Section 14 paragraphs (1) and (2) of the Minister of Health regulation 2005 *(PERMENKES RI No. 1419/menkes/per/x/2005),* states that:

a. Doctors and dentists may give the authority on their behalf to a nurse or another healthcare professional in form of written permission for performing patient care.
b. The action mentioned above has to be done by considering the capability of nurse and in accordance to the law.

Some hospitals in villages that do not have anesthesiologist are under the responsibility of the general doctor. Before the enactment of the MPA 2004, a general doctor is "courageous" to take responsibility to face any possible failure in anesthesia. Thus, there is no obstacle to the treatment of patients who require surgery, although a general practitioner does not have the competence to perform anesthesia. Nurse anesthetist also supports the "courageous" a general practitioner, because they've got the training and education for giving anesthesia and handling complications that may occur in the anesthetic failure. However, since October 6, 2005,

when the MPA 2004 applies, some general doctor did not dare take the risk, while the nurse anesthetist are also unwilling to do his job if the instruction to do anesthetic does not come directly from doctors who have competence in the field of anesthesia.

This is related to the sanctions in section 78 of the MPA 2004 which stated:

> "Everyone who utilizes tools, methods or other means to provide treatment to the people who give the impression as if the person concerned, is a doctor or dentist who has had a doctor registration letter and dentist registration letter or practice license referred in article 73 paragraph (2) shall be punished by imprisonment of five (5) years or a maximum fine of Rp. 150.000.000, - (one hundred and fifty million rupiah)."

Meanwhile, the numbers of anesthesiologist in the village are limited. Many of them only provide services in the city. The limitation on the practice of granting licenses of the maximum just three (3) places have made anesthesiologist could not practice in many villages.

The consequence of the phenomenon above, is that surgical procedures in villages that were usually handled by a joint operator with the nurse anesthetist, after the enactment of the MPA 2004, the patients are obliged to be referred to health care facilities that have anesthesiologist.[26] As a result, the patients are treated late.

In addition, the MPA 2004 also does not put terminology of medical malpractice. It makes every expert have their own perspective

[26]Anny Isfandyarie, 2006, *Opcit,* p. 18

about medical malpractice. The absence of the law makes it become more complicated and something which is scary because law enforcement has always interpreted medical malpractice as a criminal offense. The available legal system allows doctors involved in medical malpractice to be easily trapped into criminal prosecution. Nevertheless, criminal prosecution against doctors brings about some negative impact within the realm of health services. One of the disadvantages of criminal prosecution is the practice of defensive medicine.[27]

Medical practice is very complex. Law enforcement officers are difficult to prove the presence of medical malpractice. In order to achieve justice the disputes should be resolved in the appropriate institutions such as MKDKI.

According to Nusye KI Jayanti, the health law is an independent branch of law and should be placed within the category of lex specialis. Therefore, the settlement of medical disputes in civil and criminal courts which employ Civil Code or Penal Code are not appropriate.[28] The use of Civil Code or Penal Code causes the humiliation against health law and health professions, and the development of the health sector in Indonesia.[29]

Most cases of medical malpractice reported in the media involve bodily injury and many of the injured patients brought their cases under

[27]Muh. Endrio Susila, *Opcit,* p.439-458

[28] See Nusye KI Jayanti, 2009, *Penyelesaian Hukum dalam Malpraktik Kedokteran*, Yogyakarta, Pustakan Yustisia. p. 14

[29]*Ibid,* p. 14

criminal proceedings. They did so for several reasons. Some were so disappointed with the accident that they resort to the exercise of criminal liability to express their disappointment, while those who positively thought about preventing future accidents employ criminal liability with the aim of deterrence. Criminal proceedings have also been opted by medical malpractice lawyers to avoid the difficulty in proving a doctor's negligence if the case is brought to the civil court. The possibility to bring the medical malpractice cases to the criminal court and the fact that many victims of medical malpractice cases come to the police have stimulated the public in Indonesia to presume that medical malpractice cases are a criminal matter rather than a civil matter. [30]

Mohammad Hatta highlights that a medical malpractice has frequently been qualified as a crime and therefore people are confused about the scope of medical malpractice.[31] For further explanation, basically a medical malpractice is a doctor's misconduct in executing the profession. It should be judged based on the standard of the profession. Professional misconduct does not always amount to legal liability, either civil or criminal liability.[32]

Syahrul Machmud suggests that medical malpractice which amounts to criminal liability should be distinguished from the ordinary crime. In a medical malpractice case, the law enforcement officers should

[30]Muh. Endrio Susila, *Opcit,* p. 448

[31] *Ibid,* p. 439-458

[32]*Ibid,* p. 178

pay more attention on the element of doctor's negligence instead of damage. Negligence in the medical malpractice context should mean the failure to comply with the accepted standard of practice. Hence, even though the patient suffers from serious damage after undergoing medical treatment, the doctor will not directly be liable unless it is proven that the damage is caused by the doctor's negligence.[33] Damage resulting from medical treatment does not necessarily make the doctor liable criminally.[34]

On the other hand, Mudakir Iskandarsyah points out the specific procedure to be applied in a medical malpractice prosecution. He suggests that criminal prosecution against a doctor in medical malpractice cases requires a report *(aduan)* from the victim/injured patient. It means to say that the law enforcement officers may initiate criminal litigation without request from the injured patient. [35]

Amir Ilyas states that even though a criminal charge can be made against a doctor who commits negligence, it still becomes the subject of debate since there is opinion stating that a doctor can only be prosecuted criminally when he commits an intentional act such as stealing organs from or poisoning his patient.[36]

A settlement through litigation is incompatible with our Indonesia indigenous culture which emphasizes more on settling disputes through mediation. Basically, the doctors always do their effort to try to cure the

[33]*Ibid*, p. 449
[34]*Ibid*, p. 439-458
[35]*Ibid*, p. 450
[36]*Ibid*, p. 450

patient by treating patients. In fact, some of them did errors. Driving medical dispute cases to criminal issues will produce more psychological barrier to doctors in treating the patients. In the MPA 2004 which made very clear in section 1 number 14, which stated:

> "The Medical Disciplinary Tribunals (MKDKI) is the competent institution to determine whether there is an error of doctors and dentists in the application of the disciplines of medicine and dentistry, and determining the sanctions".

The section shows that the MKDKI has more competences to determine whether a doctor has conducted malpractice or not. Once again the court of justice is not competence to determine the disciplinary violence committed by the doctors. This is as evidence that the health law is a law that has the characteristics of *lex specials.*[37]

The Health Act 2009 provides another resolution of health personnel who commits negligence. In this Act, the first settlement is through mediation. So, there are two options that can be selected by the parties involved (patients and doctors) to resolve this issue, whether through MKDKI or a mediation.

In fact, if there is a medical dispute, the patients usually bring the case to the court. They neglect the existence of the MKDKI and processes that have been described in the MPA 2004. As explained previously, the MKDKI is the assembly that has the authority to determine whether there

[37] *Ibid.*p. 79

is an error that has been made by doctors and provide appropriate sanctions.

Malpractice is unsuitable term, because it is a presumption of guilt against the medical profession. This presumption of guilt could be abused by certain parties for the sake of temporary needs which can break all orders and health care system. The problems of society dissatisfaction with health care, generally is a problem of miscommunication between patient and doctor. So that, the right term is "medical disputes". Before any decision of judicial profession, misunderstanding between patient and doctor or hospital called "medical disputes", it is not a medical malpractice. Any adverse event should be analyzed first, because not all adverse events are identical to medical malpractice. The MKDKI may recommend whether it is categorized as crime or accident (*misadventure).*[38]

If the power to interpret the law is a crime, the lack of clarity in the law certainly is another crime. This is because the first is a consequence of the second. This crime will be even greater when the law was written in a language that cannot be understood by society. Those who do not care about the consequences of their actions need other help to interpret the law. But the law interpreter may have different interpretations of a

[38] Sofwan Dahlan, 2008, *Malpraktik dan Tanggung Jawab Dokter,* Semarang, Unika Soegiyopranoto

section. Crime will be rare when the book of the law is read and easily understood.[39]

B. Legal Protection for Doctors under The MPA 2004 *(Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran)*

The MPA 2004 *(Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran)* provides legal protection for doctors. Legal protection for doctors in The MPA 2004 can be found in the following provisions:

1. In consideration letter (d)

> "The regulations concerning on medical practice are needed to ensure the legal protection and legal guarantee for the health receivers, doctors and dentists".

2. Section 3 (c)

> "Providing legal certainty to the public, doctors and dentists".

3. Section 50 (a)

> "Every doctor/dentist in their duty to perform medical practice has following rights: (a) get legal protection in performing medical practice as long as the practice follows the standards of profession and standard operational procedures".

Even though legal protection has been guaranteed, however the doctors need to take into account several aspects below:

[39] Cesare Beccaria, 2011, *Perihal Kejahatan dan Hukuman,* Yogyakata, Genta, cet.1, p. 14

1. Doctors should perform the obligations as governed in section 51 of the MPA 2004 as follows:

    a. provide medical services in accordance with professional standards and standard operating procedures and medical needs of patients;
    b. refer patients to other doctors or dentists who have the expertise or the better ability, if they are not able to do a checkup or treatment;
    c. keep the patients confidential information even after the patient has died;
    d. perform emergency cares on the basis of humanity, except when he is sure that there are other people in charge who are able to do so; and
    e. update knowledge and follow the development of medicine or dentistry.

    Ignoring the above obligation will bear legal liability.

Fuady divides the primary legal obligation of doctors to 4 (four) it consists of:

a. The obligation to make the diagnosis of diseases;
b. The obligation to treat diseases;
c. The obligation to provide sufficient information to patients in a language understood by the patient, whether requested or not;
d. The obligations to obtain the patient's consent (without coercion or pressure) to the medical action that will be performed by a doctor

after the doctor gives enough information and understood by the patient.[40]

According to Nusye KI there are the 16 obligations for health personnel and Doctors. Health personnel should develop and know the 16 obligations for health personnel and Doctors in every action, in order to avoid cases of medical disputes. The 16 obligations for health personnel and Doctors namely:[41]

a. *Adequate* Information

Patients and health personnel must exchange information with equal position and balanced. Health personnel should actively ask what, where, when, how, or what. Do not let the health service a little talk.[42]

b. Informed Consent

An informed consent is an approval that is given after being informed. Informed consent should always be present because it is a part of respecting the rights of patients. Health personnel should inform the patients all the steps or actions to be undertaken together with medical risks considering the possible occurrence of this profession is uncertain profession.[43]

The contents of informed consent:

[40]Anny Isfandyarie, *Opcit, p*. 5

[41]Nusye KI Jayanti, 2009, *Penyelesaian Hukum dalam Malpraktik Kedokteran,* yogyakarta, Pustaka Yustisia, p. 80

[42] *Ibid*

[43] *Ibid*

1) The reason whether or not the action is needed;
2) The action is experimental or not experimental;
3) Medical purpose (diagnostic, therapeutic, rehabilitative, promoted)
4) Risks that may arise; and others.

c. Medical Record

A medical record is a documentation of medical and health care services provided to a patient at the directions of a physician, nurse or other caregiver. These records include documentations of medical observations and opinions by these professionals as well as the treatment and diagnostic documentation, such as X-rays, EKGs and laboratory work. These records can be a paper record, electronic record or both.[44]

d. Standard Profession of Care (doctrine of Necessity)

It is commonly called the doctrine of seriousness. This doctrine uses the doctrine of *necessity.*[45]

e. Second Opinion

If a doctor has provided health care to patients for more than 2 or 3 times and there is no progress, then the health personnel require *a second opinion.*[46]

[44] MU Heatlh Care, *"Medical Records"* http://www.muhealth.org/patient/medical-records/, accessed Monday, 12 September 2016 at 10.58PM
[45] Nusye KI Jayanti, *Op Cit, p. 82*
[46] *Ibid, p. 82*

f. Medical Risk

Health workers should be ready at all times to anticipate risks.

g. Medical Emergency Care

This means that in an emergency, health personnel must be quick and appropriate, the risk of being number two. For example, a patient comes in dying, less blood, then health personnel need to act quickly and appropriately, dead or alive it is a risk.[47]

h. Social Insurance of Health Care

Based on the international community or UN, health should be assisted by a social insurance. It is obligatory for the health personnel.[48]

i. Medical Liability

Health personnel should be able to differentiate the types of responsibility in the health care. Division of responsibilities within the health service will help and make easy in solving a problem in the case of a medical dispute. Healthcare provider will be quieter to do the job because the liability of each had been listed in Management Medical Liability.[49]

j. Negligent Medical Care *(Culpa Levisimma/lighte Schuld)*

Errors in a health care conducted by health personnel must be reasonable,for example, errors due to lack of experience and lack of

[47] *Ibid*
[48] *Ibid, p. 83*
[49] *Ibid*

knowledge. Errors must be within reasonable limits shall not be done more than two times, but it should be still in line with standard operating procedures. The reasonable error is called negligent medical care.[50]

k. Contributory Negligence

The occurrence of errors should be researched where it came from. Health personnel must understand where the error occurred (from the patient, technology, medical personnel, or non-medical personnel).[51]

l. Assumptions of Risk

All medical risks which will occur had already assumed beforehand. (*Volenti non fit injura).* Example; when a leg amputated, then it can no longer walk with a normal foot.[52]

m. Medical Intervention

Health services must always pay attention on the obligatory of informed consent and medical record in any health services as health workers legal protection.[53]

n. Medicare-Medicaid Program

In any health care should always think about the cost of health. The Medical program should be in harmony with the Medicare program.[54]

[50] *Ibid*
[51] *Ibid*
[52] *Ibid, p. 84*
[53] *Ibid*
[54] *Ibid*

o. Medical Committee *(Intern Justice of Medical Profession)*

Health personnel must have a medical committee that inspects medical error occurrence. The tasks of the medical committee are looking for the cause of the error, what happened, who did it, and who is responsible. These questions will be asked by the internal justice of medical profession.[55]

p. Accreditation of Health care (Joint Commission)

Health care accreditation is the accreditation bodies from the medical association, non-government. The medical association consists of doctors, hospitals, and other health services. The tasks are guiding not governing or judging.[56]

2. Doctor should take some preventive action

a. Avoiding negligence

Negligence can occur in three forms;[57]

1) *Malfeasance;*

Performing unlawful or improper or inadequate actions, for example: performing medical actions without adequate indication (the choice of medical action is improper).

[55] *Ibid*
[56] *Ibid*
[57] *Ibid, p. 97*

2) *Misfeasance;*

Performing the medical action well but being implemented improperly (improper performance), for example, performing medical action in violation of the procedure.

3) *Nonfeasance;*

Not performing medical procedures which are mandatory.

The forms of negligence are the same as other forms of error (mistakes, slips and lapses). Medical negligence is a form of medical malpractice, which frequently occurs. Basically, negligence may occur when someone intentionally commit something that is supposed to be done by someone else who has the same qualification in the same circumstances and situations.[58] Negligence done by individuals is not punishable unless, it is done by competent people on their profession, already act carefully but resulting harm or injuring someone else.[59]

Negligence has four elements:

1) An obligation to do or not to do something.
2) Violation or failure to comply the obligations.
3) Harm or injury to the patient.
4) The existence of causality between the violation and failure to meet these obligations with injuries or damages.

[58] *Ibid, p. 98*
[59] *Ibid*

b. Avoiding errors

Errors are divided into two:[60]

1) Medical error;

   "Error in conducting the profession on the basis of the provisions of the medical profession".

2) Juridical error;

   "Errors in conducting the profession on the basis of the provisions of the Act or the law".

There are four criteria of sources of medical errors, namely:[61]

1) Ignoring the Professional duties.
2) Doing something that should not be done, based on the profession oath
3) Ignoring something that should be done according to professional standards.
4) Behaving against the general rule which is expected by fellow peers in the same place and circumstances.

Four sources of failure above become the basis for determining the norm, whether ethics norm or legal norm. If the failure contains ethics norm then, it will be categorized as ethical malpractice, and if it contains legal norm then, it will be categorized as legal malpractice.[62]

[60] *Ibid*.
[61] *Ibid, p. 99*
[62] *Ibid*

Ethical malpractice is a professional misconduct due to negligence in carrying out professional ethics, and then the penalty is a form of ethical administrative sanctions in accordance with the degree of guilt.[63]

Legal malpractice is a professional misconduct which amount to legal liability. In common law countries, the following criteria is employed to prove doctors' negligence.[64]

1) Presence 4D's of Medical Negligence:
    a) Duty;
    b) Dereliction of that duty;
    c) Direct causation; and
    d) Damage.
2) Presence or absence of basic professional standards based on health sciences
3) Presence or absence of informed consent that meets the national or international standards.
4) Presence or absence of a complete medical record and chronology that ensures medical confidentiality.
5) Presence or absence of reasonable medical risk in accordance with science or health care
6) Presence or absence of an excuse or legal justification.

[63] *Ibid*
[64] *Ibid*

c. Avoiding Commercialism and Consumerism

Doctors and other health professionals should realign their intention to provide health care to patients. It is dangerous to let the relationship between patients and doctors from providers and health care receivers turn into commercialism and consumerism. Because if they turn into commercialism and consumerism, doctors can easily grant the patient's requests. For example:

1) The patients should not have *Caesarea*, but because of the wishes of patients, health personnel do *Caesarea* (a form of consumerism to the health service).[65]
2) The Patient should not have a CT scan, but is required to have a CT scan (a form of commercialism provider of health against receiver health).[66]
3) The patients should not install *orthodontics*, but because of the wishes of patient, the doctor finally installs *orthodontics* to the patient (a form of consumerism to the health service).

d. Maintaining a good relationship with the patient

Ethics, manners and good communication can create a good relationship between doctor and patient. The warm attitude of doctors, good delivery information and how to communicate well and warmly will

[65] *Ibid, p. 119*
[66] *Ibid*

strengthen the relationship between doctors and patients. This will make them mutually open to each other. Thus, the patient will be much more aware of the disease and also the risks. The kind of relationship will lead to a sense of kinship of mutual trust so that the accusations and prejudice against doctors will be lost because there is only a sense of trust to the doctor.

Prevention is better than cure, before falling in to medical disputes, lawsuits, and accusations of medical malpractice, the doctors should be prevented by avoiding things that become the principal reason, the demands of patients. Understanding the forms of acts categorized as omissions and errors. Thus, the doctors do not need to worry about the health law dispute settlement process that is still vacillating.

3. Medical defensive ways can protect and liberate the doctors from lawsuits.

There are nine things that can protect and/or liberate the doctors from law suit. They are:

a. Therapeutic agreement

Section 39 of the MPA 2004 *(Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran)*

> "Medical practice is organized based on the agreement between the doctor/dentist with the patient in an effort to maintain good health, disease prevention, health improvement, treatment of illness and rehabilitation of health".

The section above explains that there will be no treatments without the agreement of both parties. So before treating the patient then the action that must be done first is agreement on both sides. This agreement

concludes that the patient has agreed to undertake treatment to him. Agreement between the patients of this doctor is known as "therapeutic agreement or transaction therapeutic".

Definition of Therapeutic Agreement

Therapeutic agreement or therapeutic transaction is an agreement between doctors and patients, which authorizes the doctors to provide activities treatment to the patients based on the expertise and skills possessed by the doctors. The therapeutic transaction arise rights and obligations of each party. Patients have the rights and obligations and vice versa with the doctors.

Based on the Code of Indonesia Medical Ethics, it can be described on the characteristics of the therapeutic transaction as follows: [67]

a) The therapeutic transactions specially govern the relationship between doctor and patient.
b) The therapeutic transaction relationship should be conducted in an atmosphere of the mutual trust (confidential), which means that the patient must believe in the doctors who performed the treatment, and doctors must trust patients. Therefore, in order to maintain mutual agreement, doctors should make every effort to cure patients who have entrusted her/his health, and the patient must provide clear information about her/his disease.

[67]Anny Isfandyarie, *Opcit*, p. 71

c) This relationship is also expressed as ”always with all the emotions, hopes and fears of a human being”, because of the condition of patients who are sick, especially a chronic patient. Therefore, the doctors should be able to answer the patients and their families' questions with language that can be understood. If there is a bad news regarding the health of the patient, the doctors must explain it well so that the information does not discourage the patient's life. This condition makes therapeutic transaction more special than other transaction.

There are two kinds of obligations they are:

a) *Inspaningverbintenis* is an obligation/effort commitment: contractual obligation that a party must make an effort. There may default case when that party's efforts are inadequate, there is no obligation to achieve the result.[68]

b) *Resultaatverbintenis* is an obligation to achieve a given result[69]

Therapeutic Agreement has *inspaningverbintenis* or effort commitment, because doctors may not promise a cure to patients. Doctors conduct health services in an attempt to cure the patient. In doing this effort doctors must earnestly mobilize all the abilities and skills based on the standards of the profession.

[68] Lycaeus Juridisch Woordenboek , dictionary, http://www.juridischwoordenboek.nl/woordenboekinh.html#14939 accessed, Thursday, 18th August 2016, at 11.55 PM

[69] Lycaeus Juridisch Woordenboek , dictionary, http://www.juridischwoordenboek.nl/woordenboekrep.html#17979 accessed, Thursday, 19th August 2016, at 00.24 AM

Meanwhile, patients as other parties must also do all effort that can heal them because patients also contribute significantly to the effort to cure themself.[70]

b. Informed consent

Section 45 of the MPA 2004 requires that:

1) Any medical or dental actions performed by a doctor or dentist to a patient require approval.
2) The approval referred to paragraph (1) is given after the patient received a full description.
3) The explanation referred to paragraph (2) shall include at least:
   a) diagnosis and procedures for medical action;
   b) purpose of medical procedures;
   c) another alternative actions and its risks;
   d) the risks and complications that may occur; and
   e) Prognosis for their actions.
4) The approval referred to paragraph (2) may be provided either in writing or oral.
5) Every act of medical or dental containing high risk should be provided with a written consent signed by the authority to give consent.
6) The provision of the medical practice approval procedure referred to paragraph (1), (2), (3), (4) and (5) that are regulated by the Health Minister Regulation.

[70]Anny Isfandyarie, *Opcit*, p. 64

Informed consent is a very important to do because the medical practice is a profession that involves humans as living beings. Everyone has the right to self-determination, so all the patient should know what medical action will be done to them, what the risks are, and what alternatives can be taken. The full information given by the doctors will be delivered to the patient to decide to agree or disagree. Approval can be oral or written depending on the type of actions. This approval could be a strong evidence that the patient has agreed with his actions and the risks that will happen. Then the doctors cannot be prosecuted after the informed consent.

Definition of informed consent

Consent is an approval so that informed consent means consent based on information. Another term that is often used is the approval of the medical action. Before performing the medical action, a doctor is obliged to give an explanation to the patient and/or his family about the diagnosis and procedures for medical action, the purpose of performing medical actions, other alternative actions and prognosis for their actions.

1) Informed consent in the MPA 2004.[71]

In the MPA 2004, approval of medical action contains in Chapter VII in third paragraph 2 namely "The approval of actions medicine/dentistry" as outlined in section 45 paragraph (1) to (6),

> "Section 45 (1), any medical or dental actions performed by a doctor or dentist to a patient must be approved".

[71] *Ibid*.p. 137

From the explanation of section 45 paragraph (1) it can be described as follows:

a) In principle, the right to give approval or reject the medical action is the patient.
b) Approval of medical action can be performed not by a patient in the case;
   (1) Patients are under guardianship (*onder curetale);*
   (2) Patients are children (minors);
   (3) Unconscious patient.
c) Patient representative in three (3) condition above, are:
   (1) The family includes husband/wife, father/biological mother, biological children, and biological brothers and sisters.
   (2) If the family does not exist, then an explanation and information are given to people who accompany the patient.
d) If no companion and no family, then in a state of emergency, to save patients life, no consent is needed. Explanation will be given directly to patients (including children) at the first opportunity after the patient is awake.

"Section 45, paragraph (2) Consent as referred to paragraph (1) is given after the patient received a full explanation ".

Section 45, paragraph (3), the explanation referred to paragraph (2) shall include at least:

(1) Diagnosis and procedure to be taken;

(2) The purpose of performing medical action;

(3) Another alternative action and its risks;

(4) The possible risks and complications that may occur; and

(5) Prognosis for their actions.

Paragraph (3) explains that "the explanation should be given in a simple language because the explanation is the basis for consent". Another explanation that should also be given is related to finance.

> "Section 45 paragraph (4) Consent as referred to paragraph (2) may be provided either in writing or oral."

Oral consent in this paragraph is consent given in the form of word “agree” or form of nodding movement that is interpreted as “agree”.

> "Section 45, paragraph (5), every act of medical or dental containing high risk should be provided with a written consent signed by the authority to give consent ".

What is meant by "high-risk medical action" is like surgery or other invasive measures.[72]

Section 45, paragraph (6), the procedure of informed consent referred to paragraph (1), (2), (3), (4) and (5) is regulated by the Regulation of the Minister.

[72] *Ibid*, p. 138

Regulation of the Minister that contains the implementation of the MPA 2004 and regulates the Implementation of Medical Practice is Decree No. 1419/Menkes/Per/X/2005 *(Permenkes No 1419/Menkes/Per/X/2005).*

2) Informed consent in Decree No. 1419/Menkes/Per/X/2005 *(Permenkes No. 1419/Menkes/Per/X/2005)*

Decree No. 1419/Menkes/Per/X/2005 *(Permenkes No. 1419/Menkes/Per/X/2005)* does not explain the detailed rules regarding the informed consent. Implicitly, the consent referred to section 13, paragraph (1) which stated:

> "Doctors or Dentists in conducting medical practice are on the agreement between the doctors/dentists and the patients in the maintenance of health, disease prevention health improvement, treatment and rehabilitation of health."

While the informed consent is mentioned explicitly in section 17 as follows:

a) Doctor/dentist in providing medical or dental action firstly must give an explanation to the patient about the medical action to be performed.
b) Medical actions referred to paragraph (1) shall obtain the patient's consent.
c) Giving an explanation and consent referred to paragraph (1) and (2) shall be implemented in accordance with law. "

From the words of section 17 paragraph (3), it is clear that the Minister of Health has not been regulated in detail regarding the informed consent, so based on the Transitional Provisions of section 81 of the MPA 2004, which has been mentioned above, then we can still refer to Decree No. 585/Menkes/Per/IX/1989 regarding the informed consent *(Permenkes No. 585/Menkes/Per/IX1989 tentang Persetujuan Tindakan Medik).*

3) Decree No. 585/Menkes/Per/IX/1989 regarding the informed consent *(Permenkes No. 585/Menkes/Per/IX/1989 tentang Persetujuan Tindakan Medik)*

The preamble mentioned basic considerations by the Minister of Health are:[73]

a) Doctors need legal basis in running the medical profession as guidelines for doctors.
b) The arrangement of the informed consent is a matter that is closely related to medical treatment by doctors.
c) The Minister of Health needs to set up the legal basis as guidelines for doctors in carrying out informed consent.

The requirements for giving information are as follows:

[73]*Ibid*, p. 141

a) The delivery of the information content must be adjusted to the level of education as well as the patient's condition and situation.
b) Information about the medical action must be given by the doctor to the patient, whether it is requested or not requested, with information as complete as possible, if the doctor considers that the information may harm the interests of the health of the patient or the patient refuses to be informed.
c) Information cannot be given to the patient, and then with patient's consent the doctor can provide that information to family and companion, accompanied by a nurse/paramedic as a witness.
d) The information includes the gains and losses rather than medical action, both diagnostic and therapeutic, orally, honestly and truly.
e) For surgery or other invasive procedure, information must be provided directly by the doctor who will perform the surgery or if the doctors are unable to give the information, the information must be given by another doctor with the knowledge and instructions of the responsible doctor. Then, for medical actions which are not surgery and invasion of other actions, the

information can be given by another doctor or nurse, with the knowledge or instructions of the responsible doctor.

General Standards Service of Anesthesiology and Reanimation at Hospital issued by the Directorate General of Medical Services Ministry of Health in 1999, on page 23 stated that the form of informed consent signed by;

a) Patients or family in accordance with legal requirements and administrative regulations;
b) Doctor or nurse given the delegation of authority for it;
c) A witness, it should be a hospital personnel.

Consent of the patient or his family is an implementation of the fundamental rights of patients or health care and the right of self-determination that must be recognized and respected.

After the patient agree (consent) to medical action based on clear information, as well as medical actions have been in accordance with the standard of medical services, then the doctor cannot be blamed if there is an error which has been assumed and has been approved by the patient and/or the patient's family.[74]

[74]Syahrul Machmud, *Opcit,* p. 168

c. Medical records and medical audit

1) Section 46 of the MPA 2004

a) Every doctor/dentist in medical practice shall make medical records.

b) Medical records referred to paragraph (1) shall be completed after the patient has finished receiving a health care.

c) Every medical record shall also consist of the name, time, and signature of the person who provides services or actions.

2) Section 47

a) Medical records document referred to section 46 is owned by a doctor, dentist, or health-care facilities, while the content of medical records belongs to the patient.

b) Medical records referred to paragraph (1) shall be stored and kept confidential by a doctor or dentist and leader of the health service facilities.

c) The provisions concerning the medical records referred to paragraph (1) and (2) are regulated by the Minister Regulation.

The relation of the medical record and the legal protection for doctors is as evidence. Medical records could be valid as documentary evidence by the courts if the doctor reported by patients conducts or does not conduct treatment which can injure the patient. For sample case, a patient reports a doctor because the doctor does not give a tetanus injection

to the patient's wound. This accusation can be proved by checking back at the patient's medical record document. Whether a tetanus injection has been done or not, so if the medical records are not made, the doctor could have been convicted of it. Although the doctor may give a tetanus injection, but there was no evidence that could save him.

To minimize the criminal complaint and a civil lawsuit, the doctor and the hospital management must carefully make medical records. The value of medical records is important for administration, legal, finance, research and educational documentation.[75]

While the medical audit is required to inspect and audit the contents of the medical records that have been made by doctors medical records will be audited by professional organizations such as IDI, PDGI, and others, whether those actions in accordance with professional standards or not. According to dr. Sunarto (IDI member of DI Yogyakarta Province), medical audit is not performed at any time but it will be done every time there are reports and cases of medical disputes.[76]

The objective of medical audit is to check the standards of the profession whether those medical actions are appropriate or not. If they violate the standard, then, they do a breach of discipline, but if they are appropriate, but the errors still occur and impact on the loss of the patient then it is not a breach of discipline or omissions rather than a medical risk.

[75] Sri Siswati, *Loc.cit*

[76] At the interview of dr. Sunarto, at Wednesday, March 16th, 2016. In IDI office, special region of Yogyakarta

d. Professional standards

Section 50 (a) and (b) of the MPA 2004, states that a doctor or dentist in performing medical practice has the rights to:

1) obtain legal protection throughout the duties in accordance with professional standards and standard operating procedures;
2) provide medical services according to professional standards and standard operating procedures;

Legal protection would be obtained by doctors if they carry out their duties in accordance with professional standards. The doctors must be aware of the professional standards that have been approved by the Medical Council *(Konsil Kedokteran Indonesia).* Understanding of the standard of the profession can make doctors estimate the risk of what would appear so as to be anticipated in advance. With the implementation of medical practice in accordance with the standards of the profession, the doctors have been protected by law in performing their duties.

As described under section 50 (a) of the MPA 2004, if a doctor has been carrying out medical care or medical practice in accordance with professional standards, service standards, standards of medical services and standard operating procedures so they cannot be prosecuted either of Administrative law, civil or criminal.

The elements of the professional standards, according to W.B. Van der Mijn, namely:

1) Accuracy
2) Authority
3) Average ability

While elements of the professional standards, according to HJJ Leenan, are namely:

1) The situation and condition
2) The rule of conduct
3) Free from negligence
4) Disciplinary rules
5) Accuracy

Van der Mijn outlines the elements of professional standards in accuracy, authority and average ability. Van der Mijn focuses that profession standard is based on the ability of the average doctors. So the professional standards do not have the detail of steps that should be applied exactly by all doctors.

In the MPA 2004, the professional standards have been stated in Section 7, paragraph (1) that the Medical Council *(Konsil Kedokteran*

Indonesia) is the body that has the task to certify the standards of professional education of doctors and dentists. [77]

e. Contributory negligence

The patients cannot blame doctors for unsuccessful treatment, if the patient is not co-operative. The patients do not explain the truth about the history of their disease, and drugs ever consumed during illness, or the patients do not obey the instructions of doctor or refuse treatments that have been agreed because patients as other parties also contribute significantly to the effort to cure themself.

An uncooperative patient is a form of *contributory negligence* is not under doctors' accountability. Honesty and obeying doctor's advice and instruction are considered as patient's obligation to the doctor and the patient himself.[78] For examples: [79]

1) Patients do not explain and identify the disease clearly (there are still hidden by the patient), for example, a girl patient came to the doctor with complaints of bumps on her stomach. At the time of the anamnesis, the patient admitted that she was having regular periods. She did not admit that she ever did sexual intercourse. This can make the possibility of incorrect in diagnosing by doctor and therapy of pregnancy can be presumed

[77] The MPA 2004 (*Undang-Undang No. 29 Tahun 2004 tentang Praktik Kedokteran)*

[78]Syahrul Machmud, *Opcit,* p. 169

[79]Anny Isfandyarie, *Opcit,* p. 63

with a uterine tumor. It would require an ultrasound to distinguish it. An ultrasound checkup performed by a doctor, in this case, is not an exaggeration that violates ethics or considered as incompatible medical needs of patients. This is necessary because the patient did not tell the truth of the state of his illness.

2) A girl patient complained stomach aches at downright. After reviewed, the surgeons decided to perform surgery, because the surgeon assumed there is appendix perforation. Once opened, the surgeon found the existence of a pregnancy outside the womb, so the surgery needs longer time because they have to consult to a gynecologist. In such case, the patients were also guilty, so the act of extra-time surgery that might cause complications of the infection could not be blamed on the surgeon.
3) Patients do not take the drugs, because the recipe is not purchased.

The examples above are patients 'contributory negligence' when errors occur the complications or patients are not cured, it is not a doctor's error. It should be considered by doctors to be used as a justification, as the protection against the patients' demands.

f. Respectable Minority Rules and Error of (in) Judgment[80]

The Respectable Minority Rule is theory of law means a doctor is not considered negligence if he did choose one of the many ways of

[80]Syahrul Machmud, *Opcit,* p. 169

recognized treatments.[81] The doctor who did not follow the same course of therapy that other doctors would have followed, he can show that his course is accepted by a respectable minority of practitioners.[82]

g. *Volenti non fit injuria* or Asumption of risk[83]

Volenti non fit injuria is a defense in tort that means where a person engages in an event accepting and aware of the risks inherent in that event, then they cannot later complain of, or seek compensation for an injury suffered during the event. This is used often to defend against tort actions as a result of a sports injury.[84]

Besides, this doctrine can also be applied in cases of the patient ask to be discharged from hospital (discharged on their will, although doctors have not allowed), then that sort of thing frees doctors and hospitals from lawsuits.

[81]Anny Isfandyarie, *Opcit,* p. 170

[82] Ken LaMance, *"Standard of Care for Medical Malpractice",* published on July 4, 2015 http://www.legalmatch.com/law-library/article/standard-of-care-for-medical-malpractice.html, accessed, on Saturday, August 20, 2015, at 05.06 PM

[83]Syahrul Machmud, *Opcit,* p. 170

[84] Duhaime's Law Dictionary, http://www.duhaime.org/LegalDictionary/V/VolentiNonFitInjuria.aspx, accessed, Saturday, 20 August 2016, at 05:25PM

h. *Respondeat superior* or vicarious liability (Hospital Liability/Corporate Liability)

Respondeat Superior is a common-law doctrine that makes an employer liable for the actions of an employee when the actions take place within the scope of employment. Under *respondeat superior* the employer is liable for the injuries caused by an employee who is working within the scope of his employment relationship.[85]

In the Indonesian legal system which follows the continental Europe, such a rule can be found in section 1367 BW. It means that the employer has the right to control the actions of subordinates either on the results achieved or on the used means. Similar with the development of the health care law as well as the sophistication of medical technology, hospitals cannot escape from the responsibility of the work performed by the employees including what is done by the medical.

The opinions of some legal experts still differentiate work between superiors and subordinates and subordinates should act within the scope of the work assigned to them. Employment relationship exists when the employer has the right directly to supervise and control the activities of subordinates in performing their duties. In this case, the work is provided by the superior.[86]

[85] Farlex, The Free Dictionary: Legal Dictionary, http://legal-dictionary.thefreedictionary.com/respondeat+superior, accessed, on Saturday, August 20, 2015, at 05.45 PM

[86] Syahrul Machmud, *Opcit*, p. 171

R. Adboel Djamalics divides three responsible groups for hospitals in the event of hospitalization; referred to section 1367 BW, anything carried out by the non-doctor is the responsibility of the hospital. If the doctor is a doctor who is working full time at the hospital, so the hospital takes responsibility for the actions of the doctor. But if the doctor is free, then the doctor is responsible. While in 1965, the Anglo-Saxon legal system has developed the doctrine of *respondeat superior* in a broader sense.[87]

i. Res ispa Loquitur[88]

The doctrine of *res ispa loquitur* is directly related to the burden of proof (burden of proof), namely: the transfer of the burden of proof from the plaintiff (patient and / or family) to the defendant of medical personnel.

On certain omissions that have been clear so it can be known by a layman or according to common knowledge among laymen or the medical profession, or both of them, that defect, wound, injury or facts are obvious from the result requiring proof from the plaintiff but defendant should prove that his actions are not in the category of negligent or erroneous, medical error or medical violence[89]

Doctor or dentist can be free from claims for damages, if it can prove that the loss suffered by patients is not the doctor's fault.[90]

ME (medical error) is very different from the MV (medical violence)[91], because, in ME, doctors had acted correctly in accordance with

[87] *ibid*
[88] *Ibid,* p. 172
[89] *Ibid*
[90] Anny Isfandyarie, *Opcit*, p. 22

the adequate procedure and have been accredited in the hospital, but the ETD[92] (Unexpected Effect) still occur. It could be the establishment of procedures (medical or non-medical) in an inadequate hospital (wrong), but the doctor has been working according to the procedure, the doctor cannot be blamed. In MV, doctors have acted errors because it is not in accordance with the existing procedures at the hospital. The doctor has clearly acted negligence.[93]

The question is why ME and ETD still often happen when it should be 50% of the patients still can be prevented. Dr. Lucian Leape states that;

> "Testifying to the president's Commission on consumer protection and quality in health care that ... human being a make mistake because of the systems, tasks and processes they work in are poorly designed."

According to Idris Fachmi,[94] ME is strongly associated with the existing system. Because theoretically ME would arise if the factors that influence the error still exist. These factors are the doctors' performances and knowledge. The most dominant factor in the case of error is the performance of doctors or dentists. While in the hospital the doctor's performance is strongly influenced by the system that regulates doctors in their profession.[95]

Therefore, disability or death of the patient can occur because of ME or MV. The MV, in which doctors have conducted medical action

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[91]Fahmi Idris, Malpraktek: Error atau Kelalaian (peranan IDI dalam Rangka Perlindungan Hukum Anggotanya).
[92]*Efek Tak Terduga*
[93] Syahrul Machmud, *Opcit,* p. 173
[94]*Ibid*
[95] *Ibid*

which is not in accordance with the correct procedure so this sort of things can be considered as malpractice. Unlike the ME in which the doctor has conducted a procedure or practice that is in the hospital, then to such case, doctors are considered innocent.[96]

At ME major problems that need to be measured is the validity or existing custom. The procedure may not be wrong, which means that the doctor had been working properly in accordance with the procedure. Although such events are called errors committed by doctors, what exactly happened is hospital error or system error. Fachmi Idris emphasized that the hospital error is closely related to the existing system at the hospital. In-depth elaboration is needed on the condition of hospitals that includes visions of hospital, operation, management, and communication system. A good hospital design includes the building, operation systems, maintenance and internal regulations of the hospital. Conditions of hospital error cannot be separated from the large systems (i.e: the government policy of hospital, financing of the hospital, health financing and public demand). Error system is one of the main problems and sources of unexpected disability or death in patient.

[96] *Ibid*