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### RESEARCH ARTICLE

#### STUDY ON VICTIMOLOGY OF MEDICAL MALPRACTICE IN INDONESIA.

Sutarno.

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#### Abstract

Often, people easily judge a doctor to do malpractice to his/her patient, when in fact it is not. Conversely there are doctors who do not understand how the law works, so in terms of patient doctor relationship more to remember the noble profession ethic. The medical professional ethic is very good, but in the certain condition doctors can actually be harmed for maintaining their professional ethics when they must be opposite of positif law. This information illustrates the opinions of the author, it's not the formal opinion of any government, aimed only for educational materials, that is knowing the various victims of malpractice medic and proof that occurred in Indonesia. Doctors can be considered guilty when dealing with patients whose their treatment does not cure the patient. The result of a patient in a medical treatment depends on many factors that support and otherwise may occur a medical risk that harms the patient even though the treatment process has been in accordance with Standard Operating Procedures. Doctors can also make mistakes either intentionally or because of negligence that can harm the patient or even a sense of community justice. Victims of medical malpractice can vary, from clear or unclear, making it difficult to prove that they are victims of medical malpractice. In addition, the grade of a person's role so that he himself becomes a victim of medical malpractice also vary. With the high complexity of medical science, ordinary people are often still difficult to understand and often make mistakes in implementing the treatment process so that self-harm. In the litigation process, several ways of proving can be used either in proving a doctor has malpractice or otherwise that someone is a victim of medical malpractice. The handling of malpractice cases still often uses general laws and regulations (lex generalis).

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#### Introduction:-

A crime can cause a victim. Also, crimes that occur in the field of health or medicine can also cause casualties. In the realm of law we always assume that the parties (borrowing the term in civil law) are between the crime-maker and God, represented by the State, in this case the court / judge. So clever as any crime is covered up, we believe the concealment of a crime must be imperfect and undoubtedly dismantled. In making the litigation of a case, the process of law enforcement must proceed well, from investigation, investigation, prosecution, court examination and stage execution of the verdict (execution). In the case of medical malpractice, proof of physician's error is often not easy and many things affect so it is not as easy as in other crime cases. Doctors usually adhere to medical ethics in

addition to law, in carrying out its profession. From this, doctors and some of the general public consider that what the doctor does is a noble task because it is more concerned with the interests of the patient than his own interests. In fact, in the case of alleged malpractice medic, after the law enforcement process is completed, the concerned physician can be guilty verdict, free or free from any lawsuit. Thus for a physician who is declared free or free from any lawsuit is not a crime-maker, but a person who is harmed by the case.

In the case of malpractice medic, until now has not been specifically regulated by the positive law of Indonesia. Act number 29 of 2004, still toward the perfection. This law was once in yudical review and while it is also in the process of review yudcal again. Other health legislation relatf more calm, there has been no change (except the health manpower Act). Formulation of the problem: Is the doctor even a victim while maintaining his professional ethics and Proof that a person is a victim of medical malpractice

#### Crime and malpractice medic

##### a. Medic malpractice

According to B. Sonny Bal, the malpractice definition in the United States of Serkat, is: All acts or omissions imposed by the physician during the treatment of his patient, which deviates from the norms of practice accepted by the medical community and causes an injury to his patient.

In Indonesia, Adami Chazawi provides a description of medical malpractice as follows: An act of a physician or person under his command, intentionally or negligently committing active or passive conduct, in the medical practice of his patient at all levels, in violation of the Professional Standard, the principle of medical professional or by lawful or unauthorized violation caused without informed consent or without informed consent, without SIP or without STR, is inconsistent with the patient's medical needs, resulting in harm to the body, physical or mental health and / or patient's life so as to establish accountability law for the physician concerned.

Much effort has been made to reduce the number of cases and the magnitude of medic malpractice suits, among others, as suggested by Lisa V. Brock and Anna Mastroianni, who say it is advisable to involve risk management and legal counsel in decision-making concerning error disclosure.

If you look at the definition of malpractice in America as mentioned above, certainly before a case of malpractice brought to law enforcement, should be assessed first by professional organizations.

But in Indonesia has been decided by the Constitutional Court that in addition to the path to the discipline of profession and ethics, in parallel may be settled through litigation to law enforcement (the judgment of the Constitutional Court on Judicial review, against article 66 letter c of Law No. 29 of 2004 on medical practice). It is decided on the basis that it does not diminish the right of citizens to obtain justice.

From the Civil Code side, according to Setyo Trisnadi, the patient doctor's relationship is not only based on Article 1320 Civil Code, but more specifically, this relationship is also based on good faith and moral values.

Patients who seek treatment may end up with a cure, disability or death. Things that affect so that the results of such treatment in the form of a cure, disability or death are:

- a. Patients own factors, such as knowledge of the disease, attitudes and resistance to the disease
- b. Factors of the disease: whether the type of malignant or non-malignant, already in a state of severe or still not severe.
- c. Health workers, including doctors and nurses, are well informed, good in skills, whether their attitude or behavior is good
- d. Regulatory factors in hospitals, facilities, utilities, financing and management of a nursing home or hospital both in the sense of benefiting the patient.

##### a. Crime in medic practice

Criminality (criminologically) is any harmful (destructive) and immoral conduct that causes such great shock in a particular society, so that the public has the right to denounce and to resist the conduct by the deliberate dropping of an affront to the actor (Van Bemmelen). Other experts categorize crime as an act that violates the norms of society and the act gets a reaction from the public (Dirdjosisworo).

It is often said that it is impossible for a physician to harm his patients. But as a physician a physician can do something wrong, even a deliberate crime or negligence, which causes the patient to be unhappy. Besides, a philosopher (Cicero) said: *Cassava Socrates, Ibi Ius, Ibi Crime*. Crime is one type of a crime, in addition to the offense. Crimes that can be done by doctors include euthanasia, illegal abortion, blurring of a person's identity, cooperation with patients to fool his company, help buying and selling organs, buying and selling drugs etc. At the time of law enforcement, always have to remember at least 5 things, namely: Regulations, law enforcers, law enforcement facilities, legal culture and society.

Regulation concerning malpractice medic in Indonesia, in the criminal case can be mentioned Criminal Code, Law no 29 year 2004 about Medical Practice, Law no 36 about Health, Law number 36 year 2014 about health worker. In all of this legislation not yet formulate explicit malpractice medic. About law enforcement officers, still not many jurists who really deepen health law. For example, a Supreme Court Justice in the Supreme Court still exists using health legislation that is not applicable in terminating a case.

Facilities and infrastructure of health law enforcement, especially for proof, feels more advanced, more equipment, laboratory etc. that support. For the culture of law, it is still not practiced properly, there are still many people who object to being a witness in a legal case. Witnesses for malpractice cases, if taken from a specialist, there are still members of the community who do not believe it. This is understandable because in the doctor's oath there is a clause: I will treat my colleagues like I want to be treated. Thus if any physician becomes a defendant in a medical malpractice case and an expert witness is also a doctor, it will doubt his independence.

Society. In the case of malpractice medic this element of society becomes important, because there are people who are relatively permissive against the existence of a violation or a crime, the factor of ignorant money etc.

#### b. Kodeki and medic secrets

As is known, Beauchamp and Childress categorize basic rules of bioethics into 4, namely Beneficence, Nonmalficence, Otonomy and Justice. This has been deeply appreciated by the doctors in Indonesia. Sentence is often heard that if violating ethics does not necessarily violate the law, but if violating the law would violate the ethics, need to be further explored, given that certain conditions, a doctor can not perform legal obligations because it will violate ethics (castration on convicted drugs, dlsb). Indonesian Medical Code of Ethics (KODEKI) is an exploration of medical ethics adopted and implemented by doctors in Indonesia. Thus in Kodeki already contained directives to implement the four basic rules of bioethics.

Medic secrecy must be kept even if the patient has died. Indeed Medic record can be contrived, adjusted to the willingness of his doctor, but if a doctor always remember kodeki, this will not happen, because although as clever as the makers of crime there will be deficiencies that will be a weak point in his defense.

According to Prof. Dr. Iwan Dwirahasto, Med Sc, PhD in bioeconomic courses, convey that law as commander is not appropriate, the right is Ethics as commander, if everyone obey and run ethics, it is not required law, because surely the situation is very orderly and peaceful. In contrast to the opinion of Prof. Dr. dr. Djoko Santoso, PD I FK UNAIR, in Jawa Pos, Saturday 12/8/2017 page 4 writes doctor stereotype as a figure that is considered rigid and cold (by society) will accelerate people's mind to sentence malpraktik by a doctor, but according to writer not necessarily the deed is classified as malpractice medicine.

## 2. Victims and malpractice medic

### a. Victims due to malpractice medic

#### Understanding the victim

Many of the definitions of the victims, among others, are Arif gosita, who mentions that the victims are those who suffer bodily and spiritually as a result of the actions of others seeking the fulfillment of self-interest and others that are in conflict with the suffering human rights interests. As for Muladi, as quoted by Mansyur, Arif and Gultom, victims are individuals who individually or collectively have suffered losses including physical or mental, emotional, economic, substantial disruptions to their fundamental rights through unlawful acts or commissions criminal charges in each State including abuse of power.

Van Boven said the victims were individuals who individually or in groups suffered losses, including physical or mental injury, emotional suffering, economic losses or appropriation of their basic rights, either by act or by omission). According to Law No. 31 of 2014 on the Protection of witnesses and victims, victims are persons suffering physical, mental, and / or economic losses caused by a crime.

In the practice of medicine, there are various actions to the patient by his doctor. This depends on the type of illness, the area of expertise of the physician, the stage of action (eg whether the diagnosis, therapy or rehabilitation etc.), can be very simple (eg simple drug handling up to very complicated and serious) such as major surgery or resuscitation. In the course of the operation, malpractice would be more easily known to the patient, rather than merely giving an adverse drug effect that would occur some time later. Thus the patient realizes that he or she is the victim of a malpractice after a long time, or even never realized it at all.

Victims in general, classified by degrees of error (Mendelson), if connected in the world of medical treatment, are as follows:

- Absolutely innocent victims such as surgical accidents.
- The person being victimized by his / her negligence, the patient who should have taken the medicine but forgot or forgot the dosage so that it is woe.
- The victim is as wrong as the offender, before the general anesthesia the patient has to fast. It turns out the patient is not fasting, doctors or nurses did not ask but immediately sedated him.
- The victim is more guilty than the perpetrator. A broken bone patient in gibs, because it can not withstand itching, not yet the time gibs are released, the gibs are released on their own. It is not written deadline, but has been told by the doctor verbally.
- The victim is the only one who is guilty (the perpetrator is released). As before, it is not yet time for gibs to be released on their own, even though they have been given time limits by health workers.
- A fake victim may happen to someone who reports a physician who is examining him or her for being rude / violating a moral, for extortion.

In the case of unproven medical malpractice allegations, the physician as a victim (not included in the definition of the victim of Law 31 of 2014 on Witness and Victim Protection)) is where in the datas classification? Certainly belongs to the first group. For if into the second group and so on, it is unlikely he will be free or out of all legal demands.

Victim assistance / Legal protection for victims of malpractice medic

According to Law no 31 of 2014 on the amendment of Law n0 13 th 2006 on the protection of witnesses and victims, victims of a crime can get compensation and restitution.

The assistance that can be given to the victims of malpractice can be several things, such as: psychological assistance, eg to eliminate trauma, financial aid, legal aid up to law protection.

For legal protection, there are two kinds of legal protection, namely preventive and repressive.

b. The theory of proof

1) Theory of Proof

In the criminal procedure law, there is a legal proof that governs the valid types of evidence. The evidentiary aspect is very important to declare a person guilty or not, so the judge can decide a case, whether the defendant is guilty, free or free from any lawsuit. Some of these theories are: Conviction-in Time, Conviction-Raisonee, proof by law in a positive manner and proof by law negatively. In Indonesia, tend to use the latter.

In order to prove a criminal case, at least 2 valid evidence and judge's judgment are difficult. It is difficult to find evidence in the case of malpractice, as the incident has passed and the evidence in which the patient / victim condition may change with time travel.

### c. Difficulty proof of victims of malpractice medic

Not all the consequences of malpractice doctors immediately realized by the patient. This is related to many things, among others are the level of intelligence and the level of education of the patient, the kinds of actions by his doctor, the kinds of drugs given, the kinds of actions / operations, etc.

The action taken by the physician to his patient, where the action is by using a knife (surgery) or action that causes rapid effect, in case of malpractice will soon be diketahui by patient or his family. But in other meds action may not immediately be realized by the patient and his family that kondisi experienced is a malicious acts malpraktik. An example of this is the administration of drugs that can damage the kidneys, the old drug administration that causes deafness, whereas it may be avoided with other drugs or actions. Side effects that may occur later may not be realized by the patient that he has been a victim of malpractice medic.

A person who suffers from illness does not recover after a doctor's treatment, or even worse, disability or even death, is not necessarily the result of malpractice medic. There must be certainty whether the result of malpractice medic, or the risk of medical become a reality, from criminal law, civil law and administrative law

Are the consequences that may arise in a particular type of treatment already communicated to the patient before the treatment begins and the patient approves? (informed consent)

Patients are human beings with an extraordinarily complex and complex biological system. As humans, they are unique creatures of God's ever-changing and growing creation, self-adjusting, self-reparative and very unique. So if an (unpleasant) symptom arises, the phenomenon is the result of what it is sometimes difficult to conclude. Determining the victim is more difficult if the intended is a victim due to drug effects / surgery that has long been happening.

From the description given by Adami Chazawi above, then the proof must be done is:

1. Is it true that the physician is doing it, if not whether it is true that the person who commands the doctor.
2. Whether the act is intentional or occurs due to its negligence.
3. Such actions include being active or passive?
4. Did the incident occur when the doctor was practicing, and at what stage?
5. Are there professional standards, standard procedures or principles of medical professionals or even law violated, or violate the authority (what authority is violated)
6. Is there an informed consent, if any whether the action is still within the scope of the patient approved, or even outside the consent of the patient (outside informed consent)
7. Are there STRs and SIPs?
8. Does the action fit the patient needs (the patient's medical needs)
9. What suffers a true loss is the patient of the doctor.
10. Is it true that the patient is losing money? Because at the time after surgery is not good, but the expected results will only occur after a long time
11. What kind of loss? (body, physical, mental or life)
12. Does this doctor's actions breed legal responsibility?

Not always samanya (yet) norms that exist in the ethics and positive law. For example, doctors do not want to operate on patients for ethical reasons (bioethics). From the ethical point of view a patient should not be operated, whereas in law there can be no omission (case of conjoined twins head in Yogyakarta). The joy of prosecution relating to the difficulty of collecting evidence \*. It is mentioned above that the patient is a human, a growing biological being, conducts selfreparation, full of uncertainty. This makes it more difficult to gather valid evidence. Legal evidence: in the Criminal Procedure Code 184 paragraph (1): testimony of witnesses, expert statements, letters, instructions and statements of the accused.

Statement of witness. Usually the patient who was treated accompanied by his family and from the doctor's side there are nurses, midwives or other personnel who help him. On the part of patients, patients and generally lay people, who lack understanding of medical science. Thus what can be expressed as a witness is what is seen and heard before, during and after events, directly. In fact, such conditions are ideal conditions in the testimony of a witness, provided they are not embellished by their ordinary knowledge. Surely the witness of the patient will try to benefit the patient. Witnesses from the doctor, for example, a nurse who helps the implementation of related treatment would also be trying to benefit the doctor.

Expert description. It is expected to provide information as it is, according to the scholarship it has. A lack of expert witness here, there are some people who do not believe that this expert will provide expert information as it is. It is based on a sentence in a doctor's oath that states that a doctor will treat his colleague as he would like to be treated.

Letters, letters as valid evidence for medical malpractice cases, among others, may be *visum et repertum*. Again, this letter is made by a doctor, which can lead to a lack of faith in the patient. Especially if the manufacture of *visum et repertum* this distance is relatively long time. It is said that the body as well as the human organs, which is a collection of living cells, tissues and organs, which can perform self reparative, is constantly evolving and changing.

Directive (Criminal Code psl 188). Evidence of evidence is an act, event or circumstance because its suitability indicates that there has been a crime and who the perpetrator. The clues can only be obtained from the statements of witnesses, letters and statements of the accused.

Description of defendant. The statement of defendant alone or the accusation of the defendant is not sufficient to prove that he or she is guilty of committing the offense against him, but must be accompanied by other evidence (article 189 paragraph (4)).

Alleged medical malpractice allegations should also be made at the appropriate time. This is understandable, because if the timing is not right, for example too late or too long, then the evidence may have changed.

Often the crime is not realized by the doctor, given the focus of attention is to help the patient. Thus any requested patients are unconsciously trying to be met by a doctor, whereas it may violate the law or even a crime. Examples of this are letters of rest due to illness, receipts in mark-up etc.

Between medical malpractice and medic risk

The difference between the two is very thin, making it difficult for the layman including the jurists to distinguish. Most distinguished between one violates SOP / standard of medical service and / or professional standard (malpractice) and the other there are no standards that are violated but the results are ugly / not as expected by the patient. A previously known and discussed medic reso with the patient may be more readily accepted by the patient and his family. But for an undetectable medical risk, it will be harder to accept. For example, someone who will be injected antibiotics, although it has been tested before it is inserted and at the time of tested the result is not allergic, it could be after the drug dimasukkan happened allergic reactions that can end fatal.

Examples of difficulty prove malpractice medic:

1. Tonsil (Tonsil) that has been in operation, has been discarded, whether previously disgnosanya true that should be discarded? (record medic, yet can be contrived?)
2. What Appendix should it be in PA?
3. A person treated to be healed what is not his own body that heals, considering the human body is very unique? And there is also a psychic factor?
4. Is a kidney failure suffered by someone not because of a previous medication by a doctor?
5. Is the infant's birth defects not due to the medication work given by the doctor?
6. Is death in the ICU not due to drug administration / lack / mis-delivery?

### Closing

Doctors may be harmed from the time of suspected medical malpractice (some call the victim), or while maintaining their professional ethics. Medical ethics and positive law are not always in line, so the need for reinforcement / addition in the positive law. Proof of the condition of a person as a victim of medical malpractice may experience difficulties because of the complexity of medical science, the medical code of ethics and the state of the patient as a very unique and complex human being, always changing and developing. Need to include the limits and understanding of malpractice medic in positive law.

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