

# Medical Negligence Dispute Settlement in Indonesia

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## Abstract

The doctor-patient relationship has a specificity that distinguishes it from the business actor relationship. Malpractice is a very general term. Medical malpractice, medical negligence, and medical risk are not regulated in Indonesia and requires medical knowledge to understand them. This is where the difficulty of proving negligence and medical risk in solving medical negligence disputes. Medical negligence disputes in Indonesia are settled by litigation (criminal and civil) and non-litigation. Non-litigation medical negligence dispute settlement is a breakthrough in resolving medical negligence disputes in Indonesia, namely mediation and the Indonesian Honorary Medical Disciplinary Council or *Majelis Kehormatan Disiplin Kedokteran Indonesia* (MKDKI). This study revealed that there are no clear rules regarding medical negligence, medical risk, and medical dispute resolution to produce identical rules based on structure, substance, and culture. The settlement of medical negligence disputes through mediation is an alternative in resolving medical negligence disputes in Indonesia to allow for legal certainty and legal protection for doctors and patients.

**Keywords:** *medical negligence, medical risk, medical disciplinary sanctions, litigation, and mediation.*

## Introduction

A medical doctor is a noble profession because it saves lives and as such the relationship between a doctor and a patient is different from other relationships in any other profession. In the doctor-patient relationship, doctors are strongly influenced by the ethics of the medical profession. There are two types of relationship between doctor and patient in the effort to heal, namely relationship due to contract (therapeutic transaction) and relationship due to law. Both of these patient-doctor relationships bear legal and ethical responsibilities. According to the law, the doctor and patient relationship is an agreement whose object is in the form of medical

services or healing efforts, known as a therapeutic transaction. The engagement that arises from the therapeutic transaction (healing) is called *verbintenis inspanning*, which is an engagement that must be done with care and effort (*met zorg en inspanning*). Because of his achievements in the form of effort, the results are uncertain. As a result, if the effort fails, in the sense that the patient does not recover or even die, this is a risk that must be borne by both parties.<sup>1</sup>

In Indonesia, no clear law regarding medical negligence has been put forward so far, so the definition of negligence or malpractice has not yet been formulated.<sup>1</sup> A person is said to be negligent when he/she acts indifferent, does not care, does not pay attention to the interests of others as is usual in social relations in the community. As long as the consequences of negligence do not bring harm or injury to others, or because it involves trivial matters, then there are no legal consequences.<sup>2</sup> The terminology of medical malpractice and medical negligence are two different things. Medical negligence has a broader understanding than

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negligence because, in addition to including the meaning of negligence, the term malpractice includes actions that are done intentionally (*dolus*, *opzettelijk*) and violate the law. In the sense of intentional implied there is a motive (*mens rea*, guilty mind) while the meaning of negligence is more intentional (*culpa*), less thorough, less careful, indifferent, indifferent, reckless. Ngesti Lestari and Soedjatmiko distinguish medical malpractice into two forms, namely ethical malpractice, and judicial malpractice, in terms of professional ethics and law.<sup>3</sup> The responsibility of doctors in criminal provisions is regulated in the Criminal Code,<sup>4</sup> Law of the Republic of Indonesia No. 29/2004 on Medical Practices, and Law of the Republic of Indonesia Number 36/2009 on Health. Civil liability is contained in the Civil Code regarding breach of contract and acts against the law.<sup>5</sup>

In Indonesia, medical negligence dispute settlement can be done by litigation and non-litigation. Cases of alleged malpractice are classified as offense complaints, so long as there is no complaint from the injured party or the patient, law enforcement will not act.<sup>6</sup> In criminal malpractice, the evidence is based on whether all criminal elements have been fulfilled, Article 184 of the Criminal Procedure Code states that evidence can be used to prove criminal acts, namely witness statements, instructions, and statements of the defendant.<sup>2</sup> Allegations of malpractice due to negligence must be proven that the doctor behaves inadvertently, what someone with a cautious attitude is doing properly, or otherwise doing what someone with a cautious attitude would not do in that situation. It can also be called negligence if the doctor's actions are performed below the standard of medical services. This is hard to prove by law enforcement officers because it requires adequate medical knowledge. Besides, regulations governing malpractice have not yet been established in Indonesia. Negligence is not a crime unless it harms or injury to others.<sup>7</sup>

In this regard, Adami Chazawi claims that not all medical malpractice is included in the realm of criminal law. Three conditions must be met, namely the doctor's inner attitude (in this case there is intentional/*dolus* or *culpa*); secondly, the requirements in medical treatment include medical treatment that deviates from the standards of the medical profession, standard operating procedures, or contains unlawful properties.<sup>8</sup>

Settlement of medical negligence disputes through criminal proceedings, the legal apparatus uses articles in the Criminal Code concerning negligence in particular Article 359 to ensnare doctors. This article raises problems because negligence referred to in this article is not the same as medical negligence. Negligence blamed on doctors is not necessarily negligence that could be a medical risk and vice versa. To prove negligence or medical risk law enforcement agencies have limitations. Existing regulations also do not formulate medical malpractice and medical risk. The weakness of this Criminal Code article raises problems in solving medical negligence disputes that can harm patients and doctors. In resolving disputes through the civil code also creates problems because of the difficulty of patients to conduct evidence and the tendency of expert testimony to defend doctors. The length of the judicial process and being defeated increasingly tiring the process of resolving medical disputes. Doctors are also psychologically burdened facing legal problems that will damage their good name and interfere with medical services.

In line with legal developments, dispute resolution outside the court offers new solutions for the resolution of medical negligence disputes through mediation conducted by MKDKI. Alternative medical dispute resolution is to overcome the increasing cases of litigation that have accumulated and can provide justice for both parties. Despite this alternative medical negligence dispute settlement still has shortcomings such as doctors can still be sued for legal proceedings, punishment is only disciplinary, and the compensation process is not regulated.

Several cases of doctors and patients in Indonesia show that there are legal problems in resolving medical disputes. The case that first appeared in Indonesia was the case of Dr. Setyaningrum where the doctor had been found guilty of negligence but ultimately in the Supreme Court was found not guilty. Other legal medical cases have become common knowledge where the patient does not find justice to the medical problems he/she faces, the patient does not know where to complain, and the resolution of protracted medical disputes. Besides that, many medical negligence disputes are lost in court which raises suspicion against doctors even though the lawsuit itself is vague because it is not supported by medical and legal logic.

## Results and Discussion

### Legal Certainty

One orientation of the legal goals according to Gustav Radbruch is legal certainty. According to Radbruch, legal certainty is the first guide to the law. The guideline is to make it positive, that is, to be sure. The law must be obeyed so that the law is truly positive.<sup>9</sup> Legal certainty is legal protection against arbitrary actions, which means that someone will be able to obtain something that is expected under certain circumstances. People expect legal certainty because with legal certainty the community will be more orderly. The law is in charge of creating legal certainty because it aims at public order.<sup>10</sup> Legal certainty also means legal security and protection for the parties against the arbitrariness of judges.<sup>11</sup>

### Medical Malpractice and Risk

Medical malpractice is a term that always connotes bad connotation, stigmatization, blame. According to J. Guwandi medical malpractice can be divided into two groups:<sup>12</sup>

1. Deliberately (*dolus, vorsatz, wilens en wetens handelen*, intentional) are prohibited by statutory regulations.
2. Not deliberately (*negligence, culpa*) or due to negligence, for example neglecting the patient's treatment because of forgetfulness or carelessness so that the patient's disease gets worse and then dies (abandonment).

Medical risk, on the other hand, is an unwanted condition both by the patient and by the doctor, after the doctor tries his best to have met medical service standards and operational procedures standards, but accidents still occur. Thus this medical risk or accident contains elements that cannot be blamed (*verwijtbaarheid*), cannot be prevented (*vermijtbaarheid*), and the occurrence of unpredictability (*verzienbaarheid*).<sup>14</sup>

1. The results of a disease course or disease complication that has nothing to do with the medical actions taken by a doctor.
2. The results of a risk that can be avoided, namely;

a. The risk that cannot be known before (unforeseeable).

b. The risk that has been previously known (foreseeable) but is considered acceptable, and which the patient is aware of and has been given their consent/ approval to be carried out such as:

1. drug side effects, bleeding, and infections in surgery, etc.,
2. Risks of a high degree of probability and severity in certain circumstances, ie if these risky medical actions must be taken because they are the only way that must be taken (the only way), especially in emergencies.

In Indonesia, the notion of medical risk is not explicitly formulated in existing legislation. However, implicitly, medical risk is mentioned in several statements of informed consent, Article 45 of the Medical Practice Act, Ministry of Health Regulation No. 585 concerning the Approval of Medical Measures, and statements by the Executive Board of the Indonesian Medical Association regarding Informed Consent.

### Settlement of Litigation Medical Negligence Disputes

Settlement of litigation medical negligence disputes through criminal and civil law. Medical disputes that often occur because of complaints or demands of patients that the doctor has or suspected wrongdoing and the most common is medical negligence. In the criminal law process, law enforcement then conducts an investigation and investigation into the alleged medical negligence case. Then the case was transferred to the attorney and finally the trial process. At trial, the prosecutor must be able to prove that the doctor has committed negligence and the defendant is also entitled to present witnesses or expert testimony to alleviate the defendant. Problems have arisen since the investigation process due to a lack of knowledge of law enforcement on medical issues, difficulty in proving, and neutral and credible expert witnesses. Law enforcers will use the article regarding negligence which results in death or disability of others. Negligence in offense is not the same as medical negligence, negligence about consequences. Negligence according to layman's understanding is often equated with medical risk. As a result of medical action, if it is

per applicable rules or procedures, it is not categorized as medical negligence, but it is called medical risk and the doctor cannot be blamed.

There is no formal law in Indonesia regulating medical malpractice and medical risk. This is a problem that always arises because often the medical risk is considered negligence by law enforcement.

The above problems cause the absence of legal certainty in medical disputes. The unclear mechanism for complaints of suspected medical negligence so that every alleged medical negligence was directly addressed by a doctor to the law enforcement officers even though the case was not necessarily medical negligence. Not all medical negligence must be resolved through criminal channels only on gross negligence that is recommended to be resolved criminally. In civil cases as well, patients must prove that the doctor has neglected and this is very difficult for patients and also judges who handle the case because of the difficulty of proof and find expert witnesses who are neutral and credible. The civil settlement will require time, money, and take up open ideas and justice. Litigation medical dispute settlement does not provide legal certainty and violates the principle of legal certainty. The absence of special rules governing medical malpractice, medical risk, and medical dispute resolution. Medical dispute resolution is in essence a specialist lex where the approach is to settle it specifically through professional organizations or mediation but the organization has not provided neutrality and professionalism in medical dispute resolution and needs to be regulated how the medical dispute resolution process involves the profession and law enforcement. A civil law legal system requires the upholding of the principle of legality but in the settlement of medical disputes through litigation, no clear rules are governing medical malpractice and medical dispute resolution.

### **Settlement of Non-Litigation Medical Negligence Disputes**

Any person who knows or interests is harmed by the actions of a doctor or dentist in carrying out medical practice can complain in writing to the head of the Indonesian Honorary Medical Disciplinary Council (MKDKI). One non-litigation medical dispute resolution is through MKDKI located in Jakarta or

provinces. MKDKI is under the Indonesian Medical Council. Its membership consists of doctors representing professional organizations and hospital associations and legal experts. This institution can punish doctors if they have been proven to have violated discipline. Penalties can be in the form of reprimands/written warnings, revocation of the registration certificate, and the obligation to attend education or training. If in the investigation found ethics violations, MKDKI forward complaints to professional organizations. Complaints to MKDKI do not deprive anyone of the right to report suspected criminal acts to the authorities and / or bring civil damages to court.

Until now the central MKDKI that has resolved complaints against doctors should have been formed at the regional or provincial level but is still constrained by various problems, especially funding. This is where the difficulty of patients to report doctors because of the distance MKDKI center and also their ignorance of this institution. At the same time, the patient may also file a civil suit or report to the police for criminal proceedings so that the doctor in this case is the party who is seriously harmed. Doctors are not necessarily guilty when complaints are still being processed by MKDKI.

MKDKI can be used as the initial step of the disputing parties before proceeding to the litigation process. MKDKI's decision must be confirmed whether it can be the initial evidence/clue that the doctor has made a mistake especially negligence. Vice versa if the doctor has been found not guilty then the court has the right to reject a lawsuit filed by the patient. For punishment, MKDKI may determine compensation for the disputing party. And MKDKI is also given the authority to facilitate the parties to the dispute to mediate. Because medical dispute resolution is a lex specialist, MKDKI has a place to make improvements to better provide legal certainty and justice for all parties. Law No. 36/2009 on Health provides a breakthrough regarding the resolution of medical negligence disputes, namely through mediation as a settlement of non-litigation medical negligence disputes. Mediation is also regulated in the resolution of disputes through civil lines. Mediation provides new hope for the resolution of medical disputes, especially doctor errors due to negligence. However, mediation needs to be regulated and combined with the role of MKDKI or professional organizations. The mediation

process must be more clearly regulated for the resolution of medical disputes so that the disputing parties feel certain and fair in their dispute resolution. Settlement of litigation medical negligence disputes which tend not to provide legal certainty can be thought to make non-litigation medical negligence dispute resolution a hope. The settlement of non-litigation medical negligence disputes is also a breakthrough.

### Conclusion

Clearer regulation is needed regarding medical malpractice, especially medical negligence and medical risk. In the case of medicolegal especially regarding medical negligence, it can no longer be used as a general understanding of negligence in the Criminal Code, for this reason, it is necessary to study the existing rules to produce identical rules based on structure, substance, and culture. Institutions that determine who has the authority to investigate medical negligence must also be clear and provide comprehensive resolve medical disputes resolution mechanisms. The settlement of medical negligence disputes must be clear as to whether the litigation or non-litigation is resolved, to provide legal certainty and justice for the disputing parties. We need to consider resolving non-litigation medical negligence disputes into hopes and breakthroughs in resolving medical negligence disputes in Indonesia.

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