MEDICAL MALPRACTICE IS A BREACH OF CONTRACT, NOT A CRIMINAL ACT

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ABSTRACT

Malpractice in the healthcare profession, especially in physician practice, has been treated as a crime in Indonesia since a long time ago. The research aims to discuss and explain that healthcare malpractice is a civil dispute over a breach of contracts. This research is normative legal research that uses secondary data. Data used in the research consist of laws and regulations and scholars' opinions which explains matters that do not clear in the laws and regulations. The research found that in principle healthcare profession's relation with patients is a contractual relation. Any un-performance based on the contractual obligation shall be treated as a breach of contract. Malpractice as bad or un-performance of the duty and/or obligation, which arises from contractual relation, is, therefore, a breach of contract. However, if such breach of the contract meets the elements of a criminal provision, it does not necessarily mean that the malpractice is a crime. There is no provision in the laws and regulations that define malpractice as a crime. The research also comments on a medical special court discourse.

Keywords: Malpractice, Health Profession, Contractual Obligation, Breach of Contract, Tort, Crime

INTRODUCTION

Talking about malpractice in the healthcare profession in Indonesia, it cannot be separated from criminal offenses. Many malpractice cases in the healthcare profession ended up as criminal cases. Some cases were brought to the civil court of law in form of torts, whereby healthcare professionals were accused of making “bad” things to the patients, clients, or consumers. They were accused of causing death or injuries. These bad things were then made as considerations for sentencing penalties or compensations or remedies.

Following the issuance of Law No.29 Year 2004 regarding Medical Practice (Medical Practice Law), the Indonesian Medical Council (KKI) was established in 2004, even the secretariat of KKI was only set up based on the Minister of Health Decree No.1442/Menkes/Per/X/2005 regarding the Organization and Administration of Indonesian Medical Council. The procedure for the appointment of the member of KKI was introduced later based on President Regulation No.35 Year 2008 regarding the Procedure of Appointment and Dismissal of Members of Indonesian Medical Council. Together with the establishment of KKI, based the Minister of Health Decree No. 072/Menkes/SK/2006 regarding the appointment of Members of Indonesian Medical Discipline Honorary Council (MKDKI). The organization and administration of MKDKI were established based on the Indonesian Medical Council Regulation No.15/KKI/VIII/2006 regarding the Organization and Administration of Indonesian Medical Discipline Honorary Council and Indonesian Medical Discipline Honorary Council at the Provincial Level.

From thereon, all discipline matters pertaining to the violation of discipline of the professional works of physicians and dentists were resolved by MKDKI. Meanwhile, the ethical issues on professional works were settled by Medical Ethics Honorary Council (MKEK). Other things related to legal issues will be taken to the court of law. For civil lawsuits, it will be

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handled by a general court of law. The same will also decide on criminal/ penal cases that involved medical practitioners. Meanwhile, the administrative court will handle administration issues.

Currently, there were some thoughts from several scholars, that a special medical court must be established to settle all medical profession issues, including discipline, ethics, and laws. The idea is, with one court system, the healthcare professionals, especially physicians, will not be trialed many times for the only "mistake" that happened. This paper will not discuss whether it would be fit to have a special medical court only, despite there were so many other healthcare professions. It aims only to discuss the origin of the relationship between healthcare professionals and patients, clients or consumers, or any other terms they may be called, and the legal consequences when the relationship does not work accordingly. The latest is commonly known or called medical malpractice. By understanding the origin of the relationship, it would partially explain whether there is a need for a special medical court.

METHODOLOGY

This research is multidiscipline research that aims to elaborate, discuss and explain the origin of the relationship between healthcare professionals and patients. That is why the research focuses on normative legal research. Data used in the research are secondary data, that is data available to the public. It may include primary legal sources, secondary legal sources, and tertiary legal sources. The primary legal sources shall consist of laws and regulations issued by the government, as well as by-laws that were issued by certain organizations due to or as the consequences of terms stipulated in the prevailing laws and regulations. The secondary legal sources are sources that are required to explain the unclear definition of the concept in the primary legal sources. The tertiary legal sources will be used to explain further some relations that cannot be found in primary and secondary legal sources. In this research, they would be dictionaries and the kinds that may explain the healthcare relationship concept from a non-legal perspective.

Analysis of data will be conducted using a qualitative approach. The approach is suitable for the research because the research aims to discuss human relations, in this case, the relationship between healthcare professionals and patients. Moreover, it discusses the legal norms involved in such relations, the duty and liability that are arisen from such relationships.

The research aims to provide at least a solution that may create a better understanding of the relationship between healthcare professions and patients. It may also suggest opinions on the problems that were faced by the healthcare professions, especially physicians. The purpose of only having "one trial" instead of being judged by "three" or possible "four" institutions, that may create much more legal certainty may have a better point of discussion.

FINDINGS

Physician-patient Relationship

Historically, the Indonesian legal system was built up based on Dutch Indie legal system. It is therefore until today, Indonesian civil law is generally still based on the Indonesian Civil Code, which was previously inaugurated as the Dutch Indie Civil Code. Though there are many new laws and regulations established after the Independency of the Republic of Indonesia, including the health sector, the very basic law (the lege generally) in a civil relationship still relies on the provision in the Indonesian Civil Code (ICC). The same also applied to criminal

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acts, which are based on the Indonesian Penal Code (IPC), established as Dutch Indie Penal Code.

No provision in the ICC clearly stated the relationship between healthcare professionals and clients. However, in the Netherland, there are provisions that regulated the relationship between physicians and patients, which are regulated in Dutch Civil Code (DCC) Book 7 (Particular Agreement), Title 7.7. (Service Provision Agreement), Section 7.7.5. Medical Treatment Agreement. Article 7:446 point 1 DCC stated that: "medical treatment agreement is the agreement under which a natural or legal person ('the care provider') engages himself in the course of his medical professional practice or medical business towards another ('the principal') to carry out (perform) **medical actions** which directly affect the principal personally or a specific third party. The person who is directly affected by the medical actions is referred to as 'the patient'." Based on Article 7:446 point 2 DCC, the term 'medical actions' means:

a) "All activities - including examinations and providing medical consults - directly affecting a person and intended to cure him of a disease, to protect him from a disease, to assess his state of health or to render obstetric assistance.
b) Actions other than those referred to under point (a) which directly affect a person and which are carried out by a medical doctor or dentist acting in that capacity."

Based on Article 7:446 point 3 DCC, the term "actions" include "the attendant care and nursing of the patient and the provision in any other way for the latter's direct benefit of the material facilities under which such actions may be carried out." However, according to Article 7:446 point 4 DCC, the "actions" do not include actions "in the field of pharmacy within the meaning of the Medicines Act if performed by an independently established pharmacist within the meaning of that Act." Article 7:446 point 5 DCC limits the meaning of the "actions" if it is carried out on the instructions of a person by others in connection with determining debt-claims or obligations, eligibility for acceptance by an insurer or access to a facility, or suitability for a course of training, employment or the performance of certain work."

World Medical Association (WMA, 2020) in, WMA Declaration of Cordoba on the patient-physician relationship, stated that "The patient-physician relationship is a moral activity that arises from the obligation of the physician to alleviate suffering and respect the patient's beliefs and autonomy. It is usually initiated by mutual consent – expressed or implied – to provide quality medical care." From the statement given by my WMA, it can be said that concerning medical treatment to patients, every physician must behave, act, conduct with full compliance according to bioethical principles. However, for the relationship to exist, there must be mutual consent between the patient and the physician. It means that the physician-patient relationship is a contractual relationship that arising contractual obligations to physicians as well as patients.

May (1975) stated that the physician-patient relationship is governed by covenant. According to May, a covenant is neither based on code nor contract. The covenant includes obligations stipulated in the code and the minimal terms of mutual consent between physician and patient. The physician must also have at least the bioethical principles, which cannot be waived by way of contract. Casey and Afable (2004) try to distinguish between contract and covenant. A contract requires an outcome; meanwhile, a covenant is based on emphatic and forgiveness. Covenant is not straightforward result-oriented. In legal terms, Black's Law Dictionary (1990) defined covenant as "agreement, convention or promise of two or more parties, by deed in writing, signed and delivered." In Black's Law Dictionary of 2004, a covenant is defined as "a formal agreement or promise usually in a contract or deed." Those definitions made covenant have no difference at all with a contract. From those opinions and discussions, it can be said that

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the physician-patient relationship is a contractual relationship, but the contractual relationship does not rise the obligation that the physician must make or keep the patient in healthy conditions. The contract between physician-patient does not end in a result-oriented obligation. The contractual relation arises the obligation to the physician to do his/ her best efforts (best efforts obligation).

With respect to the liability due to the breach of contract by a physician to the patient, Article 7:462 of DCC raises joint and several liabilities for the hospital, where the physician conducts his/ her medical treatment, even though that the medical treatment agreement is not made with the hospital directly. By "hospital", it means "an institution or a department thereof that under Article 5 of the Act Admission of Care Institutions is recognized or admitted as a hospital, nursing home or mental institution, an academic hospital or an abortion clinic within the meaning of the Termination of Pregnancy Act."

Understanding Medical Malpractice based on the Physician-patients Relationship

Medical malpractice is not a definition that can be found in any regulations. The meanings are given by the scholar. Malpractice is a generic term, that refers to bad performance. Mal in Latin means bad. According to Oxford Languages Practice (https://languages.oup.com/google-dictionary-en), as a noun, practice means the actual application or use of an idea, belief, or method, as opposed to theories relating to it or the customary, habitual, or expected procedure or way of doing of something. It can be simplified that practice means performance.

Dearmon (n.d.) defines malpractice as "negligence on the part of a professional only while he or she is acting in the course of professional duties." Bal (2009) defines medical malpractice as "any act or omission by a physician during treatment of a patient that deviates from accepted norms of practice in the medical community and causes injury to the patient". Meanwhile Tan (2006) defines malpractice as "an act, by commission or omission, by a healthcare professional that departs from an accepted healthcare standard, where the departure causes an injury to the patient". Thirumoorthy (2011) states that "medical malpractice or negligence is defined as the failure or deviation from the medical professional duty of care – a failure to exercise an accepted standard of care in medical professional skills or knowledge, resulting in injury, damage or loss." Last but not least in http://medical-malpractice.com/know.htm, medical malpractice is defined as "simply a health care provider not doing what he is supposed to do or doing what he is not supposed to do."

From the given definitions of medical malpractice, it was clear that malpractice simply relates to the failure of a physician to perform accordingly based on his/ her professional standard of care. It may take the form of a commission or even an omission or deviation from the standard. The failure causes injury, damage, or loss to the patient. The injury, damage, or loss according to ICC can be compensated through monetary remedies. Such a monetary remedy is something that can be mitigated using an insurance scheme as professional liability.

DISCUSSION

As mentioned before, ICC does not regulate the physician-patient legal relationship. However, according to Article 45 paragraph (1) Medical Practice Law, every medical treatment by a physician must have obtained consent from the patient. The consent will be given upon explanation from the physician. The explanation at least consists of diagnosis and medical treatment procedure, the purpose of the medical treatment, alternative medical treatment and the

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risk of the treatment, the risk and complication that might happen after the treatment, and the prognosis of the treatment. Consent can be given orally or in writing. High-risk medical treatment requires the consent to be made in writing and signed by the patient, or another person that is authorized to make the consent. The patient is entitled to an explanation and has the full right to require the physician to provide him/ her with such an explanation until he or she can make a decision. The decision can take the form of providing the consent and continuing with the treatment or withdrawing or refusing to go further with the treatment. It is why it is called informed consent. With sufficient information provided by the physician, the patient can decide on the treatment. The Minister of Health has issued the Minister of Health Regulation No.290/MENKES/PER/111/2008 regarding Medical Treatment Consent.

In principle, consent refers to one of the four principles in bioethics. The principle of autonomy requires the patients to decide for him/ herself. However, to make the decision, the patient needs all-sufficient and enough information from the physician. It is the reflection of imbalanced information, asymmetric information in healthcare. The patient knows nothing about the medical treatment that he/ she will have, therefore he/ she needs to be informed before he/ she can make consent.

Further, the given information and the consent are the reflections of the principle of beneficence and non-maleficence in bioethics. The information about treatment and its alternatives, including any risk that may follow the treatment must result in the best interest of the patient, and in no way shall harm or increase the risk of the patient. The treatment itself is with the purpose provide something better for the patient (beneficence), that the patient is entitled to decide the best for him/ herself under the education and information given by the physician (autonomy). The physician shall in no way provide a solution in treatment that may harm or increase the risk of the patient (non-maleficence), including anything uncertain, that has no or lack of sufficient scientific evidence.

The last principle is that the treatment offered to a patient must be just for all. It is therefore the treatment must have a certain standard of care that can be used and measured by every physician with the same knowledge. Medical Practices Law mentioned at least 5 kinds of standards. They are:

1) Professional Education Standard is a standard prepared by

    a) In the case of the physician profession, by the education institution association;
    b) In the case of the specialist physician profession, the medical collegium; through coordination with the professional organization, teaching hospital association, the ministry of national education, and the ministry of health, which later will be determined as the standard by KKI.;

2) Service Standard is a standard regulated by the Minister of Health. There is the Minister of Health Regulation No.1438/Menkes/Per/IX/2010 regarding Medical Service Standard.
3) Professional Standard is a standard made by a professional organization that regulates a minimum limit of knowledge, skill, and professional attitude that must be possessed by a person to be able to perform his/ her professional activities to the society independently.
4) Operational Procedure Standard consists of standardized instruction modules/ procedures used to finish a certain routine work process. It is made based on consensus by healthcare services facilities using professional standards.
5) Competency Standard is a standard made by medical education institutions association with medical collegium.

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To be able to perform the treatment as a physician, every person engaged in medical practices must comply with all the standards.

The term "standard of care" refers to the performance based on fiduciary duty. When the standard of care is not performed, the person who is on duty to perform is called being negligence. Historically, the standard of care is a performance that follows customary. However, further development showed that standard of care also refers to some acts that seem to be reasonably conducted even it is not something common in practice. Latest, it can be said that the standard of care is a minimal conduct that must be performed by a competent physician in the same field under similar circumstances (Moffet & Moore, 2009). All the five above-mentioned standards can be referred to as the minimum standards, and therefore can be said, that those standards are part of the standard of care that must be followed by a physician practicing in the Republic of Indonesia.

In connection with the contractual provision regulated in ICC, it is very clear that there are:

1) Discussion between the physician and the patient or his guardian in law, which will end in the consent from the patient to continue with the needed medical treatment or not treatment (which means the end of discussion);
2) The discussion is about the medical treatment that would be given by the physician to the patient, which shall be conducted in accordance with the prevailing laws and regulations, customs (the standard of care), and ethics, known as by-laws (bylaw(s)).

Those are the four terms and conditions that must be fulfilled to have a valid agreement, that can be enforceable. The first two as stated in point 1 above related to the legal subject, and the last two stated in point 2 above refer to the legal object.

It means that, once the informed consent is given, legally a mutual consensus contract is established. The consent is about the legal object, which in the physician and patient relationship refers to the medical treatment provided by the physician, and the consideration paid by the patient to the physician. The parties to the contract, in medical treatment, the physician and the patient are bound to perform their obligations accordingly. According to Article 1339 ICC, the physician must perform his/ her best effort not only according to the information and consent given by the patient, but also the by-laws that are applicable and enforceable from time to time. In consideration, the patient must pay for the services granted by the physician, and follow the same by-laws applicable to the patient. According to the Minister of Health Regulation No.290/MENKES/PER/111/2008 regarding Medical Treatment Consent, the explanation that must be given to the patient or his/ her guardian in law must also include the estimation of the cost of the treatment. The informed consent will include the estimated cost.

Furthermore, in Article 1338 paragraph (1) ICC, a contract must be performed in good faith. In general, good faith means that all parties in the contract, shall with their best efforts that as long as it is still possible to try to perform their obligations. The same is also applicable for a medical treatment contract. As mentioned above, a medical treatment contract is a best efforts contract, not a result-oriented contract. It means that even though the by-laws have provided the ethics, standards, and common practice to provide the best efforts, there would be no limit for the parties to perform beyond the by-laws. Even something is not a must under common practices, but if it can be performed to increase the best efforts performance, then it must be done. Any breach in the performance in good faith of either the physician or the patient will be declared as a breach of contract.

By understanding the relationship between physician and patient as a contractual obligation that arises from a contract, it is, therefore, any misconduct, mistreatment, failure,

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negligence, or even fault in performing the duty by a physician based on the standard of care, the by-laws and the information and consent given by the patient to the physician. It is not a wrongdoing or careless act made by a driver in a car accident as a tort. Even the driver has a standard of being having a driving license, but it has no consent before the accident that may cause loss or injury to the other party.

From another point of view, medical malpractice is not also a murder conducted by a killer that belongs to a criminal act subject to penal sanction. There may be the same result, that a person loses his life. Medical malpractice in medical treatment is bound to a contract with full uncertainty, that none can predict the final result. It is different from a pure negligence act that has no underlying relationship, that caused loss or injury.

Medical malpractice is neither a decision that can be settled in administrative court. Medical malpractice is pure a breach of contract by a physician. The fact that the act meets the elements of a crime under a certain provision of the laws, it must be separated from the condition of a breach of contract.

As Moffet & Moore (2009) quoted Hall v. Hilburn, 466 So. 2d 856 (Miss. 1985).

> "Medical malpractice is a legal fault by a physician or surgeon. It arises from the failure of a physician to provide the quality of care required by law. When a physician undertakes to treat a patient, he takes on an obligation enforceable at law to use minimally sound medical judgment and render minimally competent care in the course of services he provides. A physician does not guarantee recovery… A competent physician is not liable per se for a mere error of judgment, mistaken diagnosis or the occurrence of an undesirable result."

In view of the discourse and opinion on the establishment of a special medical court, following the explanation given above that medical malpractice is a breach of contract with financial remedies that can be mitigated through insurance policies, there is no need of having a special medical court to settle medical malpractice cases. The researcher believes that the existing court of law is sufficient enough to handle medical malpractice cases.

CONCLUSION

From the above findings and discussions, it can be concluded that medical malpractice is not a crime. It is merely a default in performance by the physician or other healthcare professionals in giving healthcare services. There are minimum standards that the law requires from certified professionals in healthcare professions to be able to provide their professional services.

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