Legal Analysis Of The Differences In Perspectives On The Terminology Of Medical Malpractice In Indonesia

Riki Tsan[1], M.Nasser[2]

[1] Post Graduate School of Law, Swadaya Gunung Jati University, Cirebon, Indonesia, tsanriki@gmail.com

[2] Military Law School, East Jakarta, Indonesia, nasserkelly@gmail.com

Corresponding Author: Riki Tsan, **E-mail**: tsanriki@gmail.com

ABSTRACT

Medical malpractice is defined as the failure of a doctor to adhere to the standards of practice established by their profession, resulting in injury to the patient. However, in public discussions, this term is tendentious and tends to discredit the medical profession. Some health/medical law experts have no objection to the discussion of the term malpractice in the public discourse, while others reject it. There are difference views on the terminology of malpractice from a legal perspective. The purpose of this study is to conduct a juridical review of the use of the term "malpractice" in public sphere, between those who support its use—represented by Prof. Dr. Sutan Remy Sjahdeini, SH—and those who oppose it—represented by Dr. dr. Nasser, SpD.V.E, D.Law. The type of research employed in this study is normative juridical research, a research approach grounded in legal norms and data obtained through a literature review. The conclusions of this study are, first, Prof. Remy states that medical malpractice can be committed by medical personnel (doctors) either intentionally or due to negligence. Meanwhile, Dr. Nasser firmly states that medical malpractice contains elements of negligence, not intent. Second, Prof. Remy acknowledges that the term malpractice is used in countries with Civil Law systems like Indonesia in the context of General Criminal Acts, even though this terminology, in its original country (common law), falls under civil law as a tort. Third, Dr. Nasser rejects the narrative of malpractice accusations in the public sphere because this term should ideally be used as a judge's decision in court proceedings, is not found in Indonesian legislation, and is not part of the Civil Law system adopted by our country.

KEYWORDS

civil law; common law; medical malpractice,tort law

I. INTRODUCTION

The accusation of malpractice is often generalized by the public, as if any failure in a medical procedure performed by a doctor that results in injury or death of a patient represents a failure of all doctors in Indonesia. Furthermore, any negative outcome experienced by a patient in a healthcare effort is always claimed by the patient to be due to malpractice by the doctor, making this term very popular today, even though this perception is mistaken. In reality, among experts specializing in Health Law in Indonesia, there are differing views on the use of the term "malpractice" in public discourse.

Dr. dr. Ali Firdaus, SpA, SH, MHkes writes: "Medical malpractice or medical negligence is a term that always carries negative connotations, is stigmatizing, tendentious, and accusatory. When there is an allegation of medical malpractice, it is often categorized as a criminal offense based on the articles in the Criminal Code (KUHP) and as a civil law violation based on the Civil Code (KUH Perdata)."

J. Guwandi states that malpractice is a term with negative connotations, stigmatizing, and accusatory. Poor practice by someone in a profession, in general, is not limited to the medical profession alone but applies to other professions as well. When referring to the medical profession, it should be termed "medical malpractice." However, for some reason, especially starting from abroad, the term malpractice is always primarily associated with the medical profession.

Dr. dr. Nasser, Sp.D.V.E, D. Law, asserts that the use of the term "malpractice," which is frequently used among

the public and often narrated by educated (intellectual) circles, tends to discredit doctors and healthcare professionals who have made every effort to provide treatment, even if the results are not as expected by the patients. He rejects the use of the term "malpractice" in public discourse and, to some extent, in intellectual discussions.

Meanwhile, Prof. Dr. Sutan Remy Sjahdeini, SH, does not seem to have an issue with the use of the term "malpractice" and even intentionally promotes it, arguing that the term "malpractice" has been widely used by the Indonesian public for a long time. The problem's issue is what are the differences in perspectives on the terminology of medical malpractice in indonesia from a legal perspective?

II. METHODOLOGY

The type of research employed in this study is normative juridical research, a research approach grounded in legal norms and data obtained through a literature review. This study's research methodology includes both descriptive and prescriptive analyses. In this research, data collection involves systematically gathering, examining, and processing materials from literature sources and relevant documents and may also include materials obtained from the internet. The purpose of this study is to conduct a juridical review of the use of the term "malpractice" in public sphere, between those who support its use—represented by Prof. Dr. Sutan Remy Sjahdeini, SH—and those who oppose it—represented by Dr. dr. Nasser, SpD.V.E, D.Law

III. RESULT AND DISCUSSION

a. Definition of Malpractice

The *Contemporary Law Dictionary* defines "malpractice" as a synonym for professional negligence or neglectful or illegal performance of duty by someone in a public or professional role, such as a lawyer (legal malpractice) or physician (medical malpractice), resulting in injury or loss.

USLegal defines medical malpractice as follows: "Medical malpractice is the failure of a medical professional to follow the accepted standards of practice of his or her profession, resulting in harm to the patient."

From the definition provided by USLegal above, it can be concluded that medical malpractice is the failure of a healthcare professional to apply the applicable standards of practice for their profession, which results in injury to the patient under their care.

According to Jusuf Hanafiah, medical malpractice is the negligence of a doctor to use the level of skill and knowledge commonly applied in treating patients or injured persons, according to the standards of the same community. Meanwhile, according to Veronica, medical malpractice is an error in carrying out the medical profession that does not adhere to the professional standards of medical practice.

b. Views of Prof. Dr. Sutan Remy Sjahdeini, SH

In addition to the term "medical malpractice," Prof. Remy also mentions another equivalent term, "medical negligence." According to him, in criminal acts, the difference between these two terms lies in *mens rea*.

In *The Law Dictionary* by Steven H. Givis, *mens rea* is explained as a "guilty mind." *Mens rea* is the mental state accompanying a forbidden act—*mens rea* refers to a guilty mind. It is the mental attitude that accompanies a prohibited action.

It is called "medical malpractice" if the malpractice committed by a doctor is intentional (*dolus*), whereas if the malpractice is due to carelessness/negligence (*culpa*), it is referred to as "medical negligence."

However, Prof. Remy continues, "...both terms above are now considered to have the same meaning, that is, an act not committed intentionally but due to negligence." In another part, he also emphasizes that "medical malpractice is an act of negligence, not an intentional act."

From a legal perspective, is medical malpractice a civil offense or a criminal offense? The answer is: "Medical malpractice is both a civil and a criminal case."

"Medical malpractice is a civil case, specifically an unlawful act case. According to common law, an unlawful act is referred to as a tortious act under tort law. In addition to being a civil case, medical malpractice is also a criminal case," just as it is in other countries.

Under Indonesian law, civil lawsuits filed by parties who suffer losses as a result of unlawful acts are based on Article 1365 of the Civil Code, which states: "Every unlawful act (onrechtmatige daad) that causes harm to another person obliges the person who, due to his fault, causes the harm to compensate for the loss."

According to Prof. Remy, a healthcare professional (doctor) is considered to have committed a criminal act only if:

i. The healthcare service provided to the patient was not performed according to the applicable Medical Standard of Care for the type of healthcare service given, and

ii. The healthcare service, due to negligence, directly resulted in the patient suffering injury or death.

However, if the patient's injury or death did not occur due to negligence but was caused intentionally, then the healthcare professional (doctor) is no longer committing malpractice based on negligence *mens rea* but is committing a criminal act based on intentional *mens rea*.

Both medical malpractice offenses based on negligence *mens rea* (*culpa*) and criminal acts based on intentional *mens rea* (*dolus*) can be penalized under the Criminal Code articles, which regulate both criminal offenses based on negligence *mens rea* (negligent acts) and criminal acts based on intentional *mens rea*:

The legal basis for prosecution is found in Articles 351, 353 - 356 of the Criminal Code concerning assault intentionally committed by healthcare professionals (doctors).

Articles 359 and 360 of the Criminal Code stipulate regulations concerning the negligence of healthcare professionals (doctors) that causes death and injury to patients.

The Criminal Code does not specifically regulate the criminal offense of medical malpractice by healthcare professionals. However, the Criminal Code contains certain articles that can serve as the legal basis for prosecuting healthcare professionals (doctors) for medical malpractice, whether committed intentionally or due to negligence, resulting in the patient suffering injuries, disabilities, or death.

alpractice or medical malpractice is a term frequently used to refer to criminal acts committed by professionals in the healthcare sector, commonly referred to as healthcare workers.

c. Views of Dr. Nasser, SpDVE, D. Law

During the Health Service Law and Health Administration/Hospital Law lectures at the Military Law College, Health Law Master's Program, on November 24 and 25, 2023, Dr. Nasser, SpDVE, D. Law, shared his views on malpractice, which—in some respects—do not align with the views of Prof. Remy mentioned above.

We will explore Dr. Nasser's views, with some additional explanations from me to clarify what he conveyed. Essentially, Dr. Nasser rejects the use of the term "malpractice" in public discourse. The reason is that the term "malpractice," often used by the public, tends to discredit doctors or healthcare professionals who have made maximum efforts in treatment that do not yield the results expected by patients and their families.

Dr. Nasser presented several reasons for this:

First, according to Dr. Nasser, the term "malpractice" is a term used as a result of a judge's decision in court, which cannot be used arbitrarily in public discourse, whether in everyday conversations or viral posts on various social media platforms.

I try to understand Dr. Nasser's view through the perspective of the legal relationship between doctors and patients. As we know, the legal relationship between doctors and patients is a contractual/consensual relationship that gives rise to an obligation.

This is affirmed in article 280 of the Health Law No. 17 of 2023, which states that the practice of Medical Personnel and Healthcare Workers is carried out based on an agreement between Medical Personnel or Healthcare Workers based on the principles of equality and transparency (paragraph 4).

The agreement or contract that gives rise to this obligation is commonly referred to as a Therapeutic Contract. In a Therapeutic Contract, the objective of the obligation between a doctor and a patient is not the result of the agreement (*resultaat verbintennis*), but rather the best efforts made by the doctor in treating the patient (*inspanning verbintennis*).

This is emphasized in Article 280, paragraph 1, which states: "In practicing, Medical Personnel and Healthcare Workers providing healthcare services to patients must perform their best efforts." Followed by paragraph 2: "Such best efforts do not guarantee the success of the healthcare services provided."

This means that if, in the course of treatment, the patient cannot be cured, or may even suffer injury or death, the doctor cannot automatically be "convicted" of having made a mistake, and then discredited with allegations of malpractice.

In this context, to determine whether a doctor is guilty or not when providing healthcare services, a careful, accurate, thorough, and comprehensive examination must be conducted regarding the steps taken in their effort to treat the patient. This careful, accurate, thorough, and comprehensive examination is conducted in a legal investigation process, bringing in experts and specialists in the fields of medicine, law, and health law.

Second, during the trial, the judge will either convict or determine whether the doctor in question committed negligence referred to as malpractice or not.

In other words, the term "malpractice" should only be used in a judge's decision and is not appropriate for the general public to use in "convicting" that malpractice has been committed by a doctor or healthcare worker, even if it is only an allegation or suspicion.

Quoting Dr. Nasser, the term "malpractice" has been used by judges in deciding many cases, such as the case of Dr. Setyaningrum in Pati, 1979, and the case of Dr. Dewa Ayu Sasiary Prawani and colleagues in Manado, 2012. In the cassation stage, Dr. Setyaningrum was declared free from malpractice charges by the Supreme Court after being found guilty by the Pati District Court, which was upheld by the Semarang High Court (1981).

In this context, the Supreme Court has used the understanding of malpractice as follows: "A doctor is considered to have committed malpractice if they do not act in accordance with the professional standards applicable to them."

In my research, some excerpts from the court considerations/rulings related to malpractice cases decided include:

i. "That the Defendants did not commit medical malpractice in their handling of the patient's medical care" (Decision No. 1880 K/Pdt/2016 in a burn case at RSUD Belu).

ii. "...the plaintiff cannot sue the doctor suspected of committing malpractice (medical malpractice) or medical negligence as an unlawful act (*onrechtmatige daad*)" (Decision No. 352 PK/Pdt/2010 in a cataract surgery case in Palembang).

Third, although the term "malpractice" has been commonly used for a long time, this term cannot be found in the laws and regulations in Indonesia, even in the Minister of Health Regulations (Permenkes), as Dr. Nasser said.

Prof. Remy himself acknowledges this by stating: "The term malpractice in the field of healthcare is not found in laws and regulations in Indonesia. The term malpractice is not an official term, meaning it is not used in laws and regulations in Indonesia."

Prof. Remy's reason for using this term is that it has long been widely used by the Indonesian public and has also been widely used internationally, and to fulfill the need for terminology in Indonesian law when such terminology does not yet exist.

Fourth, Dr. Nasser says that malpractice, with its various aspects and meanings, is used in countries that adhere to the Common Law system, whereas our country adheres to the Civil Law system.

In countries that follow the Common Law system, in Tort Law, the term malpractice is attributed to the negligence of doctors or healthcare workers when performing medical actions on their patients. Doctors or healthcare workers can only be criminally prosecuted if an element of intent is found.

A brief explanation of Tort Law:

Tort in English is defined as an unlawful act (*Perbuatan Melawan Hukum - PMH*).

Catherine Elliott and Frances Quinn state: "The Law of Tort covers a wide range of situations, including such diverse claims as those of a passenger injured in a road accident, a patient injured by a negligent doctor...in broad terms, a tort occurs where there is a breach of a general duty fixed by civil law. Negligence is the most important tort in modern law."

It is mentioned in Dietro Partner, Attorneys Law that:

"Tort law in healthcare involves medical professionals and patients. Legally speaking, a tort occurs when a medical professional acts in a negligent manner and injures someone in their care. A tort is different from a criminal act...tort is a legal term for medical malpractice. Since torts are not criminal acts, torts are handled in Civil Court."

Tort Law in healthcare covers medical professionals and patients. Legally, PMH (tort) occurs when a medical professional commits negligence and causes injury to a patient in their care. An unlawful act is different from a criminal act...PMH is a legal term for malpractice. Since PMH is not a criminal act, PMH is handled in Civil Court (Civil Judiciary).

Dr. Nasser firmly states that if an element of intent is found in the healthcare service or medical action performed by a doctor, then this is no longer within the realm of medical crime but shifts into the realm of general crime.

Fifth, instead of using the still-debated term malpractice, Dr. Nasser suggests using the term "negligence," which

in this context is referred to as “medical negligence.” This term is more appropriate than “malpractice” and is considered to help minimize negative connotations among the public.

The term “negligence” can actually be found in the laws and regulations, such as Health Law No. 17 of 2023, Article 193, which states: “Hospitals are legally responsible for all damages caused by negligence committed by Hospital Healthcare Human Resources.”

Healthcare human resources include medical personnel such as doctors, dentists, specialists, and sub-specialists, as well as healthcare workers like nurses, midwives, pharmacists, and others (Articles 197-199 of Health Law No. 17/2023).

Health Law No. 17 of 2023 also uses the term “omission,” as stated in Article 440, paragraph 1:

“Any Medical Personnel or Healthcare Worker who commits an omission that results in serious injury to a patient shall be punished with a maximum imprisonment of 3 (three) years or a maximum fine of IDR 250,000,000.00 (two hundred and fifty million rupiah).”

And paragraph 2 reads: “If the omission referred to in paragraph (1) results in death, any Medical Personnel or Healthcare Worker shall be punished with a maximum imprisonment of 5 (five) years or a maximum fine of IDR 500,000,000.00 (five hundred million rupiah).”

The repeated allegations of malpractice against doctors, which have been frequently raised and gone viral in our society, have increasingly cornered the position of doctors and healthcare workers, as they have been framed in such a way as to make them seem to have committed criminal offenses, and thus should be punished as severely as possible. The more serious implication is that the honor and trust of the public in the medical profession have become increasingly degraded.

IV. CONCLUSION

From the detailed explanation above, we can draw the following conclusions:

a. Prof. Remy still asserts that Medical Malpractice can be committed by healthcare professionals (doctors) either intentionally or due to negligence. Meanwhile, Dr. Nasser firmly states that Medical Malpractice involves an element of negligence, not intentionality. If intentionality is found, then the action is no longer categorized as a Medical Criminal Offense but is instead classified as a General Criminal Offense.

b. Prof. Remy acknowledges that the term "Malpractice" is used in Common Law countries. However, he does not object to its use in Indonesia, which follows a Civil Law system, within the context of Criminal Offenses. In other words, Prof. Remy uses the term "Malpractice" to state that both negligence (and intentional acts) by doctors constitute criminal offenses, even though this terminology in its country of origin (Common Law) falls under civil law as a wrongful act (Tort). Prof. Remy's perspective aligns with the general view that all allegations of malpractice are considered general criminal cases, and thus the perpetrators should be dealt with as common criminals by law enforcement agencies.

c. Dr. Nasser rejects the use of the term "Malpractice" in public discourse, especially among intellectual circles, because this term should ideally be used as a judicial decision in court proceedings, and it is not a part of the Civil Law System adopted by our country. As an alternative to the term "Malpractice," Dr. Nasser recommends using the term "Medical Negligence," which is actually enshrined in legislation and has been used by the Supreme Court as a translation of "Medical Negligence" in one of its rulings.

d. According to Dr. Nasser, the use of the term "Malpractice," both among the general public and intellectual circles, should indeed be avoided because the term carries negative connotations and tends to discredit the medical profession and healthcare workers in Indonesia.

REFERENCES

[1] Adami Chazawi. (2007). Malpraktik Kedokteran. Bayumeedia.

[2] Anny Isfandyarie. (2006). Tanggung Jawab Hukum dan Sanksi Bagi Dokter,Buku 1. Prestasi Pustaka.

[3] Beni Satria, Redyanto Sidi Jambak. (2022). Hukum Pidana Medik dan Malpraktek,Aspek Pertanggungjawaban Pidana Terhadap Dokter Dalam Pelayanan Kesehatan. Cattleya Darmaya Fortuna.

[4] Bryan A Garrner (ed). (2004). Black’s Law Dictionary. Thompson-West.

[5] Budi Sampurna,Tjetjep D Siswaja,Zulhasmar Samsu. (2005). Bioetik dan Hukum Kedokteran. Pustaka Dwipar.

[6] Catherine Elliot & Frances Quinn. (2017). Tort Law. Pearson.

[7] Danny Wiradharma. (1996). Penuntun Kuliah Hukum Kedokteran. Binarupa Aksara.

[8] Darda Syahrizal,Senja Nilasari. (2013). Praktik Kedokteran & Aplikasinya. Dunia Cerdas.

[9] Desriza Ratman. (2014). Aspek Hukum Penyelenggaraan Praktek Kedokteran dan Malpraktek Medik. Keni Media.

[10] Desriza Ratman; (2018). Aspek Hukum Informed Consent dan Rekam Medis dalam Transaksi Terapeutik. Keni Media.

[11] Efrila. (2022). Rekonstruksi Model Penegakan Hukum Pidana Pada Profesi Dokter. Kaya Ilmu Bermanfaat.

[12] Eka Julianta W. (2012). Konsekuensi Hukum Dalam Profesi Medis. Karya Putra Darwati.

[13] Elisa Meldolesi , Johan van Soest , Nicola Dinapoli etc. (2015). Medicine is a science of uncertainty and an art of probability. Radiother Oncol, 114(1), 132–134.

[14] E.Sumaryono. (1995). Etika Profesi Hukum: Norma Norma Bagi Penegak Hukum*. Kanisius.

[15] Gayus Lumbuun. (2024, February 24). Kontrak Terapeutik. Mata Kuliah Penyelesaian Sengketa Medik, STHM,MHKes,Jakarta.

[16] Hermin Hadiati Koeswadji. (1998). Hukum Kedokteran (Studi Tentang Hubungan Huykum Dalam Mana Dokter Sebagai Salah Satu Pihak). Adytia Bakti.

[17] H.M.Ali Firdaus. (2017). Dokter Dalam Bayang Bayang Malpraktik Medik. Mencari Format Baru Perlindungan Hukum Atas Dugaan Malpraktik Medik Bagi Dokter Di Indonesia. Wydiaparamarta.

[18] J Guwandi. (2004). Hukum Medik. FKUI. J.Guwandi. (1990).

[19] Kelalaian Medik. Balai Penerbit FKUI. J.Guwandi. (2009). Dugaan Malpraktek Medik & Draf RPP : Perjanjian Terapetik Antara Dokter dan Pasien. FKUI.

[20] M.Jusuf Hanafih, Amri Amir. (1999). Etika Kedokteran dan Hukum Kesehatan. Buku Kedokteran EGC.

[21] Nasrun. (2022). Etika dan Hukum Kesehatan (Suatu Pendekatan Teori dalam Berpraktik). Deepublish. Ninik Maryati. (1998). Malpraktik Kedokteran Dari Segi Hukum Pidana dan Perdata. Bina Aksara.

[22] Oemar Seno Adji. (1991). Etika Profesional dan Hukum Pertanggungjawaban Pidana Dokter. Erlangga.

[23] Ontran Sumantri Riyanto. (2021). Pembentukan Pengadilan Khusus Medis. Deepublish.

[24] Republik Indonesia. (1974). Kitab Undang Undang Perdata.LN.Tahun 1974.N0.1,TLN No.12. Republik Indonesia. (2023).

[25] Risma Situmorang. (2020). Tanggung Jawab Hukum Dokter Dalam Malapraktik. Cendikia Press.

[26] R.Subekti; R.Tjitrosudibio. (2014). Kitab Undang Undang Hukum Perdata Burgerlijk Wetboek Dengan Tambahan Undang Undang Pokok Agraria, Undang Undang Perkawinan. Balai Pustaka. Safitri Hariyani. (2005). Sengketa Medik Alternatif Penyelesaian Perselisihan Antara Dokter. Diadit Media.

[27] Soerjono Soekanto,Herkutanto. (1987). Pengantar Hukum Kesehatan. Remadja Karya.

[28] S.Soetrisno. (2010). Malpraktek Medik dan Mediasi Sebagai Alternatif Penyelesaian Sengketa. Telaga Ilmu Indonesia.

[29] Sutan Remy Sjahdeini. (2020). Hukum Kesehatan Tentang Hukum Malapraktik Tenaga Medis,Jilid 1. IPB Press.

[30] Syahrul Machmud. (2012). Penegakan Hukum dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek. Karya Putra Darwati.

[31] Tim Penerbit Litnus. (2025). Undang Undang Kesehatan Dilengkapi Peraturan Pemerintah Tentang Kesehatan. Literasi Nusantara Abadi.

[32] Tim Penyusun. (2008). Kamus Besar Bahasa Indonesia. Pusat Bahasa Departemen Pendidikan Nasional.

[33] Veronika Komalawati; (1999). Peranan Informed Consent dalam Transaksi Terapeutik. PT Citra Aditya Bakti.

[34] Widodo Tresno Novianto. (2017). Sengketa Medik Pergulatan Hukum Dalam Menentukan Unsur Kelalaian Medik. UNS Press. Wila Chandrawila Supriadi. (2001). Hukum Kedokteran. Mandar Maju.