

PENAL MEDIATION AS A MEDICAL DISPUTE SETTLEMENT FOR HOSPITAL MALPRACTICE CASES IN INDONESIA

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Abstract

Penal Mediation is an alternative form of case settlement that originates with the idea of restorative justice. Seeing a large number of medical personnel being convicted in malpractice cases (primum remedium), mediation in dispute settlement for malpractice cases in hospitals becomes the concept of victim protection, harmonization, and overcoming rigidity/ formality in the applicable system. Therefore, the purpose of this study is to find solutions to avoid the adverse effects of the Criminal Justice System with the concept of mediation as an effort to resolve malpractice cases in the future. This paper used normative legal research or library research with a statute, conceptual, and comparative approach. The nature of the research used in this study is descriptive-prescriptive. The author used content analysis. The findings of this study are meant to provide an alternative solution to punishment which should be a last resort (ultimum remedium) from law enforcement in the form of non-litigation settlement through mediation.

Keywords: hospital; malpractice; mediation; non-litigation.

INTRODUCTION

Background

Law is a statutory regulation made by power in regulating social life.¹ Human interests as legal subjects (bearers of rights and obligations) will be achieved if the community has an orderly attitude and will foster a good balance within the community.²

The association of society which is now advanced and modern, is not enough with the existence of customs or habits carried out from generation to generation as before the birth of today's civilization or future civilizations.³ Living in a society or a state is necessary and regulated in terms of written rules known as the law. The primary purpose of the law is to create an order of life in an orderly and prosperous society in balance.⁴

1 Zico Junius Fernando, Ria Anggraeni Utami, and David Aprizon Putra, "Perlindungan Anak Terhadap Kekerasan Dalam Berpacaran (Dating Violence)," *University Of Bengkulu Law Journal* 6, no. 1 (2021): 83. doi.org/10.33369/ubelaj.6.1.82-98

2 Sudikno Mertokusomo, "Kapita Selekta Ilmu Hukum" (Yogyakarta: Penerbit Liberty, 2011), 1.

3 Ahmad Badarus Syamsi, "Transformasi Hukum Ekonomi Islam Sebagai Ius Constituendum Menjadi Ius Constitutum," *Et-Tijarie* 4, no. 1 (2017): 2-3. doi.org/10.33369/ubelaj.6.1.82-98

4 Soekidjo Notoatmodjo, "Etika Dan Hukum Kesehatan" (Jakarta: Rineka Cipta, 2010), 43.

As it is known, health is a manifestation of general welfare in a country that must be implemented to build the country and must also be supported by a policy or health system as a whole.⁵ Health development is an essential part of human resource development (HR) in realizing the noble ideals of a nation and state based on Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) as ed by the nation's founding fathers.⁶ One of the requirements to become a developed nation is a nation with a qualified or high degree of health.⁷

Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia clearly states that every person/citizen has the right to get good and proper health services.⁸ The right to health must be implemented because it is one of the human basic rights (HAM) which is essential and owned by every human. People in Indonesia get protection from various dangers that threaten their health.⁹

According to Cecep Triwibowo (2012), the definition of a hospital is a place that organizes/carries out health attempts, namely health services. A hospital is also a health provider that plays a significant role in improving health status during the life of the nation and state. Health is a human right and

one of the elements of welfare that must be fulfilled as it is mandated as the ideals of the Indonesian nation referred to in Pancasila and the Law of the Republic of Indonesia of 1945.¹⁰ As in other sectors, the government is in charge of planning, regulating, organizing, fostering, and supervising the implementation of health attempts that are equitable and affordable for the community.¹¹

Over the past few decades, we have witnessed a new phase of globalization, commercialization, and technological advancement in various aspects of our lives. The medical profession is not an exception to this phenomenon. Nowadays, this profession is getting more money-oriented, and because of this reason, claims regarding medical negligence have become a severe issue in today's era. In earlier civilizations, medical negligence was considered a crime rather than a tort.¹²

Hospitals have changed their role from social institutions into for-profit institutions. Consequently, this change not only has made hospitals show a better quality of medical services but also make them have more responsibilities for doctors and health workers who commit malpractice and corporate liability due to mistakes made by the doctors and health workers.¹³

However, malpractice cases at the hospital do not have to be settled through the litigation route but through non-litigation channels such as mediation. Therefore, when we look from the perspective of victimology

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- 5 Andy Amir & Dwi Noerjoedianto, "Studi Kasus Peran Tenaga Kesehatan Masyarakat Dalam Upaya Promotif Dan Preventif Di Kabupaten Tanjab Barat Provinsi Jambi," *Jurnal Kesmas Jambi* 1, no. 2 (2017): 55–56. doi.10.22437/jkmj.v1i1.6530
 - 6 Fais Yonas Bo'a, "Pancasila Sebagai Sumber Hukum Dalam Sistem Hukum Nasional Pancasila as the Source of Law in the National Legal System," *Jurnal Konstitusi* 15, no. 1 (2018): 28–29. doi.org/10.31078/jk1512
 - 7 Wiku Adisasmita, "Sistem Kesehatan" (Jakarta: Raja Grafindo, 2008), 4.
 - 8 I Gusti Ayu Apsari Hadi, "Perbuatan Melawan Hukum Dalam Pertanggungjawaban Dokter Terhadap Tindakan Malpraktik Medis," *Jurnal Yuridis* 5, no. 1 (2018): 99. doi.org/10.35586/v5i1.318
 - 9 Titon Slamet K, "Hak Atas Derajat HAM Di Indonesia" (Bandung: Alumni, 2009), 2.

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- 10 Cecep Tri Wibowo, "Perizinan Dan Akreditasi Rumah Sakit Sebuah Kajian Hukum Kesehatan" (Yogyakarta: Penerbit Nula Medika, 2012), 2.
 - 11 Soekidjo Notoatmodjo, Op. Cit.
 - 12 Medical Negligence Claims, "A Guide to Medical Negligence Claims and Liability in the GCC" (Dubai: Sta Law Firm, 2019), 3.
 - 13 Zico Junius Fernando, "Pertanggungjawaban Pidana Rumah Sakit Terhadap Malpraktik Tenaga Medis (Sebuah Tinjauan Ius Constitutum Dan Ius Constituendum)" (Makasar: Nasmedia, 2021), 77-78.

(victim aspect) in resolving cases through litigation, it is hard to get a satisfactory result in the process of recovering the situation for victims. In addition, the solution to the medical dispute takes quite a long time. It makes settlements related to non-litigation channels worth to be used and getting attention for the development of the future case settlement.

Research Questions

The research questions for this study are:

1. What is the hospital's legal responsibility for malpractice in civil, administrative and criminal law?
2. Is the settlement of malpractice cases in hospitals feasible to be resolved by non-litigation methods through penal mediation?

Research Goals

This research paper observes legal liability, whether criminal, civil or administrative in hospital malpractice cases and how to find the right solution by using penal mediation to resolve existing malpractice cases for future legal developments.

Research Methods

Approach

This research used normative legal research methods.¹⁴ In this case, the law is conceptualized as what is written in the legislation (law in books).¹⁵

The Source of the Data

Normative legal research is conducted in the form of library research carried out by collecting legal materials, both primary,

secondary, and tertiary.¹⁶ By doing so, answers or solutions to the problems (legal issues) that have been formulated in this research can be achieved.¹⁷ The approach used is a statute, conceptual, and comparative approach.¹⁸ The nature of the research used in this study is descriptive-prescriptive. The data collection was done through a literature study, namely the identification of literature in the form of legislation, books, official documents, papers, and several other sources related to this research. Regarding these library materials, it is also necessary to know how to write quotations, footnotes, and bibliography. In analyzing library materials and writing proposals and reports on research results, researchers will often face this.¹⁹

Data Analysis Technique

For all the materials that had been collected, the authors processed and analyzed those materials. Material management and material analysis were carried out in stages, namely by managing materials first.²⁰ The materials that have been collected are analyzed qualitatively. Qualitative technique means a way of thinking that is based on general materials obtained and then drawn to specific conclusions. To classify legal materials, the author used content analysis.²¹

14 Herlambang, Zico Junius Fernando, Helda Rahmasari, "Kejahatan Memperkaya Diri Sendiri Secara Melawan Hukum (Illicit Enrichment) Dan Aparatur Sipil Negara: Sebuah Kajian Kritis," *RechtsVinding* 11 (2022): 251.

15 Zico Junius Fernando, "Pancasila Sebagai Ideologi Pemberantasan Kejahatan Korporasi Di Indonesia," *Supremasi Hukum* 29, no. 2 (2020): 80. doi.org/10.33331/rechtsvinding.v11i2

16 Soerjono Soekanto & Sri Mamudji, "Penelitian Hukum Normatif Suatu Tinjauan Singkat" (Jakarta: Raja Grafindo Persada, 2001), 13–14.

17 Zico Junius Fernando, Wiwit Pratiwi & Yagie Sagita Putra, "Omnibus Law Sebuah Problematika Dan Paradigma Hukum Di Indonesia," *AL-IMARAH: Jurnal Pemerintahan dan Politik Islam* 6, no. 1 (2021): 92–93. doi.org/10.29300/imr.v6i1.4122

18 Peter Mahmud Marzuki, "Penelitian Hukum" (Jakarta: Kencana, 2005), 93.

19 Rianto Andi, "Metode Penelitian Sosial Dan Hukum" (Jakarta: Granit, 2005), 61.

20 Zico Junius Fernando, Pujiyono, Nur Rochaeti, "Telaah Pasal Penghinaan Terhadap Presiden Dan Wakil Presiden Di Indonesia (Study On The Article Concerning Contempt Against President Ans Vice President In Indonesia)," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 013 (2022): 138. doi.org/10.33331/rechtsvinding.v11i1

21 Zico Junius Fernando, "Perampasan Aset Pelaku Tindak Pidana Dalam Perspektif Hak Asasi

DISCUSSION

Hospital Responsibilities in Malpractice Cases from the perspective of civil, administrative, and criminal law

Health services are diagnostic and therapeutics for various diseases and health problems, both surgical and non-surgical.²² Law Number 36 the Year 2009 concerning Health, Article 1 point (7), formulates that what is meant by a hospital is “a health service facility which is a tool or place used to organize health service attempts, both promotive, preventive, curative and rehabilitative activities carried out by the Government, Regional Government or the community.”

Meanwhile, malpractice comes from the word “mal,” which means wrong or bad. The word “practice” means practice or action. Referring to the word’s meaning, malpractice can be interpreted as a wrong or immoral action.²³ If it is associated with malpractice in medical cases or medical malpractice, it means that medical actions are carried out by a medical worker (doctor, nurse, health worker, etc.).

Medical malpractice is defined as any acts or omissions by medical personnel during the treatment of a patient that deviate from accepted norms of practice in the medical community and causes an injury to the patient.²⁴ Medical malpractice is a specific

subset of tort law that deals with professional Negligence.²⁵ “Tort” is the Norman word for “wrong,” and tort law is a body of law that creates and provides remedies for civil wrongs that are distinct from contractual duties or criminal wrongs.²⁶ An essential aspect of the perceived problem with medical malpractice litigation is how malpractice claims are resolved.²⁷

The doctor-patient relationship is shaped by the quality and manner of information exchange. This is a delicate process with case-specific relational and communication elements, which all affect deliberation and decision-making on the most appropriate course of care.²⁸ Despite greater patient access to medical information, considerable physician-patient information asymmetry is still characterized by clinical practice.

While most healthcare providers aim to exercise the highest standard of care for all patients, there are times when things can go gravely wrong. If you or your loved ones have experienced poor medical care, misdiagnosis, lack of consent, or breach of doctor-patient confidentiality, in harm or injury, you may be entitled to medical malpractice recovery.

Kinds of malpractice:

1. Criminal Malpractice

An act can be categorized as criminal malpractice if it fulfills the formulation of

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- Manusia Dan Prinsip Hukum Pidana,” *Jurnal Legislasi Indonesia* 19, no. 1 (2022): 85. doi. 10.22212/jnh.v10i1.1217.84
- 22 Priharto Adi, “Formulasi Hukum Penanggulangan Malpraktik Kedokteran Legal Formula On Suppressing Medical Malpractice,” *Kanun Jurnal Hukum* 15, no. 2 (2013): 270.
- 23 Sadino Sadino, Ismet Alaik Rahmatullah, “Analisis Putusan Sanksi Perdata Malpraktek Sebagai Bentuk Pertanggungjawaban Perlindungan Konsumen (Studi Kasus Putusan Mahkamah Agung Nomor: 515 PK/Pdt/2011),” *Jurnal Magister Ilmu Hukum* 1, no. 1 (2021): 16. doi. 10.36722/jmih.v1i1.727
- 24 Wahyu Wiriadinata, “Dokter, Pasien Dan Malpraktik,” *Mimbar Hukum - Fakultas Hukum*

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- Universitas Gadjah Mada* 26, no. 1 (2014): 46. doi. 10.22146/jmh.16053
- 25 Bambang Heryanto, “Physician Malpractice in Legal Perspective,” *Jurnal Dinamika Hukum* 10, no. 2 (2010): 183–184. doi.org/10.20884/1.jdh.2010.10.2.151.
- 26 B Sonny Bal, “An Introduction to Medical Malpractice in the United States,” *Clin Orthop Relat Res* 467, no. 2 (2009): 340. doi. 10.1007/s11999-011-2206-2
- 27 C. S. Meschivitz, “Mediation And Medical Malpractice: Problems With Definition And Implementation,” *Law and contemporary problems* 54, no. 1–2 (1991): 195. doi. 10.2307/1191859
- 28 G. Elwyn, “Shared Decision Making: A Model for Clinical Practice,” *Journal of General Internal Medicine* 27, no. 1 (2011): 1361, <http://ec.europa.eu/>.

a criminal offense. First, the act must be reprehensible. Second, it is carried out with the wrong mental attitude (means rea), namely in the form of intentional, carelessness, or negligence. Examples of intentional and criminal malpractice are as follows: 1) Performing an abortion without conditions justified by medical or medical science; 2) Divulging secrets in medical science; 3) Not doing assistance to a patient who is in an emergency even though he knows no other doctor will help the patient; 4) Issuing a certificate from a doctor that does not comply with the regulated provisions; 5) Issuing a letter of visum et repertum that is not following the reality; 6) Providing information that is not true in the court process while his position as an expert requires him to follow the provisions of the applicable rules.²⁹

The term criminal malpractice is used to refer to the category of medical malpractice with criminal implications, distinguishing it from civil and administrative malpractice. Examples of criminal malpractice are euthanasia, illegal abortion etc.

In general, complaints regarding medical professional liability are based on medical error: natural or perceived as such by the patient or his or her family. These obligations are both contained in Law Number 44 of 2009 concerning Hospitals and the Hospital Code of Ethics (KODERSI). This law states that a hospital is possibly held liable for legal liability, in this case, criminal liability.

2. Ethical Malpractice

Ethical malpractice is a doctor who acts contrary to medical ethics. Meanwhile, medical ethics are outlined in a rule called the Code of Medical Ethics

(abbreviated KODEKI).³⁰ KODEKI is a set of standard rules that contain principles, norms/rules that apply to the medical profession.³¹ Advances in technology in the real world of medicine provide certain comfort and convenience to patients in health services and provide doctors to facilitate attempts in determining patient rehabilitation diagnoses that can be faster, more precise, and more accurate but have unwanted side effects.³² The negative impact and inappropriate use of medical technology on patients is ethical malpractice.³³ Some concrete examples of technological abuses in medicine that lead to ethical malpractice are stated as follows: 1) Diagnostic: Laboratory tests performed on patients are sometimes excessive with the assumption that specialists need to examine them further. However, because research centers guarantee to offer "gifts" to specialists who send patients, specialists are sometimes interested in getting those gifts too; 2) In Therapeutics: Various organizations offer anti-infective agents to specialists with a guarantee that specialists will get accommodation and persuade them that they need to use these drugs for their patients. This situation can sometimes influence the specialist judgment in providing treatment to their patients. The direction of treatment that relies on the drug manufacturer's persuasion and does not match the symptoms required by the patient is also an ethical malpractice.³⁴

29 Syahrul Machmud, "Penegakan Hukum Dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktik" (Bandung: CV. Karya Putra Darwati, 2012), 18–19.

30 Dinarjati Eka Puspitasari, "Aspek Hukum Penanganan Tindakan Malpraktek Medik Di Indonesia," *Lambung Mangkurat Law Journal* 3, no. 2 (2018): 248. doi.org/10.32801/lamlaj.v3i2.86

31 Ibid.

32 Bambang Tri Bawono, "Kebijakan Hukum Pidana Dalam Upaya Penanggulangan Malpraktik Profesi Medis," *Jurnal Hukum* 25, no. 1 (2015): 458. doi.org/10.26532/jh.v25i1.204

33 Machmud, Op. Cit.

34 Ibid.

3. Juridical Malpractice

Juridical Malpractice is a term agreed upon and used when doctors commit administrative law violations. A treatment is a juridical malpractice if a doctor or health worker violates the state administrative law (TUN). Below are some examples of administrative malpractice, namely: 1) Carrying out a medical practice without a permit; 2) Carrying out clinical activities that are not based on the license they have; 3) The doctor's practice uses an illegal license; 4) Not taking clinical notes.³⁵

4. Civil Malpractice

Civil malpractice is defined as a situation where the doctor or health worker does not carry out their obligations following applicable regulations, namely not providing matters previously agreed upon.³⁶ Examples of actions of doctors or health workers that are categorized as civil malpractice are 1) Failure to carry out the treatments that are previously agreed upon with patients; 2) Carrying out the treatments that must be done, but then it is too late to implement them; 3) Performing treatments that are mandatory but not perfect; 4) Performing treatments that must be done but should not be done.

To claim medical malpractice, the patient must show: a doctor (or another medical professional)/ patient relationship existed, the medical professional was negligent of his or her duties (conducted by them in a way that a competent professional would not have), the medical professional actions caused injury, the injury led to damages.³⁷ Patient

safety and healthcare quality are measured and analyzed using estimated numbers of avoidable mortality, presuming that the healthcare system is efficient and qualified.³⁸

The need to respect the norms of good medical practice has been there in the medical profession throughout its evolution. However, the perspective on failure in the medical act has undergone significant changes over time.³⁹

1. Hospital Liability in Administrative Law

The implications of administrative law in the legal relationship between hospitals and patients are about permits and policies or provisions that oblige health service administration for the requirements that must be met in providing quality health services.⁴⁰ These administrative-legal policies or provisions regulate the procedures for providing proper and appropriate health services regarding hospital, operational, and professional standards.⁴¹ Problems that often arise in terms of administrative law are that the established hospital does not have the conditions specified in the attachment of the Minister of Health Number 147 of 2010. These conditions are regarding the absence of permits to establish and operating permits in

³⁵ Ibid.

³⁶ Resfina Agustin Reza, "Tanggung Jawab Dokter Terhadap Pasien Dalam Hal Terjadinya Malpraktik Medik Dilihat Dari Perspektif Hukum Perdata," *Jurnal Cendikia Hukum* 4, no. 1 (2018): 4. doi.org/10.33760/jch.v4i1.30

³⁷ Amrita Shenoy, Gopinath N. Shenoy, and Gayatri G. Shenoy, "The Impact of EMTALA on Medical Malpractice Framework Models: A Review," *Patient Safety in Surgery* 16, no. 1 (December

2022): 6–7, doi. 10.1186/S13037-022-00325-W/FIGURES/1.

³⁸ Paula Kuvaja, Noora Keinänen & Lasse Pakanen, "The Incidence of Iatrogenic Deaths in the Finnish Cause-of-Death Statistics; a Retrospective Study," *Journal of Forensic and Legal Medicine* 86, no. August 2021 (2022): 1. doi.10.1016/j.jflm.2021.102302

³⁹ Bianca Hanganu et al., "Medicina Socio-Demographic, Professional and Institutional Characteristics That Make Romanian Doctors More Prone to Malpractice Complaints," *Medicina* 58, no. 287 (2022), 16. doi. 10.3390/medicina58020287

⁴⁰ Susi Natalia Tampubolon, "Pertanggungjawaban Rumah Sakit Terhadap Tindak Pidana Malpraktek," *Jurnal Mahupiki* 1, no. 1 (2014): 5. doi.10.3390/medicina58020287

⁴¹ Michael Eman Tendean, "Pertanggungjawaban Rumah Sakit Terhadap Tindakan Dokter Yang Melakukan Malpraktek," *Jurnal Lex Et Societatis* 7, no. 8 (2019): 23–24. doi.org/10.35796/les.v7i8.26963

hospitals and problems regarding the provisions which constitute compulsory administrative requirements for health services in hospitals. Violation of administrative law policies or provisions can result in administrative legal sanctions. They can be in the form of revocation of business licenses or revocation of legal entity status for hospitals, while for doctors and other medical personnel, it can be in the form of verbal or written warnings, revocation of practice permits, periodic salary delays, or promotions higher level.

2. Hospital Liability in Civil Law

In terms of civil law liability, the hospital as a legal entity is responsible as a corporation and has responsibility for the actions of the people who work for the hospital as regulated in Article 1365-1367 of the Civil Code. Problems that often arise in civil legal liability conducted by hospitals are often about patient losses to medical personnel errors. This has been regulated in Article 1365 of the Civil Code while regarding losses resulting from negligence or negligence to the patient himself has been regulated in Article 1366 of the Civil Code. Based on the formulation of Articles 1365 and 1366 of the Civil Code, an act can be said as a violation of the law if it has already been proven. The proofs can be in the form of the existence of errors and omissions, the existence of losses suffered, and the existence of a causal relationship between errors and omissions with losses. Problems that often arise in the realm of civil law are that hospitals do not want to be responsible for malpractice committed by medical personnel, especially medical personnel who do not have a direct legal relationship with the hospital. Meanwhile, in Article 46 of Law Number 44 of 2009 concerning Hospitals, it is clearly stated that hospitals are legally responsible for losses caused by negligence committed by their health

workers. Considering this situation, this article should have explained that medical personnel have a direct relationship or an indirect relationship with the hospitals (for example: in the case of an Outsourcing relationship). The hospital must be responsible if there is a demand from the patient.⁴² Since the act does not explain that the existing medical personnel or health workers have a direct or indirect relationship, this case, for further arrangements, needs to be operated based on SOP (Standard Operational Procedure), the cooperation agreement or the Hospital Law must be more detailed so that it is clear how the responsibility of the Hospital in civil law and the Hospital cannot be separated and responsible for the demands made by the patient who feels aggrieved. Civil legal liability will arise if there is an unlawful act or breach of contract about the act of binding the elements in the unlawful act. According to the author, The hospital should not release civil liability when its medical personnel commit malpractice. This responsibility must be completed by institutions that employ people who work for them, especially for the benefit of material gain.

3. Hospital Liability in Criminal Law

In addition to individuals who can be criminally prosecuted, corporations or legal entities (in this case, hospitals) can also be criminally prosecuted based on modern criminal law theory. Legal liability for any negligence that exists and is carried out by medical personnel always ends in administrative and civil liability. This case rarely touches criminal liability. Consequently, it makes malpractice cases thrive; hospitals are always passive in handling malpractice

42 Fitria Nur Halimah & Arrie Budhiartie, "Kebijakan Rumah Sakit Dalam Sistem Pengelolaan Kesehatan Lingkungan," *Mendapo: Journal of Administrative Law* 1, no. 1 (2020): 24. doi. 10.22437/MENDAPO.V1I1.8853

case and are not given shock therapy that can make them carry out a better service. Considering these, the author agrees that criminal law does not have to be an ultimum remedium (ultimate effort) but also can be used and enforced as a primum medium (preferred). By doing so, the prevention of malpractice cases can be achieved because hospitals can also be asked for legal responsibility, especially liability criminal law (Ampera, 2018). Situations like the one above also make hospitals as corporations immune to the law. So, it is challenging to ensnare hospitals to be criminally responsible for malpractices committed by medical personnel in Indonesia. It is because of the lack of firm regulation for corporations as one of the subjects of criminal law in Indonesia, as well as the existing regulations regarding corporations in any special laws or regulations outside the Criminal Code, which in this case includes the Hospital Law. These regulations are inconsistent in regulating malpractice cases or the arrangements are not the same from one another. Thus, it makes the problem complex. This situation must be overcome so law enforcement on criminal liability of Hospitals (corporations) for malpractice committed by medical personnel can be held accountable. In addition, the regulation regarding the crime contained in the criminal provisions of Law Number 44 Year 2009 concerning Hospitals states:

Article 62

"Everyone who intentionally operates a hospital without a permit as referred to in Article 25 paragraph (1) shall be sentenced to a maximum imprisonment of 2 (two) years and a maximum fine of Rp. 5,000,000,000.00- (five billion rupiah)".

Article 63

1. If the criminal act as referred to in Article 62 is committed by a corporation, in addition to imprisonment and fines for its management, the punishment that can be imposed on the corporation is in the form of a fine with a weighting of 3 (three) times the fine as referred to in Article 62;
2. In addition to the fine as referred to in paragraph (1), the corporation may be subject to additional penalties in the form of a) Revocation of business license; or b) Revocation of legal entity status.

From the existing arrangements above, the punishment regulated in Law Number 44 of 2009 concerning Hospitals only ensnares a Hospital as a corporation if it intentionally organizes a hospital that does not have a permit. A hospital is not criminally responsible if an error is made by medical personnel. This can be said that there is no setting that regulates hospital responsibility for errors committed by its medical personnel.

In general, malpractice claims are adjudicated in courts, which typically require three elements for a successful claim: 1) the patient suffered an adverse event; 2) the provider caused the event due to action or inaction; and 3) the provider was negligent, which essentially shows that the provider takes less care than what is customarily practiced by the average member of the profession with good standing, given the circumstances of the doctor and the patient.⁴³ In detail, the patient claims to the court that the hospital has harmed them. Next, the lawsuit specifies the hospital's acts and the damage those acts imposed on the patient. It also specifies the number of financial

43 Daniel P Kessler, "Evaluating the Medical Malpractice System and Options for Reform," *J Econ Perspect* 25, no. 2 (2011): 2. doi.org/10.1017/gov.2020.26.

damages to compensate victims borne by the negligent hospital. Such negligence occurs when the hospital causes harm to a patient that could reasonably have been prevented. Consequently, to obtain financial compensation from hospitals, patients must prove that they were harmed and that the hospital's actions were responsible for the harm. In other terms, they must show that the hospital's behavior did not meet the standard quality of health care as the law recognizes that many medical adverse events may occur regardless of hospitals' actions.⁴⁴

However, from the rules and settlement of litigation carried out in resolving malpractice cases in Indonesia, the public should see the other side in resolving malpractice cases using non-litigation methods. As it is known, disputes through litigation in many cases, such as this malpractice case, take a long time to resolve, with the costs incurred not small and tend to be large. In addition, the fulfillment of the rights of malpractice victims cannot be resolved properly. Furthermore, the community must also be thoughtful to see that there is some medical personnel who work in hospitals and are needed by the community because they have special expertise in the health sector.

Settlement of Malpractice Cases with Alternative Mediation Penal

Penal mediation uses many terms, such as "mediation in penal matters" / "mediation in criminal cases," which in Dutch is called "strafbemiddeling," and in German it is called "der außergerichtliche tatusgleich" in French it is called "demediation penale".⁴⁵ Penal mediation is an alternative method or

form of dispute resolution or cases outside the Court's "alternative dispute resolution." Since penal mediation mainly brings together perpetrators who commit certain crimes and victims of the crimes, then penal mediation or penal mediation is also often referred to as "victim-offender mediation" (VOM), "täter-opfer ausgleich" (TOA), or "offender victim arrangement" (OVA).⁴⁶

Takdir Rahmadi argues that penal mediation is an activity of resolving cases or disputes between one party and another through a negotiation process or seeking a way of deliberation with consensus assisted by a neutral party who does not have the authority to decide.⁴⁷ Penal mediation is a form or method of settlement in ADR that is possible in criminal cases related to malpractice cases in Indonesia.⁴⁸ According to Stefanie Trankle, quoted by Barda Nawawi Arief, Mediation in criminal cases that are being developed comes from ideas and working principles as described below:⁴⁹

1. Handling a conflict is the task of a mediator to make the parties forget the legal framework and try to get the parties to communicate in solving problems;
2. Problem-solving is based on the "process orientation or prozessorientierung" process. It must be focused on the idea that penal mediation efforts emphasize more on the quality of the process carried out rather than the results, for example, by making criminals aware of their mistakes so that conflicts or disputes can be resolved and the victim can calm down and no longer haunted by fear;

44 Rosalind Bell-Aldeghi & Bertrand Chopard, "Hospital Multi-Dimensional Quality Competition With Medical Malpractice," *International Review of Law and Economics* 68 (2021): 106025. doi: 10.1016/j.irl.2021.106025

45 Barda Nawawi Arief, "Mediasi Penal Penyelesaian Perkara Di Luar Pengadilan" (Semarang: Pustaka Magister, 2012), 1.

46 Ibid.

47 Takdir Rahmadi, "Mediasi Penyelesaian Sengketa Melalui Pendekatan Mufakat" (Depok: Rajawali Pers, 2017), 1.

48 Lysa Angrayni, "Kebijakan Mediasi Penal Dalam Penyelesaian Perkara Tindak Pidana Ringan Perspektif Restorative Justice," *Jurnal Hukum Respublica* 16, no. 1 (2016): 92. doi.org/10.31849/respublica.v16i1.1428

49 Ibid.

3. Prioritizing the informal process means that penal mediation attempts are informal, non-bureaucratic activities, reducing strict legal processes;
4. There is an active and autonomous participation of the parties, both parties, in this case, the perpetrator and the victim. Both are not seen as objects of the criminal law process but are seen as a subject who has a sense of personal responsibility and the ability to act. They are expected to do according to their own will.

Reflecting on the practice carried out by law enforcement officers (Police, Prosecutors and Judges), the settlement of cases with penal mediation is carried out through a restorative justice approach,⁵⁰ which is the discretionary authority of law enforcement officials.⁵¹ Examples that can be used, such as the implementation of penal mediation at the investigation stage, are regulated in the Regulation of the Chief of Police Number 7 of 2008 concerning Guidelines for Strategy and Implementation of Community Policing in Carrying out the Duties of the National Police, the Letter of the Chief of Police No. Pol: B / 3022 / XII / 2009 / SDEOPS concerning Case Handling Through Alternatives Dispute Resolution, Circular Letter of the Chief of Police No. SE / 8 / VII / 2018 concerning the Application of Restorative Justice in the settlement of Criminal Cases.⁵² In addition,

the implementation of penal mediation at the prosecution stage is carried out with the Prosecutor as the holder of the Dominus Litis principle who plays a significant role in determining whether or not a case is delegated to the court and as an attempt to minimize cases that are not worthy of being transferred to court, the Indonesian Prosecutor's Office Regulation No. 15 has been issued. The year 2020 on the Cessation of Prosecution Based on Restorative Justice. In addition, there is the implementation of penal mediation at the trial stage, which can be exemplified by penal mediation through the Restorative Justice approach at the trial stage, based on the Decree of the Director General of the General Judiciary Agency Number: 1691 / DJU / SK / PS.00 / 12 / 2020.⁵³ Before getting into reporting and investigation stage, the parties can also resolve malpractice cases by appointing a mediator agreed upon by both parties or appointing a professional mediator who is competent to guide the course of mediation to get a solution.

The advantages of mediation in resolving malpractice cases in hospitals are:

1. Maintaining good relations with the disputing parties (future-looking). In the mediation process, searching for the best solution is always put forward. This process does not look for the most righteous or who will be blamed for a dispute or case so that the overall outcome of the agreement reached in the future can be considered beneficial to all parties, be it the hospital, medical staff or patients as a victim of malpractice;
2. Non-binding/voluntary. Since the beginning, the purpose of mediation is to find the best solution between the parties so that the parties' participation is voluntary based on good faith. If the following process finds a dead end, the parties have not been harmed. Whether they want to continue the mediation

50 Bharatkumar Suthar et al., "Penal Mediation Policy toward the SARA Conflict Resolution of Kei Island in the National Criminal Law Reform Efforts," *IOP Conference Series: Earth and Environmental Science* 343, no. 1 (2019): 1, doi. 10.1088/1755-1315/343/1/012181.

51 Cahya Wulandari et al., "Penal Mediation: Criminal Case Settlement Process Based on the Local Customary Wisdom of Dayak Ngaju," *Lex Scientia Law Review* 6, no. 1 (2022): 70, doi. 10.15294/LESREV.V6I1.54896.

52 Zaki Bunaiya, "Sudut Pandang Mediasi Penal Dalam Sistem Hukum Pidana Modern Di Indonesia," *Qureta.Com*, last modified 2022, accessed October 11, 2022, <https://www.qureta.com/post/sudut-pandang-mediasi-penal-dalam-sistem-hukum-pidana-modern-di-indonesia>.

53 Ibid.

process or proceed to the litigation (court) process, it is entirely the decision of the parties to the dispute.

3. Confidential. Because the process is out of court (litigation), the disputing parties are not exposed to either the parties, the mediator, or the issues in dispute so that the disputing parties do not become the consumption of public attention;
4. Can reduce the anxiety of the disputing parties (eliminates fear). It is conceivable that if a doctor or hospital official faces a call to resolve a problem that takes a long time, the impact will be to lose concentration because their energy and mind will focus on how to deal with a trial in court. For patients as victims, mediation will reduce the sense of justice that is not achieved because it is clear that there will be winners and losers when they go to court;
5. Faster process (settle sooner/fast as you want). The process of mediation takes a relatively short time compared to the trial process, so the advantages can be obtained clearly between hospitals, medical personnel, and patients when malpractice occurs;
6. Process can be controlled (parties oriented). The time, location, mediator, or agenda can be mutually agreed upon during the mediation process, depending on the parties who decide. That way, the mental pressure and the burden of the mind can be reduced. The stages of mediation can be seen and discussed on the issue in dispute because the focus is not on the person (the opposing party) but on resolving the dispute;
7. Low cost (less expensive). It can be imagined that with a relatively short time compared to the court process, the costs incurred or losses caused by the length of the trial period (especially by doctors) will be minimal;
8. Flexible options (own procedures). Because of the options for the procedure and the choice of the dispute and

its informal nature, the procedure is adjusted to the parties' wishes. Unlike the litigation process, which must follow standard sequences such as summoning witnesses, examining evidence, exceptions, replicas, duplicates, etc.

9. Does not require evidence (no exposure). Since there is no decision in the mediation process, the mediation process does not require complete evidence of the problems at hand, but it is emphasized to protect the parties interests. So, both doctors and patients only negotiate the problem of losses suffered by patients with medical compensation or compensation for other material losses according to the agreement made with the record that the patient's demands only cover the loss (not seeking profit with immaterial claims).
10. The result is a win-win solution. Mediation is one form of ADR, so the soul in this process does not see who is the most correct or who will be blamed for a dispute or case. With the help of a mediator, the focus of the discussion is only on the problem, not to bring down the opposing party. The parties are equally aware of the losses they will suffer if the problem is brought to court;
11. Time efficiency and victim recovery. Doing penal mediation can shorten the time of case settlement, and the ultimate goal is to accommodate the victim's interests to get the appropriate justice.

In some countries, such as Belgium, Austria, and Germany, mediation to achieve settlement of cases against perpetrators of violations/criminal acts is done with a rehabilitation pattern or by carrying out a sanction in the form of social work in the city or place where the violation/crime is committed. It is done as a form of responsibility by the perpetrator of the violator/criminal act. This sanction tends to have a better result compared to making the perpetrator judged in the litigation process, as stated in Article 4a of

the Belgian Criminal Code. If we look closer at this regulation, the state puts more emphasis on the perpetrators to carry out restorative justice attempts in the form of mediation (non-litigation efforts) in the form of imposing fines or compensation to the perpetrators to restore the victim's condition properly by seeing the criminal threat imposed is under one-year imprisonment. Almost the same situation happens in Austria, it is even more developed because initially it was only aimed at cases of criminal acts against children. It has developed in Austria and now it can also be applied to adult offenders/criminal acts, in the Austrian Criminal Code rules. Those who can apply this concept of mediation are the ones with violations/criminal acts whose legal threats are not more than 5 (five) years for perpetrators who are considered adults and threats of no more than ten years for perpetrators who are still categorized as children/underage and mediation are also can be applied to violations or cases that are categorized as severe, but some exceptions are provided that the victim does not die. So that in Austria, the application of mediation to resolve conflicts of violations/criminal acts has been successful and suppresses the adverse effects of criminal law and uses litigation settlement patterns. The German state is even more specific in determining whether a criminal case/case can be mediated or not. This country has mandated the Prosecutor's Office and courts to play a more active role in resolving and seeing whether a criminal case or not a mediation effort can be made. If the prosecutor's office and the court see that what the legal subject has done can be mediated, the litigation process will not be continued, and efforts will be made for a settlement that prioritizes a win-win solution.

In the Draft Criminal Procedure Code concerning Penal Mediation, Article 42 of the Draft Criminal Procedure Code paragraphs (2), (3), (4) and (5):

Paragraph (2)

"The public prosecutor is also authorized to stop the prosecution in the public interest or for certain reasons."

Paragraph (3)

"The authority of the public prosecutor as referred to in paragraph (2) can be exercised if: a) The crime committed is of a light nature; b) The crime committed is punishable by a maximum imprisonment of 4 (four years); c) The crime committed is only punishable by a fine; d) The age of the suspect at the time of committing the crime is above 70 (seventy) years; or; e) Losses have been compensated."

Paragraph (4)

"The provisions as referred to in paragraph (3) letter d and letter e only apply to criminal acts punishable by imprisonment for a maximum of 5 (five) years".

Paragraph (5)

"If the public prosecutor stops the prosecution as referred to in paragraph (2), the public prosecutor is obliged to submit an accountability report to the head of the high prosecutor through the head of the state attorney's office every month.

It is possible in the Draft Criminal Procedure Code that a case or criminal act can not be prosecuted. It happens when the victim has been fulfilled or his loss has been replaced as seen in Article 42 paragraph 3 letters d and e and continued with the conditions seen in Article 42 paragraph 4 that the provisions referred to in letters d and e apply to criminal cases/not punishable by imprisonment for a maximum of 5 (five) years. This is a form of progressive law to see an alternative solution in the future (ius constituent) that can solve many problems

without having to use a penalty/litigation route which has many adverse effects, especially regarding malpractice matters carried out by medical personnel, whether intentional or not. It is necessary because of the importance of medical personnel for the safety of a nation and state, plus creating ready-to-work medical personnel also takes years. So, when a violation/criminal malpractice is done by medical personnel, this case can be resolved by mediation without taking the litigation route and imprisoning medical personnel since they are very much needed, especially at critical times such as the COVID-19 pandemic in a few years back. However, in the future, an implementation mechanism must be made so that the settlement with the mediation concept can provide a suitable solution and provide a win-win solution for both parties to the dispute.

The formal criminal process is time-consuming and does not provide certainty for offenders. In addition, victims would not necessarily meet or restore the relationship with the offenders. Conventional criminal proceedings will only make the victim as a witness at the trial level which does not significantly affect the decision of punishment. In these proceedings, the prosecuting attorney only accepts files processed for further investigation to be the basis of criminal charges, without knowing and understanding the conditions of these problems are real, and the perpetrators must be prepared to accept the punishment that would be met out to him.⁵⁴

A penal mediation can be categorized as achieving goals if the involved parties have an equal bargaining position and the parties are thoughtful to value good relations in the future if the parties want to resolve the problem with an excellent process to seek a win-win solution without any hostile intentions.

It is like the saying "losing becomes charcoal, winning becomes ashes". By considering this situation, penal mediation becomes the best solution and the right choice in solving the rampant malpractice cases that occur in hospitals by looking at the error category level or criminal acts committed.⁵⁵ Thus, it can be seen that the mediation process that takes place outside the court has its advantages.⁵⁶

The debate over the desirability of medical malpractice laws remains a contentious issue. In addition to the direct costs of litigation, medical malpractice may increase costs indirectly through "defensive medicine," defined as medical practices that reduce legal liability without significant benefit to patients.⁵⁷

Settlement of medical malpractice cases through a mediation approach, known in the Indonesian culture as a consensus agreement as contained in the 4th Precepts of Pancasila, is one alternative settlement to restore conflict to the parties most affected (victims, perpetrators) and community interests. Furthermore, giving priority to the interests of all parties.⁵⁸

Although the legislation has not regulated the application of penal mediation in medical malpractice criminal cases, there has been a paradigm shift in the existence

⁵⁴ Andi Sofyan, "Penal Mediation in Health Law," *Journal of Research in Humanities and Social Science* 3, no. 12 (2015): 1–7.

⁵⁵ Nurnaningsih Amriani, "Mediasi Alternatif Penyelesaian Sengketa Perdata Di Pengadilan" (Jakarta: Raja Grafindo, 2011), hlm. 29.

⁵⁶ Asep Sukohar, Hendra Tarigan Sibero & Maya Ganda Ratna, "Penyuluhan Mediasi Sengketa Medik Pada Dokter Yang Akan Diambil Sumpah Di Fakultas Kedokteran Unila" Vol. 01, no. 01 (2015): hlm. 72. <https://doi.org/10.23960/jpm1171-74>

⁵⁷ Brian Chen et al., "State Medical Malpractice Laws And Utilization Of Surgical Treatment For Rotator Cuff Tear And Proximal Humerus Fracture: An Observational Cohort Study," *BMC Health Services Research* 21, no. 1 (2021): 2. doi. 10.1186/s12913-021-06544-8

⁵⁸ Ahmad Syaafi, Diana Haiti & Mursidah, "Application of Restorative Justice Values in Settling Medical Malpractice Cases," *International Journal of Criminology and Sociology* 10, no. 1 (2021): 103–110. doi. 10.6000/1929-4409.2021.10.14

of quasi-private law into public law and by looking at the many penal mediation practices in resolving medical malpractice criminal cases, both with non-institutionalized and non-institutionalized mechanisms. The examples of institutionalized mechanisms happen in professional and customary courts' family deliberation which shows the community's need for penal mediation. It is the embodiment of restorative justice as an alternative in resolving criminal cases of medical malpractice to avoid the difficulties that exist in the criminal justice process.⁵⁹

CLOSING

Conclusions

The weakness of dispute resolution/malpractice cases in hospitals through litigation is seen from the side of the long settlement time, consuming a lot of costs. In addition, the victim will not get full justice, etc, making the authors put forward a concept of non-litigation settlement through penal mediation to obtain a "win-win solution" in solving the problem of malpractice cases in hospitals

Attempts to resolve problems/ cases/ disputes through penal mediation are alternative solutions amid people's lives today and beyond, by going through a process outside the Court (litigation) which is commonly known as "alternative dispute resolution" abbreviated as ADR. This process is also called appropriate dispute resolution. It is a form of case settlement that is not resolved through the litigation process. This case settlement can be used so that the disputing parties or litigants get justice (justice) which focuses on a win-win solution, especially in the resolution of malpractice cases/disputes that occur in hospitals.

The advantages of meditating in

resolving malpractice cases in hospitals are: 1) Maintaining good relations with the disputing parties (future-looking); 2) Non-binding/voluntary; 3) It is confidential; 4) Can reduce the anxiety of the disputing parties (eliminates fear); 5) Faster process (settle sooner/fast as you want); 6) Process can be controlled (parties oriented); 7) Low cost (less expensive); 8) Flexible options (own procedures); 9) Does not require evidence (no exposure); 10) The result is a win-win solution; 11). Time efficiency and victim recovery.

Penal mediation makes the process carried out for settlement does not emphasize who is most suitable or guilty. With the assistance of a mediator in the penal mediation process, the focus discussed is only on the problem, not to bring down the litigant or disputing party. The parties are equally aware of the losses they will suffer if the problem is brought to Court. In the Draft Criminal Procedure Code concerning Penal Mediation set in Article 42 of the Draft Criminal Procedure Code paragraphs (2), (3), (4) and (5).

Suggestion

Indonesia must strengthen rules and technical settlement of legal cases involving the medical profession, especially malpractice. The mediation system must be considered in the law-making process to prevent the criminalization of doctors due to medical risks during treatment and provide a suitable solution between victims and perpetrators of malpractice.

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59 S Tri Herlianto, "Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Tindak Pidana Praktik Kedokteran" 43, no. 2 (2009): 300.

so suggestions from various parties are expected. In the future, this paper can be a reference for academics, practitioners, and the public in seeing legal cases that arise in the community. This research will be upgraded to empirical research to directly see cases of malpractice in hospitals and their solutions to obtain the right formula for solving malpractice-related cases.

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