

# Evidence Doctor Error In Alleged Of Criminal Act On Medical Malpractice

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**ABSTRACT:** When the doctor have an error act during its work, so can be categorized have done the malpractice. How to determine that is an error act that can be categorized as the malpractice? To be Convicted, a doctor is not enough if only conduct the act against the law, but still need some of requirement, like the doctor whom suspected have done criminal act must be proved as guilty so he/she must take any responsibility to it. Or by proved that the act of doctor can be justified so their act is not seen as a medical malpractice.

**Key word:** Doctor, Criminal Act, Malpractice

## 1 INTRODUCTION

The needed of medical treatment in order to recover from the disease, it is part of the basic need as human being. So need other person who is expert to this to give any people who need any medical treatment in order to get free from the disease. Doctor is a scientist that well educated with professional skill to help people that demand its medical treatment. Medical education have given the knowledge, skill and professional attitude for the medical student to be a professional doctor based of professional attitude that must be ready to help the others. As a profession, the act of doctor is full with the risk. The risk caused by the unpredictable case before or the risk caused by error of the doctor itself. When the doctor have an error act during its work, so can be categorized have done the malpractice. But how is determine that is an error which is meet the malpractice? The answer is can cause some consequence, which are to the matter of medical malpractice and to the evidence of criminal act. To be Convicted, a doctor is not enough if only did the act against the law, but still meet some of requirement, like the doctor whom suspected have done criminal act must be proved as guilty so he/she must take any responsibility to it. Or by proved that the act of doctor can be justified so their act is not seen as an medical malpractice. Both, Doctor and patient need the fair legal protection. Let the negative opinion in society that medical act that risk to cause the malpractice can be raise the negative effect for the Doctor and its profession. So, it im important to get evidence so no one can be convicted without any mistake. As mentioned under the criminal law principle which is Geen Straf Zonder Schuld (There is no convict without any offense ). However, the offense must be proved, it is for the sake of Human Rights to everyone, include to the doctor that still in suspect of malpractice act.

The arrangement of duty and responsibility of doctor profession in order to health provider to the health receiver, especially patients, absolutely necessary. It is important for the protection of human rights. Ethical code of Indonesia Doctor that become a guidance of doctor in Indonesia , while arrange the duty and responsibility of doctor who carry on its profession. The law number 29 year 2004 of medical practice, article 51 have arranged some of the obligation of doctor and dentist who are done the medical practice and contain some of criminal law that related to the registration letter and permission letter of practice. It is under chapter X, started from article 75 to article 80. Some of articles under the penal code also arranged the malpractice that can be threatened to the doctor, if it had happened during its work. Apart of it, the Consul of Indonesian Doctors have made a guidance for the enforcement of the discipline of Indonesia Doctor and Dentist in order to conduct their profession. This guidance, under chapter III, mentioned 28 points to the act that can be seen as a violation of discipline of medic. The improvement of the wrong act as one of the requirement to ask for the criminal responsibility of the doctor, become on important thing to pay attention. Due to the evidence that can give the legal protection for the certainty law and to enforce the law and Human Rights in the cases of medical malpractice. Include in the legal enforcement context that: to convicted only the people who improved have offense, and no convicted to un guilt person.

### Source Of Problem

Base on the description above, so the writer put a source of problem like:

“What is the basic thing to determining the offense of the Doctor related to the suspect of malpractice act ??”

## 2. LITERATURE STUDY

### Grand Theory

**Gustav Radbruch** in his book *Einführung indie Rechtswissenschaft* that published first in Stuttgart on 1961 mentioned that a thing that have made must be have a goal. So law made with any purpose. The purpose can be created by the human being. The Purpose of Law according to Gustav Radbruch, which are:

- 1) Justice for balance;
  - 2) Certainty for Accurate;
  - 3) The Benefit for Happiness. (Muhammad Erwin, 2011: 123)
- [1]

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According to M Gustav Radbruch, Law is normative due to the justice value. As the follower of neo-Kantian, Radbruch has put back the justice value as a crown from each of the legal system. He tried to handle the dualism between sein and sollen or between the material and shape by seeing them as two sides from one of the coin. In reconstruction his theory, Radbruch started from the thesis of Baden which is culture. Culture is values of human being, whether knowledge, art, morality and even law, all of these are part of the culture that offering the justice value to the human being. Law as the bearer of justice value, and in the contrary the justice value can be base from the law. Justice has the normative characteristic also constitutive for the law. It is normative because have function as a pre requirement transcendental that based on each of positive law that integrity, based on morality law and as the point for the positive law system. Without the justice, the rule is can no be the law. To fill the justice with the concrete, must be seen on finality side. To complete the justice and finality, need the certainty. So for Radbruch, Law has 3 aspects (Bernard L. Tanya, et all, 2007: 149-152), which are:

- 1) Justice aspect, to show the equal right before the law;
- 2) Finality aspect , to determine the legal filling, to show for purpose of justice which is to forwarded the kindness in human things;
- 3) Certainty aspect, to show the guarantee of law (fill with justice and norms to forward the kindness) that function as regulation that should be obey.

Two aspects that mentioned first (justice and finality) are the ideal from the law, while the third aspect ( certainty) is the concept of legal operational. The demanding of justice and certainty are part from the law, while finality contain the relative element. The kindness value for human being may be related with three subjects that willing to move which are individual , collectivity and culture. Radbruch preferens on individualistic legal system and made he recognized the natural law that solve the positive law (Bernard L. Tanya, et, all., 2007: 153)[2], like in the following:

1. Each of individual must be threaten before the court;
2. The recognition and Respect to the Human Rights is forbidden to violate;
3. Must have balance between the violation and punishment.

According from 3 (three) principles of natural law, Radbruch is ended up with the belief that justice to the human being of individual is as a key to created the justice under the law. Due to its reason, the embodiment of justice under the law that applied positively will contribute the certain law under the society.

### 1. Middle Range Theory

**Generalization Theory** is one of Causaliteit Theorien. Called as generalization theory because it seen the facts before the events (ante factum) by measuring which is between those requirement is from human being that adequate to mentioned as emergency of the result. Those requirements must cover some of the caused so raised the result. (Tongat, 2008: 176)[3]. Due to the adequate calculate or search for the causal to raise some result, so it also called as Adequat theory. There are many theories related with generalization theory or adequate theory, they are:

#### 1) Subjective Theory, Followed by Von Kries.

According to this theory, the new making can be seen as cause that adequate if the actor can be imagine the thing that will happen after. The calculate of adequate of the objects that known or adequate to known by the actors. So can be called as Subjective Prognose. **Von Kries** put the offense as element with the knowledge of the actor is have strong relationship with his willingness to the result that he wish as a reason". (Tongat, 2008: 178)[3].

#### 2) Objective Theory, Followed by Rumelin.

According this theory, to determine which is a things can be see as a cause of the result or not, must be seen whether the things is known. The adequate calculate that not only known by the actor but also the judge although it have no yet before by the actor. (Tongat, 2008:179)[3].

#### 3) Combine Theory, Followed by Simons

According to this theory, the adequate calculate is the calculate based on the experience of human being.

#### Applied Theory

Proof Theory according to the law as negative (Negatief Wettelijke Stelsel) is one of the theory under the law of knowledge that followed and enforced under the evidence system of the case in the court in Indonesia. The evidence negative system (negatief wettelijk stelsel) is on eof the evidence system in the court in order the criminal may be imposed by the judge, must meet two absolute requirement which are, evidence tools and belief of the judge. (Munir Fuady, 2001: 2) [4] The evidence system has 2 (two) things (Munir Fuady, 2001: 2)[4] that a requirement to prove the guilty of the defendant, which are:

- 1) **Wettelijk**: There is a legal evidence tool that mentioned by the law.
- 2) **Negatief**: there is a belief from the judge, according to evidence that belief the offense of the defendant.

M.Yahya Harahap (2009: 278)[5] statement that evidence system according to the law as negative is a theory between the positive evidence system with the system of evidence based on judge belief or conviction-in time". The evidence system according to the negative law is the balance between the two system that contrary extremely each other. From those balancing, the evidence system according to law is combine the system according to the conviction with the evidence system according to the positive law. From the result of the combination between that two system, it realization the evidence system according to law where it defined that guilty or nor a defendant determine by the conviction of judge based on legal evidence tool according to Law. (M. Yahya Harahap, 2009:279)[5]

#### The Offense Under The Criminal Law

The offense is a basic thing to imposed the punishment for people who do the criminal act. Under the context of criminal law, the offense must be proved so use the principles that called guilty principles that mentioned there is no criminal act without any guilty. Under the Dutch, defined with **Geen Straf Zonder Schuld** or **nulla poena sine culpa**. While in the Anglo Saxon states with the defined as Actus non facit reum, nisi mens sit rea Orl usually called with "mens rea". While in

English used to called with “an act does not make a person guilty, unless the mind is guilty”. (Tongat, 2008: 220)[3].

**Pompe** statement that the definition of guilty have sign as the despicable, which is actually not prevent the act that against the law. Under the definition of positive law, describe of the essential of the prevent the act that against the law means have intend and culpa that proper to the characteristic to against the law and the ability to have a responsibility. (Bambang Poernomo, 1992: 136)[6].

**Vos** have seen that the guilty has 3(three) special signs, which are yaitu:

- The ability to have responsibility from the people who have done a things (toerekeningsvatbaarheid van de dader);
- Special inner relationship from the offender, which is can be intend or un intend;
- There is basic reason to eliminate the responsibility for the offender.

### Criminal Responsibility

Principality, the criminal responsibility based on the culpability principle that mentioned clearly “ there is no criminality without guilty”, in widest meaning is the ability to have responsibility, which is the situation of the heart from the offender, this is called justification to imposed the criminal act. Means that people can be asked to responsibility under the criminal law when he is seen able to take a responsibility (Tongat, 2008: 225)[3]. Moeljatno (1987: 155) [7] mentioned that a person is can not be impose if he didn't conduct the things. While it would happens if the person have conducted before. In contrary, the existence of criminal act is not depends to the reality whether then people have conduct it or not. The criminal responsibility must be conduct under the positive law “ there is no criminal act without guilty “(Chaerul Huda, 2005: 20) [8].

### Criminal Act on Medical Malpractice

Malpractice is one of term that have bad connotation, stigma and blame. The bad practice from a person that hold a profession in general, not only for medical one. If proper to the medical profession, it should be called as medical malpractice. However, everywhere, especially started abroad, the term of malpractice is always associated to the medical profession. (J. Guwandi, 2004: 20) [9].

**Ngesti Lestari (2001: 2)[10]** which is not direct connected with the doctor practice, defined malpractice as a wrong conduct. (Amri Amir, 1997: 52-53)[11].

**Steven H. Givis (1984: 281)[12]** stated that the term of malpractice means as un moral characteristic in order conduct its profession both intend or not . While according to Fred Ameln (1981: 83)[13], malpractice is one of wrong act medical or he has neglect by giving not or not enough care to the patient).

Criminal Malpractice is happens when the patient died or caused disability by the un careful doctor or other medical staff. (Anny Isfandyarie, 2005: 34-35)[14], For example like in these following:

- Criminal Malpractice due to the international, in the cases of abortion without medical indicate, euthanasia, leaking

confidential patients, neglect to do some special act on the emergence case, and giving a false medical certificate.

- Criminal Malpractice due to recklessness, for example conduct the unusual act or not as the profession standard without any permission.
- Criminal Malpractice due to negligence, due to the disability or die for the patient due to the conduct of the doctor that un careful or neglect by leaving the tool of operation under the body of the patients.

### Criminal Responsibility of Doctor

#### 1. Defeinition and Kind of Doctors

Indonesian officially Dictionary second edition mentioned that a doctor is a graduated of medical study that expert in disease and medical treatment. The Definition of doctor under the Law Number 29 year 2004 of the medical practice, under article 1 point ( 2) mentioned that doctor and dentist is doctor, doctor with specialized, doctor with nutrition and doctor of specialized with nutrition graduate medical study both in and outside of Indonesia that recognized by the government of Indonesia according to the law.

#### 2. The rights and Obligation of the Doctor

According to the Law number 29 year 2004 of the medical practice, under article 50, doctor or dentist that conduct the practice have the rights to:

- Get the legal protection while conduct its duty as the standard procedural operational
- Give the medical service according to the standard of profession and standard of procedure operational
- Get complete and truth information from the patients or the family
- Get the payment

Article 51 of the Law number 29 year 2004 of the medical practice has mentioned doctor or dentist in conduct the practice have the obligation to:

- Give the medical service according to profession standard and operational procedural standard also as the needed of the patient.
- Refer to other patient of doctor or dentist that have better skill, if un able to conduct the medical check.
- Put under confidential everything about the patients, even after the patients is dead.
- Conduct the emergence act above the humanity except if he belief there is another person who able to conduct it.,
- Add some knowledge and followed the development of scientist in medical.

#### 3. Ethical Code of Medical

Ministry of Health Republic Indonesia regulation Number: 554/Men.KES/Per/XII/1982 of the Committee the consideration and empowerment of ethical Code of medical (Anny Isfandyarie, 2005: 68) [14] mentioned some like:

- The meaning of Ethical Code is the existing norm for doctor and dentist in order to conduct the profession, as mentioned under each of the ethical code that stated by the minister of health ( under 1 point 1);
- The Implementation of ethical code of the doctor and dentist monitored by the P3EK of the province (Article 17 point 1 sub b);
- Each of the ethical code violation by the doctor or dentist, the head of region institution of Health Department of the

Province may conduct the act like warning or administrative act to the doctor mentioned by recommendation from P3EK, after the P3EK get recommendation from the association of Indonesian Doctors of the Province or the Association of Indonesian Dentist of the province and its branch ( article 20 and article 21 point 1 and 2).

Related to the problem that have caused from the cases of malpractice that often suspect to the doctors, it needed to know the obligation of the doctors to the patients (Anny Isfandiyarie, 2005: 69)[14]. Those obligation has mentioned under the articles 11, 14 until article 17.

#### 4. Criminal Responsibility of The Doctor

The criminal responsibility of the doctor that related to the neglect, speciality related to the malpractice mentioned under article 359, 360 and 361 of the Penal Code (Ninik Mariyanti, 1988: 36).[15] Munir Fuady (2005: 2-3)[4] have mentioned that the conduct of the doctor can be categories as the malpractice if meet the judicial elements, as its following:

- a. There is an act , in the meaning of Conduct or ignore;
- b. Conduct by the doctor or person under it supervision ( like nurse) , by the provider of facility of health, like hospital, clinic and pharmacy, etc;
- c. Like a medical act, both diagnosis, therapeutic or health management.;
- d. Conduct to the patient;
- e. Conduct by: Violate the law, against the obedience, violate the decency, breaking the professional principle.;
- f. Intend to conduct or neglect;
- g. Caused the damaged to the patients like disability or others.;
- h. The Doctor must take a responsibility as administrative, civil or criminal law.

### 3. RESEARCH METHOD

#### Type Of Research

The research is used the socio-juridical approach with the empirical normative type which is combined the normative research and empirical research. Legal research with the normative type is legal research that analyses the written law from many aspects, like theory, history, philosophy, comparative law, structure and composition, scope, and substances, consistence, general explanation, article by article, formality and the legal binding of the law as well as the used of language but not analyses the implementation aspect. While the legal normative-empirical research is the legal research about the implementation of the regulation law in a in action for each of the legal events that happens in society (Abdul Kadir Muhammad, 2004: 134)[16].

#### Location of Research

In this research, the writer have chosen Jakarta as location with the consideration that Jakarta is the capital city of Indonesia, become a center of many institution to report their activity, including the institution that related to the health field and legal enforcement. The locations are the central office of association of Indonesia Doctors, Consul of Doctor Association Indonesia, Police Officer, general Attorney and Supreme Court.

#### Population and Samples

Population in this research is the whole case of suspect from the medical malpractice that have been reported and handled by MKDKI and center of IDI, also the cases in medical that have been reported to the polices, general attorney and investigated to the Supreme Court within the last of three years which are between 2010-2012. Sample in this research is the criminal case of the medical malpractice that the cases have been investigated and decided to Supreme Court and have published.

#### Type and Source of Data

1. Primary Data, is data that get directly in the field or location of the research trough interview with the respondent or informant, also related documents with the case of evidence of medical practice suspected.
2. Secondary Data, is data from analysis and review the legal material that related to this research, both material for primary law or secondary law or even tarsier law.

#### Technique of Collection

1. Field Research, direct research in location of research to collect the primary data in interview and documentation related to the object of its research.
2. Literary Research is the research in analyzing the literary material and legal aid like the legislation, legal concepts related and normative is related to the object of its research.

#### Technique of Data Analysis

Technique of data analysis that use qualitative analyses, by collected data and material as the purpose of the research. After that identify data and legal material that related to the source of problem, then categories and legal material, analyses based on the quality of data material of law from the data and material law from the normative research and theoretic with the data that collected from the empirical research.

### 4. RESULT AND DISCUSSION

#### Determine Doctor Errors Related To Medical Malpractice Alleged

To determine the doctor error related to the medical malpractice alleged, so it need to determine the elements of guilty under the criminal law. To know whether can be punish to be convicted in the cases of medical malpractice, the table below is fill with the data that represented some of doctors act that could be seen as criminal act and have been reported as a case of medical malpractice.

**Table 1. Kinds and Types of Doctor Error Related to Medical Malpractice Alleged**

Year	Case	Type of Error	impact/lost	Settlement of case & Advocation
2005	Doktor, Professor caused the patient must have colostomy	<ul style="list-style-type: none"> <li>neglect/not careful</li> <li>wrong diagnosis</li> <li>wrong act</li> </ul>	<ul style="list-style-type: none"> <li>perforate stomach cause the patient to make the exhaust duct</li> </ul>	<ul style="list-style-type: none"> <li>Court decision on year 2010, must be compensate ± Rp 900 million</li> <li>Advocated by PB IDI to mediate between 2 parties, agreed to have settlement with the compensate Rp 550 million</li> </ul>
2005	Hospital of Palembang cooperate with Perdami conduct social service on cataract surgery	<ul style="list-style-type: none"> <li>neglect</li> <li>wrong act</li> </ul>	<ul style="list-style-type: none"> <li>cause the patient taken one of his eye</li> </ul>	<ul style="list-style-type: none"> <li>Decision of Constitution Court, Hospital of Palembang &amp; Perdami must compensated Rp 318million</li> <li>Advocate by BHP2A IDI: another communication with patient, sanction to pay Rp 80 million by the Hospital and partner</li> </ul>
2009	General Doctor Sidoarjo, gave injection of KCl bolus	<ul style="list-style-type: none"> <li>Neglect</li> <li>Wrong diagnosis</li> <li>Wrong act</li> </ul>	<ul style="list-style-type: none"> <li>Caused the dead of the patient</li> </ul>	<ul style="list-style-type: none"> <li>Advocacion &amp; mentoring by BHP2A PB IDI</li> <li>Decision of Court PN Sidoarjo year 2011 imprisonment of 1 year probation</li> </ul>
2009	Doktor & hospital in Papua,	<ul style="list-style-type: none"> <li>Neglect</li> <li>Handling late</li> </ul>	<ul style="list-style-type: none"> <li>Caused the dead of the patient</li> </ul>	<ul style="list-style-type: none"> <li>Demand of patient family, pay compensate Rp 1 billion</li> <li>Advocacion by BHP2A PB IDI, approaching family and customary, compensate Rp 10 million</li> </ul>
2010	Doktor was reported by the other doctor due to false of vise	<ul style="list-style-type: none"> <li>deliberate</li> <li>made a false certificate</li> </ul>	<ul style="list-style-type: none"> <li>there is no right information about the health condition</li> </ul>	<ul style="list-style-type: none"> <li>Advocacion &amp; mediation IDI, agreed to close the case</li> </ul>
2011	Doctor of Sp. OG in Tuban, alleged for abortion	<ul style="list-style-type: none"> <li>deliberate</li> <li>conduct abortion</li> </ul>	<ul style="list-style-type: none"> <li>fetus died</li> </ul>	<ul style="list-style-type: none"> <li>in process with accompany and advocacion in court (March 2013)</li> </ul>
2011	Doctor Sp. OT in Gresik, without permission conduct the surgery of fremur	<ul style="list-style-type: none"> <li>Neglect</li> <li>No license to practice</li> <li>Wrong act</li> </ul>	<ul style="list-style-type: none"> <li>Patient died</li> </ul>	<ul style="list-style-type: none"> <li>Mediation by BHP2A, case settlement</li> </ul>
2011	Doctor Sp. of skin in Surabaya, reported to the police due to dispensing drugs	<ul style="list-style-type: none"> <li>deliberate</li> <li>no permission</li> </ul>	<ul style="list-style-type: none"> <li>material lost for the pharmacy</li> </ul>	<ul style="list-style-type: none"> <li>Advocacion by PB IDI to that doctor: <ul style="list-style-type: none"> <li>prepare the struck of buying drugs from the pharmacy according to the existing law immediately</li> <li>to anticipate, have cooperation with the pharmacy</li> </ul> </li> </ul>
2011	Doctor Sp. BD, reported by the local hospital in Papua, conducted the unpleasant act and defamation	<ul style="list-style-type: none"> <li>Deliberate</li> <li>Un Pleasant act</li> <li>defamation</li> </ul>	<ul style="list-style-type: none"> <li>Cause of defamation to others.</li> </ul>	<ul style="list-style-type: none"> <li>Became police custody for 9 days</li> <li>Advocacion for settlement by sign the settlement letter</li> </ul>
2011	Family Doctor of health insurance (Askes) in Kebumen, did the corruption of health fund	<ul style="list-style-type: none"> <li>Deliberate</li> <li>corruption</li> </ul>	<ul style="list-style-type: none"> <li>caused loss of state funds</li> </ul>	<ul style="list-style-type: none"> <li>Advocacion by BHP2A PB IDI to health insurance</li> <li>Legal socialization to all doctor in Kebumen</li> </ul>
2012	Team Dokter hospital Dedari in NTT who handled the baby ED, did the wrong diagnosis and blood transfusion process trough the injection without permission from the family	<ul style="list-style-type: none"> <li>Neglect</li> <li>Wrong act,</li> <li>Wrong diagnosis,</li> <li>Act without permission from the family</li> </ul>	<ul style="list-style-type: none"> <li>Patient died</li> </ul>	<ul style="list-style-type: none"> <li>Advocacion &amp; mediation by PB IDI with the police and family of the patient still conduct (March 2013)</li> </ul>

Source of Data, reported Central PB IDI on Muktamar XXVIII, March 2013

Table above have informed some of the cases that have investigated trough the trial of medical ethics Indonesia and some of them due to the act of doctor seemed did not based on the standard operational procedure that have mentioned. According to the table above, also explain that the elements of doctors error related to the medical malpractice alleged, like:

### 1. The act of the doctor that intend or because of his neglect, have cause loss for other people ;

- Due to deliberate:
- Give the un right information about the patient condition by issued the false certificate, fetus died due of abortion, loss of material from the pharmacy, there is

another party that feel un defamation and loss due to the corruption.

- Due to Neglect: Wrong diagnosis, wrong act that cause the lost of patient whether disability (lost of his eyes) or caused died of patients.

### 2. Doctor able to take Responsibility

Doctor profession is not just profession, it must be conducted by people who have graduated from medical school and get license to conduct its profession. As a doctor that have met requirement legally to conduct his profession, so he must be in good of mental health, enough age, able to make a

consideration and able to have a prediction to what will happen after his act.

### 3. There no excuse reason in the doctor itself

A doctor who have the ability to take a legal responsibility, means there is no excuse reason in himself. Excuse reason only given to a person who is un able to take a legal responsibility when conduct the legal act. This is also means that every doctor may to have license to conduct their profession must be in good mental health.

## CONCLUSION AND SUGGESTION

### Conclusion

Basic things to determine the wrong act of the doctor related to the medical malpractice alleged, which are: 1) there is act of the doctor with deliberated or due to neglect caused the damage or loss for other people.; 2) The doctor is a person who able to take a responsibility; and 3) in the doctor itself, there is no excuse reason. There is distinguish of opinion between law and medical field in order to determine the guilty of the doctors act, cause the cases of medical malpractice alleged is still hard to improved in society.

### Suggestion

It should be mentioned clearly the violation of ethical medical code and its types under the medical profession ethical, in order to make the process of improvement of doctor error related to the medical malpractice alleged easier.

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