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INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بِوَسْطَةِ رُسُلِنَا إِسْلَامُهُ أَنْبَاءُ رِجْسِنَا مُلْكِنَا

LAW RELATING TO MEDICAL MALPRACTICE:
A COMPARATIVE STUDY BETWEEN INDONESIA
AND MALAYSIA

BY

MUH ENDRIYO SUSILA

INTERNATIONAL ISLAMIC UNIVERSITY
MALAYSIA

2005

“Oh ye who believe! Stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to make you swerve to wrong and depart from justice. Be just: that is the next to piety: and fear Allah. For Allah is well-acquainted with all that ye do” (Qur’an 6:8)

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A DISSERTATION SUBMITTED IN PARTIAL
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ABSTRACT

In the latest six months, medical malpractice becomes an actual issue in Indonesia. Several cases assumed as medical malpractice blown up by the media have attracted many attentions of the people and commentaries. Since the cases involved bodily injury of the patients or even death, most of the people associated the settlement of medical malpractice cases to the work of the police. That is why we can see from the news that most of the victims or their family submit the cases mentioned to the police for seeking justice. Yet, there were only a few in number those who sued the defendants in civil court.

Medical malpractice so far seems to be understood as a criminal matter rather than of civil matter by the public in Indonesia. It is possible because the Indonesian Penal Code (KUHP) provides some provisions which are relevant to several medical malpractice cases, mainly if the cases in question involving bodily injury even though it happened because of negligence. Negligence which causes bodily injury or death constitutes as criminal act under Indonesian Penal Code. For instance, section 359 of KUHP mentions that anyone whose negligence causing bodily injury of others will be punished accordingly with imprisonment or fine.

On the other hand, in common law tradition including in Malaysia, medical malpractice is seemed as a civil matter. Term “medical negligence” is more common in this country. In term of litigation, liability can be done through either the law of contract or the law of torts. This study is aimed to compare the concept of medical malpractice in both countries which are influenced by different legal systems respectively. Besides, the comparison on case settlement will also be observed.

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APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as dissertation for the degree of Master of Comparative Law.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

MUH ENDRIYO SUSILA

Signature.....

Date

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A COMPARATIVE STUDY BETWEEN INDONESIA AND MALAYSIA

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For appreciating all her supports and sacrifices during the completion of my study, this work is primarily dedicated to my beloved wife, RINI DWI LESTARI, and also dedicated to the reform of medical malpractice law in
INDONESIA

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This work comes in the right moment, when medical malpractice becomes an actual issue in Indonesia. Time by time and day by day, in line with the increase of public awareness in Indonesia upon their rights including the right for better health services, claims against doctors will be more common. Comprehensive understanding pertaining to medical malpractice litigation and other method of settlements of medical malpractice cases is needed by those who involve in such cases in Indonesia, like polices, prosecutors, judges, lawyers, mediators, and even health receivers who are potential to be victim in medical mishaps. Many books and articles have been written in this matter, but the comprehensive one is not found yet. This work is aimed at fulfilling that vacant space. This work may be not very comprehensive, however the comparison presented in this work, should give much benefits, especially for the purpose of learning the experiences of other countries on handling medical malpractice cases including Malaysia. This work is also hoped to be an important contribution for the process of law reform on medical malpractice in Indonesia.

Muh Endriyo Susila

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LIST OF ABBREVIATIONS

AC	: Appeal Cases
ADR	: Alternative Dispute Resolution
ALJR	: Australian Law Journal Reports
All ER	: All England Law Reports
AMR	: All Malaysian Reports
BPSK	: Badan Penyelesaian Sengketa Konsumen (Consumer Dispute Settlement Body)
CLJ	: Current Law Journal
CLR	: Commonwealth Law Reports
Dinkes	: Dinas Kesehatan (District Office of Health Ministry)
DPR	: Dewan Perwakilan Rakyat (House of People Representative)
HAN	: Hukum Administrasi Negara (Administrative Law)
HI	: Hukum Internasional (International Law)
HIR	: Herziene Indische Reglemen (Civil Procedure Code)
HTN	: Hukum Tata Negara (Constitutional Law)
Ibid	: (ibidem): in the same place
Id	: (idem): the same
IDI	: Ikatan Dokter Indonesia (Indonesian Medical Association)
Inpres	: Instruksi Presiden (Presidential Instruction)
Kepres	: Keputusan Presiden (Presidential Decision)
Kepmen	: Keputusan Menteri (Ministerial Decision)
KUHAP	: Kitab Undang-Undang Hukum Acara Pidana (Criminal Procedure Code)
KUHD	: Kitab Undang-Undang Hukum Dagang (Commercial Code)
KUHP	: Kitab Undang-Undang Hukum Pidana (Penal Code)
KUHPer	: Kitab Undang-Undang Perdata (Civil Code)
LBH	: Lembaga Bantuan Hukum (Legal Aid Institution)
LJ.	: Lord Justice
MDTK	: Majelis Disiplin Tenaga Kesehatan (Health Officer Discipline Council)
MDU	: Medical Defense Union
Med LR	: Medical Law Reports
MKDKI	: Majelis Kehormatan dan Disiplin Kedokteran Indonesia (Medical Discipline Council)
MKEK	: Majelis Kehormatan Etik Kedokteran (Medical Ethic Council)
MLJ	: Malaysian Law Journal
MMA	: Malaysian Medical Association
MMC	: Malaysian Mediation Centre
MPR	: Majelis Permusyawaratan Rakyat (House of People's Consultative)
MA	: Mahkamah Agung (Supreme Court)
NE	: North Eastern Reporter (USA)
No	: Nomor
NSWLR	: New South Wales Law Reports
Perda	: Peraturan Daerah (Ordinance)
Permenkes	: Peraturan Menteri Kesehatan (The Rule of Minister of Health)
Perpu	: Peraturan Pemerintah Pengganti Undang-Undang (Government Regulation Substituting a Statute)

PN	: Pengadilan Negeri (Trial Court)
PP	: Peraturan Pemerintah (Government Regulation)
PT	: Pengadilan Tinggi (Court of Appeal)
QBD	: Queens Bench Division (Law Reports)
REG	: Registrasi (Registration)
RI	: Republik Indonesia
RM	: Ringgit Malaysia
Rp	: Rupiah
RS	: Rumah Sakit (Hospital)
RUU	: Rancangan Undang-Undang (bill)
SASR	: South Australian State Reports
SE	: Surat Edaran (Circular Letter)
SK	: Surat Keputusan (Letter of Decision)
Th	: Tahun (year)
UU	: Undang-Undang (statute)
WLR	: Weekly Law Reports
W.v.K	: Wetboek van Koophandel (Commercial Code)
W.v.S	: Wetboek van Strafrecht (Penal Code)

LIST OF STATUTES

Indonesia

- Indonesian Penal Code (*KUHP*)
- Indonesia Civil Code (*KUHPer*)
- Health Act (*UU No. 23 / 1992*)
- Medical Practice Act (*UU No. 4 / 2004*)
- The Rule of Health Minister (*Permenkes No. 585 / 1989*)

Malaysia

- Civil Law Act 1956
- Medical Act 1977

CHAPTER 1

INTRODUCTION

1.1. Introduction

Term 'malpractice' is a general term which denotes a practice violating the social norms. The term has been associated with various professions, such as accountancy, law and medicine. Medical profession is one of the professions which has succumbed to the menace of malpractice and has been subjected to public scrutiny. Machinery of law has been activated and the courts of law have reminded the medical profession of its social and legal responsibilities.

It is undeniable that those who are involved in the profession of medicine are more vulnerable to criticism and attack compared to other professionals. This is due to the fact that doctors deal with individuals' the most precious creatures, their life and health. If an accountant or solicitor makes a mistake and loses his client's moneys, monetary compensation may be able to placate the client. However, if the doctor's mistake results in death or disability, money may be seen as poor compensation for the loss suffered.¹

The phenomenon of medical malpractice probably cannot be easily accepted by the logic of common people, since the duty of doctors is to cure and not otherwise.

Patients come to doctors for treatment and recovery and not for further sufferance or

¹ Puteri Nemie, *Medical Negligence Law in Malaysia*, Kuala Lumpur: International Law Book Services: 2003, p.1.

death. Unfortunately, the reality shows that getting injured or even dying at the hand of a medical practitioner is possible. Publicity of medical malpractice cases in media has made the society realize that doctors may commit mistakes in performing their duties and may cause injury to their patients.

The phenomenon of medical malpractice has affected the doctor-patient relationship significantly. In the past, doctors posted a high position in the society with peculiar skill they possess. The pattern of doctor-patient relationship at that time might be characterized as up-down or subject-object relationship. Patient was placed as the object of the work of medical professional with the consequence that the patient should accept whatever a doctor did on his body. The death of patient at the hands of doctor was looked at as a matter of destiny that should be accepted as it was, without any thought of questioning it. The situation has changed now. Now the doctors have to face the scrutiny at the hands of their patients and the society in general. Doctor is also a human being and may make mistakes in practicing his profession and causing harm to the patient. Such mistakes can change the status of doctor from a noble figure to the hated one.

Supported by the fact that doctors determine 'price' for their service, the pattern of doctor-patient relationship is now viewed as what may be characterized as subject to subject relationship. This relationship places both parties in equal position. As a result, in treating the patient a doctor is no more enjoying freedom of action as suggested by the doctrine of medical paternalism, but is obliged firstly to obtain his patient's consent. The consent in this case is required to be informed consent which has its own

requirements. The concept of informed consent proves the clearest expression of equality between doctor and patient.

The fact that medical treatment is not for free has carried also another consequence. Commercialization of medicine causes patients to be more willing to challenge doctors and hospitals if any mishaps occur. By paying for their service, patients have certain expectations of what the outcome of the treatment should be. They no longer condone mistakes made by doctors as misadventures which could have been avoided if the doctors had taken proper care. Ultimately, these aggrieved patients will resort to litigation as a channel to seek redress of their grievances. Medical negligence may not be confined to doctors alone but reflects all manner of dissatisfaction on the part of the patients with the conduct of the other medical staff.²

In a simpler word, it can be said that patients, as consumers of health service may feel disappointed against the quality of medical service given by the doctors, or may even sue the doctor if they suffer physically, mentally or financially. The magnitude of legal suits against doctors reflects the climax of the patients' disappointment with doctors.

In recent times, especially in advanced countries such as the United States of America, the United Kingdom, Canada, and Australia, legal suits against physicians are among the most frequent cases coming to courts. Being sued by their patients is a common experience for most doctors in these countries. Washington Times reported that 70%

²Ibid, pp.1-2

of Maryland's Obstetricians / Gynecologists have been sued at least once for medical malpractice, with the average settlement exceeding \$1 million.³

In line with this situation John Healy comments that, "It is not an easy time to be a doctor. In an increasingly pressurized working environment, doctors must assimilate and balance more technical information than ever before, work longer hours, face tougher competition from their peers, and on top of this are now far less certain about the law's present demands and the future directions it may choose to take".⁴

In recent years, medical malpractice has become a big issue in Indonesia. Several cases suspected as medical malpractice were blown up by media which invited the attention of the people and the authorities. Since the cases involved bodily injury of the patients or even their death, people sought the settlement of medical malpractice cases from the police. It is evident from the reports that most of the victims or their families in cases of alleged medical malpractice come to the police department for seeking justice⁵. Conversely, there were only a few who sued the defendants in civil court. According to a news report, ten medical malpractice cases have been reported

³ Robert Redding Jr., "Most OB-GYNs sued at least once; settlements costly", an article published in [http://www.washingtontimes.com..metro/20041211-Washington Times](http://www.washingtontimes.com..metro/20041211-Washington%20Times) on December 12, 2004, or see [114116-53999.htm](http://www.washingtontimes.com..metro/20041211-Washington%20Times)

⁴ John Healy, *Medical Negligence: Common Law Perspectives*, London: Sweet & Maxwell, 1999 p.1

⁵ See Yophiandi, "LBH Kesehatan Laporkan Malpraktek Dokter ke Polda Metro Jaya", Tempo Interaktif – Tempo News Room, July 13th, 2004. See "RSCM dan RSB YPK Diadukan ke Polisi", article, retrieved from <http://www.elshinta.com>, April 28th, 2004. See "Diduga Malpraktek, Dokter RS Islam Bogor Dilaporkan, retrieved from <http://www.detic.com>. See also, "Alat Bekas Operasi Tertinggal di Ginjal", Pikiran Rakyat Daily Nwspaper, Published on March 27th, 2003.

to the police in Indonesia during 2004⁶, while during the same time only one case has been brought to civil court.

Medical malpractice so far seems to be understood as a criminal matter rather than civil matter by the public in Indonesia⁷. It is possible because the Indonesian Penal Code (KUHP)⁸ contains some provisions which are relevant to several medical malpractice cases, mainly if the cases in question involve bodily injury even though it happened because of negligence. Negligence which causes bodily injury or death constitutes an offense under Indonesian Penal Code. For instance, article 359 of Indonesian Penal Code (KUHP) mentions that anyone whose negligence causes bodily injury to other people will be punished accordingly with imprisonment or fine. Besides, by virtue of section 304 of Indonesian Penal Code, leaving patient unsaved or untreated is qualified as a criminal act and subjected to criminal punishment accordingly.

On the other hand, in common law tradition including in Malaysia, medical malpractice constitutes a civil matter. Term medical negligence is more common in this country. In terms of litigation, legal action can be brought through either the law of contract or the law of torts. This study is aimed at comparing the concept of medical malpractice in Indonesia and Malaysia which are influenced by different legal systems. Besides, a comparative study would also be made on medical malpractice case settlement in these two countries.

⁶ See "LBH Kesehatan Laporkan Malpraktik Dokter ke Polda Metro Jaya", retrieved from <http://www.tempointeraktif.com>

⁷ See "Dokter Bisa Diseret ke Penjara", Kompas Daily, published on February 17, 2004. It can also be seen at <http://www.kompas.com/metro/news/0402/17/090750.htm>.

⁸ The Indonesian Penal Code is called *Kitab Undang-Undang Hukum Pidana* or *KUHP*. The name was given to replace its original name in Dutch language '*Wetboek van Strafrecht* or *WvS*'.

1.2. Statement of Problem

So far, there is no regulation which specifically governs medical malpractice in Indonesia. Regulations closely related to medical profession available in Indonesia are Health Act – 1992 (*UU No. 23 / 1992*), Medical Practice Act – 2004 (*UU No. 29 / 2004*), and The Rule of Minister of Health on Informed Consent - 1989 (*Permenkes No. 585 / 1989*). The mentioned Acts and rules do not cover the issue of medical malpractice. The absence of specific regulation on medical malpractice in Indonesia has given rise to a situation where litigation process for medical malpractice cases is to be related to the existing provisions. There are some provisions that are relevant to medical malpractice cases. Those legal provisions are contained in penal as well as civil code. Article 359 of Indonesia Penal Code (*KUHP*) and article 1365 of Indonesia Civil Code (*KUHPer*)⁹ are the best examples. As mentioned above, article 359 of Indonesian Penal Code qualifies doctor's negligence resulting in patient's injury as a criminal act, and therefore subject to criminal punishment. On the other hand, article 1365 of Indonesian Civil Code determines that one who causes damage to another person is subject to the obligation of paying compensation.¹⁰

This situation, with the existence of general provisions relating to medical malpractice cases both in the civil code and the penal code, allows the plaintiffs either to sue the defendants through civil courts or to choose criminal prosecution on settling their problem. In fact many injured patients or their families came to Police Department, to

⁹ The Indonesian Civil Code is called *Kitab Undang-Undang Hukum Perdata* or *KUHPer*. The name was given to replace its original name in Dutch language '*Burgerlijk Wetboek* or *BW*'.

¹⁰ This provision is similar with article 1382 of French Civil Code which mentions that any human deed whatsoever which causes harm to another creates an obligation in the person by whose fault it was caused to compensate it. This similarity can easily be understood due to the fact that the Dutch Civil Code, the mother of Indonesian Civil Code was also copied from French Civil Code.

report their cases as the first step for criminal prosecution. Whether or not they can ask for compensation in criminal trial, is a matter of concern for this study.

From all descriptions above, we can infer that medical malpractice is seen by the public in Indonesia as a criminal matter rather than civil matter. Even some of Indonesian legal scholars are of the same view. Harkristuti Harkrisnowo¹¹ while commenting on Medical Practice Act Bill said that in order to give more protection to the patient who suffers injury caused by the doctor's negligence, it is necessary to insert criminal provisions into Medical Practice Act Bill, so the scope of the job of the law enforcement officer becomes clearer. And on the other side, doctors will also be more careful in performing their duty after comprehending the rules.¹² On the other side, Kamri A. explains that since the medical malpractice transgresses the provision of the Penal Code, it constitutes a matter of criminal law (an offense) and consequently the wrongdoer must be prosecuted in criminal court accordingly.¹³ While Iskandar Sitorus¹⁴, an NGO's representative, proposed that in order to facilitate the process of investigation of medical malpractice cases, there should be a special investigator in police department.¹⁵ More surprisingly, the present minister of health of the Republic of Indonesia, Sujudi, supports this view. On one occasion, as reported by the media, he said that before the Medical Practice Act Bill was enacted, the

¹¹ Professor Harkristuti Harkrisnowo is a member of National Law Commission, an institution which is responsible for the process of the law reform in Indonesia. Considering her position, her opinion can be seen as authoritative.

¹² "RUU Praktik Kedokteran: Perlu Tambahan Ketentuan Pidana", Kompas Daily, published on August 27, 2004. It can also be seen at <http://www.kompas.com/kompas-cetak/0408/27/humaniora/1232951.htm>

¹³ Kamri A, "Dekriminalisasi Malapraktik Profesi Kedokteran", Kompas Daily Newspaper, published on August 12th, 2004

¹⁴ Iskandar Sitorus is the chief of LBH Kesehatan Jakarta, a non governmental organization which concern on giving legal advocacy to the victim of medical malpractice in Indonesia. Beside LBH Kesehatan there is also YPKKI (Yayasan Pemberdayaan Konsumen Kesehatan) or Health Consumer Empowerment Foundation)

¹⁵ "Tarik Ulur RUU Praktik Kedokteran: Masih Abaikan Kepentingan Publik", Jawa Pos Daily, published August 26, 2003