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A law perspective: The thin curtain between malpractice and medical risk

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Abstract
Medical malpractice and medical risk are two different things. Still, the difference is so slight that there is often a misunderstanding in society, resulting in patient or family dissatisfaction with medical services or actions provided by health workers, especially doctors, resulting in high legal prosecution cases—malpractice to the doctor concerned. With the Republic of Indonesia Decision Number 4 / PUU-V / 2007 of 2007, Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice as long as it is related to imprisonment and imprisonment which is subject to criminal acts regulated in articles 75, 76 and 79 (c) has been written off. Sources of legal discoveries used in this journal are statutory regulations (written law), jurisprudence, doctrine.

Keywords: malpractice; medical risk; legal; medicine

1. Introduction
The medical profession is a noble job that is carried out based on competent expertise in science obtained through a tiered learning process and a code of ethics that serves the community. Before a doctor can practice or carry out an assignment, he must first be declared passed in medical education, legalized by the Indonesian medical council. He must have a registration certificate issued by the Indonesian medical board and have obtained a practice license issued by a health official who is authorized [1].

According to Article 53 Paragraph 2 Law of the Republic of Indonesia Number 23 of 1992, a doctor must have a professional standard in the form of a reference used in carrying out the profession correctly and adequately [1. 2] As a result of the doctor's negligence, which is detrimental to the patient and his family, the patient is entitled to compensation. Apart from that, in Article 44 of Law of the Republic of Indonesia Number 29 of 2004 concerning medical practice; first, in practicing a doctor, he is obliged to follow medical service standards. Second, there are differences in the standards of medical service according to the health service level. Third, the minister of Health determines the standard of health services [2, 3].

The Indonesian medical association has formulated medical service standards which can be observed as follows; first, medical practice is guided by doing good and not hurting, injuring and harming patients; second, medical standards need to be applied to improve and control the quality of professional practice; third, medical standards must be used nationally; fourth, the functions and objectives of medical standards are to protect the community, protect the profession, as supervision, guidance, and quality improvement in practice, as a guide in effective and efficient health services; The five special provisions of standard limits are the medical service standard is the desire of health services from each specialization and its human resources, the medical service standard is a procedure for specialists but does not rule out the possibility for a general practitioner if the place does not have a specialist, medical service standards follow the conditions and situations of the hospitals, medical service standards need to be evaluated regularly following technological developments; sixth, the standard of medical services is divided into two parts; The medical service standard consists of seventeen specialization areas and the general service standard consists of three specialization areas [4].

Article 42 Decree of the Minister of Health of the Republic of Indonesia Number 983 / Menkes / SK / XI / 1992 concerning general hospital organization guidelines notifies that a medical committee is a group of medical personnel whose membership is selected from members of the functional medical staff, who carry out the task of; evaluating medical actions from individual doctors, directing medical measures to be taken, providing advice, warnings, and solving problems related to the medical activity [3, 5].

Then it is also known as a standard operating procedure, namely an instruction that is standardized as a role model for the completion of specific routine work processes, and also as a benchmark for doctors to assess whether or not they can be held accountable if there is a loss to the patient. The standard operating procedure in question is in the form of; anamnesis, in the form of two-way (doctor-patient) communication activities regarding the patient's complaints, physical diagnostics, in the form of physical examination of the patient, additional investigations if needed, in the form of laboratory examinations, x-rays, etc., the last is medical action [6].

In Sukoharjo, Polokarto Subdistrict, a child, after taking Medicine from a doctor, the child complained of fever,

[1] Undang-Undang Republik Indonesia Nomor 23 Tahun 1992 Tentang Kesehatan
[2] Undang-Undang Republik Indonesia Nomor 29 Tahun 2004 Tentang Praktek Kedokteran
[3] Surat Keputusan Menteri Kesehatan Republik Indonesia Nomer 983/Menkes/SK/XI/1992 Tentang Pedomanan Organisasi Rumah Sakit Umum

swelling under the eyelids and watery, blistered feet, and burned like a burn. In Medan, North Sumatra, a four-year-old child died after being treated using a central vein catheter to administer medication because it was not possible to get venous access to enter the drug. Then there is also Jakarta, a case of a woman's face and buttocks that harden after being injected with silicone at a beauty clinic. Looking at some of the case examples above, it can be concluded that there is a slight difference between malpractice and medical risk; if a medical action is done without explaining in detail about the procedure of action to be carried out and the medical risks, it does not rule out the possibility of higher malpractice demands in the medical community.

2. Method and Material

The research method used by researchers is in the form of a Normative Legal Review, which focuses on the study of the application of values in positive law by analyzing regulations related to the Thin Curtain between Malpractice and Medical Risk using three kinds of approaches, namely: statute approach, conceptual approach, and case approach [7].

3. Discussion

a. Definition and Classification of Malpractice

Malpractice is an error or negligence in carrying out his / her professional field; in the current discussion topic, it is related to the health sector, which means that a doctor in carrying out his practice does not use the correct level of skills and knowledge that he/she has acquired in the same environment. Malpractice can be divided into two, namely; first, deliberately malpractice and violating statutory regulations such as having an abortion without something that endangers the life of the woman, providing false medical certificates; second, accidental malpractice such as neglecting the patient's treatment until the disease gets worse and causes death [8].

Even so, doctors are also imperfect human beings because perfection belongs only to one and only God, so that good intentions to help patients do not always get the desired outcome; if the result of medical treatment results in disability or death, the community (including the patient's family) often experience misconceptions about ongoing events. The fallacy that usually occurs is the assumption that medical action's failure is medical malpractice; the patient's family dissatisfaction with the outcome of this medical treatment usually leads to legal channels [9].

The negligence of a doctor can be in the form of "Malfeasance," which means that what is done violates the law, the policy that is taken is not right, or takes a medical action without any indication; "Misfeasance" means the correct medical policy or action taken but in its implementation deviates or is not following the procedure; "Nonfeasance" means medical action which should have been the doctor's duty, not done by the doctor [10].

b. Definition of Medical Risk

Every medical action will always have risks, from mild to severe threats such as disability or death to the patient. Medical risk can be defined as events that may occur in a medical procedure performed by a doctor. To understand more about medical risks, the term "Patient Safety Incident" is known as an event that causes harm to the patient that should not have occurred. There are five categorized as patient safety incidents, namely [11].

First, an adverse event is an unexpected injury that occurs to the patient not because of the underlying disease but because of an action ("commission") or due to inaction ("omission").

Second, a near miss is an incident that has not been exposed to the patient so that it does not cause injury to the patient.

Third, an uninjured incident is an incident that has been exposed to the patient but did not cause injury.

Fourth, a potential injury condition (reportable circumstance) is a condition that has the potential to cause injury, but no incident has occurred.

Fifth, a sentinel event is an unexpected event that results in death or severe injury [12].

Medical risks that are not the responsibility of the doctor when an unexpected event occurs to the patient is; First, medical actions performed by doctors are following professional standards, medical standards, and standard operating procedures, as stated by Law of the Republic of Indonesia Number 29 of 2004 concerning medical practice in article 50 letter a which says that doctors cannot be prosecuted under civil law, criminal, and administrative if in the implementation of services it is by professional standards and operational standards [4, 13].

Second, informed consent is information provided by doctors to patients and their families regarding the patient's diagnosis; the medical actions taken include objectives, procedures, risks, complications, prognosis, other alternative measures, and ends by asking for patient and family consent, against the medical action that will be carried out. There are two types of authorization in taking medical action decisions, namely verbal consent and written consent [13].

Third, Contribution Negligence, which is when a patient refuses to cooperate or is not cooperative, the patient covers up the history of the illness he has suffered or the history of drugs he has taken for any reason, even if the patient does not follow the advice given by the doctor to him causing failure in treatment. patient, then the doctor is declared innocent and cannot be sued [13].

Fourth, misjudgment, the field of Medicine, is very broad and complex. It is not surprising that doctors and others often disagree regarding the approach or treatment of diseases suffered by patients, including in the choice of drugs used, as has been reported that Medicine is a combination of science and art. Based on this situation, a theory called (respectable minority rule) emerged, namely that a doctor is not considered negligent if he chooses one of the many recognized treatment methods [13].

Fifth, *Volenti non-fit injuria*, a legal doctrine known as the assumption of risk or a belief that the patient already knows the risk that will occur. If the patient, prior to taking medical action against himself, has known the risks that may arise due to the medical activity and has agreed to it, then when the medical risk occurs, a doctor cannot be blamed [13].

c. Difference between Malpractice and Medical Risk

Today, society often confuses malpractice and medical risks. Everything that is impacted in medical treatment is often considered and judged by the public as Medical Malpractice. It is regrettable if these assumptions and misconceptions are allowed because it will greatly affect

[4] Riza Alifianto Kurniawan. 2013. "Risiko Medis Dan Kelalaian Terhadap Dugaan Malpraktik Medis Di Indonesia." *Majalah Perspektif*.

public confidence in doctors' profession of expertise. For this reason, the public needs to know the difference between malpractice and medical risks so that there are no longer misunderstandings that cause harm, especially for doctors [5, 14].

Malpractice is defined as wrong action or practice. Suppose it is related to medical malpractice or Medical Malpractice. In that case, the meaning means that the medical action on a patient is very bad or wrong because it is carried out under the required standard. Malpractice, namely: in a general sense, malpractice is a malicious or lousy practice that does not meet the standards set by profession. Viewed from the perspective of the patient who has been harmed, it includes errors in diagnosis, during surgery, and after treatment. Thus malpractice has a meaning, which can be described as follows: 1. in a general sense: a lousy practice (especially the doctor's approach) does not meet the profession's standards. 2. In a particular substance (seen from the patient's point of view), malpractice can occur in: a. determining the diagnosis, for example, the diagnosis is ulcer disease, but it turns out that the patient has dangerous liver disease. b. Performing surgery, for example: should do surgery on the right eye, but it should be done on the left eye. c. During the maintenance, and d. After treatment, of course, within the specified time limit [15].

d. Malpractice and Medical Risks from a Bioethical (ethical) Point of View

Negligence is not called a violation of the law if the neglect is in the form of a small thing that does not harm the person, and that person can accept it. This is according to the principle of the law *de minimis noncurat lex*. There is a standard of gross negligence that, if done by a doctor, then the doctor can be prosecuted, among others; things done are against the law. The consequences of the actions taken can be imagined or avoided; the activities done can be blamed [16].

When a patient comes to see a doctor, the patient and his family put their hopes and trust in the doctor because; a doctor who treats is considered to have the skills, skills, and knowledge that can be used to treat or at least alleviate the symptoms suffered by a patient, if the patient requires medical action, the doctor is deemed to be taking action carefully and by professional standards [17].

A doctor took medical steps for his patient, if there is dissatisfaction on the part of the patient or his family, then the party who feels aggrieved must be able to provide four elements, namely the existence of an obligation for the doctor to the patient, there is a violation of medical service standards at the strata the same, the plaintiff has suffered a loss, and the failure was caused by the medical services provided by the doctor. In some contexts, patients and families do not need to prove the above elements to be able to sue a doctor as in the rules of Res Ipsa Loguitur or facts that speak, such as in the case of the leaving of objects or tools used during the operation process in the patient's body and causing complications both in the long term. Long and short term for these patients [18].

There are four fundamental ethical principles in Medicine: autonomy, beneficence, nonmaleficence, and justice [19]. Autonomy is a norm that gives freedom to patients in "self-determination," in other words, the patient has the right to himself so that all decisions on medical action to be performed on him are the patient who has the right to decide whether he is willing to agree to the action by condition, to them (patients) who will take autonomous action must have the capacity to choose, namely intentionality, understanding, and the absence of controlling influence that determines their actions. Doctors have a moral obligation to this autonomy principle, namely; explain the patient's condition, activities or steps to be taken for the patient, including goals, benefits, procedures, risks, complications, prognosis, other actions that will be taken if something untoward happens, get approval after explaining correctly -Actually and before taking these medical procedures, respect the privacy of others, and protect information regarding these patients [20].

Beneficence is a moral obligation to take action for good. To carry out this moral obligation, doctors must have two perspectives: medical actions to be carried out provide benefits, and balance between benefits and disadvantages. Some principles contribute to this moral obligation, including maintaining and protecting patients' rights, preventing harm to patients, eliminating conditions that can endanger patients, helping persons with disabilities, and saving people in danger [21].

Nonmaleficence is a moral obligation not to harm others or not to do harm. In this condition, it is better not to do something than to harm others. This principle upholds the rule of not killing, doesn't paralyze or deform people, doesn't cause pain, and doesn't offend [6, 22]. Justice is a moral obligation to allocate benefits, risks, costs, and resources equitably. The rules that contribute to this norm are to give equal shares to everyone, according to their needs, according to the efforts they do, per the contributions given, and to everyone who deserves to be provided [23].

e. Judicial Review of Malpractice and Medical Risks in Indonesia

The Republic of Indonesia is a country that is subject to the law, including in the health sector; the following will describe the laws and regulations related to medical malpractice and risks. In the Indonesian Criminal Code Article 359 which reads "the threat of five years imprisonment or one year imprisonment is applied to anyone who causes death to a person due to his / her negligence", article 360 (1) which reads "the threat of five years imprisonment. or one year imprisonment is allocated to anyone who causes serious injuries to a person due to his / her negligence", (2) which reads "threat of imprisonment of nine months or imprisonment of six months or a fine of four thousand and five hundred rupiahs to anyone who causes injury -A wound in such a way as to cause illness or not being able to work or earn a living within a certain period of time because of his negligence ", article 361 which reads" the addition of the criminal penalty by one third and deprivation of the right to the guilty in carrying out the search in which the crime was committed and the judge can ordered that the verdict be announced to anyone who committing crimes in this chapter committed in carrying out office or seeking" [7, 24].

[5] Norma Sari. 2011. "Kualifikasi Resiko Medis Dalam Transaksi Terapeutik." *Jurnal Ilmu HUkum Novelty*. *Vol:* 5.

[6] Gunnar B. J. Andersson, Jens R. Chapman, Mark B. Dekutoski, Joseph Dettori, Michael G. Fehlings, Daryl R. Fourney, Dan Norvell, and James N. Weinstein. 2010. "Do No Harm." *Spine* 35 (Supplement): S2–8. https://doi.org/10.1097/BRS.0b013e3181d9c5c5.

[7] Kitab Undang-Undang Hukum Pidana Republik Indonesia

Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice, article 45 (3), which reads "the explanation referred to in the previous paragraph is at least concerning the diagnosis and procedure of action; the purpose of the medical action performed; other action alternatives and risks; risks and complications that may occur; and prognosis for the action taken.", (5) which reads "written consent signed by those entitled to give consent is required for actions that carry a high risk," article 51 which reads "doctor's obligations include: a. provide medical services according to patient needs and following professional standards and standard operating procedures; b. referring patients who cannot be treated to doctors who have more expertise; c. keep everything about the patient secret until after the patient dies; d. perform emergency aid on a humane basis, unless the doctor believes there is someone else on duty and can do so; and e. increase knowledge and follow the development of medical science ", article 79 which reads" the threat of one-year imprisonment or a fine of fifty million rupiahs, to the doctor referred to in letter c. intentionally not fulfilling the obligations referred to in Article 51" [3].

Law of the Republic of Indonesia Number 36 of 2009 concerning Health, article 58 (1) which reads "if there is negligence or error in medical services that result in loss, then he has the right to claim compensation from medical personnel or health providers," (2) which reads "the prosecution as referred to in the previous paragraph is not applied to emergencies such as saving lives or preventing disability," (3) which states "the procedure for filing claims is regulated following the provisions of laws and regulations " [8, 25].

In addition to burdensome regulations, there are also justification regulations as follows Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice Article 50 which states that "the right of doctors includes: a) obtaining legal protection as long as doctors carry out their profession following professional standards and standards. Operational procedures; b) medical services provided by doctors are by professional standards and standard operating procedures; c) obtain complete and honest information from patients or their families; and d) receive fees for services" [3].

Law of the Republic of Indonesia, Number 36 of 2009 concerning Health, article 24 (1) which reads "medical personnel are required to comply with the provisions of the code of ethics, professional standards, rights of health service users, service standards and standard operating procedures," article 27 (1) which reads "in carrying out their professional medical personnel, have the right to receive compensation and legal protection," article 29 which reads "if there is an allegation of negligence committed by medical personnel while performing their profession, mediation must be carried out first" [25]

Government Regulation of the Republic of Indonesia Number 32 of 1996 concerning health workers article 24 (1), which reads "medical personnel who carry out their profession have met professional standards are entitled to legal protection [9, 26]. Regulation of the Minister of Health of Indonesia Number 290 / Menkes / Per / III of 2008 concerning Approval of Medical Actions Article 2 (1) reads "approval must be obtained before taking medical action," Article 3 (1) reads "on medical actions that have high risk must have written consent before the action is signed by those who have the right to give consent, "article 8 (3) reads" an explanation of the risks and complications of medical action is all possible risks and complications that can occur following the medical action being performed, except; a) risks and complications are common knowledge; b) risks and complications are very rare or the consequences are very mild; c) risks and complications that cannot be predicted [10, 27].

The decision of the Constitutional Court of the Republic of Indonesia Number 4 / PUU-V / 2007 of 2007, Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice as long as it is related to imprisonment and imprisonment which is threatened with criminal acts regulated in articles 75, 76 and 79 (c) has been written off. The elimination of imprisonment does not mean that the criminal act in question has been eliminated (decriminalization). These criminal acts are still valid except that they are no longer threatened with sanctions that are depriving independence but are punishable by fines [11, 28]. The provisions in articles 79 (a) and (c) are deemed contrary to the 1945 Constitution of the Republic of Indonesia Article 28C (1), which reads "All people have the right to develop themselves by fulfilling their basic needs, have the right to education and benefit from knowledge and technology, art and culture, to increase the quality of life and for the welfare of mankind ", (2) it reads" All people have the right to advance themselves in fighting for their rights collectively to develop their society, nation and state", article 28D (1) reads "all people have the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law", article 28G (1) reads "All people have the right to protection for themselves, their family, honour, dignity and property, who are under their control, and are entitled to a sense of security and protection from the threat of fear to do or not do something which is human right ", article 28H (1) reads" All people have the right to live in physical and spiritual prosperity, have a place to live, and have a good and healthy environment and have the right to get medical services ", (2) it reads" All people have the right obtain facilities and special treatment to get the same opportunities and benefits in order to achieve equality and justice ", and Article 34 reads" The Indonesian State is responsible for the provision of adequate health service facilities and public service facilities" [12, 29]. The Indonesian medical association's opinion regarding doctors providing health services is always following professional standards and standard operating procedures (SOP). The professional standard size is not yet standard (and for SOP itself, it is based on professional standards). Professional standards must be adapted to certain skills, conditions, and time. The size and who determines which doctors work is not in accordance with professional standards are not clear. Does anything that is not clear, carry a prison sentence? The Indonesian

[8] Undang-Undang Republik Indonesia Nomor 36 Tahun 2009 Tentang Kesehatan

[9] Peraturan Pemerintah Republik Indonesia Nomor 32 Tahun 1996 Tentang Tenaga Kesehatan

[10] Peraturan Menteri Kesehatan Indonesia Nomor 290/Menkes/Per/III tahun 2008 Tentang Persetujuan Tindakan Kedokteran

[11] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 4/PUU - V/2007 Tahun 2007

[12] Undang-Undang Dasar 1945 Republik Indonesia

medical association is of the view that this article criminalizes doctors, is unfair and discriminatory.[13][30]

In the criminal provisions in the State of the Republic of Indonesia, a doctor gets a reason for the elimination of punishment due to two reasons for the elimination of guilt, namely the reason for justification, which is a reason that eliminates the unlawful nature of proper and right actions and reasons for forgiveness. These reasons can excuse the act's nature, even though the act is against the law. However, in this case, doctors who carry out their profession according to the legal corridors will be released from lawsuits based on justification [31].

f. Legal Discovery

Paul Scholten, who gave the theoretical basis for the term "legal discovery," coined by G.J. Wiarda, is a scientific work that cannot be reached by time. The term legal discovery is then used both for the application of laws purely or through interpretation and the determination of law based on facts as custom or following propriety, a term that is accidentally needed when the law loses its monopolistic position on the judiciary [32].

Legal discovery is the process of forming a law by a judge or other legal apparatus assigned to apply legal regulations to concrete legal events. In other words, it is the process of concretization or individualization of legal regulations (*das sollen*), which are general by remembering certain concrete events (*das Sein*). So what is important is how to find or find the law for factual circumstances. The result of legal discovery by the judge is legal. After all, it has binding power as a law because it is written in the form of a decision. Besides that, the legal findings by the judge are a source of law as well [33].

A source of legal discovery is a place or a source, especially for judges to find laws. The primary sources of legal discovery are; laws and regulations (written law), customs (unwritten law), jurisprudence, international treaties, doctrines, village decisions, and human behavior. The hierarchy of legal discovery sources determines the primary sources of law used between one source of law and another. Therefore, if there is a conflict between two legal discovery sources, the source of legal discovery above will paralyze the lower source of legal discovery [33].

These laws and regulations are incomplete. There is no, and it is impossible to have complete and transparent statutes or regulations. Because it is incomplete and unclear, it must be completed and explained using "legal discovery." In simple terms, legal discovery can be said to find the law because it is still incomplete and unclear. The law was discovered by explaining, interpreting, or completing the statutory regulations. To find the law, there are several legal discovery methods, namely the method of interpretation and the method of argumentation [34].

In this discussion, the source of law used is the Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice, Law of the Republic of Indonesia Number 36 of 2009 concerning Health, Government Regulation of the Republic of Indonesia Number 32 of 1996 concerning health workers, Regulation of the Minister of Health of Indonesia Number 290 / Menkes / Per / III of 2008 concerning Approval of Medical Actions, Decision of the Constitutional Court of the Republic of Indonesia Number 4 / PUU -V / 2007 of 2007, doctrine in Common Law countries which is commonly used as an excuse to justify doctors against one medical failure, namely: Risk in treatment (Risk of therapy), a) The inherent risk, b). The risk of an allergic reaction, c). The risk of complications that have arisen in the patient's body; Accident or mishap, accident, misadventure, mischance; Errors in clinical judgment or non-negligent error of clinical judgment; *Volent non-fit iniura*; Contributory negligence [14, 35]. The method used is a multidisciplinary interpretation. In addition to handling and making clear the cases at hand, judges must also study and consider various inputs from various disciplines other than law.

g. Evidence in the Efforts of Handling Medical Malpractice in America

Anglo Saxon legal system which makes judges the main center of legal development through their decisions. In Anglo-Saxon countries, including the United States, in solving medical malpractice cases applying the principle of *res ipsa loquitur* (the thing speaks for itself), this doctrine is directly related to the burden of proof. It is explained that "*Res ipsa loquitur*" does not prove anything; it is nothing but a very limited possibility to transfer the burden of proof from the plaintiff to the defendant. The application of this doctrine does not apply automatically, only in some instances where a person's faults are so obvious that his mistakes are immediately known. This doctrine cannot be applied if the presence or absence of negligence still depends on something relative [36].

Using the standard burden of proof in Anglo-Saxon countries, there are three, namely: 1). by a preponderance of the evidence, that there must be evidence in such a way so that if it is measured, it has a greater strength of correctness (more than 50%). 2). By clear and convincing evidence, namely the level of evidence that will give the jury an impression of a level of clear measure of truth from what the plaintiff has put forward. 3). Beyond a reasonable doubt, that is, that the evidence has to be on the plaintiff's side so that there is no doubt that the assessment of the defendant's defense is no longer in doubt. This standard measure is used in criminal cases [36].

From this, we can see that one of the ways the Anglo Saxon countries successfully solve significant American medical malpractice cases. In America, the reverse proof is applied, wherein a state that adopts a continental European system such as Indonesia it is initially said that reverse proof violates the presumption of innocence, even though the application of reverse evidence itself can bring justice to both the suspect and the victim because after all Medicine is a particular field that According to the author, the final result is unpredictable so that the doctor who is considered to have committed malpractice can prove that he did not do it and this helps resolve the case of medical malpractice, which by law enforcement officials the process of proof for this case is complicated, so it cannot be appropriately determined [36].

In Anglo Saxon countries, the reverse proof is applied to

[13] Rima Nurmaya Shanti. 2012. "Implementasi Pasal 37 Ayat (2) Undang Undang No. 29 Tahun 2004 Tentang Praktik Kedokteran Pasca Putusan Mahkamah Konstitusi Nomor 4/Puu-V/2007." *Umm Intitutional Respitory*.

[14] Mahalwar K.P.S.. 1991. "Medical Negligence and the Law." *Hathi Trust Digital Library*.

cases where even the layman knows that it is the negligence of doctors, for example, in the case of Ybarra V. applied the doctrine of "Res Ipsa Loquitur" or by turning the burden of proof on those involved in the surgery, to find out whether they did neglect or it was a medical risk [36].

Now that the reversal of the burden of proof is known in the Corruption Crime Law and the Money Laundering Law in Indonesia, this means that the paradigm of reverse proof that violates the presumption of innocence has changed, that reverse evidence is used to combat injustice and is used. For urgent matters which the government is powerless to cope with. From the experiences that the United States has experienced in handling medical malpractice cases, Indonesia can follow reverse evidence for malpractice cases in Indonesia [36].

4. Conclusion

The Thin Curtain between Malpractice and Medical Risk, until now, the understanding of the difference between medical malpractice and medical risk is often misleading. Malpractice is a mistake or negligence in carrying out the profession. Malpractice can be divided into two: first, malpractice intentionally and violates laws and regulations and malpractice. Meanwhile, medical risk can be defined as an event that may occur in a medical action performed by a doctor. There are four fundamental ethical principles in Medicine: autonomy, beneficence, nonmaleficence, and justice. In the Republic of Indonesia, there are burdensome regulations, and there are also justification regulations. In particular, the Decision of the Constitutional Court of the Republic of Indonesia Number 4 / PUU -V / 2007 of 2007, Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice as long as it is related to imprisonment and imprisonment which is subject to criminal acts regulated in articles 75, 76, and 79 (c) have been written off.

In this discussion, the source of law used is the Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice, Law of the Republic of Indonesia Number 36 of 2009 concerning Health, Government Regulation of the Republic of Indonesia Number 32 of 1996 concerning health personnel, Regulation of the Minister of Health Indonesia Number 290 / Menkes / Per / III of 2008 concerning Approval of Medical Action, Decision of the Constitutional Court of the Republic of Indonesia Number 4 / PUU -V / 2007 of 2007, doctrine in Common Law countries which is commonly used as an excuse for doctors to justify a medical failure, namely: Risk of treatment, a). The inherent risk, b). The risk of an allergic reaction, c). The risk of complications that have arisen in the patient's body; Accident or mishap, accident, misadventure, mischance; Errors in clinical judgment or non-negligent error of clinical judgment; *Volent non-fit iniura*; Contributory negligence. The method used is a multidisciplinary interpretation. In addition to handling and making clear the cases at hand, judges must also study and consider various inputs from various disciplines other than law. In Anglo-Saxon countries, including the United States, in solving medical malpractice cases, it applies the principle of *res ipsa loquitur* (the thing speaks for itself).

Conflict of Interest

The authors declared that they have no conflicts of interest.

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