
REVIEW OF VULNERABILITY THEORY ON PATIENTS' RIGHTS IN MEDICAL MALPRACTICE CASES

M. Nur Alifan Zainal Muttaqin

Universitas Islam Negeri Sunan Ampel Surabaya, Indonesia

Email: nuralifan121@gmail.com

Rezky Ayu Amelia*

Universitas Islam Negeri Sunan Ampel Surabaya, Indonesia

Email: rezkyayuamelia26@gmail.com

Article Info

Keyword:

Health Systems
Medical Malpractice
Patient Protection
Vulnerability

Abstract

This study aims to analyze medical malpractice cases through the perspective of vulnerability theory, which highlights patient vulnerability as a key factor in understanding the impact of medical errors. This study uses Supreme Court Decision number 233 K/Pid.Sus/2021 as a case study, where a medical professional without specialized competency certification committed an act that significantly harmed the patient. A qualitative approach with juridical-normative methods was used to explore the dimensions of patient vulnerability as well as the legal responsibilities of medical personnel and health institutions. The results showed that patients are in a vulnerable position not only due to their dependence on medical professionals but also due to the lack of an adequate legal protection system. Patients' ignorance of their rights, combined with weak oversight of medical practices, increases the risk of becoming victims of malpractice. Vulnerability theory provides a relevant conceptual framework to understand that patient protection requires not only a punitive approach to perpetrators but also systemic improvements involving public education, strengthening the accountability of medical personnel, as well as stricter regulatory enforcement of health practices. This research contributes to expanding the discussion on victimology in the health sector by emphasizing the importance of the victim's perspective in handling malpractice cases. The implications include the development of health policies that are orientated towards victim protection, this study also suggests improving regulations in the health sector.

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* Corresponding Author.

Article history:

Received: September 11, 2024; Received in revised form: October 31, 2024; Available online: November 28, 2024.

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Introduction

Safety in emergency and non-emergency medical service systems is an important issue in guaranteeing and protecting patients from medical malpractice. Medical malpractice is a medical practice that is considered to deviate from scientific standards (Moffett & Moore, 2011), when a patient suffers a loss caused by a doctor, medical professional, or health care provider who performs or does not perform any action, where this action deviates from the standard of medical practice recognized and accepted in the medical community (Bal, 2009). Medical malpractice or medical negligence can also be defined as inappropriate and negligent behavior of healthcare providers performing substandard care resulting in injury to patients so that it can be prosecuted in a trial based on laws and regulations (Hammaker et al., 2024).

Medical malpractice can be seen in various types such as misdiagnosis; surgical errors; birth injuries (Hemeda et al., 2024); cosmetic procedure negligence (Bismark et al., 2012); an erroneous emergency room; radiology that is faulty (Sumner et al., 2024); care home negligence (Wicks, 2024); medication prescription errors (Rozenblum et al., 2020); and so on. From these types, patients can obtain their right to be held accountable from medical service providers through claim-based policy or event-based policy (Bono et al., 2023). Patients or families of patients who complain of medical malpractice can file complaints in court or out of court, although it is inevitable that these complaints have consequences such as affecting doctors, medical professionals, patients, patients' families, and the community. Identification of this medical malpractice must be carried out so that the blame is not necessarily imposed on doctors, medical professionals and health care providers (Hanganu et al., 2020).

Information about community complaints about medical malpractice can be found through news reports in the mass media (*Diduga Malpraktik, Bayi Prematur Meninggal Usai Dijadikan Konten Newborn Photography Di Klinik Alifa Tasikmalaya - Radar Semarang*, 2023; *Putri Tak Bisa Melihat Usai Berobat, Ibu Di Palembang Polisikan Oknum Bidan*, 2024). In 2000 a report submitted by The Institute of Medicine's reported that there had been 98,000 cases of medical errors (*To Err Is Human*, 2000), while in Indonesia there is no official data. By observing various data and information on medical malpractice, all parties strive to provide safety to patients and can minimize the number of cases (Kencana, 2024).

So important is the safety of patients who are being treated by doctors or medical professionals, it requires patient safety standards so that medical malpractice does not occur. The World Health Organization prepares 5 (five) patient safety standards which include the development and implementation of Standard Operating Protocols; the development of impact evaluation strategies; data collection, data analysis, and data reporting; learning from data through Collaborative Learning Communities; and the dissemination of knowledge globally (World Health Organization, 2014). There are at least 3 (three) Standard Operating Procedures: correct surgery, treatment reconciliation, and concentrated injectable drugs (Leotsakos et al., 2014). Everyone has the right to health as recognized by the Universal Declaration of Human Rights (UDHR) in Article 25.

Medical malpractice can occur in any hospital that can be experienced by patients seeking treatment. This act of medical malpractice causes suffering to the victim, for example, disability in the victim, or worse, death. This action can also be caused by negligence, intentionality, or lack of adequate health facilities in the hospital (Doğan et al., 2020). Any medical procedure performed by medicine on a patient needs to be approved first. However, in emergency conditions, no approval is required because it is to prevent more serious injuries or prevent disability in the victim and save the patient's life. Regarding emergencies, it has been regulated in Article 1 Part 24 of Law Number 17 of 2023 concerning Health, which reads:

"Emergency is a clinical condition of a patient that requires immediate medical and/or psychological action to save lives and prevent disability". Furthermore, after the doctor finishes treating or curing the victim, he must immediately inform the family or guardian. Unfortunately, if there is negligence committed by other doctors/medical personnel, the agreement that has been signed by the patient still cannot help the responsibility if it is proven that there is medical malpractice that causes suffering to the victim (Flynn, 2016).

However, it is very rare for the public to submit complaints of medical malpractice to law enforcement officials. For some ordinary people, when they feel firsthand the act of medical malpractice on them, they are often silent and reluctant to report. This is because they are not ready to take the legal route, it is feared that it will have a long impact on them, and will not yield results. As a result, patients and their families who experience the impact of medical malpractice will remain silent and mourn their fate (Schwartz, 2010). This event is what makes the author interested and want to study the existence of medical malpractice from the perspective of victimology and laws and regulations.

This study aims to examine the Supreme Court Decision number 233 K/Pid.Sus/2021 on the dynamics of the relationship between patient vulnerability and the legal responsibility of medical personnel. In legal and ethical contexts, the analysis of medical malpractice often focuses on aspects of error and omission. However, when medical malpractice is carried out deliberately, it takes a deeper perspective to understand the power dynamics and vulnerabilities that exist in the relationship between medical personnel and patients. Vulnerability theory offers a relevant framework for understanding and addressing this issue. This theory highlights the importance of recognizing the inherent vulnerability of patients in the health system, and how laws and policies should provide adequate protection to prevent the exploitation and abuse of power by medical personnel

Research Method

This The research method used in this study is normative juridical (Taekema et al., 2016). Legal research using a literature source system is carried out by collecting information from relevant sources or library materials. The case taken is one of the cases that has occurred in Indonesia based on the Supreme Court Decision number 233 K/Pid.Sus/2021 so that it has permanent legal force. This data is analyzed through data reduction, data display, conclusion-making, and verification (Creswell, 2003).

Results and Discussions

Supreme Court Decision number 233 K/Pid.Sus/2021

The Supreme Court's decision number 233 K/Pid.Sus/2021 illustrates that there was a case of medical malpractice involving the perpetrator as a general practitioner and having an alibi as a beauty doctor, namely Dr. Elisabeth Susana, she was also proven to have intentionally committed to Agita Diana Fitri's patient. Starting from the victim Agita Diana Fitri who came to Dr. Elisabeth Susana to do skin health. During the process, Dr. Elisabeth Susana injected hyaluronic acid into Agita Diana Fitri's nose twice, but because there was paleness in the area of both eyebrows of the victim, then the perpetrator or Dr. Elisabeth Susana withdrew the injection and injected it into hyaluronidase as an anti-pacifier in the nasal area to remove the content of hyaluronic acid, but there was no change. As a result, the victim, Agita Diana Fitri, felt pain and screamed and then the victim fainted, when the victim tried to open her eyes again her left eye could not see. After one week, the victim's condition did not improve. Then, the

victim asked for treatment at Siloam Hospital and Wahidin Hospital, until now the condition of Witness Agita Diana Fitri's left eye has not been able to see perfectly.

Dr. Elisabeth Susana is a general practitioner and does not have a special competency certificate as a beauty and esthetician doctor. It is also known that the perpetrator knew that injecting a filter in the form of hyaluronic acid could cause blindness even with a very small accuracy of 1.9/100,000. So, because of the perpetrator's negligence, Dr. Elisabeth Susana caused eye damage to the victim Agita Diana Fitri. From his actions, the defendant, Dr. Elisabeth Susana, so the public prosecutor with Article 79 letter c Article 51 letter a of Law Number 29 of 2004 concerning Medical Practice. Then, the judge sentenced the defendant in the form of a criminal sentence of imprisonment for two months. In the Supreme Court Decision number 233 K/Pid.Sus/2021, the incriminating thing for the defendant because it has been legally proven that he intentionally committed an intentional act that resulted in eye damage to the victim, and the thing that alarmed the victim was because the victim had never been in law and had children.

Vulnerability Theory in Medical Malpractice Cases

From this decision, if it is linked to the theory of victimology, it is included in the vulnerability theory. Victimology is a study that specifically examines the victims of crime, its origins, and the impact it causes (Waluyo, 2011). As a branch of criminology, victimology focuses on how and why a person becomes a victim, as well as how the losses suffered by the victim are part of the impact of the crime itself. The study initially emerged out of dissatisfaction with traditional criminological approaches that put more emphasis on perpetrators, without paying much attention to the victim's side (Zaidan, 2021). With the development of time, the scope of victimology includes not only victims of conventional crimes regulated in criminal law but also victims of non-conventional crimes, such as cybercrime and human trafficking (Sida, 2020). Victimology discusses victimization problems in various aspects of life, including victims of natural disasters and accidents, so it can be said that victimization includes all forms of victimization as real human problems in social life (Sunarso, 2012).

Victimology means *victima*, then *logos* means knowledge. Victimology is a branch of science that explains in more detail the suffering of victims. This suffering can be in the form of loss or pain caused by the perpetrator. Victims are not always individuals, victims in the sense that they feel harmed by a group for the sake of an interest. These victims can be in the form of agencies/groups of individuals, the environment, and the nation (Waluyo, 2011). The process of individuals/groups that can be said to be victims is that the individual/group must experience suffering, then the suffering is accompanied by an injustice, followed by the stigma related to suffering, and finally categorized in the legal aspect (police). The term victim can occur because of many things, one of which is a victim of medical malpractice. For this reason, victimology exists to be able to study more deeply the implementation or application of victims' rights (Ali, 2021).

In the context of victimology, the meaning of victim includes a broad meaning, not only limited to individuals who suffer direct losses, but also includes groups, corporations, the private sector, and the government. Meanwhile, the consequences of the victim refer to the attitude or actions of the victim, the perpetrator, and those who are directly or indirectly involved in the occurrence of a crime (Widiartana, 2009). Victimology tries to understand and enlighten the problem of crime by studying the victims of crime, the process of victimization, and its consequences to create wisdom and preventive measures and emphasize crime in a more responsible manner (Doerner & Lab, 2021).

To raise problems related to victims, victimology comes with various theories such as Victim Precipitation Theory, Lifestyle Theory, Deviant Place Theory, Routine Activities Theory, Vulnerability Theory, and others (Turvey, 2013). There are various theories of victimology, one of which will be used in reviewing the author's analysis, namely the vulnerability theory. Vulnerability theory offers a critical perspective on liberal legal and political perspectives, especially in dealing with cases where there are significant material and social inequalities. This theory provides a normative basis for evaluating how the law should respond to individuals who are in a vulnerable position, especially in the context of deliberate medical malpractice. Vulnerability theory views that the state has a responsibility to protect individuals from the negative excesses that can arise from this dependence (Fineman & Spitz, 2024).

Vulnerability theory rejects the traditional view that considers each individual as completely independent and capable of protecting himself. This traditional view believes that everyone has an equal opportunity to get the resources they need to protect themselves from various risks (Nyeck, 2024). However, Fineman argues otherwise. According to him, the state and institutions in society must be responsible for creating an environment that helps individuals deal with the inherent vulnerabilities in life. In a medical context, this means that health institutions and the state have a moral and legal responsibility to protect patients from the risk of medical malpractice, especially if the actions taken by medical personnel are carried out deliberately. So, it is not only the responsibility of individuals to protect themselves but the relevant countries and institutions must take an active part in that protection (Fineman & Spitz, 2024).

In addition, in the perspective of vulnerability, the concept of "resilience" becomes important. Resilience refers to the ability of an individual or group to face and overcome the vulnerabilities they experience. In cases of medical malpractice, patient resilience can be built through access to information, strong legal protection, and support from community and state institutions. States must ensure that these mechanisms for building resilience are available and accessible to all individuals without discrimination (Hollnagel, et al., 2019). Vulnerability theory states that everyone is inherently vulnerable in various aspects of life, such as physical or economic. However, how a person addresses these vulnerabilities depends on the resources they have, such as money, social support, or education. In cases of medical malpractice, it is important to understand that more vulnerable people need stronger protection and support for justice to be achieved (Fineman, 2011).

Naturally, humans tend to make mistakes, both small and large. Therefore, rules are needed to reduce the possibility of these errors. These rules are important because humans are always in touch and interact with others in their daily lives. Crime is one of the realities in life that requires special handling because it can cause unrest in society. Therefore, various efforts are needed to overcome evil, although, in reality, it is difficult to eradicate it. This is because crime tends to grow along with the development of society (Ilyasa, 2022).

In the current laws and regulations of the Republic of Indonesia, there is no specific definition of malpractice. However, an explanation related to malpractice can be found in Article 11 paragraph (1) letter (b) of Law No. 6 of 1963 concerning Health Workers, which has been deleted by Law No. 23 of 1992 concerning Health. In this article, malpractice is explained as an act that violates the professional obligations of a health worker, such as neglecting duties, performing actions that should not be carried out based on the oath of office, or ignoring certain obligations that should be carried out by a health worker. Medical malpractice can be defined as any professional mistake committed by a physician for not performing an assessment or action that should have been taken in the same situation, or for carrying out medical work below applicable standards. Medical malpractice also includes mistakes due to unreasonable conduct,

lack of skill, or dishonesty in carrying out professional obligations (Azwar, 1996). Medical malpractice can also be linked to violations of doctors' obligations, such as practice without a license or registration regulated in Law No. 29 of 2004 concerning Medical Practice. In this context, medical malpractice occurs when medical actions that are expected to improve health worsen the patient's condition, caused by the error or negligence of medical personnel (Ishaq, 2019).

Medical malpractice occurs due to inappropriate medical services that adversely affect the patient's health. According to the Criminal Code, medical malpractice can occur due to intentionality (*opzet* or *dolus*) or mistake (*alpa* or *should* or *culpa*). Intentionality (*opzet* or *dolus*) is related to the severity or lightness of the criminal punishment to be received. This intentionality is what presents a mistake. So, mistakes (*alpa* or *should* or *culpa*) can also be interpreted as intentional (*opzet* or *dolus*) (Kohn, 2014).

The act of medical malpractice carried out by medical personnel can be in the form of intentionality for some forgetfulness. For example, it is regulated in Article 360 paragraph (1) of the Criminal Code which reads: "Whoever due to his fault/negligence causes serious injury to another person, shall be sentenced to imprisonment for a maximum of five years or imprisonment for a maximum of one year". In addition, it is also regulated in Article 359 of the Criminal Code which reads: "Whoever due to his fault (negligence) causes the death of another person, is threatened with imprisonment for a maximum of 5 years or imprisonment for a maximum of 1 year".

The difference between the two articles lies in the consequences of the act. In Article 360 paragraph (1) of the Criminal Code related to acts that result in serious injury. Meanwhile, Article 359 of the Criminal Code results in the loss of a person's life or death. For the sentence "Whoever is due to his fault/negligence..." It can be interpreted as a criminal act. This article can be used as a reference material in handling cases of medical malpractice crimes.

In addition, related to cases of medical malpractice that are not in line with the code of ethics for health services enshrined in Health Law No. 17 of 2023, Article 4 part 1C which reads "everyone has the right to receive Safe, Quality, and Affordable Health Services to realize the highest degree of health". Regarding this article, it is clear that the public must get good and safe services from the hospital, but it is not uncommon for this to be ignored or vice versa. Therefore, there is a deviation in the aspect of public health services known as medical malpractice.

From a legal point of view, this act of medical malpractice can ensnare the perpetrator in the realm of criminal or civil law. The reason is, that cases of medical malpractice can cause losses both from material and physical health. So, that way the perpetrator can be prosecuted in court (Vuletić, 2019). Even if the victim or his family has reported the existence of medical malpractice to the legal realm, then proven guilty and the victim will receive compensation (Chopard & Musy, 2023). This may be done from a legal perspective, but from the victim's point of view, it has not been able to solve the problem, if the victim has been disabled for life or even death.

In addition, the victim is also explained in Law No. 13 of 2006 concerning the protection of witnesses and victims, which is contained in Article 1 Part 2 which reads: "A victim is a person who experiences physical, mental, and/or economic suffering caused by a criminal act". Regarding the explanation of Law No. 13 of 2006 concerning the protection of witnesses and victims, for this reason, a science called victimology has emerged which is used to review more deeply about victims.

Discussing the vulnerability of the victim so that it poses a danger to him. When committing the crime, the victim is unaware or lacks awareness of the victim during or after the

crime committed by the perpetrator. According to the College of Policing, this vulnerability is when the victim is in a situation or circumstance where he or she is unable to protect himself from danger. So directly or indirectly, a person is at risk of becoming a victim (Kohn, 2014).

Judging from the chronology of the case above, several reasons caused Agita Diana Fitri to become a victim: first, the relationship between the victim and the perpetrator before, during, and after the occurrence of the act that caused the victim to experience blindness. In the form of the perpetrator, the perpetrator deliberately tried to believe the victim with the aim that the victim was interested in the medical services he performed. This caused the victim to be tempted by the perpetrator's sweet words, so he without thinking long went to do a facial treatment; Second, there is a role for the victim such as the victim coming to the hospital to do facial treatment, so that the victim's vulnerability is victimized. Because, the victim facilitates or provides himself, thus providing an opportunity to become a victim of the perpetrator. In the sense that the victim did not realize that his actions provoked an act of violence against him; and third, the victim did not find out in advance about the doctor who would treat her skin. So, as a result, the doctor who handles it is not a beauty specialist but a general practitioner and does not have a special beauty competency certificate. The doctor has violated Article 1 paragraph (4) of Law Number 29 of 2004 concerning Medical Practice, which reads: "A certificate of competency is a letter of recognition of the ability of a doctor or dentist to practice medicine throughout Indonesia after passing the competency test".

The perpetrator only has a certificate of seminars and workshops that he has participated in for 20 months. So, the perpetrator as a general practitioner deliberately carries out medical services by professional standards. So the perpetrator deliberately injected a filter in the form of hyaluronic acid which can cause blindness even with a very small accuracy of 1.9/100,000. In this case, regarding the chronology of medical malpractice cases in Supreme Court Decision number 233 K/Pid.Sus/2021, there is a passive victim's role in the sense that the victim does not know that his actions endanger him (Hyman & Silver, 2006) Thus, causing vulnerability. The role of the victim is the relationship or relationship with the perpetrator, this relationship can be in the form of the causes of the crime.

Conclusion

The case of medical malpractice is contained in the Supreme Court Decision number 233 K/Pid.Sus/2021, if using the vulnerability theory approach, can be described as social, economic, or professional inequality experienced by everyone can make them a vulnerable group. Legal and human rights protection for this vulnerable group must be carried out to maintain their human dignity, which in this context exists in patients who are victims of medical malpractice. Medical personnel who are unprofessional and do not have a certificate of competence can harm patients, patients' families, and society in general. Especially the losses experienced by these patients who are not only included in the vulnerable group but also the inadequate health system to protect their rights. State actors and non-state actors in Indonesia must be present in creating the best and optimal health system so that in the future patients will no longer be victims of medical malpractice, by following 5 (five) patient safety standards compiled by the World Health Organization

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