

Expert Witness against the Crime of Medical Malpractice in Indonesia

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Abstract: In the legal aspect, the position and role of the doctor as an expert witness is very important. Their expert testimony even plays major consideration in the decision of the judges. However, it is not easy to invite doctors as expert witnesses if the suspects are their colleagues. In addition, the doctor, the expert witness, would give less objective testimony in court to protect their colleagues. Also, it is very rare that expert witness points out different medical measures carried out by the suspects. Proof mechanism by using a doctor as an expert witness is a flaw in law enforcement in cases of medical malpractice. Globally, there are some countries such as the Netherlands, Belgium, France and Switzerland that have introduced reversed burden proof systems.

Keywords: Expert Witness; Medical Malpractice; Indonesia.

Abstrak: Dalam aspek hukum, kedudukan dan peranan dokter sebagai saksi ahli sangatlah penting. Kesaksian ahli mereka bahkan menjadi pertimbangan utama dalam pengambilan keputusan hakim. Namun, tidak mudah untuk mengundang dokter sebagai saksi ahli jika tersangka adalah rekannya. Selain itu, dokter, sebagai saksi ahli, akan memberikan kesaksian yang kurang obyektif di pengadilan untuk melindungi rekan-rekannya. Selain itu, sangat jarang saksi ahli menunjukkan berbagai tindakan medis yang dilakukan oleh tersangka. Mekanisme pembuktian dengan menggunakan dokter sebagai saksi ahli merupakan kelemahan dalam penegakan hukum dalam kasus malpraktik kedokteran. Secara global, terdapat beberapa negara seperti Belanda, Belgia, Perancis dan Swiss yang telah memperkenalkan sistem pembuktian beban terbalik.

Kata kunci: Saksi Ahli; Malpraktik Medik; Indonesia.

1. INTRODUCTION

Each year, medical malpractice cases continue to rise. Based on the data from the Jakarta Legal Aid Institute of Health states that from 1998-2004, there are about 405 medical malpractice cases.¹ Based on data from the Indonesian Doctors Association (IDI), there were 306 medical malpractice cases reported from 1998-2004.² Chairman of the Indonesian Medical Disciplinary Council states that there were 62 medical malpractice cases reported each year.³

The increasing number of medical malpractice cases mentioned above affected on public trust towards physicians and hospitals in Indonesia.⁴ It is widely known that many Indonesian citizens went to various Asian countries such as China, Singapore, Thailand, and Malaysia just for a medical check up.⁵

One of the causes of the lack of public confidence in the doctors and hospitals in Indonesia is the high number of medical malpractice cases in Indonesia.⁶ Law enforcement in Indonesia is not able to prove the case because they do not know and understand both the substance and technical of medical science. If the verification is expected only by the efforts of the patient or the patient's family medical malpractice cases would not be revealed.⁷

Instruments available today is the process of law enforcement against medical malpractice cases simply rely on the testimony of a doctor as an expert witness. This is because only the doctors who know and understand medicine. But this raises a problem because many doctors avoid to become an expert witness because they colleagues or associates. Testimony from expert doctors are biased and not objective and tends to protect colleagues.

2. RESEARCH METHODS

This study is a qualitative research using normative juridical approach. This study is legalistic or doctrinal using analytical techniques substance (content analysis).⁸ Content analysis technique is a research carried out systematically by analyzing a legal document pertaining to cases of medical malpractice.⁹ The aim of the research is legalistic or doctrinal is to find, explain, research, analyze and propose a systematic way of facts, principles, concepts, theories, certain laws and law enforcement institutions that find knowledge and new ideas for suggested be a change or renewal.¹⁰

¹ Dedi Afandi, "Mediasi: Alternatif Penyelesaian Sengketa Medis," *Majalah Kedokteran Indonesia* 59, no. 5 (2009): 189–92.

² Syahrul Machmud, *Penegakan Hukum Dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek* (Bandung: Karya Putra Darwati, 2000).

³ Merdias Almatsier, *Kemitraan Hubungan Dokter-Pasien Bagi Media Massa* (Jakarta: UI Press, 2010).

⁴ CL Wood, "Historical Perspectives on Law, Medical Malpractice, and the Concept of Negligence," *Emerg Med Clin North Am.*, 1993, <https://www.ncbi.nlm.nih.gov/pubmed/8404569>.

⁵ Herqutanto, "Wahai Dokter Indonesia, Berkomunikasilah," *Maj Kedokt Indon* 59, no. 2 (2009): 35–38.

⁶ Muhammad Hatta, "Legal Position of Medical Malpractice in Indonesia," *Medwell Journals* 12, no. 8 (2017): 1473–81.

⁷ K Hennesy, "The Effects of Malpractice Tort Reform on Defensive Medicine," *Issues in Political Economy*, 2004, http://www.nabet.us/Archives/2004/pdf/hennesy_and_oneill.pdf.

⁸ Anwarul Yaqin, "Legal Research and Writting Malaysia," *Malayan Law Journal SDN BHD* 1 (2007): 10.

⁹ Muhammad Abdul Kadir, "Hukum Dan Penelitian Hukum.," *Bandung : PT. Citra Aditya Bakti.* 8, no. 1 (2015): 52.

¹⁰ I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Prenanda Media Group, 2017).

3. RESULTS AND DISCUSSION

3.1 Expert Witness

Black's Law Dictionary explains testimonial evidence as "a person testimony offered to prove the truth of the matter asserted, especially evidence elicited from a witness".¹¹ It means testimonial evidence is a testimony stated by a person to prove the truth claims, especially evidence showed by the witness. Meanwhile, what is meant by 'expert evidence' is "evidence about a scientific, technical, professional, or other specialized to testify because of familiarity with the subject or special training in the field, also termed expert testimony."¹²

Furthermore, the term expert testimony defines as "opinion evidence of some person who possesses special skill or knowledge in some science, profession or business which is not common to the average man and which is possessed by the expert by reason of his special study or experience. A similar definition is also affirmed by West's Legal Thesaurus that explains the expert testimony as "the opinion evidence of a person who possesses special skill or knowledge in some science, profession, or business that is not common to the average person."¹³ Curzon in Dictionary of Law defines expert evidence as referred to Civil Procedure Rules (CPR), as follows:¹⁴

An 'expert' under CPR, Part 35, is one who has been instructed to give or prepare evidence for the purpose of court proceedings: r 35.2. Expert evidence should be restricted to that which is reasonably required to resolve proceedings: r 35.1. The expert has a duty to help the court, and this overrides any obligation to the person from whom he has received instructions or by whom he is paid: r 35.3. No party may call an expert or put his report in evidence without the court's permission, and the court may limit fees and expenses that the party who wishes to rely on the expert may recover from any other party: r 35.4(4).

The Criminal Procedure Code (KUHAP) explains the expert witness in General Regulation Chapter, especially in Article 1 item 28 that states: "expert witness is the information given by a person who has special expertise in the necessary things to make light of a criminal offense for the purpose of inspection". It also says that the expert witness may be submitted during the investigation process as well as in the court. Article 120 paragraphs (1) of the Criminal Procedure Code states: "anytime when investigator considers necessary, he can ask the opinion of the experts or people who have special skills".

The explanation section of the article does not explain further on how the expert opinion is required and how the position of people who have special skills. However, according to M Karjadi and R Soesilo, 'the experts' are meant for example a radio mechanic or car mechanic. Meanwhile, 'people who have special skills' are meant for example an astrologer, astronomer, and so on. They can be examined as an ordinary witness without being sworn or consulted as an expert as long as the sworn is beforehand.¹⁵

Article 184 paragraph (1) of the Criminal Procedure Code states the expert witness as evidence. This regulation is followed by the Article 186 that states the expert witness as

¹¹ Henry Campbel, *Black's Law Dictionary* (St Paul Minn: West Publishing Co., 1999).

¹² Rafiqqa Qurrata A'yun, "The Problems of Expert Witness in Criminal Law," *Indonesia Law Review* 4, no. 3 (2014): 340-57, <https://doi.org/DOI: 10.15742/ilrev.v4n3.115>.

¹³ William Statsky, *Legal Thesaurus/Dictionary* (St. Paul: West Publishing Co., 1985).

¹⁴ LB Curzon, *Dictionary of Law. Sixth Edition* (Essex: Pearson Education Limited, 2022).

¹⁵ R. Soesilo, *Kitab Undang-Undang Hukum Acara Hukum Pidana Dengan Penjelasannya Resmi Dan Komentar* (Bogor: Politeia, 1997).

information stated in the court. From the article, according to Karjadi and Soesilo the evidence of expert testimony is not what the experts explain to the investigators or persecutors, rather the information stated by the expert in the court after he took an oath in front of the judge.

3.2 Definition of Medical Malpractice

Though the terminology of malpractice is not recognized in our legal instruments and medical malpractice term is also used for other professions such as lawyer, advocate, judges, accountants, journalists, police and others. In general, malpractice is a terminology which always has adverse effects, is stigmatic and contrary to the rules applicable.

There are two types of malpractices when referring to mistakes made by doctors or other health workers, medical malpractices and medical negligence. Creighton suggested that it would be better to consider "malpractice" synonymous with "Professional Negligence".¹⁶ It is supported by the opinion of Mason-McCall Smith who said that "malpractice is a term Instant confirmation which is increasingly used as a synonym for medical Negligence."¹⁷

According to me, the terms of medical malpractice is not the same as medical negligence. All the mistakes made by doctors and other health professionals both mistakes in the legal and ethical aspects are medical malpractice action. One form of medical malpractice is medical negligence, breach of discipline or intentional actions of doctors resulted in worsening of the patient's health, so that the definition and scope of the medical malpractice wider than the medical negligence.

Norchaya Talib believed that term is a concept in court, where the plaintiff (patient) must prove a defendant's (physician) guilt that the doctor's treatment or other medical measures are not in accordance with what is done by other doctors in general.¹⁸ According Anisah Che Ngah, medical negligence is an act which contains mistakes in establishing the diagnosis, and doctors are not careful or meticulous in carrying out treatment or other medical action.¹⁹ Careful and meticulous treatment or actions are important elements because they are benchmark of right and wrong in their profession.

World Medical Association (WMA) states that medical negligence caused by physicians profession is not compliance with the standards of the medical profession, or a lack of expertise or negligent in carrying out medical treatment which caused injury, disability or even death.²⁰

It should be understood that not all the actions of doctors who fail to cure patients is medical malpractice action because of a medical action acknowledges medical risks and accidents. All medical failure is not an act of medical malpractice when doctors perform surgery in accordance with the Standards of Medical Operations. However, operation may also cause unforeseeable results in patient' injury, disability or even death. It is called medical risks and accidents not medical malpractice. The standard is whether or not doctors operate in accordance with Standards of Medical Operations.

¹⁶ Helen Creighton, *Law Every Nurse Should Know* (U.S.A: W.B. Saunders Company, 1986).

¹⁷ J. S Costante, P & Puro, "Medical Malpractice: An Historical Perspective," *New Jersey Medicine*, 2013.

¹⁸ Adami Chazawi, *Malpraktik Kedokteran; Tinjauan Norma Dan Doktrin Hukum* (Malang: Bayu Media Publishing, 2007).

¹⁹ Anisah Che Ngah, *Perkembangan Undang-Undang Perubatan Di Malaysia: Cabaran Dan Masa Depan* (Kuala Lumpur: Universiti Kebangsaan Malaysia, 2007).

²⁰ World Medical Association, "Statement on Medical Malpractice," WMA General Assembly. Santiago, 2014, <http://www.wma.net/en/30publications/10policies/20>.

Doctors or other health personnels are not responsible for unintended consequences and not caused by a lack of skill or knowledge of doctor.²¹ Therefore, not all careful actions or attitudes considered as medical malpractice.²² If the doctor carrying out their profession in accordance with the Standards of Medical Operations and adjusted to the current development of medical science, the doctor could be free of all charges.

3.3 Doctors as Expert Witnesses

In unveiling truth, verification process that involves a variety of strategies and science (scientific investigation) are required to achieve justice for all parties. Laws can be enforced not only because the superiority of law and the ability of law enforcement alone but it takes the role of support from various disciplines such as forensic science, linguistics, psychology, criminology, victimology and other sciences that according to the case yag being handled.

The role of expert witnesses in uncovering cases is very crucial. This fact is caused by the development of crime is always faster than the development of law. Expert witnesses from various disciplines have to assist law enforcement to take in offenders. This phenomenon is not only happening in Indonesia or Malaysia, even in developed countries like the United Kingdom and the United States.

In the judicial process, everyone can be invited to be witnesses and everyone has an obligation to testify in accordance with the needs of justice. Likewise with the doctor or other health professionals, they also have the same obligation to testify or give testimony correctly in accordance with their expertise.²³

Australian Doctor Association states that doctors have the ethical obligation to assist the court in the process of alternative dispute resolution to testify as an expert witness when necessary. Doctors should give testimony freely, honestly, objectively and provide his opinion only with respect to expertise alone. Doctors also have an obligation to protect the privacy of all the evidences he had.

According to the Australian Medical Association (AMA), the expert witness' testimony is supporting statements from witnesses or other evidence to find the truth. Expert testimony can be in the form of verbal statement, written (*visum et repertum*), medical records, information circumstantial evidence and so forth. The expert testimony should support to uncover the fact that there is a causal link between the faults someone have done with the impact it caused.

In the process of investigation, the cause of injury, permanent disability or even death in patients is already known based on the examination conducted by the doctor. Description from forensic doctors in the form of a post mortem is sufficient to describe the cause of death of the patient, so that the expert witness testimony in medical malpractice cases not only as supporting information but this information could ascertain the cause of the crime occurred.

All statements of witnesses, including expert witnesses in the trial correlate one with another. It complements and perfects each other to unveil truth and justice. To bring in

²¹ Dieter Giesen, *International Medical Malpractice Law: A Comparative Study of Civil Responsibility Arising from Medical Care* (Netherlands: Springer Netherlands, 1988).

²² Salleh Buang, *Undang-Undang Kecuaian Di Malaysia*, ed. Asiah Mohd Yusoff (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1999).

²³ Australian Medical Association, "Ethical Guidelines for Doctors Acting as Medical Witnesses," AMA Position Statement, 2015, <https://ama.com.au/position-statement/ethical-guid>.

perpetrator of medical malpractice, expert witness of facts and expert witness of opinion are needed. They will ascertain whether the operation was executed in accordance with the Standards of Medical Operations and Profession.

The expert witness is a qualified person in terms of knowledge and experience to give an opinion on a particular issue to the court. Witness testimony is one type of evidence in criminal cases in the form of witness testimony about a crime he heard, saw, or based on his own experience by stating the reasons of knowledge. Franklin argued that an expert witness is someone who can conclude based on skill experience or data about an event. They can find it in person or by others, and are able to deliver their opinion.

In the legal perspective, every doctor is an expert, either a judicial expert medical science or not. Therefore all physicians can be approached for their help to enlighten a case and catch the perpetrators. But in order to obtain a maximal assistance, requests for assistance needs to be submitted to the doctor who has expertise in accordance with the object to be inspected.

Australian Medical Association states that doctors have an obligation to assist the courts and alternative dispute resolution process by providing expert evidence in court when summoned. Physicians must provide expert evidence to assist the courts that are impartial, honest, objective and limit their opinion only within the scope of their expertise. Doctors also have an obligation to protect the privacy and confidentiality of all relevant evidence he had.

Doctors involved in court cases because of the expertise, knowledge and its specific area to provide medical evidence. Doctors play an important and integral role in the litigation. Therefore, doctors are entitled to obtain full information about the case, their roles, and everything related to uncover the case. Some countries overseas have MDO (Medical Defence Organization), an organization to be asked for assistance If a lawyer or an investigator has a question or further information and doctors have difficulty in answering.

In Indonesia, the doctor can consult with the Committee of Medicolegal Doctor Indonesia or can go directly to the experts of Forensic Medicine If it is necessary to discuss with other independent expert witness or prepare a report with another expert witness, the physician must give his independent assessment, identify approved matters, not approved and needs to express the reason. Doctors should avoid instruction or request for the agreement. Use moderate and objective manner when giving evidence. Rejects efforts designed to provoke a doctor and avoid debate.

In the aspect of Indonesian law, expert witness is a qualified person in terms of knowledge and experience to give an opinion on a particular issue to the court. Witness testimony is one type of evidence in criminal cases in the form of witness testimony about a crime he heard him, saw, or experience by recalling reasons of knowledge (Article 1 of the Criminal Code Clause 27).

Meanwhile, information or expert opinion is the information given by a person who has special expertise about the necessary things to enlighten a criminal case for the purpose of examination (Article 1 of the Criminal Code Clause 28). Expert testimony is what an expert has stated in court (Article 186 Criminal Procedure Code).

Doctor's obligation to provide expert testimony was provided for in article 133 Criminal Procedure Code. The expert testimony will be used as legal evidence before the trial court

(Article 184 Criminal Procedure Code) and can be administered orally in front of the court (Article 186 Criminal Procedure Code). When a doctor or health worker intentionally does not fulfill the obligation when called as a witness a regular or an expert witness in a case allegedly linked to a crime, then punishable with imprisonment of nine months and in other case, shall be sentenced to a maximum six months (Article 224 of the Criminal Code). In Article 170 Criminal Procedure Code stated that a doctor because of work, the dignity or position may exercise the right to withdraw the request to be exempted from the obligation to give testimony, the medical secret entrusted to him by giving reason to the judge.

The judge will determine whether or not any valid reason for doctors to resign as an expert witness. However, Article 179 Criminal Procedure Code has determined that physicians are required to meet the demand of the court as an expert witness to provide expert explanation or request for information in the examination at the stage prior to the examination session court, can not be ignored by assuming a doctor or health worker has the right to withdraw.

The use of expert witness testimony is very essential in court system because it will reveal the truth pertaining to specific crimes and included as crimes involving profesional group. As a result, sophisticated approach is required to uncover the evidence. All parties to the dispute may file an expert witness if they are doubtful about the proposed expert witnesses. The opposing party shall file a rebuttal expert witnesses to refute the testimony of expert witnesses in advance so that the value of expert witness testimony is very convincing.²⁴

The role of the expert witness is to allow law enforcement to catch the doctor who is alleged to have committed the crime of medical malpractice. According to the Australian Medical Association (AMA), there are two types of witnesses in medical malpractice cases; they are witnesses of facts and independent witnesses. Witness of facts is presented by doctor who performed the inspection, maintain, perform surgery or parties directly involved in the process of medical procedures to patients. The doctor will be asked by the judge to present medical evidence or anything related to the medical measures. Later, they will provide factual information about the outcome rather than the medical measures.

In Malaysia's legal system, there are several criteria that serve as a guide for someone who can serve as an expert witness in court. Article 45 (1) Evidence Act 1950 states that if the court requires the opinion of the laws of foreign countries or of science or art, or about the identity or genuineness of handwriting or fingerprints, it would require the opinions of people who have a particular skill on the case. This regulation has required that people who have special skills that can be tested in academic or work experience he is called the expert in the field of so-called expert witnesses to the fact. However, there are several expert witnesses who are not related directly to the case but can be used as supporting information to corroborate witness testimony to the fact.

Independent witness or witnesses called is the opinion of an independent expert witnesses were asked to give an independent opinion based on the facts of the particular case that already exists. In this case the doctor will give an opinion in accordance with relevant experience and expertise. As a witness of independent experts, doctors can assist the court in two ways, namely by giving expert opinion based on their knowledge and experience to

²⁴ G Stygall, *Trial Language: Differential Discourse Processing and Discursive Formations* (Amsterdam: John Benjamins Publishing Co, 1994).

the facts and inform the court on matters related to their particular expertise so before expert doctors testified, physicians need to know in advance the position as a fact witness or independent witnesses.

In giving testimony, doctors are not angels who know everything. If in the process of verification, there are things that doctors are not familiar with. Here, doctors can consult with the Committee of Medicolegal Doctor Indonesia or can go directly to the experts of Forensic Medicine if it is necessary to discuss with an expert other independent witness or prepare a report with another expert witness, the physician must provide an independent assessment, identify approved matters, not approved and want to express why. Doctors should avoid instruction or request for the agreement. Use moderate and objective manner when giving evidence. Rejects efforts are propokatif and avoid debate.

4. CONCLUSION

In a review of Indonesian and Malaysian Law, all give important positions to the doctor as an expert witness in the process of law enforcement. The only difference is that when a doctor as an expert witness testifies. In Indonesian, doctors can provide information on the stage of the police investigation until the proceedings in the Court. Meanwhile, in Malaysia, the doctor as an expert witness testifies only at the stage of the examination process in any court. There are some obstacles in getting a doctor's expert witness as many who do not want to become an expert witness because they will deal with the defendant who is also their colleagues at a hospital. This may prolong settlement of medical malpractice cases. In addition, it is difficult to find a doctor who became an expert witness whose expertise is relevant to the case at hand because medical malpractice cases are complex and different from other cases that not everyone understands the medical action both methods of treatment and technical operations performed doctor to the patient.

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