



THE PROFESSIONAL DISCIPLINE COUNCIL IN DETERMINING MEDICAL MALPRACTICE OFFENCES: A REVIEW OF REGULATIONS, PROCEDURES, AND CRIMINAL LIABILITY (PROFESSIONAL DISCIPLINE COUNCIL IN DETERMINING MEDICAL MALPRACTICE OFFENCES: A REVIEW OF REGULATIONS, PROCEDURES AND CRIMINAL RESPONSIBILITY)

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Abstract

This study discusses the role of the Professional Disciplinary Council (MDP) in determining the existence of medical malpractice offenses before a case is brought to the general courts. This study is motivated by the need for a more objective assessment mechanism so that alleged errors by medical personnel are not immediately processed as criminal offenses without adequate professional disciplinary assessment. The method used is normative legal research by examining primary legal materials in the form of Law No. 17 of 2023 concerning Health, Law No. 1 of 2023 concerning the Criminal Code, the Criminal Procedure Code, and related regulations, as well as secondary legal materials in the form of books, journals, and legal doctrines. The research questions include the role and procedures of the MDP in handling medical malpractice, the forms of criminal liability for medical personnel under the Criminal Code and the Health Law, and the perspective of Islamic criminal law on the criminal liability of medical personnel. The results of the study indicate that the MDP serves as the initial gateway for disciplinary assessment, whereas criminal liability can only be imposed if there is fault, negligence, and a legally provable causal relationship.

Keywords: Professional Disciplinary Council (MDP); malpractice; criminal liability.

INTRODUCTION

In the legal system, a criminal act is an act that is prohibited by law and punishable by criminal sanctions. This term is known in Dutch as *strafbaar feit*, which literally means a punishable act. Meanwhile, a criminal act is also often referred to as a “delik,” a term derived from the Latin word *delictum*¹. Indonesian legal scholars use various equivalents, ranging from “criminal act,” “delik,” to “criminal offense” itself. Culpability in criminal law studies is recognized in two forms: culpability based on the element of intent and culpability based on the element of negligence.¹ According to Moeljatno, a criminal act is an act prohibited by a legal rule, where such prohibition is accompanied by a threat (sanction) in the form of a specific criminal penalty for anyone who violates that prohibition.³ In line with this, Simons defines a criminal act as a human act that is contrary to the law, committed intentionally or through negligence, by a person capable of bearing responsibility, and punishable by law.

Among the various forms of criminal acts recognized in legal science, there is a specific category that arises not because of the perpetrator's intent to commit a crime, but due to carelessness or negligence in fulfilling a legal obligation. This category is known as a “culpa” or negligence offense, which in the New Criminal Code (Law No. 1 of 2023) is defined as a fault arising from a lack of due care, a lack of knowledge, or a lack of skill that a person should possess in their position. In the context of the medical profession, this form of negligence forms the foundation of what is subsequently referred to as the criminal offense of medical malpractice. Medical

¹ Mar'ie Mahfudz Harahap, Reski Anwar. (2022). Legal Issues in Determining the Principal Perpetrator in the Imposition of Justice of a Specific Criminal Act. *PROGRESIF: Law Journal XVI*/No.

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malpractice can be understood as an act or omission committed by medical personnel in the course of their professional duties that deviates from applicable medical standards of care and results in harm to the patient. This deviation can take the form of an action that should not have been performed (commission) or the failure to perform an action that should have been performed (omission). Thus, medical malpractice is not merely a matter of professional ethics but has evolved into a serious legal issue with intertwined criminal, civil, and administrative dimensions.

Quality healthcare is a fundamental right of every citizen. In the reality of clinical practice, the complexity of medical science and the dynamics of the therapeutic relationship between healthcare providers and patients often lead to disputes that result in allegations of malpractice. Sentencing parameters or standards of sentencing tend to serve as guidelines for judges in determining and applying penalties, or can be referred to as judicial parameters for judges.² Conceptually, medical malpractice can be defined as an act or omission committed by a healthcare professional in the course of their practice that deviates from applicable medical standards, thereby causing physical, psychological, or financial harm to the patient.¹ In legal science, medical malpractice is commonly divided into three categories: ethical malpractice, civil malpractice, and criminal malpractice, with each category having different resolution mechanisms and legal consequences.³

In Islamic teachings, human life holds a very noble position. The protection of human life is normatively guaranteed through the concept of *hifdz al-nafs* (preserving life), which is one of the five primary objectives of Islamic law or *maqashid al-sharia*. This understanding affirms that no human being has the right to take or threaten the life of another human being without a reason justified by *sharia*. Allah SWT explicitly declares His power over life and death in Surah An-Najm verse 44:

وَإِذَا مَاتَ أَحَدٌ مِنْكُمْ فَإِنَّهُ يُرَدُّ إِلَىٰ رَبِّهِ فَيَكْتَبُ لَكُمْ مِنْهُ مَا كُنْتُمْ تَعْمَلُونَ ۚ وَهُوَ الَّذِي يُمْرِكُمْ فِي الْحَيَاةِ وَيُفْضِكُمْ فِيهَا ۖ وَهُوَ الَّذِي يَرْزُقُكُمْ فِيهَا وَمِنْهَا يَذْقُونَ ۚ وَأَلَّا تُؤْمِنُوا بِهِ ۖ فَذُوقُوا الْعَذَابَ بِمَا كُنْتُمْ تَكْفُرُونَ ۚ

Meaning: “And that it is He who causes death and gives life.”¹

This verse serves as a strong philosophical foundation for understanding the responsibilities of the medical profession. A medical professional never truly “holds” the life of their patient—they merely strive using the knowledge and skills at their disposal. However, this effort must be carried out competently and responsibly. Regarding this, the Prophet Muhammad SAW said in a hadith narrated by Abu Daud and Nasa’i:

ضَامِنٌ فَوْقَ طَبِّهِ مَنْ غَلِمَ وَلِ تَطَبَّ بَبَّ ۖ مَنْ

Meaning: “Whoever practices as a doctor (physician) but was not previously known to be skilled in the medical sciences bears the consequences (is liable).”⁴

This hadith affirms the principle of medical professional accountability, which is highly relevant in the context of modern law: competence is an absolute prerequisite, and incompetence that results in harm to the patient gives rise to legal liability. Islam thus not only recognizes the existence of the medical profession but also establishes strict standards of accountability for its practitioners.

The phenomenon of medical malpractice in Indonesia is not a new issue, and cases continue to rise year after year. From 2023 to 2025, no fewer than 51 cases of malpractice were recorded in Indonesia, 24 of which resulted in patient deaths, with 13 cases occurring in 2025 alone. These figures illustrate just how serious the issue of malpractice is for the national healthcare system and indicate a decline in public trust in medical professionals in Indonesia. One of the most landmark medical malpractice cases in the history of Indonesian law involves three obstetrician-gynecologists from Prof. Dr. R.D. Kandou General Hospital in Manado: Dr. Dewa Ayu Sasiary Prawani, Dr. Hendry Simanjuntak, and Dr. Hendy Siagian. The three were charged with negligence in performing an emergency cesarean section (*cito section caesaria*) on a patient named Julia Fransiska Makatey in 2010. The patient died due to an air embolism that entered the right heart chamber. The Supreme Court, through Decision No. 365 K/Pid/2012, sentenced the three doctors to 10 (ten) months in prison. This verdict sparked a massive wave of protests from doctors across Indonesia, who argued that the patient’s medical condition at the time constituted an unforeseeable risk, not merely the result of negligence. This case serves as a stark reminder of the urgent need for a legal framework that is fair, measured, and sensitive to the unique nature of medical science when assessing allegations of malpractice.

² Calvin, Noor Azizah “A Review of Islamic Criminal Law Regarding the Parameters for Imposing the Death Penalty in the National Criminal Code” *Mutawasith: Journal of Islamic Law*, Vol. 7, No. 1 (2024), p. 18

³ Soekidjo Notoatmodjo, *Ethics and Health Law*, (Jakarta: PT. Rineka Cipta, 2010), pp. 123–125.

⁴ HR. Abu Daud and Nasa’i, *Sunan Abu Daud, Book of al-Diyat, Chapter on the Doctor Who Errs*, No. 4586. See also: *Sunan al-Nasa’i*.

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In response to the complexity of this issue, the government has enacted Law No. 17 of 2023 on Health as a new legal framework for the comprehensive administration of the national health system. This law defines healthcare personnel in Article 1, point 7, as any person dedicated to the field of health who possesses knowledge and/or skills acquired through medical professional education, and for certain types of practice, requires authorization to perform healthcare interventions. The normative objectives of health care delivery are affirmed in Article 3(h) of Law No. 17 of 2023, namely to provide legal protection and certainty to patients, health care personnel, and the public.¹ This provision reflects the legislature's intent to balance two equally important interests: the protection of patients' rights on one hand, and legal certainty for medical personnel in the practice of their profession on the other.

In addition to Law No. 17 of 2023, there are a number of other relevant and complementary laws within the legal framework of medical professional liability in Indonesia. Law No. 44 of 2009 on Hospitals regulates the responsibility of hospital institutions regarding the quality of the medical services they provide. The Civil Code, particularly Article 1365, serves as the legal basis for claims for damages resulting from unlawful acts in the civil sphere. Meanwhile, Law No. 8 of 1981 on the Criminal Procedure Code (KUHP) governs the procedures for investigation and prosecution in criminal cases, including in alleged malpractice cases.⁵ Historically, Law No. 29 of 2004 on Medical Practice served as a significant milestone in establishing the regulatory framework for the medical profession in Indonesia before its provisions were integrated into Law No. 17 of 2023.¹

One of the key innovations introduced by Law No. 17 of 2023 is the establishment of the Professional Disciplinary Council (MDP) as the authorized body to investigate and adjudicate whether medical personnel have committed disciplinary violations. Unlike the previous mechanism regulated under Law No. 29 of 2004 through the Indonesian Medical Disciplinary Honorary Council (MKDKI), the MDP under this new legal framework holds a stronger position and operates under more structured procedures. Procedurally, the MDP is established and operates under the coordination of the relevant professional organization, and is tasked with assessing whether the actions of the healthcare professional who is the subject of the complaint have complied with or deviated from applicable professional standards, standard operating procedures, and professional ethics. In relation to the criminal justice process, Law No. 17 of 2023 establishes a crucial mechanism: investigations by law enforcement authorities into alleged criminal acts of medical malpractice cannot be initiated immediately without first awaiting the results of the MDP's examination and recommendations. This provision is explicitly stipulated in Article 308(1) of Law No. 17 of 2023, which states that for the purposes of law enforcement, medical and health personnel suspected of committing criminal offenses in the field of health services must first have their cases reviewed by the Professional Disciplinary Council before an investigation is conducted by law enforcement officials. In other words, the MDP's recommendation is a procedural prerequisite that must be fulfilled before a medical malpractice case can be brought into the general court system.⁶

This mechanism has strong rationality from a criminal law perspective. Given the complexity of medical science and the distinctiveness of medical professional standards, not all parties—including law enforcement officials—possess the technical capacity to assess whether a medical act has deviated from applicable standards or not. This is where the role of the MDP becomes central: as a professional filter ensuring that legal proceedings are initiated only for cases where there are clear indications of a violation of professional discipline, rather than mere failures in medical care that constitute unavoidable risks. Thus, the existence of the MDP within the framework of Law No. 17 of 2023 not only protects medical personnel from unfounded criminalization but also provides more measurable legal certainty for patients who feel they have been wronged.¹

The dimension of criminal liability in malpractice cases finds its legal basis in the New Criminal Code, as stipulated in Law No. 1 of 2023. This New Criminal Code replaces the *Wetboek van Strafrecht voor Nederlandsch Indie* (WvS), which has been in effect since the colonial era. In the New Criminal Code, provisions regarding criminal negligence (*culpa*) resulting in the death and/or injury of another person are retained and

⁵ Law No. 44 of 2009 on Hospitals, Official Gazette of the Republic of Indonesia Year 2009 No. 153; Civil Code (*Burgerlijk Wetboek*), Article 1365 on Unlawful Acts; and Law No. 8 of 1981 on the Criminal Procedure Code (KUHP), specifically the provisions regarding investigation.

⁶ Article 308(1) of Law No. 17 of 2023

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refined, particularly in the context of negligence committed by professionals in the exercise of their expertise.⁷ The application of the New Criminal Code to medical malpractice cases requires the cumulative fulfillment of criminal elements: the existence of an act or omission (*actus reus*), the existence of fault in the form of intent or negligence (*mens rea*), the existence of a causal link (*causaal verband*) between the medical professional's actions and the harm suffered by the patient, and the absence of valid grounds for criminal exemption. Thus, not every failure of medical treatment automatically constitutes a criminal offense—careful and measured proof is required.

In their work *Criminal Law on Medical Malpractice: A Review and the Upholding of Justice*, Ari Yunanto and Helmi comprehensively examine the criminal liability of medical personnel and conclude that proving the element of negligence in medical malpractice depends heavily on the applicable standard of care as well as testimony from competent experts.¹ Bahder Johan Nasution, in **Health Law: Doctors' Liability**, analyzes the legal relationship between doctors and patients from civil and criminal perspectives, emphasizing the importance of a clear distinction between unavoidable medical risks and negligence subject to legal sanctions.⁸ Hermien Hadiati Koeswadji, in **Medical Law: A Study of Legal Relationships in Which the Doctor Is One of the Parties** examines the dynamics of the therapeutic relationship from a legal perspective and asserts that the doctor-patient relationship is fundamentally an *inspanningsverbintenis* (, or obligation of effort), not a *resultaatverbintenis* (, or obligation of result), so that a doctor cannot be punished merely because the patient does not recover.¹

From the perspective of Islamic criminal law, Wahbah al-Zuhaili in *Al-Fiqh al-Islami wa Adillatuhu* discusses criminal liability in the context of medical negligence and classifies a doctor's negligence into the categories of *syibh al-'amd* (resembling intent) or *khatha'* (pure negligence), with legal consequences involving *diyat* as compensation to the victim's family.⁹ Moh. Erfan Riadi, in his study on *Medical Malpractice from an Islamic Law Perspective*, concludes that Islamic criminal liability for malpractice is not purely retributive but contains a restorative dimension through the mechanisms of *diyat* and *ta'zir*, which allow for the restoration of relationships between the perpetrator, the victim, and society.¹

These previous studies have made valuable contributions to the development of health law in Indonesia. However, most of these studies were conducted prior to the enactment of Law No. 17 of 2023 on Health and Law No. 1 of 2023 on the New Criminal Code, and thus have not yet accommodated the fundamental changes introduced by these two laws. There is a significant research gap, particularly regarding: (1) how the new MDP mechanism interacts with the criminal justice system in handling malpractice cases; and (2) how the New Criminal Code reshapes the landscape of criminal liability for medical personnel in Indonesia. Furthermore, there are few academic studies that specifically integrate the perspective of Islamic criminal law into the analysis of the MDP mechanism and the New Criminal Code, even though this integration is highly relevant for the development of a just legal system in Indonesia as a country with a Muslim majority population.¹⁰ Based on the background described above, this study formulates two main research questions as follows: (1) how do the regulations and procedures of the Professional Disciplinary Board (MDP) handle cases of medical malpractice under Law No. 17 of 2023? (2) What is the criminal liability for medical malpractice under Article 474 of the new Criminal Code and Article 440 of Health Law No. 17 of 2023? and (3) What is the perspective of Islamic criminal law regarding the criminal liability of medical personnel in malpractice cases?

RESEARCH METHOD

This study employs the normative legal research method, which involves examining secondary sources such as legislation, legal principles, legal rules, legal theories, and applicable legal doctrines. Peter Mahmud Marzuki defines normative legal research as a process to identify legal rules, legal principles, and legal doctrines to address the legal issues at hand.¹ The selection of this method is based on the characteristics of the problem under study, namely analyzing and constructing legal norms governing the criminal liability of medical

⁷ Law No. 1 of 2023 on the Criminal Code, Official Gazette of the Republic of Indonesia Year 2023 No. 1. Provisions regarding criminal negligence resulting in death are regulated in Article 474, while negligence resulting in injury is regulated in Article 475 of the New Criminal Code.

⁸ Bahder Johan Nasution, *Health Law: Physician Liability*, (Jakarta: PT. Rineka Cipta, 2005), pp. 78–95.

⁹ Wahbah al-Zuhaili, *Islamic Jurisprudence and Its Evidence*, Vol. VII, (Damascus: Dar al-Fikr, 1989), pp. 319–325.

¹⁰ Samsi Jacobalis, *The Development of Medical Science, Medical Ethics, and Bioethics*, (Jakarta: CV. Sagung Seto in collaboration with Tarumanegara University, 2005), p. 57.

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personnel in cases of medical malpractice in hospitals, particularly regarding the provisions of Law No. 17 of 2023 on Health, Law No. 1 of 2023 on the Criminal Code (New Criminal Code), as well as relevant Islamic criminal law norms. This study is not intended to test hypotheses through field data collection, but rather to provide a systematic and comprehensive legal analysis of the two research questions that have been established.¹¹

This study utilizes three types of legal materials. First, **primary legal materials**, which are legally binding, including: the 1945 Constitution; Law No. 1 of 2023 on the New Criminal Code; Law No. 17 of 2023 on Health; Law No. 44 of 2009 on Hospitals; Law No. 8 of 1981 on the Criminal Procedure Code; Article 1365 of the Civil Code; as well as relevant court decisions, particularly Supreme Court Decision No. 365 K/Pid/2012 and Rehearing Decision No. 79 PK/Pid/2013. Second, **secondary legal materials**, namely various legal literature in the form of textbooks, scientific journals, and relevant previous research, both from the perspective of positive law and Islamic criminal law, including the works of Ari Yunanto and Helmi, Bahder Johan Nasution, as well as the book *Al-Fiqh al-Islami wa Adillatuhu* by Wahbah al-Zuhaili. The collection of legal materials was conducted through library research, which involves a series of activities related to gathering library materials, reading and taking notes, and processing research materials from various relevant sources.¹

To analyze the legal issues formulated, this study employs two primary approaches commonly used in normative legal research: the statutory approach and the conceptual approach. These two approaches were chosen because they complement each other: the statutory approach provides a positive and binding normative foundation, while the conceptual approach offers a theoretical framework that enables the researcher to interpret and develop these legal norms more deeply.

The first approach is the statutory approach. This approach involves examining all laws and regulations that have a direct or indirect connection to the legal issue under study. According to Peter Mahmud Marzuki, the statutory approach is used to examine all laws and regulations related to the legal issue at hand, with the aim of determining whether there is consistency and compatibility between one law and another, or between a law and the constitution. The second approach is the conceptual approach. Unlike the statutory approach, which relies on normative texts, the conceptual approach is based on legal concepts and doctrines that have developed within legal scholarship.

The combination of these two approaches is considered the most appropriate for addressing the research questions that have been established. The statutory approach ensures that the analysis remains grounded in applicable positive law, while the conceptual approach allows researchers to fill gaps in the law and offer broader, more contextual interpretations. Thus, the research results are expected not only to describe the existing legal situation (*ius constitutum*) but also to make a constructive contribution to the development of better law in the future (*ius constituendum*), particularly regarding the regulation of criminal liability for medical personnel and the role of professional disciplinary boards within Indonesia's legal system.¹²

RESULTS AND DISCUSSION

I. The Mechanism of the Professional Disciplinary Council (MDP) in Handling Cases of Medical Malpractice Based on Law No. 17 of 2023 on Health and Its Implications for the Police Investigation Process 1. The Status and Legal Basis of the Professional Disciplinary Council (MDP)

Law No. 17 of 2023 on Health (hereinafter referred to as the 2023 Health Law) brings about fundamental changes to the system of oversight and enforcement of medical professional discipline in Indonesia. One of the most significant updates is the establishment of the Professional Disciplinary Council (MDP) as an institution specifically authorized to examine, adjudicate, and rule on alleged violations of medical professionals' professional discipline, including in the context of medical malpractice. The establishment of the MDP is explicitly regulated in Article 304(2) of the 2023 Health Law and Government Regulation No. 28 of 2024 in Articles 712(1), which state that for the purpose of enforcing discipline among medical and health personnel, the government shall establish a Professional Disciplinary Council. Furthermore, Article 304(3) of the 2023 Health Law affirms that the MDP is tasked with investigating, adjudicating, and ruling on alleged violations of professional discipline committed by medical and health personnel.¹

¹¹ Soerjono Soekanto and Sri Mamudji, *Normative Legal Research: A Brief Overview*, (Jakarta: PT. Raja Grafindo Persada, 2003), pp. 13–14.

¹² Ronny Hanitijo Soemitro, *Legal Research Methodology and Jurimetrics*, (Jakarta: Ghalia Indonesia, 1990), pp. 41–42.

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The establishment of the MDP represents a legislative response to the urgent need for a more specialized and accountable institution to address issues of violations of medical professional standards. Unlike its predecessor institutions, such as the Indonesian Medical Disciplinary Honorary Council (MKDKI), the MDP has a broader scope as it covers all medical and health personnel, not just doctors and dentists. Legally, the MDP operates autonomously within Indonesia's healthcare legal ecosystem, meaning its processes and decisions are not directly influenced by any specific professional organization.

The composition of the MDP reflects multi-stakeholder representation, comprising professional organizations, government representatives, and members of the public. This representation is crucial to ensure that MDP decisions are not solely driven by the interests of professional groups but also prioritize the protection of the public as recipients of healthcare services. This is relevant given that medical malpractice is not merely a matter of professional ethics but also touches upon patients' fundamental rights as legal subjects that must be protected by the state, as mandated by Article 28H(1) of the 1945 Constitution of the Republic of Indonesia, which guarantees every person's right to health care.¹³

Article 304 of the Health Law (Law No. 17 of 2023) regulates the establishment and authority of the Professional Disciplinary Council (MDP), stipulating that the MDP is established independently to enforce professional discipline and ethics among medical and health personnel in order to support professionalism and protect the public. Furthermore, the MDP is regulated in Government Regulation (GR) No. 28 of 2024 on the Implementing Regulations of Law No. 17 of 2023 on Health, specifically in Part Eight, Paragraph 1 (Articles 712–720).¹

2. Mechanisms and Procedures for Investigations by the MDP

The mechanism for handling malpractice cases by the MDP begins with a complaint that may be filed by a patient, the patient's family, or other parties with a legal interest. The complaint must be submitted in writing, accompanied by preliminary evidence supporting the allegation of a professional disciplinary violation. Upon receiving the complaint, the MDP conducts an administrative screening to verify whether the complaint meets formal requirements before proceeding to the substantive review stage.

The next stage is a preliminary review conducted by a panel of experts appointed by the MDP. This panel consists of medical professionals with expertise in the field relevant to the case under review, ensuring that the resulting assessment is grounded in an objective and standardized medical perspective. In this process, both the complainant and the respondent are given equal opportunity to present their statements, evidence, and arguments in accordance with the principle of *audi et alteram partem* (hearing both sides).

The MDP's review focuses on technical medical aspects, including: (a) whether the medical professional in question acted in accordance with the applicable standard of care; (b) whether there was negligence in the diagnostic process, administration of therapy, or surgical procedures; and (c) whether the healthcare facility's standard operating procedures were properly followed. These examination standards are measured based on what a healthcare professional of average competence (reasonable physician) should have done under similar circumstances.¹⁴

If the investigation results confirm a disciplinary violation, the MDP has the authority to impose disciplinary sanctions, which include: a written warning, a recommendation for the temporary revocation of a practice license, up to a recommendation for the permanent revocation of a practice license to the competent authority. It is important to understand that these sanctions are administrative in nature and do not preclude criminal or civil liability, which may be separately imposed on the healthcare professional in question. The 2023 Health Law explicitly separates the realm of professional discipline from the realm of criminal law, as a recognition that the two are enforcement systems with distinct objectives and mechanisms.

3. Implications of the MDP Mechanism on Police Investigations

One of the most crucial aspects of the implementation of the 2023 Health Law is the obligation for the police to first seek the opinion of the MDP before conducting an investigation into alleged health-related criminal offenses committed by medical personnel. This obligation is stipulated in Article 308(1) of the 2023 Health Law, which explicitly requires investigators to seek the MDP's opinion when dealing with alleged criminal offenses committed by medical or health personnel in the course of their practice.¹

¹³ Law No. 17 of 2023 on Health, Articles 283–298 on the Professional Disciplinary Council; see also General Explanation of the 2023 Health Law, Official Gazette of the Republic of Indonesia Year 2023 No. 105. ²⁷ Article 304 of the Health Law

¹⁴ Indonesian Medical Council, Guidelines for the Disciplinary Council of Medical and Health Personnel (Jakarta: KKI, 2023), pp. 12–18.

This provision has sparked a number of substantive academic debates. On the one hand, the obligation to consult the MDP prior to an investigation is intended to ensure that the police have a strong scientific basis before designating someone as a suspect, thereby avoiding the risk of overcriminalization of medical actions that actually meet professional standards. On the other hand, some view this mechanism as an obstacle to effective law enforcement, particularly for victims of malpractice who require legal certainty more promptly.¹⁵

From the perspective of criminal procedure law, the police, as investigators under Article 6(1) of the Criminal Procedure Code (KUHP), possess full authority to conduct investigations into alleged criminal offenses. However, the 2023 Health Law, as *lex specialis*, imposes an additional procedural requirement in the form of an opinion or recommendation from the MDP as a prerequisite before formal investigation begins. Furthermore, Article 308(1) of the 2023 Health Law stipulates that investigators are required to report to the MDP if, during the investigation process, indications of professional disciplinary violations are found.

An MDP opinion stating that a medical act constitutes a disciplinary violation provides a scientific basis for investigators to proceed with a criminal investigation. Conversely, if the MDP opines that the medical professional's actions were in accordance with professional standards, investigators should take that opinion seriously. Nevertheless, the MDP's opinion is not legally binding on investigators, as investigative authority falls entirely within the purview of the police under criminal procedure law. The relationship between the MDP and the police in this context is one of coordination and consultation, not a hierarchical one.

Compliance of Medical Personnel with Health Service Standards and Efforts to Meet Professional Standards Under Law No. 17 of 2023 on Health

1. Medical Service Standards as a Measure of Medical Personnel Professionalism

In Indonesia's health law system, the concept of "standards" serves as the primary benchmark used to assess whether a healthcare professional has acted professionally or not. Law No. 17 of 2023 on Health comprehensively regulates three types of standards that must be adhered to by every healthcare professional, namely: (1) professional standards, which are the minimum competency requirements that a healthcare professional must possess in practicing their profession based on established scientific knowledge, skills, and behavior as defined by professional organizations; (2) service standards, which are guidelines that healthcare professionals must follow when providing healthcare services based on the type and level of healthcare facilities; and (3) standard operating procedures (SOPs), which are a set of standardized instructions or steps for carrying out specific work processes within healthcare facilities.

These three standards are hierarchical and complementary. This means that a healthcare professional who only follows professional standards without complying with the service standards of the healthcare facility where they work—or vice versa—cannot be categorized as a healthcare professional working in accordance with regulations. The 2023 Health Law explicitly mandates that healthcare professionals, in carrying out their practice, must provide healthcare services in accordance with professional standards, service standards, and standard operating procedures, as well as the health needs of patients. This obligation is not optional but is an absolute requirement inherent in every form of medical practice, whether in primary, secondary, or tertiary healthcare facilities. To understand more concretely how these standards are applied, the definitions of each must be elaborated. Professional standards encompass aspects of medical knowledge, clinical skills, and professional conduct established by professional organizations such as the Indonesian Medical Association (IDI) for physicians, or the Indonesian National Nurses Association (PPNI) for nurses. These standards are typically outlined in clinical practice guidelines and evidence-based medical management guidelines. Meanwhile, service standards are more contextual in nature because they are tailored to the type of healthcare facility, available resources, and local geographical conditions. A tertiary hospital in a major city will have different service standards than a community health center in a remote area, yet both are still required to meet the minimum quality thresholds set by the Ministry of Health.¹

2. Indicators for Assessing Healthcare Personnel Compliance with Healthcare Service Standards

Assessing whether a healthcare worker has performed their duties in accordance with standards is not a purely subjective evaluation or one based solely on perception. The 2023 Health Law and its implementing regulations establish a number of objective indicators that can be used as assessment parameters. These indicators can be categorized as follows:

¹⁵ M. Nasser, "Medical Malpractice and Criminal Liability of Doctors," Indonesian Journal of Health Law, Vol. 2, No. 1 (2021), pp. 45–52. Available in the OJS database of the Indonesian Journal of Health Law.

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a. Possession of a Certificate of Registration (STR) and a Certificate of Practice (SIP)

The first and most fundamental indicator is the possession of a Certificate of Registration (STR) issued by the Indonesian Health Workforce Council (KTKI), as well as a Practice License (SIP) issued by the local government. The STR is a written document issued by the KTKI to healthcare professionals who have met competency requirements and possess the qualifications to practice in Indonesia. Meanwhile, the SIP is a license granted to medical personnel to practice at specific healthcare facilities. Without these two documents, a medical professional is legally unauthorized to provide healthcare services, and their actions may be classified as unlicensed practice, which violates the provisions of the 2023 Health Law.

b. Obligation to Obtain Informed Consent

The second indicator is healthcare professionals' compliance with the obligation to obtain informed consent from the patient or their family before performing specific medical procedures. The principle of informed consent is grounded in the value of patient autonomy—the patient's right to decide for themselves what actions will be taken regarding their body after receiving adequate explanation from healthcare professionals. The 2023 Health Law stipulates that any medical procedure involving high risk must be preceded by the provision of clear, complete, and easily understandable information to the patient, including: the diagnosis of the disease, the procedure to be performed, the risks and benefits of the procedure, available alternative treatments, and the prognosis if the procedure is not performed. A healthcare provider's failure to obtain valid consent constitutes a violation of standards and may serve as grounds for a complaint to the MDP.¹⁶

c. Compliance with Medical Record Obligations

The third indicator is the obligation of healthcare providers to create and maintain medical records in an orderly, complete, and accurate manner. Medical records are not merely ordinary administrative documents but are important legal instruments because they document the entire diagnostic and therapeutic process performed on the patient. The 2023 Health Law requires all healthcare professionals to maintain medical records in the course of medical practice, which must include the patient's identity, date of examination, results of the medical history and physical examination, diagnosis or medical issues, treatment plan, procedures performed, clinical observation notes and treatment outcomes, as well as informed consent for procedures when required. Complete and accurate medical records serve as primary evidence that healthcare professionals have acted in accordance with procedures. Conversely, incomplete, manipulated, or entirely absent medical records may strongly indicate negligence or the concealment of medical errors.¹

d. Compliance with Clinical Privileges and Referral Obligations

The fourth indicator is whether healthcare providers act in accordance with the clinical privileges granted by the healthcare facility. Clinical privileges are the rights of healthcare providers to perform specific medical procedures at a healthcare facility based on a competency assessment conducted by the facility's Medical Committee. A surgical specialist, for example, is not authorized to perform procedures outside their area of expertise except in emergency situations. If a patient's condition requires treatment beyond the healthcare provider's clinical privileges, the provider is obligated to refer the patient to a more competent healthcare provider or a higher-level healthcare facility. Failure to make the appropriate referral constitutes a violation of service standards and is a common basis for malpractice lawsuits in Indonesia.

3. Efforts by Healthcare Professionals to Work in Accordance with Health and Professional Standards

Compliance with medical service standards is not a static condition that can be achieved once in a lifetime, but rather a continuous process that demands active commitment from every healthcare professional throughout their professional career. The 2023 Health Law, both implicitly and explicitly, encourages healthcare professionals to continuously improve their competencies and adapt to advancements in medical science and technology. The following are concrete efforts that healthcare professionals must undertake to be categorized as professionals working in accordance with health and professional standards:

a. Continuing Medical Education

The first and most fundamental step is active participation in Continuing Medical Education (CME) programs. These programs are a mandatory requirement for renewing the STR, which is valid for a limited

¹⁶ Regulation of the Minister of Health of the Republic of Indonesia No. 290/Menkes/Per/III/2008 on Consent for Medical Procedures. This regulation details the mechanisms, requirements, and legal consequences of the informed consent requirement, which remains in effect as an implementing regulation as long as it does not conflict with the 2023 Health Law. Access: <https://peraturan.go.id/id/permenkes-nomor-290-menkes-per-iii-2008>.

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period of five years. In CME, healthcare professionals are required to accumulate a certain number of Professional Credit Units (PCUs) from various scientific activities such as seminars, symposia, workshops, research, writing scientific articles, and community service activities. This CME requirement is not merely an administrative formality but a systematic mechanism to ensure that every healthcare professional consistently updates their knowledge and skills in line with the latest advancements in medical science. The 2023 Health Law emphasizes the role of professional organizations and the government in facilitating and ensuring the effective and equitable implementation of CME across all regions of Indonesia.¹⁷

b. Implementation of Good Clinical Governance

The second effort is the implementation of good clinical governance at both the institutional and individual levels. Clinical governance is a systematic framework through which healthcare organizations are responsible for continuously improving the quality of their services and maintaining high service standards by creating an environment conducive to the development of clinical excellence. In practical terms, these efforts include: (1) conducting peer reviews that allow medical staff to evaluate the quality of each other's clinical practices; (2) conducting periodic medical audits to assess the alignment of patient management with applicable standards; (3) active participation in case conferences or mortality and morbidity conferences (M&M Conferences) to study cases involving complications or deaths without defensiveness; and (4) the development and updating of Clinical Practice Guidelines (CPGs) and Standard Operating Procedures (SOPs) based on the latest scientific evidence.¹

c. Implementation of a Patient Safety Culture

The third effort, which is no less important, is the implementation of a patient safety culture. This concept refers to the values, attitudes, competencies, and behavioral patterns of individuals and groups that collectively determine a healthcare facility's commitment, approach, and capacity in managing patient safety risks. Under the 2023 Health Law, healthcare facilities are required to implement a comprehensive patient safety management system, and healthcare professionals—as the frontline of care—play a central role in this system. Concretely, patient safety culture is realized, among other things, through: (1) a patient safety incident reporting system that allows healthcare workers to report near misses and adverse events without fear of sanctions; (2) the implementation of surgical safety checklists recommended by the World Health Organization (WHO); (3) the implementation of the double-check principle in the administration of high-risk medications; and (4) effective communication among healthcare workers using the SBAR method (Situation, Background, Assessment, Recommendation).¹⁸

d. Adherence to Professional Ethics and Oversight by Professional Organizations

The fourth effort involves adherence to professional codes of ethics and active participation in the oversight mechanisms conducted by respective professional organizations. A professional code of ethics is a set of moral and professional norms established by a professional organization to guide the behavior of its members. The Indonesian Medical Code of Ethics (KODEKI), for example, regulates not only the relationship between doctors and patients, but also the relationship between doctors and their peers, with other health professions, and with the general public. Violations of the code of ethics do not always entail criminal liability, but may result in ethical sanctions from the professional organization, ranging from restrictions to the revocation of membership. Under the 2023 Health Law system, the professional code of ethics serves as the first line of defense before a healthcare professional's actions are evaluated within the realm of professional discipline (MDP) or the legal realm. Healthcare professionals who consistently adhere to professional ethics will find it easier to demonstrate that their actions are based on good faith and do not intend to harm patients, which is one of the elements of a defense in malpractice cases.¹

e. Orderly and Transparent Documentation

The fifth effort, which is often overlooked yet crucial, is the implementation of organized and transparent documentation in every aspect of clinical practice. In addition to medical records discussed above, proper documentation also includes: recording every instance of patient education, documenting patient responses to administered therapies, documenting every change to the treatment plan along with its rationale, and recording

¹⁷ Indonesian Medical Association (IDI), Guidelines for the Implementation of Continuing Medical Education (CME) (Jakarta: IDI, 2022). Provisions regarding the CME requirement as a condition for STR renewal are regulated in the regulations of the Indonesian Health Workforce Council.

¹⁸ World Health Organization (WHO), Patient Safety: Making Health Care Safer (Geneva: WHO, 2017). This document is freely available at <https://www.who.int/publications/i/item/WHO-HIS-SDS-2017.11>.

communication among healthcare professionals related to patient care. In the era of healthcare digitalization driven by the 2023 Health Law through the concept of healthcare transformation, the use of electronic medical records (EMR) is increasingly encouraged as a more efficient, secure, and easily auditable means of documentation. Well-managed EMRs not only protect patients but also protect healthcare professionals from baseless accusations, as every clinical step taken is automatically recorded with a tamper-proof timestamp.¹⁹

Overall, if all the above efforts are consistently implemented and integrated into daily practice, a healthcare professional can be categorized as one who works in accordance with health and professional standards. Conversely, if the Medical Disciplinary Board (MDP) finds during its review that one or more of these standard elements are not met, the healthcare professional in question risks being found to have committed a professional disciplinary violation. The 2023 Health Law thus serves not only as a legal enforcement instrument following the occurrence of a violation but also as a preventive guide that, if followed diligently, will minimize the risk of healthcare professionals becoming involved in legal issues due to malpractice. Thus, compliance with standards is not only a legal obligation but also the best protection for healthcare professionals themselves in carrying out their profession with dignity and safety.

II. Criminal Liability of Medical Personnel Who Commit Malpractice Based on Article 474 of the New Criminal Code and Article 440 of Health Law No. 17 of 2023

1. The Normative Framework for Criminal Liability in the New Criminal Code

The new Criminal Code, namely Law No. 1 of 2023 on the Criminal Code (hereinafter referred to as the New Criminal Code), brings fundamental changes to Indonesia's criminal law framework, including provisions regarding criminal liability for acts of negligence. The New Criminal Code comprehensively regulates criminal liability in Book I, which contains the general principles of criminal law, while criminal provisions regarding negligence resulting in death or injury are specifically regulated in Articles 474 and 475.

Article 36(1) and (2) of the New Criminal Code address the fundamental principle of criminal liability, namely the principle of "no crime without fault" (*mens rea*). This provision ensures that a person cannot be arbitrarily punished without the presence of an element of intent or negligence. This rule applies such that legal liability can only be imposed if a criminal act is committed with intent or negligence. Article 37(a) of the New Criminal Code provides for the possibility that a person may be punished solely because the elements of a criminal act are fulfilled, without considering the presence of fault.²⁰

Specifically, Article 474(3) of the New Criminal Code states that any person who, through negligence, causes the death of another person shall be punished by imprisonment for a maximum of 5 (five) years or a fine of up to Category V. Meanwhile, Article 474(2) of the New Criminal Code provides that negligence resulting in serious injury to another person is punishable by imprisonment for a maximum of 3 (three) years or a fine of up to Category IV. These two articles replace Articles 359 and 360 of the old Criminal Code (*Wetboek van Strafrecht*), which have long served as the basis for criminal prosecution in medical malpractice cases.¹

What makes Article 474 of the New Criminal Code even more relevant in the context of medical malpractice is the inclusion of Article 474(3) regarding aggravated penalties for a person whose negligence results in the death of another person, and Article 474(2) regarding the criminal offense of gross negligence resulting in serious injury. As stipulated in Article 475(1), if the act is committed by a person in the course of performing a position or profession requiring specialized expertise, the criminal penalty imposed is increased by one-third (1/3). This aggravating provision applies directly to medical personnel practicing medicine, so that the criminal penalty for medical personnel who are negligent and cause the death of a patient can be up to 6 (six) years and 8 (eight) months in prison.

2. Article 440 of the 2023 Health Law as *Lex Specialis* Regarding Medical Malpractice

In addition to the New Criminal Code, the 2023 Health Law contains specific criminal provisions for medical personnel who commit negligence in the course of their practice. These provisions are set forth in Article 440 of the 2023 Health Law, which serves as *lex specialis* regarding the provisions of the New Criminal Code in the handling of medical malpractice cases. Article 440(1) of the 2023 Health Law stipulates that medical personnel who practice incompetently, thereby causing a patient to suffer injury or disability, shall be punished

¹⁹ Ministry of Health of the Republic of Indonesia, Roadmap for Health Digital Transformation 2021–2024 (Jakarta: Ministry of Health of the Republic of Indonesia, 2021). This document contains national policies regarding the digitization of medical records and the implementation of the Electronic Medical Record (EMR). Available at <https://sehatnegeriku.kemkes.go.id>.

²⁰ Article 37(a) of the New Criminal Code

by imprisonment for a maximum of 3 (three) years. Furthermore, Article 440(2) of the 2023 Health Law increases the penalty to a maximum of 5 (five) years' imprisonment if such negligence results in the patient's death. Section 440 differs substantially from the provisions in the New Criminal Code because it specifically targets medical personnel operating within the context of professional healthcare services, emphasizing the element of incompetence as a form of negligence that is punishable by law.

From the perspective of criminal law principles, the concurrent application of Article 440 of the 2023 Health Law and Article 474 of the New Criminal Code must be resolved using the rule of *lex specialis derogat legi generali*, meaning that the more specific provision (the 2023 Health Law) supersedes the more general provision (the New Criminal Code) to the extent that both address the same matter. However, in cases where the 2023 Health Law does not address a specific aspect, the New Criminal Code remains applicable as a general rule that supplements it. Consequently, the public prosecutor may choose whether to charge medical personnel accused of malpractice under Article 474 of the New Criminal Code, Article 440 of the 2023 Health Law, or both cumulatively.²¹

3. Elements of Criminal Liability for Medical Personnel

Doctrinally, criminal liability requires the fulfillment of two inseparable core elements: the existence of a criminal act (*actus reus*) and the presence of fault (*mens rea*) on the part of the perpetrator. In the context of medical malpractice, a criminal act can take the form of an active act (commission), such as performing surgery in a manner deviating from standard procedures, or a passive act involving a failure to act (omission), such as disregarding a patient's complaints that should have been addressed immediately.¹ For a healthcare professional to be held criminally liable for malpractice under Article 474 of the New Criminal Code and Article 440 of the 2023 Health Law, the following elements must be proven cumulatively:

First, the existence of a legal duty of care between the healthcare professional and the patient. This legal relationship is established from the moment the healthcare professional accepts or begins treating the patient, whether in a private practice setting or within a hospital or other healthcare facility.

Second, there must be a breach of the standard of medical care. A healthcare professional is deemed to have breached the standard if they act below the minimum competency expected of a healthcare professional with average ability in the same specialty and under similar conditions.

Third, there must be a causal relationship (causation) between the healthcare provider's negligence and the harm suffered by the patient. This causal relationship must be direct (proximate cause), not merely an indirect contributing factor.

Fourth, there must be actual harm (damages) to the patient, whether in the form of severe injury, disability, or death. This element of harm distinguishes malpractice from mere imperfections in treatment outcomes (medical risk), which are inherent risks of every medical procedure.²²

Fifth, the perpetrator must possess the capacity to be held criminally liable (*toerekeningsvatbaarheid*). Article 39 of the New Criminal Code (KUHP) states that a person cannot be held criminally liable if, at the time of committing the act, they were suffering from a mental disorder or mental illness that rendered them incapable of understanding the nature of their actions.¹

4. Forms of Fault in Malpractice: Negligence (Culpa)

In cases of medical malpractice, the form of fault that most frequently forms the basis for criminal liability is negligence or culpa. Unlike intent (*dolus*), which requires the will to cause a prohibited consequence, negligence in the context of criminal law is a condition in which the perpetrator fails to exercise the due care expected of them based on their capacity and knowledge. Indonesian criminal law doctrine, grounded in the teachings of figures such as Moeljatno and Roeslan Saleh, distinguishes negligence into two types: *culpa lata* (gross negligence) and *culpa levis* (minor negligence). In the context of medical malpractice that is punishable under Article 474 of the New Criminal Code, what is required is *culpa lata*—that is, negligence so severe that it can be categorized as an act contrary to the law and cannot be justified.²³

²¹ Law No. 1 of 2023 on the Criminal Code, Article 474(2) and (3), Official Gazette of the Republic of Indonesia Year 2023 No. 1, Supplement to the Official Gazette No. 6842.

²² Leden Marpaung, *Elements of Punishable Acts (Offenses)* (Jakarta: Sinar Grafika, 1991), pp. 24–30. See also Teguh Prasetyo, *Criminal Law*, Revised Edition (Jakarta: Rajawali Pers, 2014), p. 96.

²³ Roeslan Saleh, *Criminal Acts and Criminal Liability: Two Fundamental Concepts in Criminal Law* (Jakarta: Aksara Baru, 1983), p. 80.

Specifically, culpa lata in medical practice can manifest in various forms, including: failure to diagnose a serious illness that should have been detected; administration of medication or a dose that is clearly inappropriate; performing surgical procedures without adequate expertise or competence; and neglect of a patient's critical condition requiring immediate intervention. In all these situations, what is assessed is not the final success of the medical action, but rather the conformity of the process with applicable professional standards.¹

Theories of Positive Criminal Law Relevant to the Criminal Liability of Medical Personnel 1.

The Theory of Fault (Schuldtheorie)

The theory of fault is the primary foundation of modern criminal liability. According to this theory, a person can only be held criminally liable if fault is present (geen straf zonder schuld — no punishment without fault). This principle is explicitly adopted in the New Criminal Code through Article 36(2), which establishes fault as an absolute requirement for criminal liability. In the context of medical malpractice, the application of the theory of fault means that criminal proof is not sufficient merely by demonstrating that a healthcare professional caused harm to a patient; it must also be proven that such harm resulted from negligence or culpable intent.

Moeljatno explains that fault comprises three main elements: (a) the capacity of the actor to be held responsible; (b) the mental connection between the actor and their act, in the form of intent or negligence; and (c) the absence of an exculpatory justification that negates fault. All three of these elements must be cumulatively satisfied to impose criminal liability on medical personnel accused of malpractice.

2. The Theory of Liability Based on Fault vs. Strict Liability

In modern criminal law doctrine, there is a debate over whether medical professionals' liability for malpractice should be based on a fault-based liability system or a strict liability system. The fault-based liability system adopted by the New Criminal Code requires proof of negligence or intent before a person can be criminally punished. Conversely, strict liability does not require proof of fault; it is sufficient to prove that the act occurred and caused a prohibited consequence.²⁴

Under current Indonesian criminal law, medical professionals' liability for malpractice continues to follow the fault-based liability system as stipulated in Article 474 of the New Criminal Code and Article 440 of the 2023 Health Law. The use of strict liability in criminal law is strictly limited and applies only to specific crimes defined by law, as its broad application could threaten the human rights of the accused, particularly the right to the presumption of innocence.¹

3. The Theory of Causation in Medical Malpractice

The theory of causation plays a crucial role in criminal liability for medical malpractice because it determines whether there is a sufficient causal link between the actions or negligence of medical personnel and the harm suffered by the patient. In Indonesian criminal law, several relevant theories of causation are recognized, including *conditio sine qua non* (the equivalence theory developed by von Buri), the adequate causation theory, and the theory of reasonable attribution (*redelijke toerekening*).

The adequate causation theory, which is most widely accepted in Indonesian judicial practice, states that a cause can only be recognized as the legal cause of a consequence if it can reasonably and logically be anticipated that the cause will result in the relevant consequence. In the context of medical malpractice, this theory means that negligence by medical personnel can only be linked to a patient's death or injury if, logically and based on current medical knowledge, such negligence reasonably caused the resulting harm.²⁵

III. Criminal Liability of Medical Personnel for Malpractice from the Perspective of Islamic Criminal Law 1. Fundamental Principles of Islamic Criminal Law Relevant to Medical Malpractice

Islam, as a comprehensive system of norms, places the preservation of human life (*hifdzun nafs*) as one of the five primary objectives of Sharia (*al-maqashid al-khamsah*) that must be upheld and protected. The other four *maqashid* are the preservation of reason (*hifdzul 'aql*), religion (*hifdzud din*), lineage (*hifdzun nasl*), and property (*hifdzul mal*). Within this framework of the *maqashid* of Sharia, any action that negligently or

²⁴ Chairul Huda, "From 'No Crime Without Fault' to 'No Criminal Liability Without Fault'" (Jakarta: Kencana, 2006), pp. 68–73.

²⁵ E. Utrecht, *Criminal Law I* (Bandung: Padjadjaran University, 1960), pp. 257–261. See also Andi Hamzah, *Principles of Criminal Law*, Revised Edition (Jakarta: PT Rineka Cipta, 2010), p. 130.

recklessly results in harm or the loss of a person's life—including in medical practice—constitutes a serious violation of Sharia norms for which one must be held accountable.¹

The fundamental principle of liability in Islamic law is *la dharara wa la dhirara* (one must not cause harm to oneself or others), as stated by the Prophet Muhammad (peace be upon him). This principle underpins the entire relationship between medical personnel and their patients: a physician is obligated to act with all the knowledge and ability at their disposal to protect the patient from harm. If he fails to fulfill this obligation due to negligence or lack of due care (*taqshir*), then he has violated the fundamental principle of Islamic law and must bear the legal consequences.²⁶

Islamic criminal law (*jinayah*) classifies criminal acts based on the presence or absence of malicious intent (*qashd*) on the part of the perpetrator. Islamic law also allows for pardon and reduction of punishment, particularly in cases involving *qisas*, *diyat*, and *ta'zir*.¹ In the context of medical malpractice, the actions of medical personnel are generally not carried out with the intent to harm patients, so they categorically fall into the group of *jarimah khatha'* (unintentional acts) or *syibh al-khatha'* (acts resembling intentional ones). This categorization has direct implications for the type and severity of sanctions imposed.

2. The Concept of the Responsible Physician in Classical Fiqh

The *fuqaha* define a *tabib* (doctor/medical professional) as someone who possesses specialized expertise in the field of medicine and has obtained a license from the ruler (*ijazah al-sultan*) to practice. In classical *fiqh*, authorization from the ruler is an absolute prerequisite for anyone to practice medicine. The absence of such authorization directly renders the medical professional in question fully liable for any harm resulting from their actions, as they are acting beyond their authority.²⁷

Imam al-Mawardi, in his work **Al-Ahkam al-Sultaniyyah**, states that a physician who acts without a valid license and causes the death or injury of a patient must be held liable () for their actions. Furthermore, some scholars argue that even a licensed physician may still be held accountable if it is proven that they committed an error deviating from the medical standards they are qualified to practice.¹

Wahbah al-Zuhaili, in **Al-Fiqh al-Islami wa Adillatuh**, categorizes a physician's liability into three categories: First, a licensed physician who acts in accordance with professional standards but causes death or injury due to unavoidable complications cannot be held criminally liable. Second, a licensed physician who commits negligence (*taqshir*) resulting in harm is liable under civil law (*dhaman al-mal*). Third, an unlicensed physician or one acting beyond their competence is fully liable under both civil and criminal law.

3. Islamic Legal Sanctions for Malpractice Resulting in Death: Diyat and Kafarat

If medical malpractice results in the death of a patient, Islamic law classifies it as a *jarimah qatl alkhatha'* (unintentional homicide). The legal basis is the verse of Allah SWT in Surah Al-Nisa' verse 92, which states that a person who kills a believer by mistake (unintentionally) must free a believing slave and pay *diyat* to be handed over to the victim's family, unless they (the victim's family) choose to donate it as charity.

The primary penalty in cases of medical malpractice resulting in death is *diyat* (financial compensation). The amount of *diyat* for the death of a person is 100 camels or an equivalent value. The *fuqaha* differ regarding who bears the obligation of *diyat*: whether the physician personally or whether it is the responsibility of the *'aqilah* (family or solidarity group). The majority of scholars hold that in cases of unintentional negligence, the burden of *diyat* is borne by the *'aqilah*, not by the perpetrator personally. In addition to *diyat*, *kafarat* is also required of the perpetrator of unintentional homicide. *Kafarat* takes the form of freeing a slave, and if unable to do so, fasting for two consecutive months. *Kafarat* has a spiritual dimension distinct from *diyat*: *diyat* is material compensation for the victim's family, while *kafarat* is an expiation (atonement) with a vertical dimension between the perpetrator and Allah SWT.²⁸

4. Penalties for Medical Malpractice Resulting in Injury: Arsh and Qishash Al-Atraf

If medical malpractice results in physical injury without leading to death, Islamic law provides two sanction mechanisms: *qishash al-atraf* (retaliation involving the affected body part) and *arsh* (compensation for injury to a body part). In cases of medical malpractice classified as *jarimah khatha'*, *qishash* is generally not applied due to the absence of intent; therefore, the obligation to pay *arsh* as compensation for the resulting injury applies.

²⁶ Ahmad Wardi Muslich, *Islamic Criminal Law* (Jakarta: Sinar Grafika, 2005), pp. 165–170.

²⁷ Ibn Qudamah, *Al-Mughni*, Vol. VIII (Beirut: Dar al-Kitab al-Arabi, 1983), pp. 324–327.

²⁸ Topo Santoso, *Conceptualizing Islamic Criminal Law: The Application of Islamic Sharia in the Context of Modernity* (Bandung: Asy Syaamil, 2000), pp. 140–145.

The amount of arsh varies depending on the type and severity of the injury sustained by the patient. Classical jurists have established detailed provisions regarding the amount of arsh for various types of injuries. In a modern context, determining the amount of arsh requires adaptation to current economic and social conditions through *ijtihad jama'i* (collective *ijtihad*) by authorized Islamic jurisprudence institutions.

5. Ta'zir Sanctions as an Instrument for Enforcing Medical Professional Discipline in Islamic Law

Islamic law emphasizes the importance of restoring the rights of victims and seeking the rehabilitation of perpetrators, rather than focusing solely on punishment.¹ In addition to *diyat*, *arsh*, and *kafarat*, Islamic law recognizes *ta'zir* as a sanction imposed by the authorities (*ulil amri*) or a judge based on considerations of the public interest (*mashlahah mursalah*). *Ta'zir* has no fixed standard in the texts of Islamic law and is entirely left to the judge's discretion based on the severity of the offense and its impact on society. In the context of medical malpractice, *ta'zir* serves as a highly relevant and flexible legal instrument. Forms of *ta'zir* that may be imposed on medical personnel proven to have committed malpractice include: revocation of the license to practice (*intiza' al-ijazah*), issuance of a stern warning (*tawbikh*), financial fines (*gharamah*), prohibition from practicing in a specific region, and even imprisonment () in particularly severe cases. This flexibility is essential in addressing the diverse types and severity levels of medical malpractice, while also serving as a deterrent (*al-zajr*) and preventing the recurrence of similar acts in the future.

CONCLUSION

Initially, the police cannot initiate an investigation into alleged medical malpractice before a decision or opinion is issued by the Professional Disciplinary Board (MDP). The MDP's decision serves as the initial threshold for determining whether medical personnel can indeed be held criminally liable, as without such an assessment, alleged medical acts cannot yet be directly classified as criminal offenses. The MDP also emphasizes that criminal liability can only arise if it is proven that there was negligence or misconduct in the performance of professional duties.

From the perspective of the Criminal Code (KUHP) and the Health Law, criminal liability for medical personnel is determined by the fulfillment of the elements of the act, fault, and the resulting harm, not merely because the treatment outcome did not meet expectations. Thus, medical personnel are not automatically subject to criminal liability merely because a patient suffers harm; rather, it must first be proven that there was negligence violating professional standards, service standards, or applicable procedures.

From the perspective of Islamic criminal law, the responsibility of medical personnel is viewed through the lenses of due diligence, professional trust, and the protection of human life. If medical negligence results in harm or death, liability may be imposed through the concepts of *diyat* and *ta'zir*, commensurate with the degree of fault committed. Therefore, Islamic criminal law fundamentally requires medical personnel to work with care, competence, and responsibility to ensure patient safety.

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