



Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>

[IJCS] Submission Acknowledgement

Support Manager <support@lifescienceglobal.com> 19 November 2020 15.03
Kepada: Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>

Ahmad Syaafi:

Thank you for submitting the manuscript, "APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES" to International Journal of Criminology and Sociology. With the online journal management system that we are using, you will be able to track its progress through the editorial process by logging in to the journal web site:

Manuscript URL:

<https://www.lifescienceglobal.com/pms/index.php/ijcs/author/submission/6886>

Username: asyaafi

If you have any questions, please contact me. Thank you for considering this journal as a venue for your work.

Support Manager

International Journal of Criminology and Sociology

International Journal of Criminology and Sociology
<http://www.lifescienceglobal.com/pms/index.php/ijcs>

Lampiran

TITLE PAGE



Article Title

Application of Restorative Justice Values in Settling Medical Malpractice Cases

Author

Ahmad Syaafi

Diana Haiti

Mursidah

Affiliation

¹Lambung Mangkurat University

²Public senior high school 8 Banjarmasin

Corresponding author

Lambung Mangkurat University, Kalimantan Selatan 70123, Indonesia

Jl. Brigjen H. Hasan Basri, Pangeran, Banjarmasin, Kalimantan Selatan 70123, Indonesia.

Email: asyaafi@ulm.ac.id; asyaafi.fh.unlam@gmail.com

Tel: 08125024987

Fax: (0511) 3305648

Statement

We hereby confirm that the manuscript has no any actual or potential conflict of interest with any parties, including any financial, personal or other relationships with other people or organizations within three years of beginning the submitted work that could inappropriately influence or be perceived to influence. We confirm that the paper has not been published previously, it is not under consideration for publication elsewhere, and the manuscript is not being simultaneously submitted elsewhere.

APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES



ABSTRACT

Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This research is a qualitative research using normative legal research as a scientific research procedure to find the truth based on legal scientific logic from the normative side. In an effort to achieve the stated research objectives, this study uses a statute approach approach and a conceptual approach approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Keywords: *Restorative Justice, Legal Settling, Medical Malpractice Restorative Justice, Legal Settling, Medical Malpractice*

INTRODUCTION

Lawsuits submitted by patients or their families to the hospital and/or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence law. The behavior demanded is medical malpractice which is the designation "genus" (collection) of medical professional behavior groups that deviate and cause injury, death, or harm to patients. Basically, the hospital functions as a place to heal illnesses and restore health and the intended function has a meaning of responsibility which should be the responsibility of the government in improving the level of community welfare. Malpractice victims in Indonesia often find it difficult to seek justice, the current legal system has not yet sided with patients. Health sector reform that includes a variety of substances, including malpractice, is urgently needed to prevent further casualties. Health reforms that cover a variety of substances, especially malpractice victims are increasingly widespread. If counted annually from Jakarta, it tends to increase, not to mention those in the regions. The Jakarta Legal Aid Institute (LBH) revealed, Reports of malpractice cases and the absence of the right to health are likely to increase. In 2009, LBH Jakarta recorded at least 7 complaints reports from the public. In 2010 the number increased to 10 complaints.

The current law governing health and hospital matters does not favor the patient because it places evidence on the victim. In this case the patient must prove the occurrence of malpractice. In addition, there is a gap (distance) of knowledge and information between the

victim and the doctor, if this is aligned with the usual evidentiary law that is related to the criminal law, it certainly will not be met, and even tends to lose the patient, because all the evidence held by the doctor. Based on observations of LBH Jakarta, reports from the community in the police regarding malpractice have been relatively deadlocked, and many have even stopped, this is because the police always base their investigations on expert statements. What was said by the expert was recorded by the police, in this case the expert who gave objective information or not. On the other hand the patient (victim) who asks the expert of a doctor is reluctant to give testimony of this matter there is a kind of conspiracy in the world of medicine, to cover up so that for example the doctor is protected from his mistakes. This fact is not surprising if many people prefer to remain silent rather than have to report events that have befallen them due to poor health services, even patients often consider this as a fate that must be accepted. The practice of settling criminal cases outside the court so far has no formal legal basis, so there are often cases where informally there has been a peaceful settlement (though through a customary law mechanism), the judicial process is still processed according to the applicable law (Arief, 2008). Based on the description, the main problem in this paper is how to apply the values of restorative justice in solving medical malpractice cases?

RESEARCH METHODOLOGY

This research is a qualitative research using normative legal research. Normative legal research is a scientific research procedure to find the truth based on legal scientific logic from the normative side (Ibrahim, 2006). In an effort to achieve the stated research objectives, this study uses a statute approach approach and a conceptual approach approach.

RESULT AND DISCUSSION

Black's Law Dictionary mentions malpractice is any attitude of wrong action, lacking skills in an unnatural measure. This term is generally used towards the attitude of actions of doctors, lawyers, and accountants. Failure to provide professional services and do so at a reasonable level of skill and intelligence by the average colleague of his profession in society, resulting in injury, loss or loss in service recipients who trust them, including wrong professional acts, lack of improper skills, violating professional or legal obligations, very bad practices, illegal, or immoral behavior. Herkutanto (2011) quoted from the Word Medical Association Statement on Medical Malpractice adapted from the 44th World Medical Assembly Marbella Spain, September 1992 states tha: "medical malpractice is the failure of doctors to meet the standard procedures in handling their patients, the inability or negligence, causing a direct cause of harm to the patient. Komalawati (1989) states that the term malpractice comes from "malpractice" which in essence is a mistake in carrying out the profession that arises as a result of obligations that must be done by doctors. According to Chazawi (2007), medical malpractice is a doctor or a person who under his command intentionally or negligently performs acts (active or passive) in the practice of medicine to his patients at all levels that violate professional standards, standard procedures or medical principles, or by violating law without authority; by causing a result (causaal verband) loss of body, physical and mental health and or life of the patient, and therefore establishes legal liability for doctors.

According to Hanafiah & Amir (1999), medical malpractice is the negligence of a doctor to use the level of skills and knowledge that is commonly used in treating patients or injured

people according to the size of the same environment. Meanwhile, according to Ninik Mariyanti (1988), malpractice actually has a broad understanding, which can be described as follows:

1. In a general sense: a bad practice, which does not meet the standards set by the profession;
2. In a special sense (seen from the patient's point of view) malpractice can occur in determining the diagnosis, carrying out operations, during treatment, and after treatment.

Based on some understanding of medical malpractice above scholars agree to interpret medical malpractice as the fault of health workers who for not using knowledge and skill levels in accordance with professional standards which ultimately results in injured or disabled patients or even death. Malpractice according to Lestari (2001) and Isfandyarie (2005) can be distinguished in two forms, namely ethical malpractice and juridical malpractice. Every juridical malpractice is definitely an ethical malpractice, but not all ethical malpractice is a legal malpractice. Ethical malpractice occurs when doctors perform actions that are contrary to the medical code of ethics which is a set of ethical standards, principles, rules and norms that apply to doctors in carrying out their profession (Purwadi et al., 2019). Soedjatmiko (2001) distinguishes juridical malpractice in three categories, namely:

1. Civil malpractice.
Civil malpractice will occur if the doctor or the hospital does not fulfill the obligation or does not provide the rights of the patient based on the agreement to provide health services, so that the doctor and or the hospital have defaulted on the agreement. Civil malpractice can also occur if the doctor or patient does an action that causes harm to the patient so that it can be said to have committed an illegal act.
2. Criminal malpractice.
Criminal malpractice occurs if there is a doctor's mistake in taking a careless action that causes the patient to die or become disabled. Criminal malpractice can occur due to three things, namely: (i). for example, in cases of leaking medical secrets, abortions without medical indication or omitting a patient for any reason; (ii). due to carelessness that occurs because the doctor or health worker acts not in accordance with medical standards or without asking for patient consent; and (iii). due to negligence that occurs due to inadvertence of the doctor causing death or disability in the patient. Criminal malpractice also occurs if there is an incident in the form of omission and/or rejection of patients who come, citing the patient's inability to pay for hospital, medical and/or nursing services, both inpatient and outpatient. This type of malpractice occurs because there is no fulfillment of obligations prescribed by law by the hospital in the form of providing assistance to patients who should be helped, resulting in death or disability in these patients as a result of lack of help.
3. Administrative malpractice.
Administrative malpractice occurs if doctors, health workers or hospitals practice violating state administrative laws such as carrying out practices without permission, carrying out practices or actions that are not in accordance with their permits, or having their licenses expired and or carrying out practices without making medical records clear.

There are three theories that mention the source of malpractice, namely (Mariyanti, 1988):

1. Contract Violation Theory.

The first theory is that the source of malpractice is due to breach of contract. This is based on the principle that legally a health worker has no obligation to care for someone if between the two there is no contractual relationship between the health worker and the patient. The relationship between health workers and patients only occurs when a contract has occurred between the two parties.

In relation to the relationship between the patient's contract with the health worker, it does not mean that the relationship between the health worker and the patient always occurs with mutual agreement. In cases where the patient is not self-conscious or in an emergency situation, for example, a person may not give their consent.

If this situation occurs, then the approval or contract of the patient's health worker can be requested from a third party, namely the patient's family acting on behalf of and representing the patient's interests. If this is also not possible, for example because the emergency patient comes without family and is only escorted by other people who happen to have helped him, then in the interest of the sufferer, according to applicable laws, a health worker is required to provide assistance as well as possible. This action has been legally considered as an embodiment of the medical-patient contract.

2. Theory of Deliberate Acts.

The second theory that can be used by patients as a basis for suing health workers for malpractice is intentional tort, which results in someone physically injured (assault and battery).

3. Theory of Negligence.

The third theory states that the source of malpractice is negligence. Negligence that causes the source of actions that are categorized in this malpractice must be proven to exist, besides the negligence in question must be included in the category of gross negligence (*culpa lata*). To prove this is certainly not an easy task for law enforcement officers.

The concept of solving medical malpractice cases both contained in Act Number 29 of 2004 concerning Medical Practices, Act Number 36 of 2009 concerning Health, and Act Number 44 of 2009 concerning Hospitals only regulates the settlement of cases in the realm of civil law. For medical malpractice cases that contain elements of criminal law directly submitted to the police for an investigation process as referred to in Article 186 of Law Number 36 Year 2009, it reads: supervisory staff must report to investigators in accordance with the provisions of the legislation".

Arrangement of medical malpractice case/dispute settlement through civil law can be seen in Article 29 of Law Number 36 Year 2009 which states that: "In the case of health personnel suspected of negligence in carrying out their profession, negligence must be resolved first through mediation".

Further in the Elucidation of the article states that "mediation is conducted if a dispute arises between the health service provider and the patient as the recipient of health services. Mediation is carried out aimed at resolving disputes outside the court by mediators agreed by the parties". Likewise Article 60 letter f of Law Number 44 Year 2009, states that "the Provincial Hospital Supervisory Agency is in charge of receiving complaints and making efforts to resolve disputes by means of mediation".

Claims for medical malpractice often fail in the middle of the road because of the difficulty of proof. In this case the doctor needs to defend himself and defend his rights by stating the reasons for his actions. Both in the case patients and doctors, judges and prosecutors have difficulty in dealing with this medical malpractice problem, especially from the legal technical point of view or legal formulation that is appropriate to use. The problem lies in the absence of specific legal studies on medical malpractice that can be used as a guideline in determining and overcoming the existence of medical malpractice in Indonesia. For this reason, it is necessary to review the criminal law formulation policy regarding mediation of penalties

which can be linked to medical negligence or malpractice, especially in providing legal protection to victims of malpractice in this case patients.

If the lawsuit is filed through a criminal legal process, then the patient is sufficient to report it to the investigator by showing preliminary evidence or reasons. Furthermore, investigators will conduct investigations by conducting police actions, such as examining witnesses and suspects, examining documents and requesting expert handling. *Visum et repertum* may be needed by investigators, the investigation result file is submitted to the public prosecutor to be able to compile its claims, in the event that the investigator does not find sufficient evidence then it will be considered for the issuance of termination of the investigation, so that most patients do lose on court.

For the public, especially victims, the question of concern is why it is so difficult to bring malpractice cases from the operating table to the court. Whether the existing legal instruments and legislation are not enough to bring the issue of medical malpractice into the realm of law, especially criminal law, it is necessary to review the current formulation policy (laws relating to medical malpractice) and formulation policies that are will come in overcoming the crime of medical malpractice by emphasizing uniformity and consistency in terms of the formulation of criminal acts, criminal liability and the most appropriate punishment in order to provide a sense of justice for victims and perpetrators as well as the use of mediating penal as one form of settlement in the medical field *ius constituendum* in an effort to provide a sense of justice for victims. This is related to the development of criminal law in various countries today, namely the use of mediation of penalties as an alternative to solving problems in the field of criminal law.

The development of the theory of punishment always experiences ups and downs in its development. Criminal theories aimed at rehabilitation have been criticized because they are based on the belief that rehabilitation goals cannot work. In the 1970s there were pressures that treatment of rehabilitation was unsuccessful and indeterminate sentences were not given appropriately without guidelines.

Against the pressures on rehabilitation goals the "Justice Model" was born as a modern justification for punishment proposed by Sue Titus Reid (1987). This justice model is also known as the justice approach or just reward model (Just Desert Model). This model is based on 2 (two) theories about the purpose of punishment, namely prevention and retribution. The basis of retribution in the just desert model assumes that violators will be judged by the sanctions that should be received by violators in view of the crimes they have committed, proper sanctions will prevent criminals from committing more criminal acts and prevent others from committing crimes.

Under this just desert model scheme, perpetrators with the same crime will receive the same punishment and the more serious perpetrators of the crime will receive a harsher sentence than the lighter offenders. There are 2 things that become critics of this just desert theory, namely: First, because desert theories place primarily by emphasizing the relationship between proper punishment and crime rates, so that with the interest of treating such cases, this theory ignores differences other relevant differences between the perpetrators such as the personal background of the offender and the impact of punishment on the offender and his family. This theory also often treats cases that are not the same in the same way. Second, overall the emphasis is on guidelines for distinguishing crime and criminal records that affect the psychology of punishment and those who punish (Tonry, 1996). The Restorative Justice Model which is often confronted with the Retributive Justice Model and is a development of the Restitutive Justice

Model. Van Ness & Daniel (1980) states that the foundation of restorative justice theory can be summarized in the following characteristics (Abidin, 2005) :

1. Crime is primarily a conflict between individuals resulting in injuries to victims, communities and the offenders themselves, only secondary is it lawbreaking. (free translation: Crimes by their very nature are primary conflicts between individuals resulting in injury to victims, the community and the perpetrators themselves, while the definition of crime as something that is illegal is only secondary)
2. The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.
3. The overall goal of the criminal justice process must be to reconcile the parties to the conflict/dispute, as well as repair the injuries caused by the crime)
4. The criminal justice process should facilitate active participation by victims, offenders and their communities. A should not be dominated by government to the exclusion of others.
5. The criminal justice process must facilitate the active participation of victims, perpetrators and the community. This should not be dominated by the government by putting aside other people or other matters).

The restorative justice model is proposed by abolitionists who reject coercive means in the form of litigative facilities and are replaced by reparative (non-litigation) facilities. Abolitionists consider the criminal justice system to contain problems or structural flaws so that it must realistically change the structural basis of the system (Bentham, 1996; Van Apeldoorn & Leyten, 1972; Radbruch, 2004). In the context of a criminal sanction system, the values underlying abolitionist understanding still make sense to look for alternative sanctions that are more feasible and effective than institutions such as prisons. The restorative justice model to be built by abolitionists can be seen in detail the comparison of the current system (which abolitionists call retributive justice) and the system proposed by abolitionists under the name restorative justice, as follows (Muladi, 1995).

Table 1	
COMPARISON BETWEEN RETRIBUTIVE AND RESTORATIVE JUSTICE	
Retributive Justice	Restorative Justice
1. Crimes are formulated as violations of the State	1. A crime is formulated as someone's violation of another person
2. Attention is directed towards determining mistakes in the past	2. The point of attention on problem solving, responsibility and obligations in the future
3. Relations of parties that are resistant, through an orderly and normative process	3. Normative nature is built on the basis of dialogue and negotiation
4. Application of suffering for digestion and prevention	4. Restitution as a means of improving the parties, reconciliation and restoration as the main objective
5. Justice is formulated with deliberate and process	5. Justice is formulated as rights relations, assessed on the basis of results
6. The nature of the conflict from evil is obscured and suppressed	6. Crimes are recognized as conflicts
7. One social loss is replaced by another	7. Target attention on repairing social losses
8. Society is on the sidelines displayed abstractly by the state	8. The community is a facilitator in the restorative process
9. Promoting competitive and individualistic values	9. Promote mutual assistance
10. Action is directed from the state to perpetrators of crime: passive victims	10. The role of victims and perpetrators of crime is recognized, both in the problem and in the settlement of the rights and needs of victims, perpetrators of criminal acts are encouraged to take responsibility

11. The responsibility of the perpetrators of criminal acts is formulated in the context of criminal prosecution	11. The perpetrator's responsibility is formulated as the impact of the request on the action and to help decide the best
12. Crimes are formulated in legal terminology which are theoretical and pure, without having moral, social and economic dimensions	12. Crimes are understood in a holistic, moral, social and economic context
13. Sin or debt is given to the State and society abstractly	13. Sin or debt and liability to the victim are recognized
14. The reactions and responses are focused on the perpetrators of the crimes that have occurred	14. The reactions and responses are focused on the consequences of the actions of the perpetrators of the crime
15. The stigma of crime cannot be eliminated	15. Stigma can be removed through restorative action
16. There is no encouragement to repent and forgive	16. There are possibilities that are helpful
17. Attention is directed at the debate between free will and social psychological determinism in the power of evil	17. Attention is directed to accountability for the consequences of actions

Restorative justice places a higher value in the direct involvement of the parties. The victim is able to restore the element of control, while the perpetrator is encouraged to assume responsibility as a step in correcting the mistakes caused by crime and in establishing his social value system. Community involvement actively strengthens the community itself and binds the community to values to respect and love one another. The role of the government is substantially reduced in monopolizing the current judicial process. Restorative justice requires cooperative efforts from the community and government to create a condition where victims and perpetrators can reconcile conflict between the two parties and repair the wounds of both parties. This consensus agreement as putlined in Pancasila has a philosophical and theological foundation that leads to the restoration of the dignity and dignity of all parties involved, replacing the atmosphere of conflict with peace (the principle of friendship), eliminating blasphemous blasphemy with forgiveness, stopping demands for blame and blame (the principle of mutual forgiveness and asking for forgiveness) to God). Desired clarification is not through the court table, but through the table of peace and negotiation (the principle of deliberation).

CONCLUSION

Settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

REFERENCES

Abidin, Z. (2005). *Pemidanaan, Pidana, dan tindakan dalam Rancangan KUHP 2005*. Elsam.

- Arief, B. N. (2008). *Mediasi penal: penyelesaian perkara di luar pengadilan*. Program Magister Ilmu Hukum, Pascasarjana, Undip.
- Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.
- Chazawi, A. (2007). *Malpraktik kedokteran: tinjauan norma dan doktrin hukum*. Bayumedia.
- Hanafiah, M. J., & Amir, A. (1999). *Etika kedokteran dan Hukum kesehatan*. Jakarta: EGC.
- Herkutanto, H. (2011). *Medicolegal Aspects of Emergency Services*. *Journal of the Indonesian Medical Association*, 57(02).
- Hutapea, T. P. D. (2018). Penerapan Rehabilitasi Medis Dan Sosial Bagi Prajurit Tni Dalam Putusan Pengadilan/The Implementation Of Medical And Social Rehabilitation For Indonesian National Armed Forces Personnel In Court Decision. *Jurnal Hukum dan Peradilan*, 7(1), 67-86.
- Ibrahim, J. (2006). *Teori dan metodologi penelitian hukum normatif*. Malang: Bayumedia Publishing, 57.
- Isfandyarie, A. (2005). *Malpraktek dan resiko medik dalam kajian hukum pidana*. Prestasi Pustaka Publisher.
- Komalawati, V. (1989). *Hukum dan etika dalam praktek dokter*. Pustaka Sinar Harapan.
- Lestari, N. (2001). *Masalah Malpraktek Etik Dalam Praktek Dokter*. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar, Malang*.
- Mariyanti, N. (1988). *Malpraktek kedokteran: dari segi hukum pidana dan perdata*. Bina Aksara.
- Muladi. (1995). *Kapita selekta sistem peradilan pidana*. Badan Penerbit Universitas Diponegoro.
- Ness, V., & Daniel, W. (1980). *Restorative justice and International Human Rights, Restorative Justice: International Perspektive*, edited by Burt Galaway and Joe Hudson, Amsterdam, The Netherland.
- Purwadi, A., Enggarsasi, U., & Suhandi, S. (2019). From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes. *Journal of Advanced Research in Law and Economics*, 10(5), 1517-1524.
- Radbruch, G. (2004). *Philosophy of law. Moscow: International relationships [in Russian]*.
- Reid, S. T. (1987). *Criminal justice: Procedures and issues*. West Publishing Company.
- Soedjatmiko, H. M. (2001). *Masalah Medik dalam Malpraktik Yuridik*. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran*.
- Tonry, M. (1996). *Sentencing matters*. *Journal of Criminal Justice*, 6(24), 570-571.
- Van Apeldoorn, L. J., & Leyten, J. C. (1972). *Inleiding tot de studie van het Nederlandse recht. 17., herziene dr. door JCM Leyten*. Tjeenk Willink.

Peer Review Process



Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>

RE: [IJCS] Submission Acknowledgement

mzahid@lifescienceglobal.com

23 November 2020

<mzahid@lifescienceglobal.com>

19.12

Kepada: Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>

Dear Prof./Dr. Ahmad Syaufi,

Thank you for submitting the manuscript, "APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES" to International Journal of Criminology and Sociology.

Please be informed that the article processing charges for an accepted paper are USD 530. If you agreed then we will proceed your paper for peer review.

Looking forward for your positive response.

Regards,

Zahid Khan
Manager Publications
www.lifescienceglobal.com

-----Original Message-----

From: Support Manager [mailto:support@lifescienceglobal.com]

Sent: Thursday, November 19, 2020 1:04 PM

To: Ahmad Syaufi

Subject: [IJCS] Submission Acknowledgement

Ahmad Syaufi:

Thank you for submitting the manuscript, "APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES" to International Journal of Criminology and Sociology. With the online journal management system that we

are using, you will be able to track its progress through the editorial process by logging in to the journal web site:

Manuscript URL:

<https://www.lifescienceglobal.com/pms/index.php/ijcs/author/submission/6886>

Username: asyaufi

If you have any questions, please contact me. Thank you for considering this journal as a venue for your work.

Support Manager

International Journal of Criminology and Sociology

International Journal of Criminology and Sociology

<http://www.lifescienceglobal.com/pms/index.php/ijcs>

Ahmad Syaui <asyaufi.fh.unlam@gmail.com>

23 November 2020 19.00

Kepada: mzahid@lifescienceglobal.com

Dear Editor

Thanks for your positive feedback.

We agree with the fee and schedule of publication

Please proceed our paper to review phase.

Best regards,

Saufi

[Kutipan teks disembunyikan]

mzahid@lifescienceglobal.com

28 November 2020

<mzahid@lifescienceglobal.com>

19.51

Kepada: Ahmad Syaui <asyaufi.fh.unlam@gmail.com>

Dear Prof./Dr. Ahmad Syaui,

Thank you for your positive response.

You may suggest 3-4 names of referees with their email IDs who may help in peer review of the articles.

Regards,

Zahid Khan

Manager Publications

www.lifescienceglobal.com

[Kutipan teks disembunyikan]

Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>
Kepada: mzahid@lifescienceglobal.com

29 November 2020 19.29

Dear Editor,

We suggest four potential reviewers:

Anne-Maree Farrell

School of Law, Queen's University Belfast, UK

A.Farrell@qub.ac.uk

Gefei Shi

Shanghai Key Laboratory of Forensic Medicine, Shanghai Forensic Service Platform, Academy of Forensic Science, China.

shigf@ssfjd.cn

Nuannuan Lin

Assistant Professor in Law, School of Law, Deakin University, Australia.

n.lin@deakin.edu.au

Weijun Hu

Independent researcher, formerly an assistant professor at Fudan University, China.

william.wj.hu@outlook.com

best regards,

Ahmad Syaafi

[Kutipan teks disembunyikan]

mzahid@lifescienceglobal.com

<mzahid@lifescienceglobal.com>

Kepada: Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>

30 November 2020

20.41

noted

[Kutipan teks disembunyikan]

mzahid@lifescienceglobal.com

<mzahid@lifescienceglobal.com>

Kepada: Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>

28 Desember 2020

19.35

Dear Prof./Dr. Ahmad Syaafi,,

This is with reference to your manuscript entitled “**APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES**” submitted for publication in the International Journal of Criminology and Sociology. It is my pleasure to inform you that the referees have suggested to accept your manuscript after some minor revision.

You are required to revise your manuscript according to the referees' comments **below** and **highlight the changes**, in addition to these comments also please have a look at Editorial Requirements at 'Authors Guidelines' particularly in term of reference section when revising your manuscript. We greatly, anticipate submission of your revised manuscript (in **MS-Word** or **LaTeX**) **in a week**.

Reviewer comments :

It is important to correct some things in the abstract, introduction, methodology, and results that need to be following the review. References need to be added in the last 10 years. Overall, this article is interestingly outlined by the author.

Please note that the publishing option for authors after their manuscript is accepted for publications:

OPEN ACCESS: Your article your article is published with barrier free access for readers. The article processing fee is **US\$ 530**.

Please make sure to send your response to the reviewers comments in a separate word file.

You are requested to kindly confirm a safe receipt of the message and don't hesitate to contact us if you have any additional query/concern.

Looking forward to hear from you at your earliest possible.

Regards,
Zahid Khan
Manager Publications
www.lifescienceglobal.com

From: mzahid@lifescienceglobal.com [mailto:mzahid@lifescienceglobal.com]

Sent: Monday, November 30, 2020 6:42 PM

To: 'Ahmad Syaafi'

Subject: RE: [IJCS] Submission Acknowledgement

noted

[Kutipan teks disembunyikan]

mzahid@lifescienceglobal.com

<mzahid@lifescienceglobal.com>

Kepada: Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>

28 Desember 2020

19.37

Regards,

Zahid Khan

Manager Publications

www.lifescienceglobal.com

From: mzahid@lifescienceglobal.com [mailto:mzahid@lifescienceglobal.com]

Sent: Monday, December 28, 2020 5:36 PM

To: 'Ahmad Syaafi'

Subject: RE: [IJCS] Submission Acknowledgement

Dear Prof./Dr. Ahmad Syaafi,,

This is with reference to your manuscript entitled “**APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES**” submitted for publication in the International Journal of Criminology and Sociology. It is my pleasure to inform you that the

referees have suggested to accept your manuscript after some minor revision.

You are required to revise your manuscript according to the referees' comments **below** and **highlight the changes**, in addition to these comments also please have a look at Editorial Requirements at 'Authors Guidelines' particularly in term of reference section when revising your manuscript. We greatly, anticipate submission of your revised manuscript (in **MS-Word** or **LaTeX**) **in a week**.

Reviewer comments :

It is important to correct some things in the abstract, introduction, methodology, and results that need to be following the review. References need to be added in the last 10 years. Overall, this article is interestingly outlined by the author.

Please note that the publishing option for authors after their manuscript is accepted for publications:

OPEN ACCESS: Your article your article is published with barrier free access for readers. The article processing fee is **US\$ 530**.

Please make sure to send your response to the reviewers comments in a separate word file.

You are requested to kindly confirm a safe receipt of the message and don't hesitate to contact us if you have any additional query/concern.

Looking forward to hear from you at your earliest possible.

Regards,

Zahid Khan

Manager Publications

www.lifescienceglobal.com

From: mzahid@lifescienceglobal.com [<mailto:mzahid@lifescienceglobal.com>]

Sent: Monday, November 30, 2020 6:42 PM
To: 'Ahmad Syaufi'
Subject: RE: [IJCS] Submission Acknowledgement

noted

Regards,

[Kutipan teks disembunyikan]



1. Review Putri (1).docx
38K

mzahid@lifescienceglobal.com

<mzahid@lifescienceglobal.com>

Kepada: Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>

7 Januari 2021

13.54

Dear Prof./Dr. Ahmad Syaufi,,

I am waiting for your response regarding the revised article which has been scheduled for publication in January as you may know composing, galley proof, English Language editing and online publication will also take sufficient time. In order to meet the deadline you are again requested to send your revised article and respond my mail.

Regards,

Zahid Khan

Manager Publications

www.lifescienceglobal.com

From: mzahid@lifescienceglobal.com [mailto:mzahid@lifescienceglobal.com]

Sent: Monday, December 28, 2020 5:36 PM

To: 'Ahmad Syaafi'

Subject: RE: [IJCS] Submission Acknowledgement

Dear Prof./Dr. Ahmad Syaafi,,

This is with reference to your manuscript entitled “**APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES**” submitted for publication in the International Journal of Criminology and Sociology. It is my pleasure to inform you that the referees have suggested to accept your manuscript after some minor revision.

You are required to revise your manuscript according to the referees’ comments **below** and **highlight the changes**, in addition to these comments also please have a look at Editorial Requirements at ‘Authors Guidelines’ particularly in term of reference section when revising your manuscript. We greatly, anticipate submission of your revised manuscript (in **MS-Word** or **LaTeX**) **in a week**.

Reviewer comments :

It is important to correct some things in the abstract, introduction, methodology, and results that need to be following the review. References need to be added in the last 10 years. Overall, this article is interestingly outlined by the author.

Please note that the publishing option for authors after their manuscript is accepted for publications:

OPEN ACCESS: Your article your article is published with barrier free access for readers. The article processing fee is US\$ 530.

Please make sure to send your response to the reviewers comments in a separate word file.

You are requested to kindly confirm a safe receipt of the message and don't hesitate to contact us if you have any additional query/concern.

Looking forward to hear from you at your earliest possible.

Regards,

Zahid Khan

Manager Publications

www.lifescienceglobal.com

From: mzahid@lifescienceglobal.com [mailto:mzahid@lifescienceglobal.com]

Sent: Monday, November 30, 2020 6:42 PM

To: 'Ahmad Syaufi'

Subject: RE: [IJCS] Submission Acknowledgement

noted

Regards,

[Kutipan teks disembunyikan]

Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>
Kepada: mzahid@lifescienceglobal.com

9 Januari 2021 23.30

Dear Editor,

We would like to submit revised version.

We are sorry for the late reply.

We have addressed all reviewer comments.

We used your last version as a basis for revision.

We are looking forward to hearing from you soon.

Best regards,

Ahmad Syaafi

[Kutipan teks disembunyikan]



Respons_1. Review Putri_2.docx

60K

mzahid@lifescienceglobal.com

<mzahid@lifescienceglobal.com>

Kepada: Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>

11 Januari 2021

20.54

Dear Prof./Dr. Ahmad Syaafi,,

We have forwarded your article for English Language Editing

[Kutipan teks disembunyikan]

Lampiran

APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES

ABSTRACT



Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This research is a qualitative research using normative legal research as a scientific research procedure to find the truth based on legal scientific logic from the normative side. In an effort to achieve the stated research objectives, this study uses a statute approach approach and a conceptual approach approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Keywords: Restorative Justice, Legal Settling, Medical Malpractice Restorative Justice, Legal Settling, Medical Malpractice

INTRODUCTION

Lawsuits submitted by patients or their families to the hospital and/or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence law. The behavior demanded is medical malpractice which is the designation "genus" (collection) of medical professional behavior groups that deviate and cause injury, death, or harm to patients. Basically, the hospital functions as a place to heal illnesses and restore health and the intended function has a meaning of responsibility which should be the responsibility of the government in improving the level of community welfare. Malpractice victims in Indonesia often find it difficult to seek justice, the current legal system has not yet sided with patients. Health sector reform that includes a variety of substances, including malpractice, is urgently needed to prevent further casualties. Health reforms that cover a variety of substances, especially malpractice victims are increasingly widespread. If counted annually from Jakarta, it tends to increase, not to mention those in the regions. The Jakarta Legal Aid Institute (LBH) revealed, Reports of malpractice cases and the absence of the right to health are likely to increase. In 2009, LBH Jakarta recorded at least 7 complaints reports from the public. In 2010 the number increased to 10 complaints.

The current law governing health and hospital matters does not favor the patient because it places evidence on the victim. In this case the patient must prove the occurrence of malpractice. In addition, there is a gap (distance) of knowledge and information between the victim and the doctor, if this is aligned with the usual evidentiary law that is related to the criminal law, it certainly

Commented [L1]: Better differentiate: introduction, purpose, methods, results, conclusion so it's easy to understand.

Commented [L2]: Literature was poorly reviewed by reputable international journals.

Reference has not used the literature in the last 10 years.

will not be met, and even tends to lose the patient, because all the evidence held by the doctor. Based on observations of LBH Jakarta, reports from the community in the police regarding malpractice have been relatively deadlocked, and many have even stopped, this is because the police always base their investigations on expert statements. What was said by the expert was recorded by the police, in this case the expert who gave objective information or not. On the other hand the patient (victim) who asks the expert of a doctor is reluctant to give testimony of this matter there is a kind of conspiracy in the world of medicine, to cover up so that for example the doctor is protected from his mistakes. This fact is not surprising if many people prefer to remain silent rather than have to report events that have befallen them due to poor health services, even patients often consider this as a fate that must be accepted. The practice of settling criminal cases outside the court so far has no formal legal basis, so there are often cases where informally there has been a peaceful settlement (though through a customary law mechanism), the judicial process is still processed according to the applicable law (Arief, 2008). Based on the description, the main problem in this paper is how to apply the values of restorative justice in solving medical malpractice cases?

Commented [L3]: Reference research material has not used the literature in the last 10 years.

Commented [L4]: The purpose of this research needs to be explained

RESEARCH METHODOLOGY

This research is a qualitative research using normative legal research. Normative legal research is a scientific research procedure to find the truth based on legal scientific logic from the normative side (Ibrahim, 2006). In an effort to achieve the stated research objectives, this study uses a statute approach approach and a conceptual approach approach.

Commented [L5]: In the methods section, the author must explain how data mining not only deconstructs how to obtain data but explains the process of the data obtained. for example, the way this study uses a statute approach and a conceptual approach.

RESULT AND DISCUSSION

Black's Law Dictionary mentions malpractice is any attitude of wrong action, lacking skills in an unnatural measure. This term is generally used towards the attitude of actions of doctors, lawyers, and accountants. Failure to provide professional services and do so at a reasonable level of skill and intelligence by the average colleague of his profession in society, resulting in injury, loss or loss in service recipients who trust them, including wrong professional acts, lack of improper skills, violating professional or legal obligations, very bad practices, illegal, or immoral behavior. Herkutanto (2011) quoted from the Word Medical Association Statement on Medical Malpractice adapted from the 44th World Medical Assembly Marbella Spain, September 1992 states tha: "medical malpractice is the failure of doctors to meet the standard procedures in handling their patients, the inability or negligence, causing a direct cause of harm to the patient. Komalawati (1989) states that the term malpractice comes from "malpractice" which in essence is a mistake in carrying out the profession that arises as a result of obligations that must be done by doctors. According to Chazawi (2007), medical malpractice is a doctor or a person who under his command intentionally or negligently performs acts (active or passive) in the practice of medicine to his patients at all levels that violate professional standards, standard procedures or medical principles, or by violating law without authority; by causing a result (causaal verband) loss of body, physical and mental health and or life of the patient, and therefore establishes legal liability for doctors.

According to Hanafiah & Amir (1999), medical malpractice is the negligence of a doctor to use the level of skills and knowledge that is commonly used in treating patients or injured people according to the size of the same environment. Meanwhile, according to Ninik Mariyanti (1988), malpractice actually has a broad understanding, which can be described as follows:

1. In a general sense: a bad practice, which does not meet the standards set by the profession;
2. In a special sense (seen from the patient's point of view) malpractice can occur in determining the diagnosis, carrying out operations, during treatment, and after treatment.

Based on some understanding of medical malpractice above scholars agree to interpret medical malpractice as the fault of health workers who for not using knowledge and skill levels in accordance with professional standards which ultimately results in injured or disabled patients or even death. Malpractice according to Lestari (2001) and Isfandyarie (2005) can be distinguished in two forms, namely ethical malpractice and juridical malpractice. Every juridical malpractice is definitely an ethical malpractice, but not all ethical malpractice is a legal malpractice. Ethical malpractice occurs when doctors perform actions that are contrary to the medical code of ethics which is a set of ethical standards, principles, rules and norms that apply to doctors in carrying out their profession (Purwadi et al., 2019). Soedjatmiko (2001) distinguishes juridical malpractice in three categories, namely:

1. Civil malpractice.
Civil malpractice will occur if the doctor or the hospital does not fulfill the obligation or does not provide the rights of the patient based on the agreement to provide health services, so that the doctor and or the hospital have defaulted on the agreement. Civil malpractice can also occur if the doctor or patient does an action that causes harm to the patient so that it can be said to have committed an illegal act.
2. Criminal malpractice.
Criminal malpractice occurs if there is a doctor's mistake in taking a careless action that causes the patient to die or become disabled. Criminal malpractice can occur due to three things, namely: (i). for example, in cases of leaking medical secrets, abortions without medical indication or omitting a patient for any reason; (ii). due to carelessness that occurs because the doctor or health worker acts not in accordance with medical standards or without asking for patient consent; and (iii). due to negligence that occurs due to inadvertence of the doctor causing death or disability in the patient. Criminal malpractice also occurs if there is an incident in the form of omission and/or rejection of patients who come, citing the patient's inability to pay for hospital, medical and/or nursing services, both inpatient and outpatient. This type of malpractice occurs because there is no fulfillment of obligations prescribed by law by the hospital in the form of providing assistance to patients who should be helped, resulting in death or disability in these patients as a result of lack of help.
3. Administrative malpractice.
Administrative malpractice occurs if doctors, health workers or hospitals practice violating state administrative laws such as carrying out practices without permission, carrying out practices or actions that are not in accordance with their permits, or having their licenses expired and or carrying out practices without making medical records clear.

There are three theories that mention the source of malpractice, namely (Mariyanti, 1988):

1. Contract Violation Theory.
The first theory is that the source of malpractice is due to breach of contract. This is based on the principle that legally a health worker has no obligation to care for someone if between the two there is no contractual relationship between the health worker and the patient. The relationship between health workers and patients only occurs when a contract has occurred between the two parties.
In relation to the relationship between the patient's contract with the health worker, it does not mean that the relationship between the health worker and the patient always occurs with mutual agreement. In cases where the patient is not self-conscious or in an emergency situation, for example, a person may not give their consent.
If this situation occurs, then the approval or contract of the patient's health worker can be requested from a third party, namely the patient's family acting on behalf of and representing the patient's interests. If

this is also not possible, for example because the emergency patient comes without family and is only escorted by other people who happen to have helped him, then in the interest of the sufferer, according to applicable laws, a health worker is required to provide assistance as well as possible. This action has been legally considered as an embodiment of the medical-patient contract.

2. Theory of Deliberate Acts.

The second theory that can be used by patients as a basis for suing health workers for malpractice is intentional tort, which results in someone physically injured (assault and battery).

3. Theory of Negligence.

The third theory states that the source of malpractice is negligence. Negligence that causes the source of actions that are categorized in this malpractice must be proven to exist, besides the negligence in question must be included in the category of gross negligence (*culpa lata*). To prove this is certainly not an easy task for law enforcement officers.

The concept of solving medical malpractice cases both contained in Act Number 29 of 2004 concerning Medical Practices, Act Number 36 of 2009 concerning Health, and Act Number 44 of 2009 concerning Hospitals only regulates the settlement of cases in the realm of civil law. For medical malpractice cases that contain elements of criminal law directly submitted to the police for an investigation process as referred to in Article 186 of Law Number 36 Year 2009, it reads: supervisory staff must report to investigators in accordance with the provisions of the legislation".

Arrangement of medical malpractice case/dispute settlement through civil law can be seen in Article 29 of Law Number 36 Year 2009 which states that: "In the case of health personnel suspected of negligence in carrying out their profession, negligence must be resolved first through mediation".

Further in the Elucidation of the article states that "mediation is conducted if a dispute arises between the health service provider and the patient as the recipient of health services. Mediation is carried out aimed at resolving disputes outside the court by mediators agreed by the parties". Likewise Article 60 letter f of Law Number 44 Year 2009, states that "the Provincial Hospital Supervisory Agency is in charge of receiving complaints and making efforts to resolve disputes by means of mediation".

Claims for medical malpractice often fail in the middle of the road because of the difficulty of proof. In this case the doctor needs to defend himself and defend his rights by stating the reasons for his actions. Both in the case patients and doctors, judges and prosecutors have difficulty in dealing with this medical malpractice problem, especially from the legal technical point of view or legal formulation that is appropriate to use. The problem lies in the absence of specific legal studies on medical malpractice that can be used as a guideline in determining and overcoming the existence of medical malpractice in Indonesia. For this reason, it is necessary to review the criminal law formulation policy regarding mediation of penalties which can be linked to medical negligence or malpractice, especially in providing legal protection to victims of malpractice in this case patients.

If the lawsuit is filed through a criminal legal process, then the patient is sufficient to report it to the investigator by showing preliminary evidence or reasons. Furthermore, investigators will conduct investigations by conducting police actions, such as examining witnesses and suspects, examining documents and requesting expert handling. *Visum et repertum* may be needed by investigators, the investigation result file is submitted to the public prosecutor to be able to compile its claims, in the event that the investigator does not find sufficient evidence then it will be considered for the issuance of termination of the investigation, so that most patients do lose on court.

For the public, especially victims, the question of concern is why it is so difficult to bring malpractice cases from the operating table to the court. Whether the existing legal instruments and legislation are not enough to bring the issue of medical malpractice into the realm of law, especially criminal law, it is necessary to review the current formulation policy (laws relating to medical malpractice) and formulation policies that are will come in overcoming the crime of medical malpractice by emphasizing uniformity and consistency in terms of the formulation of criminal acts, criminal liability and the most appropriate punishment in order to provide a sense of justice for victims and perpetrators as well as the use of mediating penal as one form of settlement in the medical field ius constituendum in an effort to provide a sense of justice for victims. This is related to the development of criminal law in various countries today, namely the use of mediation of penalties as an alternative to solving problems in the field of criminal law.

The development of the theory of punishment always experiences ups and downs in its development. Criminal theories aimed at rehabilitation have been criticized because they are based on the belief that rehabilitation goals cannot work. In the 1970s there were pressures that treatment of rehabilitation was unsuccessful and indeterminate sentences were not given appropriately without guidelines.

Against the pressures on rehabilitation goals the "Justice Model" was born as a modern justification for punishment proposed by Sue Titus Reid (1987). This justice model is also known as the justice approach or just reward model (Just Desert Model). This model is based on 2 (two) theories about the purpose of punishment, namely prevention and retribution. The basis of retribution in the just desert model assumes that violators will be judged by the sanctions that should be received by violators in view of the crimes they have committed, proper sanctions will prevent criminals from committing more criminal acts and prevent others from committing crimes.

Under this just desert model scheme, perpetrators with the same crime will receive the same punishment and the more serious perpetrators of the crime will receive a harsher sentence than the lighter offenders. There are 2 things that become critics of this just desert theory, namely: First, because desert theories place primarily by emphasizing the relationship between proper punishment and crime rates, so that with the interest of treating such cases, this theory ignores differences other relevant differences between the perpetrators such as the personal background of the offender and the impact of punishment on the offender and his family. This theory also often treats cases that are not the same in the same way. Second, overall the emphasis is on guidelines for distinguishing crime and criminal records that affect the psychology of punishment and those who punish (Tonry, 1996). The Restorative Justice Model which is often confronted with the Retributive Justice Model and is a development of the Restitutive Justice Model. Van Ness & Daniel (1980) states that the foundation of restorative justice theory can be summarized in the following characteristics (Abidin, 2005) :

1. Crime is primarily a conflict between individuals resulting in injuries to victims, communities and the offenders themselves, only secondary is it lawbreaking. (free translation: Crimes by their very nature are primary conflicts between individuals resulting in injury to victims, the community and the perpetrators themselves, while the definition of crime as something that is illegal is only secondary)
2. The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.
3. The overall goal of the criminal justice process must be to reconcile the parties to the conflict/dispute, as well as repair the injuries caused by the crime)
4. The criminal justice process should facilitate active participation by victims, offenders and their communities. A should not be dominated by government to the exclusion of others.

5. The criminal justice process must facilitate the active participation of victims, perpetrators and the community. This should not be dominated by the government by putting aside other people or other matters).

The restorative justice model is proposed by abolitionists who reject coercive means in the form of litigative facilities and are replaced by reparative (non-litigation) facilities. Abolitionists consider the criminal justice system to contain problems or structural flaws so that it must realistically change the structural basis of the system (Bentham, 1996; Van Apeldoorn & Leyten, 1972; Radbruch, 2004). In the context of a criminal sanction system, the values underlying abolitionist understanding still make sense to look for alternative sanctions that are more feasible and effective than institutions such as prisons. The restorative justice model to be built by abolitionists can be seen in detail the comparison of the current system (which abolitionists call retributive justice) and the system proposed by abolitionists under the name restorative justice, as follows (Muladi, 1995).

Table 1	
COMPARISON BETWEEN RETRIBUTIVE AND RESTORATIVE JUSTICE	
Retributive Justice	Restorative Justice
1. Crimes are formulated as violations of the State	1. A crime is formulated as someone's violation of another person
2. Attention is directed towards determining mistakes in the past	2. The point of attention on problem solving, responsibility and obligations in the future
3. Relations of parties that are resistant, through an orderly and normative process	3. Normative nature is built on the basis of dialogue and negotiation
4. Application of suffering for digestion and prevention	4. Restitution as a means of improving the parties, reconciliation and restoration as the main objective
5. Justice is formulated with deliberate and process	5. Justice is formulated as rights relations, assessed on the basis of results
6. The nature of the conflict from evil is obscured and suppressed	6. Crimes are recognized as conflicts
7. One social loss is replaced by another	7. Target attention on repairing social losses
8. Society is on the sidelines displayed abstractly by the state	8. The community is a facilitator in the restorative process
9. Promoting competitive and individualistic values	9. Promote mutual assistance
10. Action is directed from the state to perpetrators of crime: passive victims	10. The role of victims and perpetrators of crime is recognized, both in the problem and in the settlement of the rights and needs of victims, perpetrators of criminal acts are encouraged to take responsibility
11. The responsibility of the perpetrators of criminal acts is formulated in the context of criminal prosecution	11. The perpetrator's responsibility is formulated as the impact of the request on the action and to help decide the best
12. Crimes are formulated in legal terminology which are theoretical and pure, without having moral, social and economic dimensions	12. Crimes are understood in a holistic, moral, social and economic context
13. Sin or debt is given to the State and society abstractly	13. Sin or debt and liability to the victim are recognized
14. The reactions and responses are focused on the perpetrators of the crimes that have occurred	14. The reactions and responses are focused on the consequences of the actions of the perpetrators of the crime
15. The stigma of crime cannot be eliminated	15. Stigma can be removed through restorative action

16. There is no encouragement to repent and forgive	16. There are possibilities that are helpful
17. Attention is directed at the debate between free will and social psychological determinism in the power of evil	17. Attention is directed to accountability for the consequences of actions

Restorative justice places a higher value in the direct involvement of the parties. The victim is able to restore the element of control, while the perpetrator is encouraged to assume responsibility as a step in correcting the mistakes caused by crime and in establishing his social value system. Community involvement actively strengthens the community itself and binds the community to values to respect and love one another. The role of the government is substantially reduced in monopolizing the current judicial process. Restorative justice requires cooperative efforts from the community and government to create a condition where victims and perpetrators can reconcile conflict between the two parties and repair the wounds of both parties. This consensus agreement as putlined in Pancasila has a philosophical and theological foundation that leads to the restoration of the dignity and dignity of all parties involved, replacing the atmosphere of conflict with peace (the principle of friendship), eliminating blasphemous blasphemy with forgiveness, stopping demands for blame and blame (the principle of mutual forgiveness and asking for forgiveness) to God). Desired clarification is not through the court table, but through the table of peace and negotiation (the principle of deliberation).

Note:

CONCLUSION

Settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

REFERENCES

- Abidin, Z. (2005). *Pemidanaan, Pidana, dan tindakan dalam Rancangan KUHP 2005*. Elsam.
- Arief, B. N. (2008). *Mediasi penal: penyelesaian perkara di luar pengadilan*. Program Magister Ilmu Hukum, Pascasarjana, Undip.
- Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.
- Chazawi, A. (2007). *Malpraktik kedokteran: tinjauan norma dan doktrin hukum*. Bayumedia.
- Hanafiah, M. J., & Amir, A. (1999). *Etika kedokteran dan Hukum kesehatan*. Jakarta: EGC.
- Herkutanto, H. (2011). *Medicolegal Aspects of Emergency Services*. *Journal of the Indonesian Medical Association*, 57(02).
- Ibrahim, J. (2006). *Teori dan metodologi penelitian hukum normatif*. Malang: Bayumedia Publishing, 57.
- Isfandyarie, A. (2005). *Malpraktek dan resiko medik dalam kajian hukum pidana*. Prestasi Pustaka Publisher.
- Komalawati, V. (1989). *Hukum dan etika dalam praktek dokter*. Pustaka Sinar Harapan.

Commented [L6]: Result and discussion: Literature was poorly reviewed by reputable international journals. Reference research material has not used the literature in the last 10 years.

Commented [L7]: Result and discussion: It is better to explain how foreign countries handle malpractice cases so that they can be used as a comparison in handling malpractice cases in Indonesia.

Commented [L8]: Literature was poorly reviewed by reputable international journals. Reference research material has not used the literature in the last 10 years.

- Lestari, N. (2001). Masalah Malpraktek Etik Dalam Praktek Dokter. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar, Malang*.
- Mariyanti, N. (1988). *Malapraktek kedokteran: dari segi hukum pidana dan perdata*. Bina Aksara.
- Muladi. (1995). *Kapita selekta sistem peradilan pidana*. Badan Penerbit Universitas Diponegoro.
- Ness, V., & Daniel, W. (1980). Restorative justice and International Human Rights, Restorative Justice: International Perspectives, edited by Burt Galaway and Joe Hudson, Amsterdam, The Netherland.
- Purwadi, A., Enggarsasi, U., & Suhandi, S. (2019). From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes. *Journal of Advanced Research in Law and Economics*, 10(5), 1517-1524.
- Radbruch, G. (2004). Philosophy of law. *Moscow: International relationships [in Russian]*.
- Reid, S. T. (1987). *Criminal justice: Procedures and issues*. West Publishing Company.
- Soedjatmiko, H. M. (2001). Masalah Medik dalam Malpraktik Yuridik. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran*.
- Tony, M. (1996). Sentencing matters. *Journal of Criminal Justice*, 6(24), 570-571.
- Van Apeldoorn, L. J., & Leyten, J. C. (1972). *Inleiding tot de studie van het Nederlandse recht. 17., herziene dr. door JCM Leyten*. Tjeenk Willink.

REVIEWER COMMENTS



Abstract

Better differentiate: introduction, purpose, methods, results, conclusion so it's easy to understand.

Response:

Done. It now has introduction, purpose, method, results and conclusion/main findings

ABSTRACT

Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia. This research is a qualitative research using normative legal research and uses a statute approach and a conceptual approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. The conclusion showed that the restorative justice emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Hence, restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Introduction

Literature was poorly reviewed by reputable international journals.

Reference has not used the literature in the last 10 years.

Response:

Done. The references were updated to the last 10 years and sourced from reputable international journals

Lawsuits submitted by patients or their families to the hospital and/or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence law (Raveesh et al., 2016; Traina, 2009; Mello, 2001). The behavior demanded is medical malpractice which is the

designation "genus" (collection) of medical professional behavior groups that deviate and cause injury, death, or harm to patients. Basically, the hospital functions as a place to heal illnesses and restore health and the intended function has a meaning of responsibility which should be the responsibility of the government in improving the level of community welfare. Malpractice victims in Indonesia often find it difficult to seek justice, the current legal system has not yet sided with patients (Iswanty et al., 2017; Sasanthi, 2018; Purwadi & Enggarsasi, 2019). Health sector reform that includes a variety of substances, including malpractice, is urgently needed to prevent further casualties. Health reforms that cover a variety of substances, especially malpractice victims are increasingly widespread. If counted annually from Jakarta, it tends to increase, not to mention those in the regions. The Jakarta Legal Aid Institute (LBH) revealed, Reports of malpractice cases and the absence of the right to health are likely to increase. In 2009, LBH Jakarta recorded at least 7 complaints reports from the public. In 2010 the number increased to 10 complaints. In the last eight years, the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia/MKDKI*) received 193 complaints of alleged malpractice. Of that number, 34 doctors were given written sanctions, 6 were required to participate in the re-education program, and, the worst part, 27 doctors had their registration certificates revoked which automatically made their license to practice invalid (Tempo.co, 2013).

Reference research material has not used the literature in the last 10 years.

Response:

Done

This fact is not surprising if many people prefer to remain silent rather than have to report events that have befallen them due to poor health services, even patients often consider this as a fate that must be accepted. The practice of settling criminal cases outside the court so far has no formal legal basis, so there are often cases where informally there has been a peaceful settlement (though through a customary law mechanism), the judicial process is still processed according to the applicable law (Sohn & Bal, 2012; Liebman, 2013; Morreim, 2012; Bielen et al., 2020; Arief, 2008).

Methods

In the methods section, the author must explain how data mining not only deconstructs how to obtain data but explains the process of the data obtained. for example, the way this study uses a statute approach and a conceptual approach.

Response:

Done

This research is a qualitative research using normative legal research. Normative legal research is a scientific research procedure to find the truth based on legal scientific logic from the normative side

(Ibrahim, 2006). In an effort to achieve the stated research objectives, this study uses a statute approach and a conceptual approach.

Results and Discussion

... According to Yunanto and Helmi (2010) in medical disputes, there are two basic things. First, on the part of the patient or the patient's family who do not understand about medical actions or procedures that sometimes can cause risks. Second, from the doctor who is less communicative, does not provide a strong explanation of the disease or medical action he is taking. ...

... Restorative justice is a paradigm that can be used as a frame for a strategy for handling criminal cases that aims to answer dissatisfaction with the functioning of the current criminal justice system. Tonny Marshal stated that Restorative Justice is, "a process in which the parties involved in crime jointly resolve problems related to how to deal with post-crime problems and their consequences in the future" (Mansyur, 2010)..

... Restorative justice according to Zulfa (2011a; 2011b) contains the following ideas and principles:

- a. Building joint participation between perpetrators, victims and community groups in resolving an incident or criminal act. Placing perpetrators, victims, and the community as "stakeholders" who work together and immediately try to find a solution that is considered fair for all parties (win-win solution).
- b. Pushing perpetrators to be held accountable to victims for events or criminal acts that have caused injury or loss to the victim. Furthermore, building responsibility does not repeat the criminal act he has committed.
- c. Placing a criminal event or act not primarily as a form of violation of the law, but as a violation by a person (group of people) against someone (a group of people). Because of that, the perpetrator should be directed towards being accountable to the victim, not prioritizing legal accountability.
- d. Encourage resolving an event or criminal action in more informal and personal ways, rather than resolving it in formal (rigid) and impersonal ways.

Settlement of medical malpractice cases using a restorative justice approach is basically focused on efforts to transform mistakes made by doctors with corrective efforts. Included in this effort is improving the relationship between doctors and patients / their families. This is implemented in the presence of actions which represent changes in the attitudes of the parties in an effort to achieve a common goal, namely improvement.

...

References

Literature was poorly reviewed by reputable international journals. Reference research material has not used the literature in the last 10 years.

Response:

Literature was poorly reviewed by reputable international journals. Reference research material has not used the literature in the last 10 years.

Abidin, Z. (2005). *Pemidanaan, Pidana, dan tindakan dalam Rancangan KUHP 2005*. Elsam.

Arief, B. N. (2008). *Mediasi penal: penyelesaian perkara di luar pengadilan*. Program Magister Ilmu Hukum, Pascasarjana, Undip.

Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.

Bielen, S., Grajzl, P., & Marneffe, W. (2020). The resolution process and the timing of settlement of medical malpractice claims. *Health Economics, Policy and Law*, 15(4), 509-529.

Bornstein, B. H., Rung, L. M., & Miller, M. K. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral sciences & the law*, 20(4), 393-409.

Chazawi, A. (2007). *Malpraktik kedokteran: tinjauan norma dan doktrin hukum*. Bayumedia.

Hanafiah, M. J., & Amir, A. (1999). *Etika kedokteran dan Hukum kesehatan*. Jakarta: EGC.

Herkutanto, H. (2011). Medicolegal Aspects of Emergency Services. *Journal of the Indonesian Medical Association*, 57(02).

Herlianto, S. (2014). Constructing Penal Mediation on Medical Malpractice Cases: A Restorative Justice Perspective. *JL Pol'y & Globalization*, 24, 9.

Hutapea, T. P. D. (2018). Penerapan Rehabilitasi Medis Dan Sosial Bagi Prajurit Tni Dalam Putusan Pengadilan/The Implementation Of Medical And Social Rehabilitation For Indonesian National Armed Forces Personnel In Court Decision. *Jurnal Hukum dan Peradilan*, 7(1), 67-86.

Ibrahim, J. (2006). *Teori dan metodologi penelitian hukum normatif*. Malang: Bayumedia Publishing, 57.

Isfandyarie, A. (2005). *Malpraktek dan resiko medik dalam kajian hukum pidana*. Prestasi Pustaka Publisher.

Iswanty, M., Razak, A., Sampurno, S., & Halim, H. (2017). Maladministration as Doctor Medical Malpractice: A Health Law Perspective in Indonesia. *JL Pol'y & Globalization*, 67, 167.

Komalawati, V. (1989). *Hukum dan etika dalam praktek dokter*. Pustaka Sinar Harapan.

Lestari, N. (2001). Masalah Malpraktek Etik Dalam Praktek Dokter. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar, Malang*.

Liebman, B. L. (2013). Malpractice mobs: medical dispute resolution in China. *Columbia Law Review*, 181-264.

Mansyur, R. (2010). *Mediasi Penal Terhadap Perkara KDKRT (Kekerasan Dalam Rumah Tangga)*, Jakarta: Yayasan Gema Yustisia Indonesia.

Mariyanti, N. (1988). *Malpraktek kedokteran: dari segi hukum pidana dan perdata*. Bina Aksara.

McMichael, B. J. (2018). The Failure of Sorry: An Empirical Evaluation of Apology Laws, Health Care, and Medical Malpractice. *Lewis & Clark L. Rev.*, 22, 1199.

Mello, M. M. (2001). Of swords and shields: the role of clinical practice guidelines in medical malpractice litigation. *University of Pennsylvania Law Review*, 149(3), 645-710.

Morreim, H. (2012). Malpractice, mediation, and moral hazard: The virtues of dodging the data bank. *Ohio St. J. on Disp. Resol.*, 27, 109.

Muladi. (1995). *Kapita selekta sistem peradilan pidana*. Badan Penerbit Universitas Diponegoro.

Ness, V., & Daniel, W. (1980). Restorative justice and International Human Rights, Restorative Justice: International Perspektive, edited by Burt Galaway and Joe Hudson, Amsterdam, The Netherland.

Purwadi, A., & Enggarsasi, U. (2019). From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes. *J. Advanced Res. L. & Econ.*, 10, 1517.

Purwadi, A., Enggarsasi, U., & Suhandi, S. (2019). From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes. *Journal of Advanced Research in Law and Economics*, 10(5), 1517-1524.

Radbruch, G. (2004). Philosophy of law. *Moscow: International relationships [in Russian]*.

Raveesh, B. N., Nayak, R. B., & Kumbar, S. F. (2016). Preventing medico-legal issues in clinical practice. *Annals of Indian Academy of Neurology*, 19(Suppl 1), S15.

Reid, S. T. (1987). *Criminal justice: Procedures and issues*. West Publishing Company.

Sasanthi, N. W. I. S. (2018). Medical Actions Resulting in Malpractice in the Perspective of Indonesian Criminal Law. In *Proceedings of International Conference of Social Science, ICOSS 2018*. European Alliance for Innovation (EAI).

Soedjatmiko, H. M. (2001). Masalah Medik dalam Malpraktik Yuridik. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran*.

Sohn, D. H., & Bal, B. S. (2012). Medical malpractice reform: the role of alternative dispute resolution. *Clinical Orthopaedics and Related Research*®, 470(5), 1370-1378.

Tempo.co. (Dec 23, 2013). Ketua MKDKI: Kami Tak Mengenal Istilah Malpraktek. Retrieved from <https://nasional.tempo.co/read/539526/ketua-mkdki-kami-tak-mengenal-istilah-malpraktek/full&view=ok>. Accessed Dec 29, 2020.

Tonry, M. (1996). Sentencing matters. *Journal of Criminal Justice*, 6(24), 570-571.

Traina, F. (2009). Medical malpractice: the experience in Italy. *Clinical orthopaedics and related research*, 467(2), 434-442.

Van Apeldoorn, L. J., & Leyten, J. C. (1972). *Inleiding tot de studie van het Nederlandse recht. 17., herziene dr. door JCM Leyten*. Tjeenk Willink.

Van Ness, D. W., & Strong, K. H. (2014). *Restoring justice: An introduction to restorative justice*. Routledge.

Yunanto, A & Helmi, (2010). *Hukum Pidana Malpraktek Medik Tinjauan dan Perspektif Medikolegal*,

Zehr, H. (2015). *The little book of restorative justice: Revised and updated*. Simon and Schuster.

Zulfa, E. A. (2011a). *Pergeseran Paradigma Pemidanaan*, Bandung: Lubuk Agung.

Zulfa, E. A. (2011b). Restorative Justice in Indonesia: Traditional Value. *Indonesia Law Review*, 1(2),33-43.



APPLICATION OF RESTORATIVE JUSTICE VALUES IN SETTLING MEDICAL MALPRACTICE CASES

ABSTRACT

Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia. This research is a qualitative research using normative legal research and uses a statute approach and a conceptual approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. The conclusion showed that the restorative justice emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Hence, restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Keywords: Restorative Justice, Legal Settling, Medical Malpractice Restorative Justice, Legal Settling, Medical Malpractice

INTRODUCTION

Lawsuits submitted by patients or their families to the hospital and/or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence law (Raveesh et al., 2016; Traina, 2009; Mello, 2001). The behavior demanded is medical malpractice which is the designation "genus" (collection) of medical professional behavior groups that deviate and cause injury, death, or harm to patients. Basically, the hospital functions as a place to heal illnesses and restore health and the intended function has a meaning of responsibility which should be the responsibility of the government in improving the level of community welfare. Malpractice victims in Indonesia often find it difficult to seek justice, the current legal system has not yet sided with patients (Iswanty et al., 2017; Sasanthi, 2018; Purwadi & Enggarsasi, 2019). Health sector reform that includes a variety of substances, including malpractice, is urgently needed to prevent further casualties. Health reforms that cover a variety of substances, especially malpractice victims are increasingly widespread. If counted annually from Jakarta, it tends to increase, not to mention those in the regions. The Jakarta Legal Aid Institute (LBH) revealed, Reports of malpractice cases and the absence of the right to health are likely to increase. In 2009, LBH Jakarta recorded at least 7 complaints reports from the public. In 2010 the number increased to 10 complaints. In the last eight years, the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia*/MKDKI) received 193 complaints of alleged malpractice. Of that number, 34 doctors were given written sanctions, 6 were required to participate in the re-education program,

Commented [L1]: Better differentiate: introduction, purpose, methods, results, conclusion so it's easy to understand.

Commented [J2R1]: Done. It now has introduction, purpose, method, results and conclusion/main findings

Commented [L3]: Literature was poorly reviewed by reputable international journals.

Reference has not used the literature in the last 10 years.

Commented [J4R3]: Done. The references were updated to the last 10 years and sourced from reputable international journals

and, the worst part, 27 doctors had their registration certificates revoked which automatically made their license to practice invalid (Tempo.co, 2013).

The current law governing health and hospital matters does not favor the patient because it places evidence on the victim. In this case the patient must prove the occurrence of malpractice. In addition, there is a gap (distance) of knowledge and information between the victim and the doctor, if this is aligned with the usual evidentiary law that is related to the criminal law, it certainly will not be met, and even tends to lose the patient, because all the evidence held by the doctor. Based on observations of LBH Jakarta, reports from the community in the police regarding malpractice have been relatively deadlocked, and many have even stopped, this is because the police always base their investigations on expert statements. What was said by the expert was recorded by the police, in this case the expert who gave objective information or not. On the other hand the patient (victim) who asks the expert of a doctor is reluctant to give testimony of this matter there is a kind of conspiracy in the world of medicine, to cover up so that for example the doctor is protected from his mistakes. This fact is not surprising if many people prefer to remain silent rather than have to report events that have befallen them due to poor health services, even patients often consider this as a fate that must be accepted. The practice of settling criminal cases outside the court so far has no formal legal basis, so there are often cases where informally there has been a peaceful settlement (though through a customary law mechanism), the judicial process is still processed according to the applicable law (Sohn & Bal, 2012; Liebman, 2013; Morreim, 2012; Bielen et al., 2020; Arief, 2008). This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia?

RESEARCH METHODOLOGY

This research is a qualitative research using normative legal research. Normative legal research is a scientific research procedure to find the truth based on legal scientific logic from the normative side (Ibrahim, 2006). In an effort to achieve the stated research objectives, this study uses a statute approach and a conceptual approach.

In this study, the statutory approach was used. It is a research that prioritizes legal materials in the form of statutory regulations as a basic reference for conducting research about medical malpractice. The statutory approach is used to examine statutory regulations which in normalizing there are still deficiencies or even foster deviant practices both at the technical level or in their implementation in the field. To examine statutory regulations, this study used some Indonesian laws about medical practice such as Law No. 23 of 1992 about health. More specifically, Article 55 paragraph (1) of Law No. 23 of 1992 on Health stated that every person has the right to compensation due to mistakes or negligence committed by health workers.

Moreover, the conceptual approach is used in this study. It is a type of approach in legal research that provides an analysis point of view of problem solving in legal research seen from the aspects of the legal concepts behind it, or can even be seen from the values contained in normalizing a regulation in relation to the concept used about malpractice in medical service.

RESULT AND DISCUSSION

Black's Law Dictionary mentions malpractice is any attitude of wrong action, lacking skills in an unnatural measure. This term is generally used towards the attitude of actions of doctors, lawyers, and accountants. Failure to provide professional services and do so at a reasonable level of skill and intelligence by the average colleague of his profession in society, resulting in injury,

Commented [L5]: Reference research material has not used the literature in the last 10 years.

Commented [J6R5]: Done

Commented [L7]: The purpose of this research needs to be explained

Commented [J8R7]: Done

Commented [L9]: In the methods section, the author must explain how data mining not only deconstructs how to obtain data but explains the process of the data obtained. for example, the way this study uses a statute approach and a conceptual approach.

Commented [J10R9]: Done

loss or loss in service recipients who trust them, including wrong professional acts, lack of improper skills, violating professional or legal obligations, very bad practices, illegal, or immoral behavior. Herkutanto (2011) quoted from the World Medical Association Statement on Medical Malpractice adapted from the 44th World Medical Assembly Marbella Spain, September 1992 states that: "medical malpractice is the failure of doctors to meet the standard procedures in handling their patients, the inability or negligence, causing a direct cause of harm to the patient. Komalawati (1989) states that the term malpractice comes from "malpractice" which in essence is a mistake in carrying out the profession that arises as a result of obligations that must be done by doctors. According to Chazawi (2007), medical malpractice is a doctor or a person who under his command intentionally or negligently performs acts (active or passive) in the practice of medicine to his patients at all levels that violate professional standards, standard procedures or medical principles, or by violating law without authority; by causing a result (causaal verband) loss of body, physical and mental health and or life of the patient, and therefore establishes legal liability for doctors.

According to Hanafiah & Amir (1999), medical malpractice is the negligence of a doctor to use the level of skills and knowledge that is commonly used in treating patients or injured people according to the size of the same environment. Meanwhile, according to Ninik Mariyanti (1988), malpractice actually has a broad understanding, which can be described as follows:

1. In a general sense: a bad practice, which does not meet the standards set by the profession;
2. In a special sense (seen from the patient's point of view) malpractice can occur in determining the diagnosis, carrying out operations, during treatment, and after treatment.

Based on some understanding of medical malpractice above scholars agree to interpret medical malpractice as the fault of health workers who for not using knowledge and skill levels in accordance with professional standards which ultimately results in injured or disabled patients or even death. According to Yunanto and Helmi (2010) in medical disputes, there are two basic things. First, on the part of the patient or the patient's family who do not understand about medical actions or procedures that sometimes can cause risks. Second, from the doctor who is less communicative, does not provide a strong explanation of the disease or medical action he is taking. Malpractice according to Lestari (2001) and Isfandyarie (2005) can be distinguished in two forms, namely ethical malpractice and juridical malpractice. Every juridical malpractice is definitely an ethical malpractice, but not all ethical malpractice is a legal malpractice. Ethical malpractice occurs when doctors perform actions that are contrary to the medical code of ethics which is a set of ethical standards, principles, rules and norms that apply to doctors in carrying out their profession (Purwadi et al., 2019). Soedjatmiko (2001) distinguishes juridical malpractice in three categories, namely:

1. Civil malpractice.
Civil malpractice will occur if the doctor or the hospital does not fulfill the obligation or does not provide the rights of the patient based on the agreement to provide health services, so that the doctor and or the hospital have defaulted on the agreement. Civil malpractice can also occur if the doctor or patient does an action that causes harm to the patient so that it can be said to have committed an illegal act.
2. Criminal malpractice.
Criminal malpractice occurs if there is a doctor's mistake in taking a careless action that causes the patient to die or become disabled. Criminal malpractice can occur due to three things, namely: (i). for example, in cases of leaking medical secrets, abortions without medical indication or omitting a patient for any reason; (ii). due to carelessness that occurs because the doctor or health worker acts not in

accordance with medical standards or without asking for patient consent; and (iii). due to negligence that occurs due to inadvertence of the doctor causing death or disability in the patient. Criminal malpractice also occurs if there is an incident in the form of omission and/or rejection of patients who come, citing the patient's inability to pay for hospital, medical and/or nursing services, both inpatient and outpatient. This type of malpractice occurs because there is no fulfillment of obligations prescribed by law by the hospital in the form of providing assistance to patients who should be helped, resulting in death or disability in these patients as a result of lack of help.

3. Administrative malpractice.

Administrative malpractice occurs if doctors, health workers or hospitals practice violating state administrative laws such as carrying out practices without permission, carrying out practices or actions that are not in accordance with their permits, or having their licenses expired and or carrying out practices without making medical records clear.

There are three theories that mention the source of malpractice, namely (Mariyanti, 1988):

1. Contract Violation Theory.

The first theory is that the source of malpractice is due to breach of contract. This is based on the principle that legally a health worker has no obligation to care for someone if between the two there is no contractual relationship between the health worker and the patient. The relationship between health workers and patients only occurs when a contract has occurred between the two parties.

In relation to the relationship between the patient's contract with the health worker, it does not mean that the relationship between the health worker and the patient always occurs with mutual agreement. In cases where the patient is not self-conscious or in an emergency situation, for example, a person may not give their consent.

If this situation occurs, then the approval or contract of the patient's health worker can be requested from a third party, namely the patient's family acting on behalf of and representing the patient's interests. If this is also not possible, for example because the emergency patient comes without family and is only escorted by other people who happen to have helped him, then in the interest of the sufferer, according to applicable laws, a health worker is required to provide assistance as well as possible. This action has been legally considered as an embodiment of the medical-patient contract.

2. Theory of Deliberate Acts.

The second theory that can be used by patients as a basis for suing health workers for malpractice is intentional tort, which results in someone physically injured (assault and battery).

3. Theory of Negligence.

The third theory states that the source of malpractice is negligence. Negligence that causes the source of actions that are categorized in this malpractice must be proven to exist, besides the negligence in question must be included in the category of gross negligence (*culpa lata*). To prove this is certainly not an easy task for law enforcement officers.

The concept of solving medical malpractice cases both contained in Act Number 29 of 2004 concerning Medical Practices, Act Number 36 of 2009 concerning Health, and Act Number 44 of 2009 concerning Hospitals only regulates the settlement of cases in the realm of civil law. For medical malpractice cases that contain elements of criminal law directly submitted to the police for an investigation process as referred to in Article 186 of Law Number 36 Year 2009, it reads: supervisory staff must report to investigators in accordance with the provisions of the legislation".

Arrangement of medical malpractice case/dispute settlement through civil law can be seen in Article 29 of Law Number 36 Year 2009 which states that: "In the case of health personnel suspected of negligence in carrying out their profession, negligence must be resolved first through mediation".

Further in the Elucidation of the article states that "mediation is conducted if a dispute arises between the health service provider and the patient as the recipient of health services. Mediation is carried out aimed at resolving disputes outside the court by mediators agreed by the

parties". Likewise Article 60 letter f of Law Number 44 Year 2009, states that "the Provincial Hospital Supervisory Agency is in charge of receiving complaints and making efforts to resolve disputes by means of mediation".

Claims for medical malpractice often fail in the middle of the road because of the difficulty of proof. In this case the doctor needs to defend himself and defend his rights by stating the reasons for his actions. Both in the case patients and doctors, judges and prosecutors have difficulty in dealing with this medical malpractice problem, especially from the legal technical point of view or legal formulation that is appropriate to use. The problem lies in the absence of specific legal studies on medical malpractice that can be used as a guideline in determining and overcoming the existence of medical malpractice in Indonesia. For this reason, it is necessary to review the criminal law formulation policy regarding mediation of penalties which can be linked to medical negligence or malpractice, especially in providing legal protection to victims of malpractice in this case patients.

If the lawsuit is filed through a criminal legal process, then the patient is sufficient to report it to the investigator by showing preliminary evidence or reasons. Furthermore, investigators will conduct investigations by conducting police actions, such as examining witnesses and suspects, examining documents and requesting expert handling. *Visum et repertum* may be needed by investigators, the investigation result file is submitted to the public prosecutor to be able to compile its claims, in the event that the investigator does not find sufficient evidence then it will be considered for the issuance of termination of the investigation, so that most patients do lose on court.

For the public, especially victims, the question of concern is why it is so difficult to bring malpractice cases from the operating table to the court. Whether the existing legal instruments and legislation are not enough to bring the issue of medical malpractice into the realm of law, especially criminal law, it is necessary to review the current formulation policy (laws relating to medical malpractice) and formulation policies that are will come in overcoming the crime of medical malpractice by emphasizing uniformity and consistency in terms of the formulation of criminal acts, criminal liability and the most appropriate punishment in order to provide a sense of justice for victims and perpetrators as well as the use of mediating penal as one form of settlement in the medical field *ius constituendum* in an effort to provide a sense of justice for victims. This is related to the development of criminal law in various countries today, namely the use of mediation of penalties as an alternative to solving problems in the field of criminal law.

The development of the theory of punishment always experiences ups and downs in its development. Criminal theories aimed at rehabilitation have been criticized because they are based on the belief that rehabilitation goals cannot work. In the 1970s there were pressures that treatment of rehabilitation was unsuccessful and indeterminate sentences were not given appropriately without guidelines.

Against the pressures on rehabilitation goals the "Justice Model" was born as a modern justification for punishment proposed by Sue Titus Reid (1987). This justice model is also known as the justice approach or just reward model (Just Desert Model). This model is based on 2 (two) theories about the purpose of punishment, namely prevention and retribution. The basis of retribution in the just desert model assumes that violators will be judged by the sanctions that should be received by violators in view of the crimes they have committed, proper sanctions will prevent criminals from committing more criminal acts and prevent others from committing crimes.

Under this just desert model scheme, perpetrators with the same crime will receive the same punishment and the more serious perpetrators of the crime will receive a harsher sentence

than the lighter offenders. There are 2 things that become critics of this just desert theory, namely: First, because desert theories place primarily by emphasizing the relationship between proper punishment and crime rates, so that with the interest of treating such cases, this theory ignores differences other relevant differences between the perpetrators such as the personal background of the offender and the impact of punishment on the offender and his family. This theory also often treats cases that are not the same in the same way. Second, overall the emphasis is on guidelines for distinguishing crime and criminal records that affect the psychology of punishment and those who punish (Tonry, 1996). The Restorative Justice Model which is often confronted with the Retributive Justice Model and is a development of the Restitutive Justice Model.

Restorative justice is a paradigm that can be used as a frame for a strategy for handling criminal cases that aims to answer dissatisfaction with the functioning of the current criminal justice system. Tonny Marshal stated that Restorative Justice is, "a process in which the parties involved in crime jointly resolve problems related to how to deal with post-crime problems and their consequences in the future" (Mansyur, 2010). Van Ness & Daniel (1980) states that the foundation of restorative justice theory can be summarized in the following characteristics (Abidin, 2005) :

1. Crime is primarily a conflict between individuals resulting in injuries to victims, communities and the offenders themselves, only secondary is it lawbreaking. (free translation: Crimes by their very nature are primary conflicts between individuals resulting in injury to victims, the community and the perpetrators themselves, while the definition of crime as something that is illegal is only secondary)
2. The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.
3. The overall goal of the criminal justice process must be to reconcile the parties to the conflict/dispute, as well as repair the injuries caused by the crime)
4. The criminal justice process should facilitate active participation by victims, offenders and their communities. A should not be dominated by government to the exclusion of others.
5. The criminal justice process must facilitate the active participation of victims, perpetrators and the community. This should not be dominated by the government by putting aside other people or other matters).

The restorative justice model is proposed by abolitionists who reject coercive means in the form of litigative facilities and are replaced by reparative (non-litigation) facilities. Abolitionists consider the criminal justice system to contain problems or structural flaws so that it must realistically change the structural basis of the system (Bentham, 1996; Van Apeldoorn & Leyten, 1972; Radbruch, 2004). In the context of a criminal sanction system, the values underlying abolitionist understanding still make sense to look for alternative sanctions that are more feasible and effective than institutions such as prisons. The restorative justice model to be built by abolitionists can be seen in detail the comparison of the current system (which abolitionists call retributive justice) and the system proposed by abolitionists under the name restorative justice, as follows (Muladi, 1995).

COMPARISON BETWEEN RETRIBUTIVE AND RESTORATIVE JUSTICE	
Retributive Justice	Restorative Justice
1. Crimes are formulated as violations of the State	1. A crime is formulated as someone's violation of another person
2. Attention is directed towards determining mistakes in the past	2. The point of attention on problem solving, responsibility and obligations in the future

3. Relations of parties that are resistant, through an orderly and normative process	3. Normative nature is built on the basis of dialogue and negotiation
4. Application of suffering for digestion and prevention	4. Restitution as a means of improving the parties, reconciliation and restoration as the main objective
5. Justice is formulated with deliberate and process	5. Justice is formulated as rights relations, assessed on the basis of results
6. The nature of the conflict from evil is obscured and suppressed	6. Crimes are recognized as conflicts
7. One social loss is replaced by another	7. Target attention on repairing social losses
8. Society is on the sidelines displayed abstractly by the state	8. The community is a facilitator in the restorative process
9. Promoting competitive and individualistic values	9. Promote mutual assistance
10. Action is directed from the state to perpetrators of crime: passive victims	10. The role of victims and perpetrators of crime is recognized, both in the problem and in the settlement of the rights and needs of victims, perpetrators of criminal acts are encouraged to take responsibility
11. The responsibility of the perpetrators of criminal acts is formulated in the context of criminal prosecution	11. The perpetrator's responsibility is formulated as the impact of the request on the action and to help decide the best
12. Crimes are formulated in legal terminology which are theoretical and pure, without having moral, social and economic dimensions	12. Crimes are understood in a holistic, moral, social and economic context
13. Sin or debt is given to the State and society abstractly	13. Sin or debt and liability to the victim are recognized
14. The reactions and responses are focused on the perpetrators of the crimes that have occurred	14. The reactions and responses are focused on the consequences of the actions of the perpetrators of the crime
15. The stigma of crime cannot be eliminated	15. Stigma can be removed through restorative action
16. There is no encouragement to repent and forgive	16. There are possibilities that are helpful
17. Attention is directed at the debate between free will and social psychological determinism in the power of evil	17. Attention is directed to accountability for the consequences of actions

Restorative justice according to Zulfa (2011a; 2011b) contains the following ideas and principles:

- a. Building joint participation between perpetrators, victims and community groups in resolving an incident or criminal act. Placing perpetrators, victims, and the community as "stakeholders" who work together and immediately try to find a solution that is considered fair for all parties (win-win solution).
- b. Pushing perpetrators to be held accountable to victims for events or criminal acts that have caused injury or loss to the victim. Furthermore, building responsibility does not repeat the criminal act he has committed.
- c. Placing a criminal event or act not primarily as a form of violation of the law, but as a violation by a person (group of people) against someone (a group of people). Because of that, the perpetrator should be directed towards being accountable to the victim, not prioritizing legal accountability.
- d. Encourage resolving an event or criminal action in more informal and personal ways, rather than resolving it in formal (rigid) and impersonal ways.

Settlement of medical malpractice cases using a restorative justice approach is basically focused on efforts to transform mistakes made by doctors with corrective efforts. Included in this effort is improving the relationship between doctors and patients / their families. This is implemented in the presence of actions which represent changes in the attitudes of the parties in an effort to achieve a common goal, namely improvement.

Restorative justice places a higher value in the direct involvement of the parties. It is also suggested in the malpractice case (Bornstein et al., 2002; Herlianto, 2014; McMichael, 2018). The victim is able to restore the element of control, while the perpetrator is encouraged to assume responsibility as a step in correcting the mistakes caused by crime and in establishing his social value system. Community involvement actively strengthens the community itself and binds the community to values to respect and love one another. The role of the government is substantially reduced in monopolizing the current judicial process. Restorative justice requires cooperative efforts from the community and government to create a condition where victims and perpetrators can reconcile conflict between the two parties and repair the wounds of both parties (Zehr, 2015; Van Ness & Strong, 2014). This consensus agreement as putlined in Pancasila has a philosophical and theological foundation that leads to the restoration of the dignity and dignity of all parties involved, replacing the atmosphere of conflict with peace (the principle of friendship), eliminating blasphemous blasphemy with forgiveness, stopping demands for blame and blame (the principle of mutual forgiveness and asking for forgiveness) to God). Desired clarification is not through the court table, but through the table of peace and negotiation (the principle of deliberation).

CONCLUSION

Settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

REFERENCES

- Abidin, Z. (2005). *Pemidanaan, Pidana, dan tindakan dalam Rancangan KUHP 2005*. Elsam.
- Arief, B. N. (2008). *Mediasi penal: penyelesaian perkara di luar pengadilan*. Program Magister Ilmu Hukum, Pascasarjana, Undip.
- Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.
- Bielen, S., Grajzl, P., & Marneffe, W. (2020). The resolution process and the timing of settlement of medical malpractice claims. *Health Economics, Policy and Law*, 15(4), 509-529.
- Bornstein, B. H., Rung, L. M., & Miller, M. K. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral sciences & the law*, 20(4), 393-409.

Commented [L11]: Literature was poorly reviewed by reputable international journals. Reference research material has not used the literature in the last 10 years.

Commented [J12R11]: Done. The additional reference was colored with yellow mark

- Chazawi, A. (2007). *Malpraktik kedokteran: tinjauan norma dan doktrin hukum*. Bayumedia.
- Hanafiah, M. J., & Amir, A. (1999). *Etika kedokteran dan Hukum kesehatan*. Jakarta: EGC.
- Herkutanto, H. (2011). Medicolegal Aspects of Emergency Services. *Journal of the Indonesian Medical Association*, 57(02).
- Herlianto, S. (2014). Constructing Penal Mediation on Medical Malpractice Cases: A Restorative Justice Perspective. *JL Pol'y & Globalization*, 24, 9.
- Hutapea, T. P. D. (2018). Penerapan Rehabilitasi Medis Dan Sosial Bagi Prajurit Tni Dalam Putusan Pengadilan/The Implementation Of Medical And Social Rehabilitation For Indonesian National Armed Forces Personnel In Court Decision. *Jurnal Hukum dan Peradilan*, 7(1), 67-86.
- Ibrahim, J. (2006). Teori dan metodologi penelitian hukum normatif. Malang: Bayumedia Publishing, 57.
- Isfandyarie, A. (2005). *Malpraktek dan resiko medik dalam kajian hukum pidana*. Prestasi Pustaka Publisher.
- Iswanti, M., Razak, A., Sampurno, S., & Halim, H. (2017). Maladministration as Doctor Medical Malpractice: A Health Law Perspective in Indonesia. *JL Pol'y & Globalization*, 67, 167.
- Komalawati, V. (1989). *Hukum dan etika dalam praktek dokter*. Pustaka Sinar Harapan.
- Lestari, N. (2001). Masalah Malpraktek Etik Dalam Praktek Dokter. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar, Malang*.
- Liebman, B. L. (2013). Malpractice mobs: medical dispute resolution in China. *Columbia Law Review*, 181-264.
- Mansyur, R. (2010). *Mediasi Penal Terhadap Perkara KDKRT (Kekerasan Dalam Rumah Tangga)*, Jakarta: Yayasan Gema Yustisia Indonesia.
- Mariyanti, N. (1988). *Malapraktek kedokteran: dari segi hukum pidana dan perdata*. Bina Aksara.
- McMichael, B. J. (2018). The Failure of Sorry: An Empirical Evaluation of Apology Laws, Health Care, and Medical Malpractice. *Lewis & Clark L. Rev.*, 22, 1199.
- Mello, M. M. (2001). Of swords and shields: the role of clinical practice guidelines in medical malpractice litigation. *University of Pennsylvania Law Review*, 149(3), 645-710.
- Morreim, H. (2012). Malpractice, mediation, and moral hazard: The virtues of dodging the data bank. *Ohio St. J. on Disp. Resol.*, 27, 109.
- Muladi. (1995). *Kapita selekta sistem peradilan pidana*. Badan Penerbit Universitas Diponegoro.
- Ness, V., & Daniel, W. (1980). Restorative justice and International Human Rights, Restorative Justice: International Perspective, edited by Burt Galaway and Joe Hudson, Amsterdam, The Netherland.
- Purwadi, A., & Enggarsasi, U. (2019). From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes. *J. Advanced Res. L. & Econ.*, 10, 1517.
- Purwadi, A., Enggarsasi, U., & Suhandi, S. (2019). From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes. *Journal of Advanced Research in Law and Economics*, 10(5), 1517-1524.
- Radbruch, G. (2004). Philosophy of law. Moscow: *International relationships [in Russian]*.
- Raveesh, B. N., Nayak, R. B., & Kumbar, S. F. (2016). Preventing medico-legal issues in clinical practice. *Annals of Indian Academy of Neurology*, 19(Suppl 1), S15.
- Reid, S. T. (1987). *Criminal justice: Procedures and issues*. West Publishing Company.

- Sasanthi, N. W. I. S. (2018). Medical Actions Resulting in Malpractice in the Perspective of Indonesian Criminal Law. In *Proceedings of International Conference of Social Science, ICOSS 2018*. European Alliance for Innovation (EAI).
- Soedjatmiko, H. M. (2001). Masalah Medik dalam Malpraktik Yuridik. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran*.
- Sohn, D. H., & Bal, B. S. (2012). Medical malpractice reform: the role of alternative dispute resolution. *Clinical Orthopaedics and Related Research*®, 470(5), 1370-1378.
- Tempo.co. (Dec 23, 2013). Ketua MKDKI: Kami Tak Mengenal Istilah Malpraktek. Retrieved from <https://nasional.tempo.co/read/539526/ketua-mkdki-kami-tak-mengenal-istilah-malpraktek/full&view=ok>. Accessed Dec 29, 2020.
- Tonry, M. (1996). Sentencing matters. *Journal of Criminal Justice*, 6(24), 570-571.
- Traina, F. (2009). Medical malpractice: the experience in Italy. *Clinical orthopaedics and related research*, 467(2), 434-442.
- Van Apeldoorn, L. J., & Leyten, J. C. (1972). *Inleiding tot de studie van het Nederlandse recht. 17., herziene dr. door JCM Leyten*. Tjeenk Willink.
- Van Ness, D. W., & Strong, K. H. (2014). *Restoring justice: An introduction to restorative justice*. Routledge.
- Yunanto, A & Helmi, (2010). *Hukum Pidana Malpraktek Medik Tinjauan dan Perspektif Medikolegal*,
- Zehr, H. (2015). *The little book of restorative justice: Revised and updated*. Simon and Schuster.
- Zulfa, E. A. (2011a). *Pergeseran Paradigma Pemidanaan*, Bandung: Lubuk Agung.
- Zulfa, E. A. (2011b). Restorative Justice in Indonesia: Traditional Value. *Indonesia Law Review*, 1(2),33-43.

Acceptance & Invoice



Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>

[IJCS] Invoice

Muhammad Umair Zia
<omairzia@lifescienceglobal.com>
Kepada: asyaufi.fh.unlam@gmail.com

12 Januari 2021
22.17

Dear Dr. **Ahmad Syaufi**,

We understand from the Editor in chief of International Journal of Criminology and Sociology that your manuscript entitled “**Application of Restorative Justice Values in Settling Medical Malpractice Cases**” has been accepted for publication in International Journal of Criminology and Sociology. Please find attached the invoice for Open access charges covering the production costs.

Please click or copy/Paste in your browser the following hyperlink for payment through credit card.

https://www.2checkout.com/checkout/purchase?sid=1451442&quantity=1&product_id=15

Kindly process this as soon as possible to expedite publication of your article in the forthcoming issue of the journal.

Please acknowledge the receipt of the invoice.

Best Regards,

Thanking You
For Lifescience Global

Muhammad Umair Zia
Accountant



Virus-free. www.avast.com



LSG-INVOICE 202101-24-IJCS.pdf
88K



Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>

Your order on www.lifescienceglobal.com: Payment received

2Checkout Support <support@2checkout.com>
Kepada: asyaufi.fh.unlam@gmail.com

12 Januari 2021 22.55

Lifescience Global
<http://www.lifescienceglobal.com>

Dear Ahmad Syaufi,

Thank you for your order on 2021-01-12 from
<http://www.lifescienceglobal.com>! We received your **7,524,117.57**
IDR payment (**Visa/MasterCard - 1013**) for order **142027605**.

The charge on your bank statement will appear as
2CO.COM*Lifescien. 2Checkout.com, Inc. acts as an authorized
payment service provider of Lifescience Global online products and
services.

Payment/Order information

Billing Information

Ahmad Syaufi

Jl. Brigjen H. Hasan Basri, Kayu Tangi, Banjarmasin 219,
Indonesia

Ordered item(s)	Unit Price	Total
1 x Open Access - (V-nw)	7,524,117.57 IDR	7,524,117.57 IDR
	Sales Tax / VAT	0.00 IDR
	Grand Total	7,524,117.57 IDR

You can access your products according to the terms and conditions you accepted during purchase.

Support information

Need technical support? For product installation, activation and other technical support issues, please contact Lifescience Global on +1 416 420 9739 or info@lifescienceglobal.com

Need order support? Use myAccount to easily manage your order, subscription, invoice and payment details. [Signup / Login](#) using your email address asyaufi.fh.unlam@gmail.com

2Checkout has processed your order as the authorized payment service provider of Lifescience Global.

Thank you,

The 2Checkout Team

www.2co.com

Payment Information

Muhammad Umair Zia
<omairzia@lifescienceglobal.com>
Kepada: asyaufi.fh.unlam@gmail.com

13 Januari 2021
20.18

Dear Dr. Ahmad Syaufi,

We are pleased to inform you that your paid amount US\$ 530 has been received as on **12-01-2021** against invoice no. 202101-24-IJCS, manuscript title "**Application of Restorative Justice Values in Settling Medical Malpractice Cases**" Through 2checkout.

Thank you once again for your payment and for contributing your valuable manuscript in the issue.

Best Regards,

Thanking You
For Lifescience Global

Muhammad Umair Zia
Accountant



***** DO NOT REPLY TO THIS EMAIL *****

*** Order information ***

Date: 2021-01-12 10:55:04

Time zone: GMT-05:00

2Checkout reference: 142027605

External reference:

Order number: 697

Payment method: Visa/MasterCard

Order status: Order complete

Referrer: N/A

Order flow: REGULAR

Order origin: Web

Message type: COMPLETE

*** Ordered products ***

Product #: 6597932

Product name: Open Access - (V-nw)

External reference: OA(V-nw)

Product code: 15

Quantity: 1

Unit price: 7524117.57 IDR

TAX/VAT: 0.00 IDR

Total: 7524117.57 IDR

Shipping taxes: 0.00 IDR

Order total: 7524117.57 IDR

Processing fee: 495456.04 IDR

*** Billing information ***

First name: Ahmad

Last name: Syaufi

CNP:

Company:

Registration number:

Street: Jl. Brigjen H. Hasan Basri, Kayu Tangi

City: Banjarmasin

State: -

Zip: 219

Country: Indonesia

Phone:

Fax:

Email: asyaufi.fh.unlam@gmail.com

*** Delivery information ***

First name: Ahmad

Last name: Syaufi

Company:

Street: Jl. Brigjen H. Hasan Basri, Kayu Tangi

City: Banjarmasin

State: -

Zip: 219

Country: Indonesia

Phone:

*** Additional information ***

IP: 114.142.170.29

Language: en

*** Ordered products (in USD) ***

Product #: 6597932

Product name: Open Access - (V-nw)

External reference: OA(V-nw)

Product code: 15

Quantity: 1

Unit price: 530.00000002263 USD

TAX/VAT: 0 USD

Total: 530.00000002263 USD

Shipping taxes: 0.00 USD

Order total: 530.00 USD

Processing fee: 34.90 USD



Virus-free. www.avast.com

Lampiran

INVOICE

Billed to:

Ahmad Syaafi

E:mail:asyaafi.fh.unlam@gmail.com

Invoice No: 202101-24-IJCS

Invoice Date: 1/12/2021

Invoice Due: Immediate

EIN: 98-1157084

(All prices in US \$)

Description	Net Price	QTY	Total
Open access charges Journal Code: IJCS	500.00	01	500.00
Article Title: Application of Restorative Justice Values in Settling Medical Malpractice Cases			
Add: Bank and Miscellaneous Charges			+ 30.00
Invoice Total:			US\$ 530.00

**Payment Through Credit Card:**

To pay through credit card visit the following link, your secure transaction will be carried out through www.2checkout.com

(Click or copy paste in browser the below hyperlink for online payment):

https://www.2checkout.com/checkout/purchase?sid=1451442&quantity=1&product_id=15

Payment Accepted through Bank Transfers

NOTE: Please 'CAREFULLY' use below Beneficiary Information

If paying by bank transfer: Please send an email at omairzia@lifescienceglobal.com mentioning Invoice number, Bank Transaction ID, and Transaction date, so that your payment can be tracked.

Bank Swift CODE: BAHLPKKA
Beneficiary Account Number: 1031-0081-013860-01-1
IBAN PK44 BAHL 1031 0081 0138 6001
Beneficiary Account Title: LIFESCIENCE GLOBAL
Bank Address: Bank Al Habib Limited, C-21, Block 13,
F. B. Area, Shahrah-e-Pakistan,
Karachi, Pakistan

Issued by:

Manager Accounts

contact: omairzia@lifescienceglobal.com

Address: North America

728 States Street, Mississauga, Ontario, L5R0B6, Canada

Email: omairzia@lifescienceglobal.com

Galley Proof

Composed version of your manuscript for IJCS Vol. 10 (Syaafi)



Farrukh Imran <fimran@lifescienceglobal.com>
Kepada: asyaafi.fh.unlam@gmail.com

12 Januari 2021 22.05

Dear Dr. Ahmad Syaafi;

Please find enclosed the composed version of your article and I will be grateful if you could kindly check the manuscript for any potential errors, missing lines/paragraphs, errors in figures/diagrams etc. Authors must ensure that all references are complete and accurate in accordance with the journal's instruction for author.

You are required to complete the following steps after reviewing the galley proofs of your manuscript:

1. Kindly ensure to return a typed **list of corrections** along with the corrected article within the **next three days** by email at fimran@lifescienceglobal.com
 - a. Corrections reported on galley proofs PDFs / PDF comments are acceptable.
 - b. Please print the composed version and mark the suggestion/changes clearly, scan the corrected copy and send us via e-mail.

c. Corrections are also acceptable through a list of corrections. Please find attached a MS Word template file to use for the list of corrections.

2. Please find enclosed a copyright notice / author declaration from which needs to be filled in and returned along with your comments on the galley proofs.

Please submit the e-mail addresses of all co-authors in your article. We maintain contact information record of all contributing authors to keep them updated about the publication.

3. Article Reprints are supplied only ON ORDER. An order of a minimum one hundred (100) copies can be placed using the attached Reprint Order form.

Notes about the Galley Proofs:

The enclosed galley proofs have been prepared directly from the electronic files of the manuscript you provided. However, in the transformation process, certain errors may occur due to different software versions used. Thus the typesetting department is not responsible for the inclusion of such errors.

The conversion to PDF version may also distort your original figures, therefore kindly check them carefully and report these problems. All figures will be

reproduced directly from your supplied copies and the resolution of the figures in the final manuscript will be exactly the same as the figures you supplied to us with the original manuscript (except chemical structures).

This manuscript is being considered with the understanding that it is submitted on an exclusive basis and has not been submitted elsewhere simultaneously for publication.

Kindly acknowledge the receipt of this e-mail at your earliest convenience. For any other assistance or information feel free to contact us at info@lifescienceglobal.com.

With best wishes,

Farrukh Imran

Composer

www.lifescienceglobal.com

----- End of Forwarded Message

4 lampiran

 **AUTHOR WARRANTY & COPYRIGHT_FORM.pdf**
175K

 **Correction Form.doc**
60K

 **Reprint Order Form (OA journal).pdf**
88K

 **Syaufi_IJCS.pdf**
187K

Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>
Kepada: Farrukh Imran <fimran@lifescienceglobal.com>

12 Januari 2021 23.31

Dear Editor,

Thank you very much for your kind response. We are very happy to know that our paper will be published soon.
We are working to complete and carefully check the final version.

Warm regards,

[Kutipan teks disembunyikan]

Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>
Kepada: Farrukh Imran <fimran@lifescienceglobal.com>

13 Januari 2021 08.00

Dear editor,

Below we attach the revisions to the final manuscript.
We have also paid the publication fee.
We hope that our manuscript will be published as soon as possible.

Best Regards,

[Kutipan teks disembunyikan]

2 lampiran

 **Correction Form_Syaufi_IJCS.doc**
59K

 **AUTHOR WARRANTY & COPYRIGHT_FORM_Syaufi_IJCS.pdf**
724K

Ahmad Syaafi <asyaafi.fh.unlam@gmail.com>
Kepada: Farrukh Imran <fimran@lifescienceglobal.com>

13 Januari 2021 11.53

Dear Editor,

This is the form of copyright and the correction form.
We are looking forward to hearing from you as soon as possible.


Best regards,

Syaufi

[Kutipan teks disembunyikan]

2 lampiran

 **Correction Form_Ahmad Syaufi.docx**
16K

 **CamScanner 01-13-2021 11.44.pdf**
824K

Farrukh Imran <fimran@lifescienceglobal.com>
Kepada: Ahmad Syaufi <asyaufi.fh.unlam@gmail.com>

13 Januari 2021 14.31

Dear Dr. Ahmad Syaufi:

Thanks for your email. Please find attached revised galley proofs for your checking and approval.

Best regards,
Farrukh Imran
Composer
www.lifescienceglobal.com

[Kutipan teks disembunyikan]

[Kutipan teks disembunyikan]

>>>> www.lifescienceglobal.com
<<http://www.lifescienceglobal.com>>

[Kutipan teks disembunyikan]

>>>

 **Syaufi_IJCS.pdf**
191K

Lampiran

**AUTHOR'S WARRANTY & COPYRIGHT ASSIGNMENT FORM**

This Agreement is made with Lifescience Global ("Publisher"). The Agreement is for the Article submitted by you ("Author") for publication in ("Journal title") declared below and is referred to in this Agreement as "Article".

To enable the publisher to publish the Article in ("Journal title"), the ownership of copyright must be established. Please read and complete the form below (Section A plus Section B as appropriate) and return one copy via email or fax.

The Article cannot be published until this signed Agreement is received by the Journal.

SECTION (A): Author's Warranty (Please complete with your details)

Journal title
(for which manuscript is submitted): International Journal of Criminology and Sociology

Corresponding Author's name: Ahmad Syaufi

Complete Mailing Address: Faculty of Law, Lambung Mangkurat University, Jl. Brigjend.H. Hasan Basry (Kayu Tangi), Banjarmasin, Indonesian, 70123

Telephone: 08125024987

Fax: (0511) 3305648

Email: asyaufi@ulm.ac.id / asyauafi.fh.unlam@gmail.com

Article title: Application of Restorative Justice Values in Settling Medical Malpractice Cases

Please check any that apply:

- I am or was a US government employee, and the article is made in that capacity.
- I am or was a UK, Canadian, or Australian government employee, and the article is made in that capacity

NOTE: If you are or were a US Government employee and the Article is made in that capacity, there is no copyright to assign, but you must sign the form to confirm the author warranties in Section A. If you are or were a UK Crown servant, or a Canadian or Australian government employee, and the Article is made in that capacity, the Article must be submitted for clearance by the Permanent Head of the Department concerned, and you must sign the form to confirm the author warranties in Section A. If the Article is determined to be copyrightable at a later date, then copyright and all rights included in this will be transferred to LIFESCIENCE GLOBAL and its assignees, and are deemed to have been automatically transferred at the date the copyrights arose or the date the author's agreement was signed, whichever is later.

In consideration of the publication of the Article in ("JOURNAL TITLE"), I hereby warrant and undertake:]

- a) that this Article is an original work, has not been published before and is not being considered for publication. The article is/will not be submitted to any other journal for publication while in consideration for publication with Lifescience Global.
- b) elsewhere in its final form either in printed or electronic form.
- c) that I have acknowledged the source of all material reproduced in the Article for which the copyright is not owned by me;

- d) that I have obtained written permission from the copyright holder to reproduce in the Article (in all medianow or later developed, including print and electronic form) all material whose copyright is not owned by the Author, and that I have attached to this document true copies of each such permission that I have obtained;
- e) that this Article contains no violation of any existing copyright or other third party right or any material of an obscene, indecent, libellous or otherwise unlawful nature and that to the best of my knowledge this Article does not infringe the rights of others;
- f) that I will indemnify and keep indemnified the Editors and Lifescience Global against all claims and expenses (including legal costs and expenses) arising from any plagiarism complaints, any breach of this warranty and the other warranties on my behalf in this Agreement;
- g) that in the case of a multi-authored Article I have obtained copyright assignment from all co-authors, in writing, including consent to enter into this Agreement on their behalf and to bind them to it and to any modifications of it, and that all co-authors have read and agreed to the above warranties and undertakings, including the accompanying Notes.

SECTION (B): Copyright Assignment

- In consideration of the publication of the Article in Journal that follows subscription/ pay to view model, I hereby assign to the Lifescience global the copyright for the full period of copyright and all renewals, extensions, revisions and revivals together with all accrued rights of action throughout the world in any form and in any language (including all media, both now known or later developed). LIFESCIENCE GLOBAL may assign its rights under this Agreement. Notwithstanding the above, I retain all proprietary rights to the information disclosed in the Article, such as patent and trade mark rights and rights to any process or procedure described in the Article. Full detail regarding the assignment of copyright, the management of permissions, and what rights are granted back to the authors can be found on the accompanying Notes, which are fully incorporated into, and form part of, this Agreement.
- If the article is published in OPEN ACCESS, copyrights remain with the author and the rules in [Creative Commons Attribution License](#) will apply.

AGREED:

Author Name:

Ahmad Syaufi

Signature:



Date:

13 January 2021

In signing this form, the signee warrants that any authors not signing have granted the signee the power of attorney to do so on their behalf, that a copy of this power of attorney is attached, that the manuscript submitted has been approved by these authors in the form in which it has been submitted, and that the warranties given above have been read and agreed by all authors.

**PLEASE RETURN A SIGNED COPY OF THIS FORM TO THE PRODUCTION OFFICE:
(An email with scanned attachment or fax is acceptable)**

Production Office – Lifescience Global
Suite #1, Ground Floor, R-552, Sector 15/A-2
Bufferzone, Karachi
Pakistan
Tel: +92-21-36965952
Email: info-pk@lifescienceglobal.com

Head Office – Lifescience Global
728 States Street,
Mississauga, Ontario, L5R0B6
Canada
Email: info-na@lifescienceglobal.com

Application of Restorative Justice Values in Settling Medical Malpractice Cases



Ahmad Syaufi^{1,*}, Diana Haiti¹ and Mursidah²

¹Faculty of Law, Lambung Mangkurat University, Banjarmasin, Indonesian

²Public Senior High School 8 Banjarmasin, Kalimantan Selatan 70125, Indonesia

Abstract: Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia. This research is a qualitative research using normative legal research and uses a statute approach and a conceptual approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. The conclusion showed that the restorative justice emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Hence, restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Keywords: Restorative Justice, Legal Settling, Medical Malpractice Restorative Justice, Legal Settling, Medical Malpractice.

INTRODUCTION

Lawsuits submitted by patients or their families to the hospital and/or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence law (Raveesh *et al.*, 2016; Traina, 2009; Mello, 2001). The behavior demanded is medical malpractice which is the designation "genus" (collection) of medical professional behavior groups that deviate and cause injury, death, or harm to patients. Basically, the hospital functions as a place to heal illnesses and restore health and the intended function has a meaning of responsibility which should be the responsibility of the government in improving the level of community welfare. Malpractice victims in Indonesia often find it difficult to seek justice, the current legal system has not yet sided with patients (Iswanty *et al.*, 2017; Sasanthi, 2018; Purwadi & Enggarsasi, 2019). Health sector reform that includes a variety of substances, including malpractice, is urgently needed to prevent further casualties. Health reforms that cover a variety of substances, especially malpractice victims are increasingly widespread. If counted annually from Jakarta, it tends to increase, not to mention those in the regions. The Jakarta Legal Aid Institute (LBH) revealed, Reports of malpractice cases and the absence of the right to health are likely to

increase. In 2009, LBH Jakarta recorded at least 7 complaints reports from the public. In 2010 the number increased to 10 complaints. In the last eight years, the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia/ MKDKI*) received 193 complaints of alleged malpractice. Of that number, 34 doctors were given written sanctions, 6 were required to participate in the re-education program, and, the worst part, 27 doctors had their registration certificates revoked which automatically made their license to practice invalid (Tempo.co, 2013).

The current law governing health and hospital matters does not favor the patient because it places evidence on the victim. In this case the patient must prove the occurrence of malpractice. In addition, there is a gap (distance) of knowledge and information between the victim and the doctor, if this is aligned with the usual evidentiary law that is related to the criminal law, it certainly will not be met, and even tends to lose the patient, because all the evidence held by the doctor. Based on observations of LBH Jakarta, reports from the community in the police regarding malpractice have been relatively deadlocked, and many have even stopped, this is because the police always base their investigations on expert statements. What was said by the expert was recorded by the police, in this case the expert who gave objective information or not. On the other hand the patient (victim) who asks the expert of a doctor is reluctant to give testimony of this matter there

*Address correspondence to this author at Faculty of Law, Lambung Mangkurat University, Jalan Brigjend. H. Hasan Basry (Kayu Tangi), Banjarmasin, 70123, Indonesian; Tel: 08125024987; Fax: (0511) 3305648; E-mail: asyaufi@ulm.ac.id, asyaufi.fh.unlam@gmail.com

is a kind of conspiracy in the world of medicine, to cover up so that for example the doctor is protected from his mistakes. This fact is not surprising if many people prefer to remain silent rather than have to report events that have befallen them due to poor health services, even patients often consider this as a fate that must be accepted. The practice of settling criminal cases outside the court so far has no formal legal basis, so there are often cases where informally there has been a peaceful settlement (though through a customary law mechanism), the judicial process is still processed according to the applicable law (Sohn & Bal, 2012; Liebman, 2013; Morreim, 2012; Bielen *et al.*, 2020; Arief, 2008). This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia?

RESEARCH METHODOLOGY

This research is a qualitative research using normative legal research. Normative legal research is a scientific research procedure to find the truth based on legal scientific logic from the normative side (Ibrahim, 2006). In an effort to achieve the stated research objectives, this study uses a statute approach and a conceptual approach.

In this study, the statutory approach was used. It is a research that prioritizes legal materials in the form of statutory regulations as a basic reference for conducting research about medical malpractice. The statutory approach is used to examine statutory regulations which in normalizing there are still deficiencies or even foster deviant practices both at the technical level or in their implementation in the field. To examine statutory regulations, this study used some Indonesian laws about medical practice such as Law No. 23 of 1992 about health. More specifically, Article 55 paragraph (1) of Law No. 23 of 1992 on Health stated that every person has the right to compensation due to mistakes or negligence committed by health workers.

Moreover, the conceptual approach is used in this study. It is a type of approach in legal research that provides an analysis point of view of problem solving in legal research seen from the aspects of the legal concepts behind it, or can even be seen from the values contained in normalizing a regulation in relation to the concept used about malpractice in medical service.

RESULT AND DISCUSSION

Black's Law Dictionary mentions malpractice is any attitude of wrong action, lacking skills in an unnatural measure. This term is generally used towards the attitude of actions of doctors, lawyers, and accountants. Failure to provide professional services and do so at a reasonable level of skill and intelligence by the average colleague of his profession in society, resulting in injury, loss or loss in service recipients who trust them, including wrong professional acts, lack of improper skills, violating professional or legal obligations, very bad practices, illegal, or immoral behavior. Herkutado (2011) quoted from the World Medical Association Statement on Medical Malpractice adapted from the 44th World Medical Assembly Marbella Spain, September 1992 states that: "medical malpractice is the failure of doctors to meet the standard procedures in handling their patients, the inability or negligence, causing a direct cause of harm to the patient. Komalawati (1989) states that the term malpractice comes from "malpractice" which in essence is a mistake in carrying out the profession that arises as a result of obligations that must be done by doctors. According to Chazawi (2007), medical malpractice is a doctor or a person who under his command intentionally or negligently performs acts (active or passive) in the practice of medicine to his patients at all levels that violate professional standards, standard procedures or medical principles, or by violating law without authority; by causing a result (causaal verband) loss of body, physical and mental health and or life of the patient, and therefore establishes legal liability for doctors.

According to Hanafiah & Amir (1999), medical malpractice is the negligence of a doctor to use the level of skills and knowledge that is commonly used in treating patients or injured people according to the size of the same environment. Meanwhile, according to Ninik Mariyanti (1988), malpractice actually has a broad understanding, which can be described as follows:

1. In a general sense: a bad practice, which does not meet the standards set by the profession;
2. In a special sense (seen from the patient's point of view) malpractice can occur in determining the diagnosis, carrying out operations, during treatment, and after treatment.

Based on some understanding of medical malpractice above scholars agree to interpret medical

malpractice as the fault of health workers who for not using knowledge and skill levels in accordance with professional standards which ultimately results in injured or disabled patients or even death. According to Yunanto and Helmi (2010) in medical disputes, there are two basic things. First, on the part of the patient or the patient's family who do not understand about medical actions or procedures that sometimes can cause risks. Second, from the doctor who is less communicative, does not provide a strong explanation of the disease or medical action he is taking. Malpractice according to Lestari (2001) and Isfandyarie (2005) can be distinguished in two forms, namely ethical malpractice and juridical malpractice. Every juridical malpractice is definitely an ethical malpractice, but not all ethical malpractice is a legal malpractice. Ethical malpractice occurs when doctors perform actions that are contrary to the medical code of ethics which is a set of ethical standards, principles, rules and norms that apply to doctors in carrying out their profession (Purwadi *et al.*, 2019). Soedjatmiko (2001) distinguishes juridical malpractice in three categories, namely:

1. Civil malpractice

Civil malpractice will occur if the doctor or the hospital does not fulfill the obligation or does not provide the rights of the patient based on the agreement to provide health services, so that the doctor and or the hospital have defaulted on the agreement. Civil malpractice can also occur if the doctor or patient does an action that causes harm to the patient so that it can be said to have committed an illegal act.

2. Criminal malpractice.

Criminal malpractice occurs if there is a doctor's mistake in taking a careless action that causes the patient to die or become disabled. Criminal malpractice can occur due to three things, namely: (i). for example, in cases of leaking medical secrets, abortions without medical indication or omitting a patient for any reason; (ii). due to carelessness that occurs because the doctor or health worker acts not in accordance with medical standards or without asking for patient consent; and (iii). due to negligence that occurs due to inadvertence of the doctor causing death or disability in the patient. Criminal malpractice also occurs if there is an incident in the form of omission and/or rejection of patients

who come, citing the patient's inability to pay for hospital, medical and/or nursing services, both inpatient and outpatient. This type of malpractice occurs because there is no fulfillment of obligations prescribed by law by the hospital in the form of providing assistance to patients who should be helped, resulting in death or disability in these patients as a result of lack of help.

3. Administrative malpractice.

Administrative malpractice occurs if doctors, health workers or hospitals practice violating state administrative laws such as carrying out practices without permission, carrying out practices or actions that are not in accordance with their permits, or having their licenses expired and or carrying out practices without making medical records clear.

There are three theories that mention the source of malpractice, namely (Mariyanti, 1988):

1. Contract Violation Theory.

The first theory is that the source of malpractice is due to breach of contract. This is based on the principle that legally a health worker has no obligation to care for someone if between the two there is no contractual relationship between the health worker and the patient. The relationship between health workers and patients only occurs when a contract has occurred between the two parties.

In relation to the relationship between the patient's contract with the health worker, it does not mean that the relationship between the health worker and the patient always occurs with mutual agreement. In cases where the patient is not self-conscious or in an emergency situation, for example, a person may not give their consent.

If this situation occurs, then the approval or contract of the patient's health worker can be requested from a third party, namely the patient's family acting on behalf of and representing the patient's interests. If this is also not possible, for example because the emergency patient comes without family and is only escorted by other people who happen to have helped him, then in the interest of the sufferer, according to applicable laws, a health worker is required to

provide assistance as well as possible. This action has been legally considered as an embodiment of the medical-patient contract.

2. Theory of Deliberate Acts.

The second theory that can be used by patients as a basis for suing health workers for malpractice is intentional tort, which results in someone physically injured (assault and battery).

3. Theory of Negligence.

The third theory states that the source of malpractice is negligence. Negligence that causes the source of actions that are categorized in this malpractice must be proven to exist, besides the negligence in question must be included in the category of gross negligence (*culpa lata*). To prove this is certainly not an easy task for law enforcement officers.

The concept of solving medical malpractice cases both contained in Act Number 29 of 2004 concerning Medical Practices, Act Number 36 of 2009 concerning Health, and Act Number 44 of 2009 concerning Hospitals only regulates the settlement of cases in the realm of civil law. For medical malpractice cases that contain elements of criminal law directly submitted to the police for an investigation process as referred to in Article 186 of Law Number 36 Year 2009, it reads: supervisory staff must report to investigators in accordance with the provisions of the legislation".

Arrangement of medical malpractice case/dispute settlement through civil law can be seen in Article 29 of Law Number 36 Year 2009 which states that: "In the case of health personnel suspected of negligence in carrying out their profession, negligence must be resolved first through mediation".

Further in the Elucidation of the article states that "mediation is conducted if a dispute arises between the health service provider and the patient as the recipient of health services. Mediation is carried out aimed at resolving disputes outside the court by mediators agreed by the parties". Likewise Article 60 letter f of Law Number 44 Year 2009, states that "the Provincial Hospital Supervisory Agency is in charge of receiving complaints and making efforts to resolve disputes by means of mediation".

Claims for medical malpractice often fail in the middle of the road because of the difficulty of proof. In

this case the doctor needs to defend himself and defend his rights by stating the reasons for his actions. Both in the case patients and doctors, judges and prosecutors have difficulty in dealing with this medical malpractice problem, especially from the legal technical point of view or legal formulation that is appropriate to use. The problem lies in the absence of specific legal studies on medical malpractice that can be used as a guideline in determining and overcoming the existence of medical malpractice in Indonesia. For this reason, it is necessary to review the criminal law formulation policy regarding mediation of penalties which can be linked to medical negligence or malpractice, especially in providing legal protection to victims of malpractice in this case patients.

If the lawsuit is filed through a criminal legal process, then the patient is sufficient to report it to the investigator by showing preliminary evidence or reasons. Furthermore, investigators will conduct investigations by conducting police actions, such as examining witnesses and suspects, examining documents and requesting expert handling. *Visum et repertum* may be needed by investigators, the investigation result file is submitted to the public prosecutor to be able to compile its claims, in the event that the investigator does not find sufficient evidence then it will be considered for the issuance of termination of the investigation, so that most patients do lose on court.

For the public, especially victims, the question of concern is why it is so difficult to bring malpractice cases from the operating table to the court. Whether the existing legal instruments and legislation are not enough to bring the issue of medical malpractice into the realm of law, especially criminal law, it is necessary to review the current formulation policy (laws relating to medical malpractice) and formulation policies that are will come in overcoming the crime of medical malpractice by emphasizing uniformity and consistency in terms of the formulation of criminal acts, criminal liability and the most appropriate punishment in order to provide a sense of justice for victims and perpetrators as well as the use of mediating penal as one form of settlement in the medical field *ius constituendum* in an effort to provide a sense of justice for victims. This is related to the development of criminal law in various countries today, namely the use of mediation of penalties as an alternative to solving problems in the field of criminal law.

The development of the theory of punishment always experiences ups and downs in its development.

Criminal theories aimed at rehabilitation have been criticized because they are based on the belief that rehabilitation goals cannot work. In the 1970s there were pressures that treatment of rehabilitation was unsuccessful and indeterminate sentences were not given appropriately without guidelines.

Against the pressures on rehabilitation goals the "Justice Model" was born as a modern justification for punishment proposed by Sue Titus Reid (1987). This justice model is also known as the justice approach or just reward model (Just Desert Model). This model is based on 2 (two) theories about the purpose of punishment, namely prevention and retribution. The basis of retribution in the just desert model assumes that violators will be judged by the sanctions that should be received by violators in view of the crimes they have committed, proper sanctions will prevent criminals from committing more criminal acts and prevent others from committing crimes.

Under this just desert model scheme, perpetrators with the same crime will receive the same punishment and the more serious perpetrators of the crime will receive a harsher sentence than the lighter offenders. There are 2 things that become critics of this just desert theory, namely: First, because desert theories place primarily by emphasizing the relationship between proper punishment and crime rates, so that with the interest of treating such cases, this theory ignores differences other relevant differences between the perpetrators such as the personal background of the offender and the impact of punishment on the offender and his family. This theory also often treats cases that are not the same in the same way. Second, overall the emphasis is on guidelines for distinguishing crime and criminal records that affect the psychology of punishment and those who punish (Tonry, 1996). The Restorative Justice Model which is often confronted with the Retributive Justice Model and is a development of the Restitutive Justice Model.

Restorative justice is a paradigm that can be used as a frame for a strategy for handling criminal cases that aims to answer dissatisfaction with the functioning of the current criminal justice system. Tonny Marshal stated that Restorative Justice is, "a process in which the parties involved in crime jointly resolve problems related to how to deal with post-crime problems and their consequences in the future" (Mansyur, 2010). Van Ness & Daniel (1980) states that the foundation of restorative justice theory can be summarized in the following characteristics (Abidin, 2005) :

1. Crime is primarily a conflict between individuals resulting in injuries to victims, communities and the offenders themselves, only secondary is it lawbreaking. (free translation: Crimes by their very nature are primary conflicts between individuals resulting in injury to victims, the community and the perpetrators themselves, while the definition of crime as something that is illegal is only secondary)
2. The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.
3. The overall goal of the criminal justice process must be to reconcile the parties to the conflict/dispute, as well as repair the injuries caused by the crime)
4. The criminal justice process should facilitate active participation by victims, offenders and their communities. A should not be dominated by government to the exclusion of others.
5. The criminal justice process must facilitate the active participation of victims, perpetrators and the community. This should not be dominated by the government by putting aside other people or other matters).

The restorative justice model is proposed by abolitionists who reject coercive means in the form of litigative facilities and are replaced by reparative (non-litigation) facilities. Abolitionists consider the criminal justice system to contain problems or structural flaws so that it must realistically change the structural basis of the system (Bentham, 1996; Van Apeldoorn & Leyten, 1972; Radbruch, 2004). In the context of a criminal sanction system, the values underlying abolitionist understanding still make sense to look for alternative sanctions that are more feasible and effective than institutions such as prisons. The restorative justice model to be built by abolitionists can be seen in detail the comparison of the current system (which abolitionists call retributive justice) and the system proposed by abolitionists under the name restorative justice, as follows (Muladi, 1995).

Restorative justice according to Zulfa (2011a; 2011b) contains the following ideas and principles:

- a. Building joint participation between perpetrators, victims and community groups in resolving an incident or criminal act. Placing perpetrators,

Table 1: Comparison between Retributive and Restorative Justice

Retributive Justice	Restorative Justice
1. Crimes are formulated as violations of the State	1. A crime is formulated as someone's violation of another person
2. Attention is directed towards determining mistakes in the past	2. The point of attention on problem solving, responsibility and obligations in the future
3. Relations of parties that are resistant, through an orderly and normative process	3. Normative nature is built on the basis of dialogue and negotiation
4. Application of suffering for digestion and prevention	4. Restitution as a means of improving the parties, reconciliation and restoration as the main objective
5. Justice is formulated with deliberate and process	5. Justice is formulated as rights relations, assessed on the basis of results
6. The nature of the conflict from evil is obscured and suppressed	6. Crimes are recognized as conflicts
7. One social loss is replaced by another	7. Target attention on repairing social losses
8. Society is on the sidelines displayed abstractly by the state	8. The community is a facilitator in the restorative process
9. Promoting competitive and individualistic values	9. Promote mutual assistance
10. Action is directed from the state to perpetrators of crime: passive victims	10. The role of victims and perpetrators of crime is recognized, both in the problem and in the settlement of the rights and needs of victims, perpetrators of criminal acts are encouraged to take responsibility
11. The responsibility of the perpetrators of criminal acts is formulated in the context of criminal prosecution	11. The perpetrator's responsibility is formulated as the impact of the request on the action and to help decide the best
12. Crimes are formulated in legal terminology which are theoretical and pure, without having moral, social and economic dimensions	12. Crimes are understood in a holistic, moral, social and economic context
13. Sin or debt is given to the State and society abstractly	13. Sin or debt and liability to the victim are recognized
14. The reactions and responses are focused on the perpetrators of the crimes that have occurred	14. The reactions and responses are focused on the consequences of the actions of the perpetrators of the crime
15. The stigma of crime cannot be eliminated	15. Stigma can be removed through restorative action
16. There is no encouragement to repent and forgive	16. There are possibilities that are helpful
17. Attention is directed at the debate between free will and social psychological determinism in the power of evil	17. Attention is directed to accountability for the consequences of actions

victims, and the community as "stakeholders" who work together and immediately try to find a solution that is considered fair for all parties (win-win solution).

- b. Pushing perpetrators to be held accountable to victims for events or criminal acts that have caused injury or loss to the victim. Furthermore, building responsibility does not repeat the criminal act he has committed.
- c. Placing a criminal event or act not primarily as a form of violation of the law, but as a violation by a person (group of people) against someone (a group of people). Because of that, the perpetrator should be directed towards being accountable to the victim, not prioritizing legal accountability.
- d. Encourage resolving an event or criminal action in more informal and personal ways, rather than resolving it in formal (rigid) and impersonal ways.

Settlement of medical malpractice cases using a restorative justice approach is basically focused on efforts to transform mistakes made by doctors with corrective efforts. Included in this effort is improving the relationship between doctors and patients / their families. This is implemented in the presence of actions which represent changes in the attitudes of the parties in an effort to achieve a common goal, namely improvement.

Restorative justice places a higher value in the direct involvement of the parties. It is also suggested in the malpractice case (Bornstein *et al.*, 2002; Herlianto, 2014; McMichael, 2018). The victim is able to restore the element of control, while the perpetrator is encouraged to assume responsibility as a step in correcting the mistakes caused by crime and in establishing his social value system. Community involvement actively strengthens the community itself and binds the community to values to respect and love one another. The role of the government is

substantially reduced in monopolizing the current judicial process. Restorative justice requires cooperative efforts from the community and government to create a condition where victims and perpetrators can reconcile conflict between the two parties and repair the wounds of both parties (Zehr, 2015; Van Ness & Strong, 2014). This consensus agreement as putlined in Pancasila has a philosophical and theological foundation that leads to the restoration of the dignity and dignity of all parties involved, replacing the atmosphere of conflict with peace (the principle of friendship), eliminating blasphemous blasphemy with forgiveness, stopping demands for blame and blame (the principle of mutual forgiveness and asking for forgiveness) to God). Desired clarification is not through the court table, but through the table of peace and negotiation (the principle of deliberation).

CONCLUSION

Settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

REFERENCES

Abidin, Z. (2005). *Pemidanaan, Pidana, dan tindakan dalam Rancangan KUHP 2005*. Elsam.

Arief, B. N. (2008). *Mediasi penal: penyelesaian perkara di luar pengadilan*. Program Magister Ilmu Hukum, Pascasarjana, Umdip.

Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.
<https://doi.org/10.1093/actrade/9780198205166.book.1>

Bielen, S., Grajzl, P., & Marneffe, W. (2020). The resolution process and the timing of settlement of medical malpractice claims. *Health Economics, Policy and Law*, 15(4), 509-529.
<https://doi.org/10.1017/S1744133119000185>

Bornstein, B. H., Rung, L. M., & Miller, M. K. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral sciences & the law*, 20(4), 393-409.

<https://doi.org/10.1002/bsl.496>

Chazawi, A. (2007). *Malpraktik kedokteran: tinjauan norma dan doktrin hukum*. Bayumedia.

Hanafiah, M. J., & Amir, A. (1999). *Etika kedokteran dan Hukum kesehatan*. Jakarta: EGC.

Herkutanto, H. (2011). *Medicolegal Aspects of Emergency Services*. *Journal of the Indonesian Medical Association*, 57(02).

Herlianto, S. (2014). *Constructing Penal Mediation on Medical Malpractice Cases: A Restorative Justice Perspective*. *JL Pol'y & Globalization*, 24, 9.

Hutapea, T. P. D. (2018). *Penerapan Rehabilitasi Medis Dan Sosial Bagi Prajurit TNI Dalam Putusan Pengadilan/The Implementation Of Medical And Social Rehabilitation For Indonesian National Armed Forces Personnel In Court Decision*. *Jurnal Hukum dan Peradilan*, 7(1), 67-86.
<https://doi.org/10.25216/JHP.7.1.2018.67-86>

Ibrahim, J. (2006). *Teori dan metodologi penelitian hukum normatif*. Malang: Bayumedia Publishing, 57.

Isfandyarie, A. (2005). *Malpraktek dan resiko medik dalam kajian hukum pidana*. Prestasi Pustaka Publisher.

Iswanty, M., Razak, A., Sampurno, S., & Halim, H. (2017). *Maladministration as Doctor Medical Malpractice: A Health Law Perspective in Indonesia*. *JL Pol'y & Globalization*, 67, 167.

Komalawati, V. (1989). *Hukum dan etika dalam praktek dokter*. Pustaka Sinar Harapan.

Lestari, N. (2001). *Masalah Malpraktek Etik Dalam Praktek Dokter*. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar*, Malang.

Liebman, B. L. (2013). *Malpractice mobs: medical dispute resolution in China*. *Columbia Law Review*, 181-264.

Mansyur, R. (2010). *Mediasi Penal Terhadap Perkara KDKRT (Kekerasan Dalam Rumah Tangga)*, Jakarta: Yayasan Gema Yustisia Indonesia.

Mariyanti, N. (1988). *Malpraktek kedokteran: dari segi hukum pidana dan perdata*. Bina Aksara.

McMichael, B. J. (2018). *The Failure of Sorry: An Empirical Evaluation of Apology Laws, Health Care, and Medical Malpractice*. *Lewis & Clark L. Rev.*, 22, 1199.
<https://doi.org/10.2139/ssrn.3020352>

Mello, M. M. (2001). *Of swords and shields: the role of clinical practice guidelines in medical malpractice litigation*. *University of Pennsylvania Law Review*, 149(3), 645-710.
<https://doi.org/10.2307/3312867>

Morreim, H. (2012). *Malpractice, mediation, and moral hazard: The virtues of dodging the data bank*. *Ohio St. J. on Disp. Resol.*, 27, 109.

Muladi. (1995). *Kapita selekta sistem peradilan pidana*. Badan Penerbit Universitas Diponegoro.

Ness, V., & Daniel, W. (1980). *Restorative justice and International Human Rights, Restorative Justice: International Perspektive*, edited by Burt Galaway and Joe Hudson, Amsterdam, The Netherland.

Purwadi, A., & Enggarsasi, U. (2019). *From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes*. *J. Advanced Res. L. & Econ.*, 10, 1517.

Purwadi, A., Enggarsasi, U., & Suhandi, S. (2019). *From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes*. *Journal of Advanced Research in Law and Economics*, 10(5), 1517-1524.

Radbruch, G. (2004). *Philosophy of law*. Moscow: International relationships [in Russian].

Raveesh, B. N., Nayak, R. B., & Kumbar, S. F. (2016). *Preventing medico-legal issues in clinical practice*. *Annals of Indian Academy of Neurology*, 19(Suppl 1), S15.
<https://doi.org/10.4103/0972-2327.192886>

- Reid, S. T. (1987). *Criminal justice: Procedures and issues*. West Publishing Company.
- Sasanthi, N. W. I. S. (2018). Medical Actions Resulting in Malpractice in the Perspective of Indonesian Criminal Law. In *Proceedings of International Conference of Social Science, ICOS 2018*. European Alliance for Innovation (EAI). <https://doi.org/10.4108/eai.21-9-2018.2281133>
- Soedjatmiko, H. M. (2001). Masalah Medik dalam Malpraktik Yuridik. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran*.
- Sohn, D. H., & Bal, B. S. (2012). Medical malpractice reform: the role of alternative dispute resolution. *Clinical Orthopaedics and Related Research*, 470(5), 1370-1378. <https://doi.org/10.1007/s11999-011-2206-2>
- Tempo.co. (Dec 23, 2013). Ketua MKDKI: Kami Tak Mengenal Istilah Malpraktek. Retrieved from <https://nasional.tempo.co/read/539526/ketua-mkdki-kami-tak-mengenal-istilah-malpraktek/full&view=ok>. Accessed Dec 29, 2020.
- Tonry, M. (1996). Sentencing matters. *Journal of Criminal Justice*, 6(24), 570-571. [https://doi.org/10.1016/S0047-2352\(97\)81182-8](https://doi.org/10.1016/S0047-2352(97)81182-8)
- Traina, F. (2009). Medical malpractice: the experience in Italy. *Clinical orthopaedics and related research*, 467(2), 434-442. <https://doi.org/10.1007/s11999-008-0582-z>
- Van Apeldoorn, L. J., & Leyten, J. C. (1972). *Inleiding tot de studie van het Nederlandse recht*. 17., herziene dr. door JCM Leyten. Tjeenk Willink.
- Van Ness, D. W., & Strong, K. H. (2014). *Restoring justice: An introduction to restorative justice*. Routledge. <https://doi.org/10.4324/9781315721330>
- Yunanto, A & Helmi, (2010). *Hukum Pidana Malpraktek Medik Tinjauan dan Perspektif Medikolegal*,
- Zehr, H. (2015). *The little book of restorative justice: Revised and updated*. Simon and Schuster.
- Zulfa, E. A. (2011a). *Pergeseran Paradigma Pemidanaan*, Bandung: Lubuk Agung.
- Zulfa, E. A. (2011b). Restorative Justice in Indonesia: Traditional Value. *Indonesia Law Review*, 1(2),33-43. <https://doi.org/10.15742/ilrev.v1n2.81>

Published Online

Manuscript Online for IJCS

Farrukh Imran <fimran@lifescienceglobal.com>

19 Januari 2021 16.48

Kepada: asyaufi@ulm.ac.id, asyaufi.fh.unlam@gmail.com

Dear Dr. Ahmad Syaufi:

First of all this email is to thank you for your recent article contribution entitled "**Application of Restorative Justice Values in Settling Medical Malpractice Cases** <<https://www.lifescienceglobal.com/independent-journals/international-journal-of-criminology-and-sociology/volume-10/83-abstract/ijcs/4487-abstract-application-of-restorative-justice-values-in-settling-medical-malpractice-cases>> " in "International Journal of Criminology and Sociology <<https://www.lifescienceglobal.com/independent-journals/international-journal-of-criminology-and-sociology>> ". Please find attached the complimentary copy of the final article in PDF format for your personal use.

In addition, we will be very grateful if you could send us your brief feedback/suggestions regarding your publication experience with "Lifescience Global". We publish selected comments on our testimonials page which can be viewed here <<http://www.lifescienceglobal.com/component/content/article?id=204>>.

Looking forward to your cooperation and hope you will continue to publish your work with us.

Best regards

Farrukh Imran

Composer

www.lifescienceglobal.com



IJCSV10A14-Syaufi.pdf

193K

Lampiran

Application of Restorative Justice Values in Settling Medical Malpractice Cases

Ahmad Syaufi^{1,*}, Diana Haiti¹ and Mursidah²



¹Faculty of Law, Lambung Mangkurat University, Banjarmasin, Indonesian

²Public Senior High School 8 Banjarmasin, Kalimantan Selatan 70125, Indonesia

Abstract: Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia. This research is a qualitative research using normative legal research and uses a statute approach and a conceptual approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. The conclusion showed that the restorative justice emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Hence, restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Keywords: Restorative Justice, Legal Settling, Medical Malpractice Restorative Justice, Legal Settling, Medical Malpractice.

INTRODUCTION

Lawsuits submitted by patients or their families to the hospital and/or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence law (Raveesh *et al.*, 2016; Traina, 2009; Mello, 2001). The behavior demanded is medical malpractice which is the designation "genus" (collection) of medical professional behavior groups that deviate and cause injury, death, or harm to patients. Basically, the hospital functions as a place to heal illnesses and restore health and the intended function has a meaning of responsibility which should be the responsibility of the government in improving the level of community welfare. Malpractice victims in Indonesia often find it difficult to seek justice, the current legal system has not yet sided with patients (Iswanty *et al.*, 2017; Sasanthi, 2018; Purwadi & Enggarsasi, 2019). Health sector reform that includes a variety of substances, including malpractice, is urgently needed to prevent further casualties. Health reforms that cover a variety of substances, especially malpractice victims are increasingly widespread. If counted annually from Jakarta, it tends to increase, not to mention those in the regions. The Jakarta Legal Aid Institute (LBH) revealed, Reports of malpractice cases and the absence of the right to health are likely to

increase. In 2009, LBH Jakarta recorded at least 7 complaints reports from the public. In 2010 the number increased to 10 complaints. In the last eight years, the Indonesian Medical Discipline Honorary Council (*Majelis Kehormatan Disiplin Kedokteran Indonesia/ MKDKI*) received 193 complaints of alleged malpractice. Of that number, 34 doctors were given written sanctions, 6 were required to participate in the re-education program, and, the worst part, 27 doctors had their registration certificates revoked which automatically made their license to practice invalid (Tempo.co, 2013).

The current law governing health and hospital matters does not favor the patient because it places evidence on the victim. In this case the patient must prove the occurrence of malpractice. In addition, there is a gap (distance) of knowledge and information between the victim and the doctor, if this is aligned with the usual evidentiary law that is related to the criminal law, it certainly will not be met, and even tends to lose the patient, because all the evidence held by the doctor. Based on observations of LBH Jakarta, reports from the community in the police regarding malpractice have been relatively deadlocked, and many have even stopped, this is because the police always base their investigations on expert statements. What was said by the expert was recorded by the police, in this case the expert who gave objective information or not. On the other hand the patient (victim) who asks the expert of a doctor is reluctant to give testimony of this matter there

*Address correspondence to this author at Faculty of Law, Lambung Mangkurat University, Jalan Brigjend. H. Hasan Basry (Kayu Tangi), Banjarmasin, 70123, Indonesian; Tel: 08125024987; Fax: (0511) 3305648; E-mail: asyaufi@ulm.ac.id, asyaufi.fh.unlam@gmail.com

is a kind of conspiracy in the world of medicine, to cover up so that for example the doctor is protected from his mistakes. This fact is not surprising if many people prefer to remain silent rather than have to report events that have befallen them due to poor health services, even patients often consider this as a fate that must be accepted. The practice of settling criminal cases outside the court so far has no formal legal basis, so there are often cases where informally there has been a peaceful settlement (though through a customary law mechanism), the judicial process is still processed according to the applicable law (Sohn & Bal, 2012; Liebman, 2013; Morreim, 2012; Bielen *et al.*, 2020; Arief, 2008). This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia?

RESEARCH METHODOLOGY

This research is a qualitative research using normative legal research. Normative legal research is a scientific research procedure to find the truth based on legal scientific logic from the normative side (Ibrahim, 2006). In an effort to achieve the stated research objectives, this study uses a statute approach and a conceptual approach.

In this study, the statutory approach was used. It is a research that prioritizes legal materials in the form of statutory regulations as a basic reference for conducting research about medical malpractice. The statutory approach is used to examine statutory regulations which in normalizing there are still deficiencies or even foster deviant practices both at the technical level or in their implementation in the field. To examine statutory regulations, this study used some Indonesian laws about medical practice such as Law No. 23 of 1992 about health. More specifically, Article 55 paragraph (1) of Law No. 23 of 1992 on Health stated that every person has the right to compensation due to mistakes or negligence committed by health workers.

Moreover, the conceptual approach is used in this study. It is a type of approach in legal research that provides an analysis point of view of problem solving in legal research seen from the aspects of the legal concepts behind it, or can even be seen from the values contained in normalizing a regulation in relation to the concept used about malpractice in medical service.

RESULT AND DISCUSSION

Black's Law Dictionary mentions malpractice is any attitude of wrong action, lacking skills in an unnatural measure. This term is generally used towards the attitude of actions of doctors, lawyers, and accountants. Failure to provide professional services and do so at a reasonable level of skill and intelligence by the average colleague of his profession in society, resulting in injury, loss or loss in service recipients who trust them, including wrong professional acts, lack of improper skills, violating professional or legal obligations, very bad practices, illegal, or immoral behavior. Herkutado (2011) quoted from the World Medical Association Statement on Medical Malpractice adapted from the 44th World Medical Assembly Marbella Spain, September 1992 states that: "medical malpractice is the failure of doctors to meet the standard procedures in handling their patients, the inability or negligence, causing a direct cause of harm to the patient. Komalawati (1989) states that the term malpractice comes from "malpractice" which in essence is a mistake in carrying out the profession that arises as a result of obligations that must be done by doctors. According to Chazawi (2007), medical malpractice is a doctor or a person who under his command intentionally or negligently performs acts (active or passive) in the practice of medicine to his patients at all levels that violate professional standards, standard procedures or medical principles, or by violating law without authority; by causing a result (causaal verband) loss of body, physical and mental health and or life of the patient, and therefore establishes legal liability for doctors.

According to Hanafiah & Amir (1999), medical malpractice is the negligence of a doctor to use the level of skills and knowledge that is commonly used in treating patients or injured people according to the size of the same environment. Meanwhile, according to Ninik Mariyanti (1988), malpractice actually has a broad understanding, which can be described as follows:

1. In a general sense: a bad practice, which does not meet the standards set by the profession;
2. In a special sense (seen from the patient's point of view) malpractice can occur in determining the diagnosis, carrying out operations, during treatment, and after treatment.

Based on some understanding of medical malpractice above scholars agree to interpret medical

malpractice as the fault of health workers who for not using knowledge and skill levels in accordance with professional standards which ultimately results in injured or disabled patients or even death. According to Yunanto and Helmi (2010) in medical disputes, there are two basic things. First, on the part of the patient or the patient's family who do not understand about medical actions or procedures that sometimes can cause risks. Second, from the doctor who is less communicative, does not provide a strong explanation of the disease or medical action he is taking. Malpractice according to Lestari (2001) and Isfandyarie (2005) can be distinguished in two forms, namely ethical malpractice and juridical malpractice. Every juridical malpractice is definitely an ethical malpractice, but not all ethical malpractice is a legal malpractice. Ethical malpractice occurs when doctors perform actions that are contrary to the medical code of ethics which is a set of ethical standards, principles, rules and norms that apply to doctors in carrying out their profession (Purwadi *et al.*, 2019). Soedjatmiko (2001) distinguishes juridical malpractice in three categories, namely:

1. Civil malpractice

Civil malpractice will occur if the doctor or the hospital does not fulfill the obligation or does not provide the rights of the patient based on the agreement to provide health services, so that the doctor and or the hospital have defaulted on the agreement. Civil malpractice can also occur if the doctor or patient does an action that causes harm to the patient so that it can be said to have committed an illegal act.

2. Criminal malpractice.

Criminal malpractice occurs if there is a doctor's mistake in taking a careless action that causes the patient to die or become disabled. Criminal malpractice can occur due to three things, namely: (i). for example, in cases of leaking medical secrets, abortions without medical indication or omitting a patient for any reason; (ii). due to carelessness that occurs because the doctor or health worker acts not in accordance with medical standards or without asking for patient consent; and (iii). due to negligence that occurs due to inadvertence of the doctor causing death or disability in the patient. Criminal malpractice also occurs if there is an incident in the form of omission and/or rejection of patients

who come, citing the patient's inability to pay for hospital, medical and/or nursing services, both inpatient and outpatient. This type of malpractice occurs because there is no fulfillment of obligations prescribed by law by the hospital in the form of providing assistance to patients who should be helped, resulting in death or disability in these patients as a result of lack of help.

3. Administrative malpractice.

Administrative malpractice occurs if doctors, health workers or hospitals practice violating state administrative laws such as carrying out practices without permission, carrying out practices or actions that are not in accordance with their permits, or having their licenses expired and or carrying out practices without making medical records clear.

There are three theories that mention the source of malpractice, namely (Mariyanti, 1988):

1. Contract Violation Theory.

The first theory is that the source of malpractice is due to breach of contract. This is based on the principle that legally a health worker has no obligation to care for someone if between the two there is no contractual relationship between the health worker and the patient. The relationship between health workers and patients only occurs when a contract has occurred between the two parties.

In relation to the relationship between the patient's contract with the health worker, it does not mean that the relationship between the health worker and the patient always occurs with mutual agreement. In cases where the patient is not self-conscious or in an emergency situation, for example, a person may not give their consent.

If this situation occurs, then the approval or contract of the patient's health worker can be requested from a third party, namely the patient's family acting on behalf of and representing the patient's interests. If this is also not possible, for example because the emergency patient comes without family and is only escorted by other people who happen to have helped him, then in the interest of the sufferer, according to applicable laws, a health worker is required to

provide assistance as well as possible. This action has been legally considered as an embodiment of the medical-patient contract.

2. Theory of Deliberate Acts.

The second theory that can be used by patients as a basis for suing health workers for malpractice is intentional tort, which results in someone physically injured (assault and battery).

3. Theory of Negligence.

The third theory states that the source of malpractice is negligence. Negligence that causes the source of actions that are categorized in this malpractice must be proven to exist, besides the negligence in question must be included in the category of gross negligence (*culpa lata*). To prove this is certainly not an easy task for law enforcement officers.

The concept of solving medical malpractice cases both contained in Act Number 29 of 2004 concerning Medical Practices, Act Number 36 of 2009 concerning Health, and Act Number 44 of 2009 concerning Hospitals only regulates the settlement of cases in the realm of civil law. For medical malpractice cases that contain elements of criminal law directly submitted to the police for an investigation process as referred to in Article 186 of Law Number 36 Year 2009, it reads: supervisory staff must report to investigators in accordance with the provisions of the legislation".

Arrangement of medical malpractice case/dispute settlement through civil law can be seen in Article 29 of Law Number 36 Year 2009 which states that: "In the case of health personnel suspected of negligence in carrying out their profession, negligence must be resolved first through mediation".

Further in the Elucidation of the article states that "mediation is conducted if a dispute arises between the health service provider and the patient as the recipient of health services. Mediation is carried out aimed at resolving disputes outside the court by mediators agreed by the parties". Likewise Article 60 letter f of Law Number 44 Year 2009, states that "the Provincial Hospital Supervisory Agency is in charge of receiving complaints and making efforts to resolve disputes by means of mediation".

Claims for medical malpractice often fail in the middle of the road because of the difficulty of proof. In

this case the doctor needs to defend himself and defend his rights by stating the reasons for his actions. Both in the case patients and doctors, judges and prosecutors have difficulty in dealing with this medical malpractice problem, especially from the legal technical point of view or legal formulation that is appropriate to use. The problem lies in the absence of specific legal studies on medical malpractice that can be used as a guideline in determining and overcoming the existence of medical malpractice in Indonesia. For this reason, it is necessary to review the criminal law formulation policy regarding mediation of penalties which can be linked to medical negligence or malpractice, especially in providing legal protection to victims of malpractice in this case patients.

If the lawsuit is filed through a criminal legal process, then the patient is sufficient to report it to the investigator by showing preliminary evidence or reasons. Furthermore, investigators will conduct investigations by conducting police actions, such as examining witnesses and suspects, examining documents and requesting expert handling. *Visum et repertum* may be needed by investigators, the investigation result file is submitted to the public prosecutor to be able to compile its claims, in the event that the investigator does not find sufficient evidence then it will be considered for the issuance of termination of the investigation, so that most patients do lose on court.

For the public, especially victims, the question of concern is why it is so difficult to bring malpractice cases from the operating table to the court. Whether the existing legal instruments and legislation are not enough to bring the issue of medical malpractice into the realm of law, especially criminal law, it is necessary to review the current formulation policy (laws relating to medical malpractice) and formulation policies that are will come in overcoming the crime of medical malpractice by emphasizing uniformity and consistency in terms of the formulation of criminal acts, criminal liability and the most appropriate punishment in order to provide a sense of justice for victims and perpetrators as well as the use of mediating penal as one form of settlement in the medical field *ius constituendum* in an effort to provide a sense of justice for victims. This is related to the development of criminal law in various countries today, namely the use of mediation of penalties as an alternative to solving problems in the field of criminal law.

The development of the theory of punishment always experiences ups and downs in its development.

Criminal theories aimed at rehabilitation have been criticized because they are based on the belief that rehabilitation goals cannot work. In the 1970s there were pressures that treatment of rehabilitation was unsuccessful and indeterminate sentences were not given appropriately without guidelines.

Against the pressures on rehabilitation goals the "Justice Model" was born as a modern justification for punishment proposed by Sue Titus Reid (1987). This justice model is also known as the justice approach or just reward model (Just Desert Model). This model is based on 2 (two) theories about the purpose of punishment, namely prevention and retribution. The basis of retribution in the just desert model assumes that violators will be judged by the sanctions that should be received by violators in view of the crimes they have committed, proper sanctions will prevent criminals from committing more criminal acts and prevent others from committing crimes.

Under this just desert model scheme, perpetrators with the same crime will receive the same punishment and the more serious perpetrators of the crime will receive a harsher sentence than the lighter offenders. There are 2 things that become critics of this just desert theory, namely: First, because desert theories place primarily by emphasizing the relationship between proper punishment and crime rates, so that with the interest of treating such cases, this theory ignores differences other relevant differences between the perpetrators such as the personal background of the offender and the impact of punishment on the offender and his family. This theory also often treats cases that are not the same in the same way. Second, overall the emphasis is on guidelines for distinguishing crime and criminal records that affect the psychology of punishment and those who punish (Tonry, 1996). The Restorative Justice Model which is often confronted with the Retributive Justice Model and is a development of the Restitutive Justice Model.

Restorative justice is a paradigm that can be used as a frame for a strategy for handling criminal cases that aims to answer dissatisfaction with the functioning of the current criminal justice system. Tonny Marshal stated that Restorative Justice is, "a process in which the parties involved in crime jointly resolve problems related to how to deal with post-crime problems and their consequences in the future" (Mansyur, 2010). Van Ness & Daniel (1980) states that the foundation of restorative justice theory can be summarized in the following characteristics (Abidin, 2005) :

1. Crime is primarily a conflict between individuals resulting in injuries to victims, communities and the offenders themselves, only secondary is it lawbreaking. (free translation: Crimes by their very nature are primary conflicts between individuals resulting in injury to victims, the community and the perpetrators themselves, while the definition of crime as something that is illegal is only secondary)
2. The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.
3. The overall goal of the criminal justice process must be to reconcile the parties to the conflict/dispute, as well as repair the injuries caused by the crime)
4. The criminal justice process should facilitate active participation by victims, offenders and their communities. A should not be dominated by government to the exclusion of others.
5. The criminal justice process must facilitate the active participation of victims, perpetrators and the community. This should not be dominated by the government by putting aside other people or other matters).

The restorative justice model is proposed by abolitionists who reject coercive means in the form of litigative facilities and are replaced by reparative (non-litigation) facilities. Abolitionists consider the criminal justice system to contain problems or structural flaws so that it must realistically change the structural basis of the system (Bentham, 1996; Van Apeldoorn & Leyten, 1972; Radbruch, 2004). In the context of a criminal sanction system, the values underlying abolitionist understanding still make sense to look for alternative sanctions that are more feasible and effective than institutions such as prisons. The restorative justice model to be built by abolitionists can be seen in detail the comparison of the current system (which abolitionists call retributive justice) and the system proposed by abolitionists under the name restorative justice, as follows (Muladi, 1995).

Restorative justice according to Zulfa (2011a; 2011b) contains the following ideas and principles:

- a. Building joint participation between perpetrators, victims and community groups in resolving an incident or criminal act. Placing perpetrators,

Table 1: Comparison between Retributive and Restorative Justice

Retributive Justice	Restorative Justice
1. Crimes are formulated as violations of the State	1. A crime is formulated as someone's violation of another person
2. Attention is directed towards determining mistakes in the past	2. The point of attention on problem solving, responsibility and obligations in the future
3. Relations of parties that are resistant, through an orderly and normative process	3. Normative nature is built on the basis of dialogue and negotiation
4. Application of suffering for digestion and prevention	4. Restitution as a means of improving the parties, reconciliation and restoration as the main objective
5. Justice is formulated with deliberate and process	5. Justice is formulated as rights relations, assessed on the basis of results
6. The nature of the conflict from evil is obscured and suppressed	6. Crimes are recognized as conflicts
7. One social loss is replaced by another	7. Target attention on repairing social losses
8. Society is on the sidelines displayed abstractly by the state	8. The community is a facilitator in the restorative process
9. Promoting competitive and individualistic values	9. Promote mutual assistance
10. Action is directed from the state to perpetrators of crime: passive victims	10. The role of victims and perpetrators of crime is recognized, both in the problem and in the settlement of the rights and needs of victims, perpetrators of criminal acts are encouraged to take responsibility
11. The responsibility of the perpetrators of criminal acts is formulated in the context of criminal prosecution	11. The perpetrator's responsibility is formulated as the impact of the request on the action and to help decide the best
12. Crimes are formulated in legal terminology which are theoretical and pure, without having moral, social and economic dimensions	12. Crimes are understood in a holistic, moral, social and economic context
13. Sin or debt is given to the State and society abstractly	13. Sin or debt and liability to the victim are recognized
14. The reactions and responses are focused on the perpetrators of the crimes that have occurred	14. The reactions and responses are focused on the consequences of the actions of the perpetrators of the crime
15. The stigma of crime cannot be eliminated	15. Stigma can be removed through restorative action
16. There is no encouragement to repent and forgive	16. There are possibilities that are helpful
17. Attention is directed at the debate between free will and social psychological determinism in the power of evil	17. Attention is directed to accountability for the consequences of actions

victims, and the community as "stakeholders" who work together and immediately try to find a solution that is considered fair for all parties (win-win solution).

- b. Pushing perpetrators to be held accountable to victims for events or criminal acts that have caused injury or loss to the victim. Furthermore, building responsibility does not repeat the criminal act he has committed.
- c. Placing a criminal event or act not primarily as a form of violation of the law, but as a violation by a person (group of people) against someone (a group of people). Because of that, the perpetrator should be directed towards being accountable to the victim, not prioritizing legal accountability.
- d. Encourage resolving an event or criminal action in more informal and personal ways, rather than resolving it in formal (rigid) and impersonal ways.

Settlement of medical malpractice cases using a restorative justice approach is basically focused on efforts to transform mistakes made by doctors with corrective efforts. Included in this effort is improving the relationship between doctors and patients / their families. This is implemented in the presence of actions which represent changes in the attitudes of the parties in an effort to achieve a common goal, namely improvement.

Restorative justice places a higher value in the direct involvement of the parties. It is also suggested in the malpractice case (Bornstein *et al.*, 2002; Herlianto, 2014; McMichael, 2018). The victim is able to restore the element of control, while the perpetrator is encouraged to assume responsibility as a step in correcting the mistakes caused by crime and in establishing his social value system. Community involvement actively strengthens the community itself and binds the community to values to respect and love one another. The role of the government is

substantially reduced in monopolizing the current judicial process. Restorative justice requires cooperative efforts from the community and government to create a condition where victims and perpetrators can reconcile conflict between the two parties and repair the wounds of both parties (Zehr, 2015; Van Ness & Strong, 2014). This consensus agreement as putlined in Pancasila has a philosophical and theological foundation that leads to the restoration of the dignity and dignity of all parties involved, replacing the atmosphere of conflict with peace (the principle of friendship), eliminating blasphemous blasphemy with forgiveness, stopping demands for blame and blame (the principle of mutual forgiveness and asking for forgiveness) to God). Desired clarification is not through the court table, but through the table of peace and negotiation (the principle of deliberation).

CONCLUSION

Settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Then restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

REFERENCES

Abidin, Z. (2005). *Pemidanaan, Pidana, dan tindakan dalam Rancangan KUHP 2005*. Elsam.

Arief, B. N. (2008). *Mediasi penal: penyelesaian perkara di luar pengadilan*. Program Magister Ilmu Hukum, Pascasarjana, Undip.

Bentham, J. (1996). *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Clarendon Press.
<https://doi.org/10.1093/actrade/9780198205166.book.1>

Bielen, S., Grajzl, P., & Marneffe, W. (2020). The resolution process and the timing of settlement of medical malpractice claims. *Health Economics, Policy and Law*, 15(4), 509-529.
<https://doi.org/10.1017/S1744133119000185>

Bornstein, B. H., Rung, L. M., & Miller, M. K. (2002). The effects of defendant remorse on mock juror decisions in a malpractice case. *Behavioral sciences & the law*, 20(4), 393-409.
<https://doi.org/10.1002/bsl.496>

Chazawi, A. (2007). *Malpraktik kedokteran: tinjauan norma dan doktrin hukum*. Bayumedia.

Hanafiah, M. J., & Amir, A. (1999). *Etika kedokteran dan Hukum kesehatan*. Jakarta: EGC.

Herkutanto, H. (2011). *Medicolegal Aspects of Emergency Services*. *Journal of the Indonesian Medical Association*, 57(02).

Herlianto, S. (2014). *Constructing Penal Mediation on Medical Malpractice Cases: A Restorative Justice Perspective*. *JL Pol'y & Globalization*, 24, 9.

Hutapea, T. P. D. (2018). *Penerapan Rehabilitasi Medis Dan Sosial Bagi Prajurit Tni Dalam Putusan Pengadilan/The Implementation Of Medical And Social Rehabilitation For Indonesian National Armed Forces Personnel In Court Decision*. *Jurnal Hukum dan Peradilan*, 7(1), 67-86.
<https://doi.org/10.25216/JHP.7.1.2018.67-86>

Ibrahim, J. (2006). *Teori dan metodologi penelitian hukum normatif*. Malang: Bayumedia Publishing, 57.

Isfandyarie, A. (2005). *Malpraktek dan resiko medik dalam kajian hukum pidana*. Prestasi Pustaka Publisher.

Iswanty, M., Razak, A., Sampurno, S., & Halim, H. (2017). *Maladministration as Doctor Medical Malpractice: A Health Law Perspective in Indonesia*. *JL Pol'y & Globalization*, 67, 167.

Komalawati, V. (1989). *Hukum dan etika dalam praktek dokter*. Pustaka Sinar Harapan.

Lestari, N. (2001). *Masalah Malpraktek Etik Dalam Praktek Dokter*. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran diselenggarakan oleh RSUD Dr. Saiful Anwar, Malang*.

Liebman, B. L. (2013). *Malpractice mobs: medical dispute resolution in China*. *Columbia Law Review*, 181-264.

Mansyur, R. (2010). *Mediasi Penal Terhadap Perkara KDKRT (Kekerasan Dalam Rumah Tangga)*. Jakarta: Yayasan Gema Yustisia Indonesia.

Mariyanti, N. (1988). *Malpraktek kedokteran: dari segi hukum pidana dan perdata*. Bina Aksara.

McMichael, B. J. (2018). *The Failure of Sorry: An Empirical Evaluation of Apology Laws, Health Care, and Medical Malpractice*. *Lewis & Clark L. Rev.*, 22, 1199.
<https://doi.org/10.2139/ssrn.3020352>

Mello, M. M. (2001). *Of swords and shields: the role of clinical practice guidelines in medical malpractice litigation*. *University of Pennsylvania Law Review*, 149(3), 645-710.
<https://doi.org/10.2307/3312867>

Morreim, H. (2012). *Malpractice, mediation, and moral hazard: The virtues of dodging the data bank*. *Ohio St. J. on Disp. Resol.*, 27, 109.

Muladi. (1995). *Kapita selekta sistem peradilan pidana*. Badan Penerbit Universitas Diponegoro.

Ness, V., & Daniel, W. (1980). *Restorative justice and International Human Rights, Restorative Justice: International Perspektif*, edited by Burt Galaway and Joe Hudson, Amsterdam, The Netherland.

Purwadi, A., & Enggarsasi, U. (2019). *From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes*. *J. Advanced Res. L. & Econ.*, 10, 1517.

Purwadi, A., Enggarsasi, U., & Suhandi, S. (2019). *From Liability Based on Fault Principle towards Presumption of Liability Principle in Medical Disputes*. *Journal of Advanced Research in Law and Economics*, 10(5), 1517-1524.

Radbruch, G. (2004). *Philosophy of law*. Moscow: International relationships [in Russian].

Raveesh, B. N., Nayak, R. B., & Kumbar, S. F. (2016). *Preventing medico-legal issues in clinical practice*. *Annals of Indian Academy of Neurology*, 19(Suppl 1), S15.
<https://doi.org/10.4103/0972-2327.192886>

- Reid, S. T. (1987). *Criminal justice: Procedures and issues*. West Publishing Company.
- Sasanthi, N. W. I. S. (2018). Medical Actions Resulting in Malpractice in the Perspective of Indonesian Criminal Law. In *Proceedings of International Conference of Social Science, ICOS 2018*. European Alliance for Innovation (EAI). <https://doi.org/10.4108/eai.21-9-2018.2281133>
- Soedjatmiko, H. M. (2001). Masalah Medik dalam Malpraktik Yuridik. In *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran*.
- Sohn, D. H., & Bal, B. S. (2012). Medical malpractice reform: the role of alternative dispute resolution. *Clinical Orthopaedics and Related Research*, 470(5), 1370-1378. <https://doi.org/10.1007/s11999-011-2206-2>
- Tempo.co. (Dec 23, 2013). Ketua MKDKI: Kami Tak Mengenal Istilah Malpraktek. Retrieved from <https://nasional.tempo.co/read/539526/ketua-mkdki-kami-tak-mengenal-istilah-malpraktek/full&view=ok>. Accessed Dec 29, 2020.
- Tonry, M. (1996). Sentencing matters. *Journal of Criminal Justice*, 6(24), 570-571. [https://doi.org/10.1016/S0047-2352\(97\)81182-8](https://doi.org/10.1016/S0047-2352(97)81182-8)
- Traina, F. (2009). Medical malpractice: the experience in Italy. *Clinical orthopaedics and related research*, 467(2), 434-442. <https://doi.org/10.1007/s11999-008-0582-z>
- Van Apeldoorn, L. J., & Leyten, J. C. (1972). *Inleiding tot de studie van het Nederlandse recht*. 17., herziene dr. door JCM Leyten. Tjeenk Willink.
- Van Ness, D. W., & Strong, K. H. (2014). *Restoring justice: An introduction to restorative justice*. Routledge. <https://doi.org/10.4324/9781315721330>
- Yunanto, A & Helmi, (2010). *Hukum Pidana Malpraktek Medik Tinjauan dan Perspektif Medikolegal*,
- Zehr, H. (2015). *The little book of restorative justice: Revised and updated*. Simon and Schuster.
- Zulfa, E. A. (2011a). *Pergeseran Paradigma Pidana, Bandung: Lubuk Agung*.
- Zulfa, E. A. (2011b). Restorative Justice in Indonesia: Traditional Value. *Indonesia Law Review*, 1(2),33-43. <https://doi.org/10.15742/ilrev.v1n2.81>

Received on 22-12-2020

Accepted on 12-01-2021

Published on 18-01-2021

DOI: <https://doi.org/10.6000/1929-4409.2021.10.14>© 2021 Syaufi *et al.*; Licensee Lifescience Global.

This is an open access article licensed under the terms of the Creative Commons Attribution Non-Commercial License (<http://creativecommons.org/licenses/by-nc/3.0/>) which permits unrestricted, non-commercial use, distribution and reproduction in any medium, provided the work is properly cited.



Application of Restorative Justice Values in Settling Medical Malpractice Cases

Ahmad Syauf

Faculty of Law, Lambung Mangkurat University,
Banjarmasin, Indonesian

Diana Haiti

Faculty of Law, Lambung Mangkurat University,
Banjarmasin, Indonesian

Mursidah

Public Senior High School 8 Banjarmasin, Kalimantan
Selatan 70125, Indonesia

DOI: <https://doi.org/10.6000/1929-4409.2021.10.14>

ABSTRACT

Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia. This research is a qualitative research using normative legal research and uses a statute approach and a conceptual approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. The conclusion showed that the restorative justice emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Hence, restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of control so as to avoid feelings of revenge both individual or family or group.

Keywords: Restorative Justice, Legal Settling, Medical Malpractice Restorative Justice, Legal Settling, Medical Malpractice.



PDF

PUBLISHED

2021-01-18

HOW TO CITE

Syauf, A. ., Haiti, D. ., & Mursidah. (2021). Application of Restorative Justice Values in Settling Medical Malpractice Cases. *International Journal of Criminology and Sociology*, 10, 103–110. <https://doi.org/10.6000/1929-4409.2021.10.14>

[More Citation Formats](#) ▾

ISSUE

[Vol. 10 \(2021\)](#)

SECTION

Articles

LICENSE

Policy for Journals/Articles with Open Access

Authors who publish with this journal agree to the following terms:

- Authors retain copyright and grant the journal right of first publication with the work simultaneously

licensed under a [Creative Commons Attribution License](#) that allows others to share the work with an acknowledgement of the work's authorship and initial publication in this journal.

- Authors are permitted and encouraged to post links to their work online (e.g., in institutional repositories or on their website) prior to and during the submission process, as it can lead to productive exchanges, as well as earlier and greater citation of published work

Policy for Journals / Manuscript with Paid Access

Authors who publish with this journal agree to the following terms:

- Publisher retain copyright .
- Authors are permitted and encouraged to post links to their work online (e.g., in institutional repositories or on their website) prior to and during the submission process, as it can lead to productive exchanges, as well as earlier and greater citation of published work .

Open Journal Systems

INFORMATION

For Readers

For Authors

For Librarians



1 of 1

Export Download Print E-mail Save to PDF Save to list More... >

View at Publisher|

Document type

Article

Source type

Journal

ISSN

19294409

DOI

10.6000/1929-4409.2021.10.14

View more ▾

International Journal of Criminology and Sociology • Open Access • Volume 10, Pages 103 - 110 • 18 January 2021

Application of restorative justice values in settling medical malpractice cases

Syaufi A.^a ✉, Haiti D.^a, Mursidah^b

Save all to author list

^a Faculty of Law, Lambung Mangkurat University, Banjarmasin, Indonesia

^b Public Senior High School 8 Banjarmasin, Kalimantan Selatan, 70125, Indonesia

15

Views count ?

View all metrics >

Abstract

Author keywords

SciVal Topics

Metrics

Abstract

Lawsuits submitted by patients or their families to the hospital and / or their doctors can take the form of criminal or civil lawsuits by almost always basing on the theory of negligence. This paper seeks to explore the application of the values of restorative justice in resolving cases of medical malpractice in Indonesia. This research is a qualitative research using normative legal research and uses a statute approach and a conceptual approach. The results showed that settlement of medical malpractice cases through a restorative justice approach or which is known in the culture of the Indonesian people as a consensus agreement as contained in the 4th Precepts of Pancasila is one alternative settlement that is to restore conflict to the parties most affected (victims, perpetrators and interests community) and give priority to the interests of all parties. The conclusion showed that the restorative justice emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore the parties to their original condition rather than simply giving formal justice actors or legal actors and victims not getting any justice. Hence, restorative justice also strives to restore the security of victims, personal respect, dignity and more importantly is a sense of

Cited by 0 documents

Inform me when this document is cited in Scopus:

Set citation alert >

Related documents

The application of restorative justice system through the diversion of children in conflict with laws in central java polda (Regional police of the Republic of Indonesia)

Sudewo, F.A. , Abdurrachman, H. , Aryani, F.D. (2020) *International Journal of Psychosocial Rehabilitation*

"There's got to be a better way": Global Perspectives of Medicolegal Environment and Neurosurgical Socioeconomics

Kandregula, S. , Lefever, D. , Trosclair, K. (2021) *World Neurosurgery*

Claims, liabilities, injures and compensation payments of medical malpractice litigation cases in China from 1998 to 2011

Li, H. , Wu, X. , Sun, T. (2014) *BMC Health Services Research*

View all related documents based on references

Find more related documents in Scopus based on:

Authors > Keywords >

Author keywords


Legal settling ; Legal settling ; Medical malpractice ; Medical malpractice restorative justice ; Restorative justice

SciVal Topics 

Topic name

Medical Malpractice; Tort Reform; Negligence

Prominence percentile

89.258 

Metrics

Scopus metrics

Views count 

Last updated on 19 May 2021

15

Views count 2021

15

Views count 2012-2021

PlumX metrics

Captures

4

Readers

[View PlumX details >](#)

References (40)

[View in search results format >](#)

All

[Export](#)  [Print](#)  [E-mail](#)  [Save to PDF](#) [Create bibliography](#)

1 Abidin, Z.
(2005) *Pemidanaan, Pidana, dan tindakan dalam Rancangan KUHP 2005*
Elsam

2 Arief, B. N.
(2008) *Mediasi penal: penyelesaian perkara di luar pengadilan*. Cited 7 times.
Program Magister Ilmu Hukum, Pascasarjana, Undip

3 Bentham, J.
(1996) *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. Cited 4144 times.
Clarendon Press
<https://doi.org/10.1093/actrade/9780198205166.book.1>

-
- 4 Bielen, S., Grajzl, P., Marneffe, W.
The resolution process and the timing of settlement of medical malpractice claims
(2020) *Health Economics, Policy and Law*, 15 (4), pp. 509-529. Cited 5 times.
<http://journals.cambridge.org/action/displayJournal?jid=HEP>
doi: 10.1017/S1744133119000185
View at Publisher
-
- 5 Bornstein, B.H., Rung, L.M., Miller, M.K.
The effects of defendant remorse on mock juror decisions in a malpractice case ([Open Access](#))
(2002) *Behavioral Sciences and the Law*, 20 (4), pp. 393-409. Cited 48 times.
doi: 10.1002/bsl.496
View at Publisher
-
- 6 Chazawi, A.
(2007) *Malpraktik kedokteran: tinjauan norma dan doktrin hukum*. Cited 3 times.
Bayumedia
-
- 7 Hanafiah, M. J., Amir, A.
(1999) *Etika kedokteran dan Hukum kesehatan*
Jakarta: EGC
-
- 8 Herkutanto, H.
Medicolegal Aspects of Emergency Services
(2011) *Journal of the Indonesian Medical Association*, 57. (02)
-
- 9 Herlianto, S.
Constructing Penal Mediation on Medical Malpractice Cases: A Restorative Justice Perspective
(2014) *JL Polly & Globalization*, 24, p. 9.
-
- 10 Hutapea, T. P. D.
Penerapan Rehabilitasi Medis Dan Sosial Bagi Prajurit Tni Dalam Putusan Pengadilan/The Implementation Of Medical And Social Rehabilitation For Indonesian National Armed Forces Personnel In Court Decision
(2018) *Jurnal Hukum dan Peradilan*, 7 (1), pp. 67-86. Cited 2 times.
<https://doi.org/10.25216/JHP.7.1.2018.67-86>
-
- 11 Ibrahim, J.
(2006) *Teori dan metodologi penelitian hukum normatif*, p. 57. Cited 39 times.
Malang: Bayumedia Publishing
-
- 12 Isfandyarie, A.
(2005) *Malpraktek dan resiko medik dalam kajian hukum pidana*
Prestasi Pustaka Publisher
-

-
- 13 Iswanty, M., Razak, A., Sampurno, S., Halim, H.
Maladministration as Doctor Medical Malpractice: A Health Law Perspective
in Indonesia
(2017) *JL Poly & Globalization*, 67, p. 167.
-
- 14 Komalawati, V.
(1989) *Hukum dan etika dalam praktek dokter*. Cited 2 times.
Pustaka Sinar Harapan
-
- 15 Lestari, N.
Masalah Malpraktek Etik Dalam Praktek Dokter
(2001) *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran
diselenggarakan oleh RSUD Dr
Saiful Anwar, Malang*
-
- 16 Liebman, B.L.
Malpractice mobs: Medical dispute resolution in China

(2013) *Columbia Law Review*, 113 (1), pp. 181-264. Cited 60 times.
<http://www.columbialawreview.org/wp-content/uploads/2013/01/Liebman-181-264.pdf>
-
- 17 Mansyur, R
(2010) *Mediasi Penal Terhadap Perkara KDKRT (Kekerasan Dalam Rumah
Tangga)*
Jakarta: Yayasan Gema Yustisia Indonesia
-
- 18 Mariyanti, N.
(1988) *Malapraktek kedokteran: dari segi hukum pidana dan perdata*
Bina Aksara
-
- 19 McMichael, B. J.
The Failure of Sorry: An Empirical Evaluation of Apology Laws, Health Care,
and Medical Malpractice
(2018) *Lewis & Clark L. Rev*, 22, p. 1199. Cited 3 times.
<https://doi.org/10.2139/ssrn.3020352>
-
- 20 Mello, M.M.
Of swords and shields: The role of clinical practice guidelines
in medical malpractice litigation

(2001) *University of Pennsylvania Law Review*, 149 (3), p. 645. Cited 84 times.
<http://www.pennumbra.com/issues/>
doi: 10.2307/3312867

View at Publisher
-
- 21 Morreim, H.
Malpractice, mediation, and moral hazard: The virtues of dodging the data
bank
(2012) *Ohio St. J. on Disp. Resol*, 27, p. 109. Cited 6 times.
-

-
- 22 (1995) *Kapita selekta sistem peradilan pidana*. Cited 2 times.
Muladi. Badan Penerbit Universitas Diponegoro
-
- 23 Ness, V., Daniel, W.
(1980) *Restorative justice and International Human Rights, Restorative Justice: International Perspective*
edited by Burt Galaway and Joe Hudson, Amsterdam, The Netherland
-
- 24 Purwadi, A., Enggarsasi, U., Suhandi
From liability based on fault principle towards presumption of liability principle in medical disputes

(2019) *Journal of Advanced Research in Law and Economics*, 10 (5), pp. 1517-1524.
<http://journals.aserspublishing.eu/jarle/issue/archive>
doi: 10.14505/jarle.v10.5(43).22

View at Publisher
-
- 25 Purwadi, A., Enggarsasi, U., Suhandi
From liability based on fault principle towards presumption of liability principle in medical disputes

(2019) *Journal of Advanced Research in Law and Economics*, 10 (5), pp. 1517-1524.
<http://journals.aserspublishing.eu/jarle/issue/archive>
doi: 10.14505/jarle.v10.5(43).22

View at Publisher
-
- 26 Radbruch, G.
(2004) *Philosophy of law*. Cited 3 times.
Moscow: International relationships [in Russian]
-
- 27 Raveesh, B.N., Nayak, R.B., Kumbar, S.F.
Preventing medico-legal issues in clinical practice (Open Access)

(2016) *Annals of Indian Academy of Neurology*, 19 (5), pp. S15-S20. Cited 18 times.
<http://www.annalsofian.org>
doi: 10.4103/0972-2327.192886

View at Publisher
-
- 28 Reid, S. T.
(1987) *Criminal justice: Procedures and issues*. Cited 17 times.
West Publishing Company
-
- 29 Sasanthi, N. W. I. S.
Medical Actions Resulting in Malpractice in the Perspective of Indonesian Criminal Law
(2018) *Proceedings of International Conference of Social Science, ICOSS 2018*
European Alliance for Innovation (EAI)
<https://doi.org/10.4108/eai.21-9-2018.2281133>
-

-
- 30 Soedjatmiko, H. M.
Masalah Medik dalam Malpraktik Yuridik
(2001) *Kumpulan Makalah Seminar tentang Etika dan Hukum Kedokteran*
-
- 31 Sohn, D.H., Sonny Bal, B.
Medical malpractice reform: The role of alternative dispute resolution ([Open Access](#))

(2012) *Clinical Orthopaedics and Related Research*, 470 (5), pp. 1370-1378. Cited 29 times.
<https://journals.lww.com/clinorthop/pages/default.aspx>
doi: 10.1007/s11999-011-2206-2

View at Publisher
-
- 32 (2013) *Ketua MKDKI: Kami Tak Mengenal Istilah Malpraktek*
Tempo.co. (Dec 23). Retrieved from Accessed Dec 29, 2020
<https://nasional.tempo.co/read/539526/ketua-mkdki-kami-tak-mengenal-istilahmalpraktek/full&view=ok>
-
- 33 Tonry, M.
Sentencing matters
(1996) *Journal of Criminal Justice*, 6 (24), pp. 570-571.
[https://doi.org/10.1016/S0047-2352\(97\)81182-8](https://doi.org/10.1016/S0047-2352(97)81182-8)
-
- 34 Traina, F.
Medical malpractice: The experience in italy ([Open Access](#))

(2009) *Clinical Orthopaedics and Related Research*, 467 (2), pp. 434-442. Cited 48 times.
<https://journals.lww.com/clinorthop/pages/default.aspx>
doi: 10.1007/s11999-008-0582-z

View at Publisher
-
- 35 Van Apeldoorn, L. J., Leyten, J. C.
(1972) *Inleiding tot de studie van het Nederlandse recht*. Cited 3 times.
17., herziene dr. door JCM Leyten. Tjeenk Willink
-
- 36 Van Ness, D.W., Strong, K.H.
Restoring Justice: An Introduction to Restorative Justice: Fifth Edition

(2014) *Restoring Justice: An Introduction to Restorative Justice: Fifth Edition*, pp. 1-235. Cited 23 times.
<http://www.sciencedirect.com/science/book/9781455731398>
ISBN: 978-145573139-8
-
- 37 Yunanto, A, Helmi
(2010) *Hukum Pidana Malpraktek Medik Tinjauan dan Perspektif Medikolegal*
-
- 38 Zehr, H.
(2015) *The little book of restorative justice: Revised and updated*. Cited 636 times.
Simon and Schuster
-

□ 39 Zulfa, E. A.
(2011) *Pergeseran Paradigma Pidanaan*
Bandung: Lubuk Agung

□ 40 Zulfa, E. A.
Restorative Justice in Indonesia: Traditional Value
(2011) *Indonesia Law Review*, 1 (2), pp. 33-43. Cited 4 times.
<https://doi.org/10.15742/ilrev.v1n2.81>

🔍 Syaufi, A.; Faculty of Law, Lambung Mangkurat University, Jalan Brigjend. H. Hasan Basry (Kayu Tangi), Banjarmasin, Indonesia; email:asyaufi@ulm.ac.id
© Copyright 2021 Elsevier B.V., All rights reserved.

1 of 1

^ Top of page

About Scopus

What is Scopus
Content coverage
Scopus blog
Scopus API
Privacy matters

Language

日本語に切り替える
切换到简体中文
切换到繁體中文
Русский язык

Customer Service

Help
Contact us

ELSEVIER

[Terms and conditions](#) ↗ [Privacy policy](#) ↗

Copyright © Elsevier B.V. All rights reserved. Scopus® is a registered trademark of Elsevier B.V.

We use cookies to help provide and enhance our service and tailor content. By continuing, you agree to the use of cookies.

 RELX

