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1 Role of the Doctor as Expert Witness in Medical Malpractice

Cases

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Abstract

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

Keywords: Role of Doctor, Expert Witness, Settlement of Medical Malpractice Case

Introduction

Medical malpractice is prevalent in various countries such as in Canada, Japan, and even United States of America and the United Kingdom. The experienced this crisis in the 1970s and 1980. This is also the case in Malaysia. Although the cases are not as many in the above scountries, medical malpractices cases increased each year.

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

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

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

Instrument available today is the process of law enforcement against medical malpractice cases simply rely on the testimony of a doctor as an expert witness. This is because only the doctors who know and understand medicine. But this raises a problem because many doctors avoid to become an expert witness because they colleagues or associates. Testimony from expert doctors are biased and not objective and tends to protect colleagues. Therefore, this study will look to extent of the role of a doctor in law enforcement? What causes doctor's testimony as an expert witness not objective in the case of medical malpractice in the court? and to find out solution to facilitate the enforcement of the law for medical malpractice cases?

3 Research Method

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

Doctors as Expert Witnesses

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

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

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

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

Doctors also have an obligation to protect the privacy of all the evidences he had.

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

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

All statements of witnesses, including expert witnesses in the trial correlate one with another. It complements and perfects each other to unveil truth and justice. To bring in perpetrator of medical malpractice, expert witness of facts (*witness of fact*) and expert witness of opinion (*witness of opinion*) are needed. They will ascertain whether the operation was executed in accordance with the Standards of Medical Operations and Profession. In the court process, public prosecutor can present expert witness. Expert witness can be classified into two; *witness of fact and witness of opinion*. Based on Ethical Guidelines for Doctors Acting as Medical Witnesses, expert witness is a doctor directly take care the patient and his testimony was based on facts he encountered when taking care of the patient

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

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

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

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

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

Position and Role of Doctor as Expert Witness on Madical Malpractice Cases

In the verification process, the legal soundness of some family law (family recht) in the world has put the burden of proof on those who sue or Public Prosecutor. Hayt and Groeschel in their book *Law of Hospital, Physician and Patient* mention that in a criminal case, the burden of proof always lies on the prosecutor and continues to remain up until the inspection took place on the court.

While in the field of civil law, both parties stand in line or fight for their rights or what they believe to be true. This brings the consequence that in civil cases, in addition to the presumption of innocence, it is also possible, in special case, to do the transfer of the burden of proof from the plaintiff to the defendant.

One thing to consider is that patient is less knowledgeable, and even the prosecutor who has legal educational background is not able to prove a case of malpractice. To cover up the ignorance of the public on legal issues related to the health of the world then this problem, using expert witness, both general practitioners and specialists in accordance with the needs of the case evidence, can be implemented.

At this stage of the examination in court, both the public prosecutor and the suspect may present expert witness under the permission of the court. If their expertise directly related to the case that is being handled, a doctor may also be presented as a witness.

In the aspect of Indonesian law, expert witness is a qualified person in terms of knowledge and experience to give an opinion on a particular issue to the court. Witness testimony is one type of evidence

in criminal cases in the form of witness testimony about a crime he heard him, saw, or experience by recalling reasons of knowledge (Article 1 of the Criminal Code Clause 27).

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

Doctor's obligation to provide expert testimony was provided for in article 133 Criminal Procedure Code. The expert testimony will be used as legal evidence before the trial court (Article 184 Criminal Procedure Code) and can be administered orally in front of the court (Article 186 Criminal Procedure Code). When a doctor or health worker intentionally does not fulfill the obligation when called as a witness a regular or an expert witness in a case allegedly linked to a crime, then punishable with imprisonment of nine months and in other case, shall be sentenced to a maximum six months (Article 224 of the Criminal Code). In Article 170 Criminal Procedure Code stated that a doctor because of work, the dignity or position may exercise the right to withdraw the request to be exempted from the obligation to give testimony, the medical secret entrusted to him by giving reason to the judge.

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

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

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

In Malaysia's legal system, there are several criteria that serve as a guide for someone who can serve as an expert witness in court. Article 45 (1) *Evidence Act* 1950 states that if the court requires the opinion of the laws of foreign countries or of science or art, or about the identity or genuineness of handwriting or

fingerprints, it would require the opinions of people who have a particular skill on the case. This regulation has required that people who have special skills that can be tested in academic or work experience he is called the expert in the field of so-called expert witnesses to the fact. However, there are several expert witnesses who are not related directly to the case but can be used as supporting information to corroborate witness testimony to the fact.

Independent witness or witnesses called is the opinion of an independent expert witnesses were asked to give an independent opinion based on the facts of the particular case that already exists. In this case the doctor will give an opinion in accordance with relevant experience and expertise. As a witness of independent experts, doctors can assist the court in two ways, namely by giving expert opinion based on their knowledge and experience to the facts and inform the court on matters related to their particular expertise so before expert doctors testified, physicians need to know in advance the position as a fact witness or independent witnesses.

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

Typically, solving case of medical negligence requires a very long time because it is not easy to get a doctor as an expert witness whose expertise is relevant to the case at hand. In addition, many doctors who do not want to become an expert witness because it will deal with the defendant which the defendant is in fact one of his professional colleagues in the same hospital. Moreover, it is not easy for the judges to understand the complex nature of medical science¹ such as reading and understanding the patient's medical records, technical surgery, examination results and other support so that it will take considerable time and high costs.

Barriers and Challenge

Barriers and challenges in pertaining health law is that health law in Indonesia has just begun to develop and is still *in statu nascendi*. To complete and perfect the instrument of the law, we have to study longstanding and high jurisprudence of overseas literature. Legal considerations that the judge pronounced in a variety of medical case is what we can earn and received so far it does not conflict with our own socio-cultural, so that the development of medical law in Indonesia more quickly so that we can advance faster.

¹ M. Stauch, *Sourcebook on Medical Law*, Cavendish Publishing Limited, London, 1998, page 337.

It is very difficult to get doctors to provide their objective expert statements based on facts to verify whether his colleagues actions are guilty or not guilty of performing or not performing medical procedures on patients. Doctors on the subject play a major role in providing proof in court. However, it is not an easy matter for the public prosecutor to get a doctor who would be an expert witness and is willing to provide information of their colleagues or associates in his field's wrongdoing medical malpractice. It is difficult to maintain the independence when involving colleagues.

According to Giesen, difficult to proof elements in a medical malpractice case is the cause (*causation*). Patients should prove there is direct relationship between the causes and the result of the action. If the patient fails to prove this element, the demands of the patient can be canceled. In the court, the judge has no choice but to win the defendant if all expert witnesses justify the doctor's action was in accordance with the Standards of Medical Operations and Profession.

Moreover, persistent fact in law enforcement on medical malpractice is very strong relationship among medical professionals. A peer relationship is based on the Pledge of Medicine Indonesia and Code of Ethics Indonesia (KODEKI). KODEKI in Article 14 states that "*every doctor treats his colleagues as he wants to be treated*". The provisions of this conduct, but the context of a general nature to treat colleagues in terms of goodness related to their profession. But in fact found that all doctors always maintain good relations with colleagues to avoid conflict of interest with colleagues.

Defending colleagues who are guilty through the testimony of a specialist court is not mentioned in the regulation. Physicians should provide professional information in accordance with their expertise. Doctors should look at the case not look at who is doing such errors. When the doctor involves feelings based on emotional relationships of his colleagues in providing expert testimony in court then the explanation would be biased and not objective so it will be a lot of allegations that doctors tend to defend his colleagues in court.

Collegial relationship among doctors based on misled understanding of professional relationship, affect negatively to law enforcement in Indonesia. Law enforcement against the medical profession would make it difficult for the seeker of justice to prove the guilt of doctors if the doctor as an expert witness has collaborated with the defendant. This will be a major factor that the patient or the patient's family will not win a case of medical criminal offense in court.

Very rare that an expert witness who testified in court is different and contrary to the practice of medicine taken by the suspect. Many, expert witness justify his colleagues, because only the doctor who knows the surgical techniques or other medical action, so when taking this approach, the council of judges will follow the views of the expert witnesses and will surely win doctor in the case.

Solution and Analysis

In the theory of evidence, there is a principle that says "*He who asserts must prove or in Dutch called *wie Stelt, moet zijn kunnen bewijzen recht**". In the aspect of civil law, the parties are obliged to prove the guilt of doctors and patients in the aspect of criminal law and public prosecutor has the authority to prove.

When applying this authentication system, as has been explained from the beginning, it would be difficult for patients to prove that doctor is guilty.

Difficulty to prove guilty doctors was mentioned in the US Department of Health, Education and Welfare Report which states that one of the most difficult to prove cases are medical malpractice. Weakness verification system which is the limiting factor medical malpractice case are not up to the court, and so we need to reform the system in proving especially to cases of medical malpractice.

In a global aspect, current proving system is being neglected. In specific cases especially, proving principle '*he who asserts must prove*' which put the burden of proof obligation (*burden of proof*) to the patient changed to a system of proof by obliging to the doctor to prove medical malpractice cases. Reversed evidence against medical malpractice cases has been implemented in various European countries such as Switzerland, the Netherlands, Belgium and France. All these countries would realize that it is unfair if the state imposes a burden of proof to patients who do not have a good educational background as the medical profession itself.

The transfer of the burden of proof on the part of the patient to the doctor or other medical personnels is believed to bring positive change to medical malpractice cases in litigation. Ideally, the doctor or medical personnels prove medical malpractice because he knows, understands, authorized and experienced in the practice.

Shift of the burden to the doctor as mentioned by *Lord Justice May* in cases *Dwyer v. Roderick* that in medical malpractices, the burden of proving of medical malpractices. Lord Justice May said that:

"To shut one's eyes to the obvious if one denied that the burden of achieving something more than the mere balance of probabilities was greater when one was investigating the complicated and sophisticated actions of a qualified and experienced doctor than one was inquiring into the inattention of the driver in a simple running down action".

In addition to applying the burden of reversed proof as a solution to resolve medical malpractice cases, there are several countries have introduced a settlement out of court (*non litigation*) or in a civil law aspects of the so-called *alternative dispute resolution* by using the mediation approach. In Article 29 of Law No. 36 Year 2009 on Health states that medical malpractice settlement in mediation before the case is brought to court. Mediation is done when a dispute arises between health workers with patient health providers as recipients of health services. Mediation is done aims to resolve disputes out of court by a mediator agreed upon by the parties pursuant to the principle of *win-win solution and win-win situation*.

Malaysia also provides the option to the doctor and the patient that the medical malpractice case should be resolved through the courts or out of court. However, judges in Malaysia are given the authority to advise the disputing parties settle the case through mediation first. Likewise, with Singapore cases of medical malpractice should first be resolved out of court through mediation approach.

Conclusion

In a review of Indonesian and Malaysian Law, all give important positions to the doctor as an expert witness in the process of law enforcement. The only difference is that when a doctor as an expert witness testifies. In Indonesian, doctors can provide information on the stage of the police investigation until the proceedings in the Court. Meanwhile, in Malaysia, the doctor as an expert witness testifies only at the stage of the examination process in any court.

There are some obstacles in getting a doctor's expert witness as many who do not want to become an expert witness because they will deal with the defendant who is also their colleagues at a hospital. This may prolong settlement of medical malpractice cases. In addition, it is difficult to find a doctor who became an expert witness whose expertise is relevant to the case at hand because medical malpractice cases are complex and different from other cases that not everyone understands the medical action both methods of treatment and technical operations performed doctor to the patient.

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