



Malpractice during the Covid-19 Pandemic in Indonesia from a Medico Legal Perspective



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Abstract

This article examines malpractice cases during the Covid-19 pandemic in Indonesia from a medico-legal perspective, with particular attention to the problem of causality in determining legal liability. The study employs a qualitative legal review supported by empirical case materials, statutory analysis, medico-legal literature, and relevant scholarly studies. Using a meta-synthesis approach, the article identifies how emergency health conditions, limited resources, rapidly changing medical protocols, and institutional responses during the pandemic created complex causal relationships between medical conduct, patient harm, and legal responsibility. The findings indicate that several malpractice-related incidents during the pandemic involved overlapping dimensions of criminal, civil, ethical, and administrative violations, particularly in patient treatment and the evacuation of bodies of Covid-19 patients by task force officers and medical personnel. The study argues that these cases reveal a condition of causal uncertainty, in which conventional civil liability doctrines face difficulties in proving a direct causal link between wrongful conduct and damage. Accordingly, this article proposes that Indonesian civil law should develop a more refined framework for tort liability in cases involving uncertain causation, including the possible recognition of proportional liability or causal probability-based responsibility. This refinement is essential to ensure legal protection for patients and families while maintaining fairness for medical professionals operating under public health emergency conditions.

Keywords: Malpractice; Medico-legal; Covid-19; Causality

I. Introduction

Medical malpractice in Indonesia has become a topic of discussion in scientific forums in the fields of law and medicine. Apart from being difficult to be prosecuted by law, malpractice cases are also difficult in terms of proof. Not only in Indonesia, in developed countries there are still problems in the implementation of malpractice that can be prosecuted by law. Another issue is that in countries that apply the Anglo Saxon legal system (Anglo-American or common law, a legal system originating from England which later spread to the United States and its former colonies) such as the United States¹, malpractice claims are troubling medical personnel.² In the

¹ Sunaryati Hartono. "Legal politics towards a national legal system." (Bandung: Alumni, 2020), 73

² James M. Prieto, Bianca Falcone, Penny Greenberg, Alicia G. Sykes, William B. Sisson, Kenneth W. Gow, and Romeo C. Ignacio, "Trial and Error: Learning from Malpractice Claims in Childhood Surgery." *Journal of Surgical Research* 279 (2022): 84-88, 85.

year 2000 alone, in the United States there were 86,640 malpractice cases that went to court.³ In Japan, many malpractice cases are also brought to court and are concerning to patients.⁴

In Indonesia, the World Health Organization (WHO) declared the COVID-19 pandemic since March 11th, 2020. The first case of Covid-19 was confirmed on March 2, 2020. In just 8 days (April 10, 2020) Covid-19 had spread to 34 provinces in Indonesia. Apart from health issues, Covid-19 also had an impact on all fields and sectors of life. Clearly, since March 2020, during the pandemic in Indonesia (2020-2021), there have been many allegations of malpractice, involving both the Covid 19 Task Force and Health Practitioners.

The importance of this study is to review the description of the process and causal relationship from the perspective of general law vis-à-vis criminal law. Criminal law does not search for natural causes for something, but focuses on the human behavior which plays a role as the real cause to the issue.⁵

Previous malpractice-related studies were conducted. The study focuses on identifying the causes and factors that contribute to liability claims in order to prevent future litigation. The study analyzed national databases of malpractice claims involving pediatric patients undergoing surgical procedures and identified them. As well as reflecting poor patient outcomes, being sued for malpractice has a negative effect on the satisfaction and welfare of doctors. An increase in malpractice claims involving pediatric patients is indicated by the continued increase in compensation payments. Malpractice claims are known to have adverse effects on surgeons, including increased levels of fatigue, depression, and suicidal thoughts. Understanding the specific factors that contribute to the obligation to increase career satisfaction and quality of life for surgeons is very important. Contributing factors related to malpractice claims include the number of hours worked, frequency of night calls, surgical subspecialty, and specific practice settings. The study concluded that malpractice claims could represent an opportunity for focused quality improvement in surgical services and other healthcare systems. Educational programs in patient diagnosis, technical skills, and communication must be adapted to specific subspecialties and procedures. Understanding the contributing factors that can lead to litigation, and training surgeons to minimize complications will improve surgical care and patient safety for children undergoing surgery.⁶ Thus, the abovementioned study focuses on factors that contribute to malpractice claims against health workers. This study looks at malpractice from the patient's side by emphasizing the aspect of legal responsibility.

II. Research Problems

This study is also considered important in order to construct a clearer line of difference between the teachings of causality in criminal law and the teachings of causality in natural sciences. This study aims to review and assess selected studies related to medical malpractice against the public and patients suspected of being affected by the Covid 19 Virus in Indonesia. For this purpose, this study will answer three (3) research questions, namely: (1) How are allegations of malpractice cases in Indonesia viewed from a medico-legal perspective?; (2) What are the allegations of malpractice involving the Covid-19 Task Force and health practitioners during the Covid-19 pandemic from a causal perspective?; and (3) What is the mechanism for resolving cases of alleged malpractice?

³ Ardianingtyas and Charles M. Tampubolon, "Doctor's Misdiagnosis: Classified as Malpractice or Negligence," *Hukum Online.com*. <https://www.hukumonline.com/berita/baca/hol10135/kesalahan-diagnosis-dokter-tergolong-malpraktek-atau-kelalaian>

⁴ Syahrul Machmud. *Law enforcement and Legal Protection for Doctors Suspected of Medical Malpractice* (Jakarta: Mandar Maju. 2008), 1-3.

⁵ J.M. Van Bemmelen, "Criminal Law I (General Material Criminal Law)", diterjemahkan oleh Hasnan, (Jakarta: Bina Cipta, Cet.II, 1987), 154-155.

⁶ James M. Prieto, Bianca Falcone, Penny Greenberg, Alicia G. Sykes, William B. Sisson, Kenneth W. Gow, and Romeo C. Ignacio, "Trial and Error: Learning From Malpractice Claims in Childhood Surgery." *Journal of Surgical Research* 279 (2022), 84-88.

III. Research Methods

This study uses the systematic literature review (SLR) method, through metasynthesis, literature review, research review, systematic review and research synthesis. Thus, this study reviews and evaluates selected descriptive⁷ qualitative data⁸ by analysing, interpreting and accurately re-explaining⁹ the cases that occurred.¹⁰ This study combines empirical data¹¹ and literature search data holistically (overall).¹² Malpractice cases (the subject of the study¹³) that occurred during the Covid-19 pandemic in Indonesia from a medico-legal perspective (instruments, institutions and procedures) in terms of causality. As an SLR study, this study explores, identifies themes, compares, combines and consolidates a series of studies to provide a richer, complete and in-depth view; analyze, identify patterns to make theoretical contributions or build theories (expansion, refinement or theory generation) taking context into account. The potential bias in validity and reliability may stem from incomplete literature or invalid data. SLR begins with problem formulation, literature search, careful assessment, selection, meta synthesis, synthesis presentation and process reflection.¹⁴ Coding and analysis procedures were also applied.¹⁵ The limitations of the meta synthesis process can occur in the subjective interpretation of the reviewer, understanding of the data, skills of the assessor and limitations in electronic searches.¹⁶

IV. Result and Discussion

A. Malpractice, Medico-legal and Causality

Every Person has the Right to determine their own fate (the right to self-determination). This philosophical statement can be interpreted to mean that no matter how severe a person's condition is, or a person's illness or a person's condition or type of disease, every person or individual, consumer or patient has rights protected by the law against any medical action to be carried out by a practitioner/health or health institutions against him/her.

Malpractice is the language commonly used by legal practitioners to suspect that a health practitioner or health institution has undertaken a medical act to a patient which resulted in the patient's injury or death. The Covid-19 virus, carried out by doctors or the Covid-19 Task Force without informed consent is an act that violates the law, both civil and criminal, or in terms of health law is called malpractice. In every profession, including the profession of health workers, ethical and legal norms apply. Therefore, if there is an allegation of a malpractice, it should be measured or viewed from the point of view of the two norms. Mistakes from an ethical point of view are called ethical malpractice and from a legal point of view they are called juridical

⁷ W. Lawrence Neuman. *Qualitative research methods, qualitative and quantitative approaches*, Third ed., Allyn and Bacon, Boston, 1991, 327-332; Keith. F. Puch, *Introduction to social research, quantitative and qualitative approaches*, (London. SAGE publications Ltd, 1998), 138.

⁸ Fraenkel dalam Rusinah Joned. "Research Methodology." *Serdang*: Faculty of Educational Studies Universiti Putra Malaysia, 43400 UPM, Serdang, Selangor, Malaysia, (2001), 81.

⁹ J.R Fraenkel & N.E Walle. *How to design and evaluate research in education* (Singapore, McGraw-Hill, 1993), 45.

¹⁰ Cooper H. *Research synthesis and meta-analysis: A step-by-step approach* (Vol. 2). (Sage publications, 2015).

¹¹ R. Bogdan & S. Biklen, "Qualitative." *Research In Education: an Introduction to Teory and Methods Boston: Allyn and Bacon Inc* (1982), 27

¹² Rusinah Joned. " Research Methodology." *Serdang*: Faculty of Educational Studies Universiti Putra Malaysia, 43400 UPM, Serdang, Selangor, Malaysia, (2001), 82

¹³ S. Nasution, *Qualitative Naturalistic Research Methods*. Bandung: Transsito (1992), 54; HH. Nawawi. 2000. *Strategic Management, Non-Profit Organizations in the Governmental Field with Illustrations in the Educational Field*. Yogyakarta: Gadjah; I. S. P. Morrisey, GL 2002. *Morrisey and Planning*. Translated by: Gianto Widiyanto. Jakarta: Prenhallindo. See also S. Nasution. "Qualitative Naturalistic Research Methods (Bandung). Tarsito." *library. fis. uny. ac. id/opac/index. php* (2003).

¹⁴ E. J Erwin, M.J. Brotherson, & J.A. Summers. Understanding qualitative metasynthesis: Issues and opportunities in early childhood intervention research. *Journal of Early Intervention*, 33(3) (2011), 186-200.

¹⁵ C. Hoon. Meta-synthesis of qualitative case studies: An approach to theory building. *Organizational Research Methods*, 16(4) (2013), 522-556.

¹⁶ J. Chrastina. Meta-Synthesis of Qualitative Studies: Background, Methodology and Applications. *NORDSCI*. (2018) <https://eric.ed.gov/?id=ED603222>

malpractice. This needs to be understood considering that in the profession of medical personnel ethical norms and legal norms apply, so if there is malpractice, it is necessary to look at what domain was violated. Because ethics and law have fundamental differences regarding substance, authority, purpose and sanctions, the normative measures used to determine the existence of ethical or juridical malpractice are also different. Malpractice in medico-legal studies is a type of legal issue that is difficult to resolve, both legally in court and ethically in ethical institutions such as MKEK (*Majelis Kehormatan Etik Kedokteran* or the *Honorary Council of Doctoral Ethics*) and MKDKI (*Majelis Kehormatan Disiplin Kedokteran Indonesia* or the *Indonesian Doctoral Discipline Honorary Council*). This issue has become a discourse for thinking about legal studies, in addition to the difficulty of proving malpractice at trial, the fact that many legal practitioners do not really understand the ins and outs of medical malpractice law, and health practitioners who have a low understanding of health law. Not to mention the fact that the term "malpractice" still does not have a standard definition. As a result, each legal practitioner translates it according to their ability to understand the term. According to the Big Indonesian Dictionary (KBBI), medical malpractice is medical practices that are done incorrectly or inappropriately, violating the law or code of ethics¹⁷. Initially, the term medical malpractice was not recognized in the legal system in Indonesia. There is no law that specifically mentions the issue of malpractice. This is reasonable considering that the term originates from the Anglo-Saxon system, although in fact there are several statutory regulations such as the Civil Code¹⁸ (default¹⁹ / article 1243 of the Civil Code and Tort in article 1365) as well as several conventional articles in the Criminal Code²⁰ (such as articles 89, 351, 359, 360 and 344) which, although not explicitly setting out provisions regarding malpractice, can be used as a basis for filing civil claims or criminal charges.

Causality (cause and effect) is a relationship or process between two or more events or circumstances of an event where one factor triggers or causes another factor.²¹ This issue of uncertainty becomes even more difficult when determining the cause and the effect, especially if there are many factors that make up the event.²² The concept of causality includes ways of thinking about oneself, about the environment, about the whole nature in which humans live and the relationship between humans and nature.²³ Discovering all these relationships between cause and effect provides insight into the structure of causality in nature, and forms the basis for humans to learn to act intelligently in the world. Finding out what is true is the cause that allows humans to construct patterns of causal arrangement, and this makes rational predictions, decision-making and actions possible in this world.²⁴ In natural science, the teaching of causality is used to explain the order of things, or systems of elements, which link one another to form a cause-and-effect relationship and have a causal principle.²⁵

Table 1. Different Perspectives on Cause and Effect and their Explanation According to Five Science Philosophies (Van de Ven, 2007; Durand and Vaara, 2009; Geels et al., 2016a; Saunders et al., 2018).

¹⁷ The Department of Education and Culture, "The Big Indonesian Dictionary," 1990, 551

¹⁸ Civil Deed applicable in Indonesia

¹⁹ Violation of the Contract

²⁰ Crime Deed applicable in Indonesia

²¹ For more on evolution, see Simon Blackburn (1996), 'I Rather Think I am a Darwinist', *Philosophy*, 71, 605-16.

²² A.Z. Abidin and Andi Hamzah, *Introduction to Criminal Law in Indonesia*, (Jakarta: Yarsif Watampone, 2010), pg. 213.

²³ See Blackburn, 'Realism: Quasi or Queasy?', in John Haldane and Crispin Wright (eds) (1993), *Reality, Representation, and Projection*. Oxford: Oxford University Press, pg. 366.

²⁴ In relation to this law of nature, J.M. van Bemmelen stated that natural science tries to find causal relationships between certain facts. For example, if water at 100 degrees Celsius boils and evaporates, we say that heat is the cause of the boiling and evaporation of the water. Another example put forward by him is about the involvement of several factors that cause change. An ice will melt faster if it is mixed with salt and then placed at a higher temperature. Salt causes ice to melt faster, even though placing ice at a higher temperature causes ice to melt too, but the process of melting ice is much faster if it is not mixed with salt. (J.M van Bemmelen, *Criminal Law I (General Material Criminal Law)*, translated by Hasnan, Bandung: Bina Cipta Bandung, 1987, p. 154).

²⁵ Hans Kelsen, "Pure Legal Theory: Fundamentals of Normative Law", translated from the original script "Pure Theory of Law" by Raisul Muttaqien. (Bandung : Nusamedia and Nuansa Publishing, 2nd printing, 2007), pg. 86

	Ontology	Causality	Explanation	Methods
Positivism	Reality is independent of the researcher and objective (i.e., observable and measurable).	Nomothetic: law-like regularity (or 'constant conjunction') between entities.	The explanation is a deductive, logical and formal argument that includes an explanandum under a general law or theory.	Testing formal propositions with quantitative techniques (experiments, causal models).
Pragmatism	Reality is actively created and constantly changing, because people act to solve practical problems.	The instrumental perspective on causality is due to interest (influences) the effects and causes.	The outcome ('the dependent variable') is explained as the effect of the independent variable.	Various qualitative and quantitative methods, including statistical techniques for variable-based research.
Critical Realism	Reality is independent and layered (which is empirical, actual, real).	Generative causality: results are generated by (among) acting entities, causal mechanisms and structures. Several types of causes are possible.	Explanations provide explanations of how outcomes are produced by actors and causal mechanisms in a structural context.	The range of methods and data types appropriate to the research topic and questions.
Interpretivism (hermeneutics, ethnomethodology, phenomenology)	Reality is socially constructed through subjective (inter) meanings.	Cause is rejected as deterministic.	Focus on understanding people's diverse experiences and reasons (Verstehen) rather than explanations.	Qualitative methods such as ethnography, interviews, textual analysis, case studies.
Post-modernism	There is no single reality, but many stories and narratives from different realities.	Little interest in cause and effect.	The goal is not to explain, but to critique dominant narratives and forces, freeing silenced voices, or asking normative questions.	deconstructive method; reveal (textual) contradictions or paradoxes; denotes multiplicity and alternatives.

Source: Geels, Frank W., 2022 (translated into Bahasa Indonesia).

The legal study paradigm originates from the philosophy of science. In the philosophy of science, two of the five philosophies (positivism, pragmatism, critical realism, interpretivism, and post-modernism) differ in their ontological assumptions about the (social) nature of reality and about causality. Interpretivism holds that causation is rejected as deterministic. Post-modernism is also less interested in causality. Thus, there are three perspectives of causality and explanation in the three philosophies of science, namely: (1) Positivism assumes that reality is objective (apart from the researcher's cognition) and has law-like characteristics. Positivism focuses on observable and measurable phenomena and entities. This is in line with empiricism which argues that knowledge comes from sensory experience such as observation or measurement. Causality is understood as a nomothetic (law-like) regularity between entities, which are repeated (constant conjunction). Thus, X is supposed to cause Y if there is a "constant (deterministic) conjunction or probabilistic association between X and Y" which is described as a law. (2) Pragmatism is an alternative to positivism claiming that knowing and doing are always related through practical actions aimed at solving problems. Pragmatism sees "theories, concepts, ideas, hypotheses and research findings in terms of the role they play as instruments of thought and action. The practical orientation of the pragmatists is instrumental. A causal approach that focuses on manipulable causes that have specific effects. This causal approach to causality conceptualizes the world as consisting of independent variables ('causes') that have effects on the dependent variable ('outcomes'). Mohr (1982) calls it push-type causality. Abbott (2004) characterizes this view of causality as Standard Paradigm Causal Analysis (SCA). It is clear that the instrumental view of causality influences and gives effect to causation. (3) Critical realism is also an alternative to positivism, which is criticized for reducing reality to what can be observed by the senses. Critical realists criticize positivism's constant conjunction approach to causality as superficial and focus on correlations between phenomena (which repeatedly occur together in a law-like manner) rather than on explanations of co-occurrence. The critical realism approach to causality is based on an ontological model that postulates three domains of reality (Bhaskar, 1975, 1989): empirical, actual and real. Empirical means events that are observed and experienced, actual means the causal mechanism that produces events; and real means entities and structures with eternal nature and causal power. It is clear that critical realism has a generative causality view, namely that outcomes are produced by interactions between causal entities, mechanisms and structures. Thus, allowing for multiple types of causation.²⁶

The determinism of the teaching of causality holds that everything that happens is solely the result of a cause.²⁷ Daniel Little²⁸ said that the theory of causation is very suitable for social explanation although it has to consider several things, namely: first, causal theory cannot be generalized to all social situations. Second, causal theory relies heavily on causal mechanisms²⁹ that link causation, and third, causal theory involves references to beliefs and desires, forces and barriers that influence individuals in social reality.³⁰ This means that causality is actually a logical thinking to explain an event, where the event arises because of the factors that influence it. Daniel E. Little has three main ideas in explaining causation, namely the causal mechanism (CM), the

²⁶ Frank W. Geels. "Causality and explanation in socio technical transitions research: Mobilising epistemological insights from the wider social sciences." *Research policy* 51.6 (2022): 104537, 2-5.

²⁷ Kattsoff Louis O. "Introduction to Philosophy" translated by Soejono Soemargono (Yogyakarta: Tiara Wacana, 2004), 55-56

²⁸ Daniel E. Little is a professor of philosophy at the University of Michigan, USA. He earned his Ph.D in philosophy from Harvard University in 1977. Among his famous books are *Varieties Social Explanation* (1991), *Microfoundations, Method and Causation* (1998).

²⁹ In explaining the causal mechanism, he gave an example with the following formulation: If C is the Cause and E is the Effect. Then the CM of C and E is: $C \rightarrow C1 \rightarrow C2 \rightarrow C3 \rightarrow C4 \rightarrow E$. Concrete examples: C= A car tire nut loosely installed, E= Accident. The causal mechanisms are: A loose tire nut (C) causes when the car is running a vibration occurs which causes the nut to become looser and finally dislodged (C1) the vibration that occurs gets louder causing the other nuts to also become loose and finally all the nuts become dislodged (C2) because all the nuts came off causing the car's tires to come off (C3) and because the tires came off causing the car to lose control (C4) and finally an accident occurred (E).

³⁰ Daniel E. Little, "Varieties of Social Explanation: An Introduction to the Philosophy of Social Science" (San Francisco: Westview Press, Colgate University, 1991), 13-14.

relationship between two or more variables (Inductive Regularity = IR) and one event which is a necessary or sufficient condition/Necessary or Sufficient Conditions (NSC).³¹ CM is a series of events arranged in "lawlike regularities" that lead to a cause to an effect. To apply IR, there are two things that need to be considered: (1) Regularity conjoining events. The explanation: C and E have a causal relationship if there is regularity in the series of events C and E. (2) Conditional Probability. The explanation: E is affiliated with C only if the conditional probability of E caused by C is different from the absolute probability of E.³² According to the NSC theory, C has a causal relationship with E only if C is an important and sufficient factor for E to occur, meaning that if C does not exist then E will not occur. However, in reality there is not just one condition that can cause something to happen but usually a series of conditions that make something happen.³³ Daniel E. Little emphasizes the regularity of each event. Meanwhile, John Mackie believes that the elements of action are equally important to produce an effect, but these elements do not have to run regularly. Events that occur can be in the form of a combination of various causes (plurality of causes). Even though they are different conditions or events, each of these elements must be sufficient elements in order to produce a consequence.³⁴ These plural conditions together are sufficient to produce consequences, but this condition may not be so important, but there are a number of alternative conditions which together produce the same consequences. Mackie refers to a condition like this as something important from a set of sufficient (but necessary) to produce a certain type of consequence which he calls an INUS (Insufficient but Necessary part of an Unnecessary but Sufficient) condition³⁵. Meckie also concluded that the analysis of regular causes as a collection of INUS conditions is often applied not only to types of acts or events but also to specific acts or events.³⁶

The study of law looks at causality from a causal perspective, for example whether a person's actions caused a fire to occur, and whether there were other parties who contributed to the fire.³⁷ In law, the teaching of causality is used to explain the relationship between the norms of human behavior which can consist of legal objects and legal norms. For example, statements about if an individual commits a crime, he must be punished, or if an individual does not pay off his debt, then civil law must be applied to his property, or if an individual has an infectious disease he/she must be quarantined in an institution. This is the basic principle of causality that links two elements, these two elements being crime and law, civil violations and civil executions, illness and the quarantine of a person. The relationship between these two elements is brought about by legal authorities or in other words by human intervention.³⁸ In civil law, the teaching of causality can be used in discussing the limitations of liability for acts of tort that contain causal uncertainty.³⁹ As in the case of Erin Brockovich, causal uncertainty occurs because the impact caused by the company's actions (pollution) is not immediately apparent, but can only be identified after some time. In this context, there is justification for limiting the perpetrator's liability for damage and other impacts.⁴⁰ Determination of legal (civil) liability is based on the distribution of probabilities that are considered to have the potential to cause consequences.

B. Malpractice during the Covid-19 Pandemic in Indonesia

On December 8, 2019, the Corona virus was first found in Wuhan City, China and spread quickly and widely from "human to human" in various countries including Indonesia. WHO

³¹ Daniel E. Little, *Ibid.*

³² Daniel E. Little, *Ibid.*

³³ Daniel E. Little, *Ibid.*

³⁴ John Mackie in the Anthony Maurice Honore "Responsibility and Fault", (Oxford : Hart, 1999), 96.

³⁵ John Mackie, *Ibid.*, 97

³⁶ John Mackie, *Ibid.*

³⁷ John Mackie in the Anthony Maurice Honore, *op.cit.*

³⁸ Hans Kelsen, *op.cit.*, 87-88. This is what distinguishes the relationship of causality in natural law, in natural law the relationship between cause and effect does not depend on human intervention.

³⁹ Robert Young, Michael Faure and Paul Fenn, "Causality and Causation in Tort Law", (International Review of Law and Economic 24, 2004) 504-523.

⁴⁰ Shavell S. "Uncertainty Over Causation and the Determination of Civil Liability", (London: Journal of Law and Economic, 1985), 587-609

(World Health Organization) introduced the name of this disease as Coronavirus disease 2019 (Covid-19)⁴¹ and was declared a global pandemic; in fact, as of February 26, 2021 WHO recorded a total of 2,501,299 (two million five hundred and one thousand two hundred and ninety-nine) people that had died as a result of being positive for Covid-19.⁴² With the issuance of Presidential Decree No. 11 of 2020 concerning efforts to counter Covid-19 and Government Regulation No. 21 of 2020 concerning Large-Scale Social Restrictions (*Pembatasan Sosial Berskala Besar* or PSBB), various policies were carried out by the Indonesian government related to the Corona virus outbreak. The first batch included the formation of the Task Force for the Acceleration of Handling Covid-19, the Social Distancing and Physical Distancing policies, PSBB to the Implementation of the Enforcement of Restrictions on Public Activities (*Pemberlakuan Pembatasan Kegiatan Masyarakat* or PPKM) starting from the Aceh Province to Papua Province and 34 (thirty-four) Provinces that have been affected whereby the response action was led by the respective governors and regional mayors/regents. Specifically for handling Covid-19 on March 31, 2020, the government issued three related regulations as a form of countermeasures against the pandemic, namely: first, Presidential Decree Number 11 of 2020 concerning the Declaration of A Public Health Emergency for the Corona Virus Disease 2019 (Covid-19) ("Presidential Decree No. 11/2020"); second, Government Regulation Number 21 of 2020 concerning Large-Scale Social Restrictions in the Context of Accelerating the Management of Corona Virus Disease 2019 (Covid-19) ("GR No. 21/2020"); and third, Government Regulation In Lieu of Law Number 1 of 2020 concerning the State Financial Policy and Financial System Stability for Handling the 2019 Corona Virus Disease (Covid-19) Pandemic and/or in the Context of Dealing with Threats that Endanger the National Economy and/or Financial System Stability ("GR in Lieu of Law No. 1/2020"). The spread of this virus in Indonesia was first discovered in the Depok area with the discovery of 2 (two) people who tested positive.⁴³

In response to the spread of the Covid-19 virus, the Government of Indonesia took three preventive steps, namely PSBB, PPKM and Vaccination. PSBB (Large-Scale Social Restrictions) is defined as "Restrictions on certain activities of residents in an area suspected of being infected with a disease and/or contaminated in such a way as to prevent the possibility of spreading disease or contamination."⁴⁴ PSBB provides for narrowing down movement and even a complete blockage of several activities in the community. The government enforced PSBB restrictions and even closure of activities for almost 2 years (early 2020-early 2022), namely restrictions for: Formal Education Activities from Kindergarten, Elementary School, Junior High School, Senior High School and equivalent to Higher Education; Activities of Government Institutions, Private institutions to Traders; Religious activities in special places that cause crowds; Community Social Activities such as Weddings, Circumcision, Recitation and so on. After imposing PSBB in 2020, the government subsequently implemented PPKM (Enforcement of Restrictions on Public Activities). The Government of Indonesia first implemented PPKM on January 11-25, 2021, carried out based on the instruction of the Minister of Home Affairs (Mendagri) Number 1 of 2021 and specifically implemented in the Java and Bali regions. PPKM was implemented by blocking traffic lanes that are often passed by the community to limit the spread of the virus by: Limiting workplaces/offices by implementing 75% work from home (WFH) and 25% work from office (WFO) policies by enforcing health protocols more strictly; carry out teaching and learning activities online; whereby essential sectors related to the basic needs of the community were able to continue operating 100% with more stringent regulation of operating hours, capacity and

⁴¹ Yuliana. "Corona Virus Diseases (Covid-19) A Literature Review." *Wellness And Healthy Magazine* 2.1 (2020): 187-192

⁴² WHO. Coronavirus disease (COVID-19) Pandemic. 2019. Retrieved from <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> <https://prfmnews.pikiran-rakyat.com/nasional/pr-131520311/hari-ini-tepat-satu-tahun-pandemi-covid-19-menghantui-indonesia-kasus-pertama-ditemukan-di-depok>

⁴³ Today Marks Exactly One Year since the Covid 19 Pandemic Haunts Indonesia: First Case Found in Depok, , *Pikiran Rakyat*. <https://prfmnews.pikiran-rakyat.com/nasional/pr-131520311/hari-ini-tepat-satu-tahun-pandemi-covid-19-menghantui-indonesia-kasus-pertama-ditemukan-di-depok>

⁴⁴ The Government of the Republic of Indonesia. Law No. 6 tahun 2018 concerning Health Quarantine. State Gazette Number 128 and Supplementary State Gazette Number 6236. Article 1 number 11.

implementation of health protocols; make arrangements for the implementation of restrictions (restaurant activities (eating/drinking on site by 25% and for food services via delivery or take-away) were still permitted according to restaurant operating hours with stricter application of health protocols; and limiting operating hours for shopping centers/malls until 19.00 o'clock Western Indonesian Time); allowing construction activities to operate 100% with the application of stricter health protocols; allowing places of worship to be function with a capacity limit of 50% with the application of stricter health protocols. As it was ineffective, the government finally extended PPKM through Minister of Home Affairs Instruction Number 2 of 2021. The government even extended the PPKM period through micro PPKM, by stipulating restrictions up to the *Rukun Tetangga* (Neighbourhood Association or RT) / *Rukun Warga* (Community Association or RW) level. Based on Minister of Home Affairs Instruction No. 3 of 2021, this time PPKM used the distribution of control zones for the spread of Covid-19 in each RT, such as the red zone, orange zone, yellow zone and green zone.⁴⁵ After being carried out for two weeks, the government extended this micro PPKM several times, and after being evaluated the government finally extended the PPKM under the name of Emergency PPKM which took effect from the July 3-25, 2021. Under such PPKM, the government closed almost all sectors of community activities, social, economic, religious and cultural activities.

Vaccination. According to Regulation of the Minister of Health (MOH) of the Republic of Indonesia Number 10 of 2021 concerning the Implementation of Vaccinations in the Context of Mitigating the 2019 Corona Virus Disease (COVID-19) Pandemic, vaccines are biological products that contain antigens in the form of attenuated dead or living microorganisms, still intact or parts of them, or in the form of microorganism toxins that have been processed into toxoids or recombinant proteins, which are added with other substances, which when given to someone will actively cause immunity specifically towards certain diseases.⁴⁶ According to Nature Communication 2021, vaccination during a pandemic is considered as a "public goods" effort carried out by the government as a mandatory matter. Therefore all vaccination costs are fully borne by the government. In Indonesia, the widely used Covid-19 vaccine is Sinovac, which can be administered to people aged 18-59 years old who are in good health. Each resident will be given the vaccine 2 times, with a difference of at least 14 days, in which the dose for one injection is 0.5 ml, given free of charge to the public. This is done with the target to reduce the pandemic within one year. The administration of this vaccine is of course done by prioritising the implementation of operational standards, namely with the conditions of normal body temperature and normal blood pressure and the approval of the person concerned. At the end of 2021, the Minister of Health issued Circular Letter No. HK.02.02/I/1727/2021 concerning Phase 3 of the Vaccination for ages 12-17 years old. Furthermore, there was also a vaccination circular letter for the elderly, namely those aged 60 and over must also be vaccinated.⁴⁷ And finally, the circular letter to carry out vaccinations for children aged 6-11 years with a circular letter issued by the Minister of Health No. HK. 01. 07/Menkes/6688/2021 concerning the Vaccination of Children Aged 6-11 Years Old. This time, the author will try to highlight the problems that are related to the field of law, for example the many cases of law violations in handling Covid 19 patients in Indonesia. The problem that has been widely reported is the existence of violations of the medical code of ethics and hospital code of ethics in handling Covid-19 patients. In addition to violations of the code of ethics, health practitioners also violate the law in taking action against patients suspected of experiencing Covid-19 complications, which includes the following:

1. not giving informed consent (Information on the disease and the medical actions to be carried out by the doctor);
2. not making a Theurapathic Contract with the patient;

⁴⁵ Get to know what the Emergency PPKM is and how it differs from Micro PPKM, Kompas. <https://www.kompas.com/tren/read/2021/07/01/130657765/mengenal-apa-itu-ppkm-darurat-dan-bedanya-dengan-ppkm-mikro?page=all>

⁴⁶ Regulation of the Minister of Health Number 10 of 2021 concerning the Implementation of Vaccinations in the Context of Mitigating the 2019 Corona Virus Disease (Covid - 19) Pandemic, Article 1.

⁴⁷ The Government of the Republic of Indonesia. Circular Letter No.HK.02.02/II/368/2021 concerning the Implementation of Vaccines for the Elderly.

3. Undertaking unilateral actions regarding the patient's death status before there are laboratory reports;
4. not giving patients a choice about private isolation or special isolation from the hospital;
5. arranging a special burial place without the consent of the patient's family.

With the excessive fear experienced by health practitioners and Covid-19 task force officers, they did not pay attention to the ethical and legal pathways, so ethical or legal violations in handling Covid-19 patients were considered a natural thing as an emergency action. Likewise with the implementation of health services for the community, it is the community's right to make choices about using health services, in this case regarding the Covid-19 vaccine, whether or not the community is willing to be vaccinated, informed consent is required for adults, and parental approval for children who are under 18 years of age. The concept of Indonesian law not only recognises the principle of *dolus* (intentionally) in a criminal act, but Indonesia also recognises the principle of *culpa* (falsehood). The word negligence (*culpa*) in a broad sense means an error in general, while in a narrow sense it is a type of error in the form of negligence. *Cculpa* is an element of guilt when a situation endangers the security of people or property, or causes a material and irreparable loss to a person.⁴⁸ The author does not discuss specifically about *dolus* or *culpa*, but in line with the title of this article, the author will try to explore several definitions so that readers understand that an act of tort is not necessarily limited to intentional acts; rather, acts committed due to negligence can also be punished.

Rights and Responsibilities of Patients Everyone has something fundamental to themselves, so that when other people take away their rights, it can be considered as a violation of human rights. Even in Article 28 of the 1945 Constitution, several rights are stipulated, including the right to life, "Every person has the right to live and has the right to defend his/her life and well-being". Medical actions carried out by a doctor or hospital against patients suspected of being affected by the Covid-19 virus are closely related to a person's rights before the law, especially in carrying out medical actions. Procedures in the actions of a doctor cannot be separated from an informed consent, which is a medical statement from a doctor to a patient about his/her illness and the medical action to be performed on the patient, as well as the patient's consent to the medical action to be carried out by the doctor. When a patient comes to a doctor to be examined, the legal relationship that occurs between them is essentially a service buying and selling relationship that is identical to the relationship between producers and consumers. Patients are positioned as the consumers of health services, while doctors or health workers are sellers of health services. This engagement relationship is known as a therapeutic agreement or therapeutic transaction. In therapeutic transactions, patients have the same position as doctors or health workers. The patient has the right to determine what medical actions may and may not be performed on their body. The patient's right to their own body is one of the basic human rights, whereby Munir Fuady classifies it as one of the rights under the umbrella of the right to self-determination. No matter how good a doctor is, they are still not allowed to take medical actions on their patient without obtaining approval.⁴⁹ The agreement in question is a written agreement made by the health institution (hospital) with proof of the signature of the patient who is considered an adult, or signed by their guardian if the patient in question is still underage. In deciding whether to agree to a doctor's action or medical action, the patient needs to get sufficient information from the doctor. The process in which a doctor provides information which is then followed by the patient giving consent to a medical action is known as informed consent. Its existence is one of the elements of the occurrence of therapeutic transactions, and as an agreement, therapeutic transactions are subject to the provisions of civil law. In other words, if there is no signing of the informed consent letter, the hospital or doctor has not fulfilled the elements of an Agreement in accordance to Article 1320 of the Civil Code, namely, "1. An agreement that binds both parties; 2. The capacity (of an Adult) in making an engagement; 3.

⁴⁸ Hendri Paidun, "Review of the Crime of Negligence Causing the Death of People Committed by Drivers of Motorised Vehicles", *Lex Crimen Journal*. Vol II No.7 (November 2013), 119.

⁴⁹ Munir Fuady. *The Hippocratic Oath (Aspects of the Doctors' Malpractice Law)*. (Bandung PT. Citra Aditya Bakti. 2005), 59.

Having a subject matter; 4. A cause that is not against the law".⁵⁰ In addition to violating the validity of an agreement, the act can be classified as an act of default, which is the failure to complete an obligation arising from an agreement made by one of the parties in the agreement.⁵¹ Even in the absence of signing an informed consent letter, this act can be classified as an act of tort based on Article 1365 of the Civil Code, namely: "1. The patient suffers a loss; 2. There is an error or omission; 3. There is a causal relationship between the loss and fault; 4. The act violates the law⁵². In the Medical Practice Act No. 29 of 2004, Article 45 stipulates that (1) Any medical or dental action to be performed by a doctor or dentist on a patient must obtain approval. (2) The approval as referred to in paragraph (1) is given after the patient has received a complete explanation." This law quite clearly upholds the importance of obtaining medical consent from the patient before the doctor performs a medical action. In fact, if we look at it from the point of view of criminal law, the doctor's actions in taking medical action which did not/have not received consent from the patient, are considered as tort. It is even considered to have violated Article 351 of the Criminal Code as an act of abuse⁵³, a surgery performed without the patient's permission can be called abuse and is a violation of Article 351 of the Criminal Code. In addition to Article 351 of the Criminal Code, Sri Siswati also relates Article 89 of the Criminal Code regarding performing surgery that requires anesthesia to this issue. This article stipulates that putting someone in a state of fainting or helplessness, is an act of violence.⁵⁴ It can be concluded that the absence of informed consent will only cause legal problems if the doctor's actions cause harm to the patient. The loss in question has a fairly broad scope; both material losses such as pain or scars that interfere with daily life as well as psychological losses such as violations of certain beliefs or religions can be used as grounds for claims. Furthermore, if examined through the perspective of health law, according to Law No. 36 of 2009, Article 56 stipulates that every person has the right to accept or refuse part or all of the assistance that will be given to them after receiving and understanding the information. Thus, specifically in this law, it is explained that it is the patient's prerogative to accept or reject the results of informed consent that has been made by a doctor.

Alleged Malpractice Involving Health Practitioners Juridicially, actions that are considered as a malpractice by health practitioners or the task force in treating patients who are suspected of having contracted the Covid-19 virus during the outbreak, can be subject to criminal, civil and state administrative sanctions. On the other hand, ethically, such actions can only be subject to professional sanctions or the code of ethics of the profession concerned. Informed Consent or the approval from the patient for the doctor to carry out a medical action, is not just done as a formality to fulfil the requirement of an agreement between the patient and the doctor. It is a detailed description of how much risk is involved, what the disease is, and what is the condition of the body after the medical action is taken. Therefore, the patient or the patient's family, with the explanation from the doctor, are able to give their permission to the doctor to carry out the medical action. This is stated in the regulation of the Minister of Health of the Republic of Indonesia.⁵⁵ For example, in treating patients suspected of being infected with the Covid-19 virus, if the task force officers force the patient to be taken to the hospital, before informed consent and the signing of a therapeutic contract, and if the patient subsequently dies, the actions of the officers who participated in the team can be used as a basis for the right to file claims against the officer on suspicion of having committed an act of malpractice. Furthermore, violations committed in carrying out vaccinations for people at any age must still refer to the

⁵⁰ R. Subekti and R. Tjitrosudibio. *Civil Law*. (Jakarta: Pradnya Paramita, 2004), 43.

⁵¹ A.F. Erawaty and J. S. Badudu. *English-Indonesian Dictionary of Economic Law*. Ellipse Project Economic Law Development Component, 1996, 10.

⁵² Soetrisno. *Medical Malpractice & Mediation as an Alternative to Dispute Resolution*. (Tangerang: Telaga Ilmu, 2010), 38

⁵³ Sri Siswati. *Ethics and Health Law in the Perspective of Health Law*. (Jakarta: PT. Raja Grafindo Perkasa, 2013), 105

⁵⁴ Sri Siswati. *Ibid*.

⁵⁵ The Government of the Republic of Indonesia. Regulation of the Minister of Health Number 290/men. kes./per/iii/2008.

operational standard of implementation in laws relating to the field of health and medicine, namely the existence of permission from the consumers concerned.⁵⁶

Ventilator A ventilator or ventilation is a breathing apparatus that provides positive pressure through an artificial airway.⁵⁷ Ventilators create controlled airflow in the patient's airway so that they are able to maintain and improve ventilation and oxygen delivery in the long term. According to Sari, a mechanical ventilator is a tool used to take over the respiratory function because of a certain effect on an illness. (Sari et.al., 2019). Ventilators are devices used to replace or support respiratory function which are widely used for patient care in the Intensive Care Unit (ICU). The purpose of using a ventilator is to protect the airway and prevent respiratory failure (Alfaray 2019). The Intensive Care National Audit and Research Center (ICNARC) study claims that Corona patients who are treated with ventilator breathing apparatus have a smaller chance of survival. Corona COVID-19 virus patients who are treated using ventilators only have a 34 percent chance of survival. This claim is based on monitoring results of 6,720 critical COVID-19 patients. The Daily Star said that 65.4 percent of critical patients who used ventilators died. While those who were still able to fight for their life and recover were as much as 34.6 percent, ICNARC then compared them with those who did not use ventilators. As a result, patients who recovered could reach 81.9 percent, while only 18.1 percent died.⁵⁸ In the context of using a ventilator for Covid-19 patients in Indonesia while receiving medical treatment and using a medical device that is not supported by informed consent, causing the patient to die, a claim can be made that the doctor has made a mistake in taking medical action. Statistics generally show that 40-50 percent of patients with acute respiratory complaints die while being treated on a ventilator. Even in New York City's coronavirus cases, more than 80 percent of patients who were attached to a respiratory support machine died, according to reports by city and federal officials. "Higher than normal fatality rates are also being reported from many parts of the United States," said Dr. Albert Rizzo, who is one of the medical leaders of the American Lung Association.⁵⁹

V. Conclusion

Based on the meta synthesis, it is evident that malpractice cases that occur are a form of casual uncertainty and legal (civil) liability based on the distribution of probabilities which are considered to have the potential to cause an outcome. The discovery of violations of law and ethics committed by task force officers and the medical team in handling patients suspected of being contaminated with the Covid-19 virus and carrying out the evacuation of bodies suspected of being contaminated with the Covid-19 virus is an indication of the many acts that are suspected of being malpractice, not only considered as a criminal or civil act of tort, but also as an administrative violation of ethics. On the grounds of an emergency situation, Circular Letters of the Minister were prioritized over laws, regulations and codes of ethics, and moreover coercive medical measures were undertaken by evacuating bodies that were not necessarily contaminated with the Covid-19 virus. It is recommended that civil law in Indonesia expand the discussion on the limitations of liability for tort acts that contain causal uncertainties. However, this study has limitations in terms of elaborating each case by case considering the limitations of primary sources for Covid-19 research related to malpractice.

⁵⁶ The Government of the Republic of Indonesia. Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practice. State Gazette Number 116 and Supplementary State Gazette Number 4431. Article 45 paragraph (1).

⁵⁷ C.M. Hudak and B. M. Gallo. "Critical Care Nursing: A Holistic Approach. (5th Edition Volume 1)." *Translated by Allenidekania, B., Susanto, Nerera, & Yasmin. Jakarta: EGC (2013), 32.*

⁵⁸ This Study Says Ventilators Can Be Dangerous for the Lungs of Corona Patients, Detik.com. <https://health.detik.com/berita-detikhealth/d-4994899/studi-ini-sebut-ventilator-bisa-berbahaya-bagi-paru-paru-pasien-corona>

⁵⁹ Deaths Rising, Doctors Try Not to Use Ventilators for Covid-19, Kompas.com. <https://www.kompas.com/sains/read/2020/04/14/070900623/kematian-meningkat-dokter-berusaha-tak-pakai-ventilator-untuk-covid-19?page=all>

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