# ANALYSIS OF THE INDONESIAN CRIMINAL CODE ARTICLE NO. 359 IMPLEMENTATION ON MEDICAL MALPARTICE CASE (Case Study on the Supreme Court Verdict No.: 365-K/Pid./2012)

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## ABSTRACT

This study aims to examine and analyse the implemetation of Article 359 of Criminal Code on medical malpractice case which was happened in the State Court of Manado jurisdiction. The study is starting at the present of implementation gap of law by the judge assembly of Indonesian Supreme Court based on considerations about "medical negligence of the accused that cause the death of the pastient".

This study is a library research that used juridical normative approach which analyse the verdict of Supreme Court Judges based on enacting statute.The study using the secondary data i.e Supreme Court Verdict No. 365.K/Pid/2012 and related statutes. Data analysis and interpretation was performed using the comparative analysis technique.

The result shows: (a) The supreme court conducted an unappropriate manner in receiving the cassation appeal from the prosecutor for the verdict " free of charge" from the state court of Manado; (b) The verdict of judges assmbly of the supreme court which sentenced "guilty" to the accused on violating the article 359 Criminal code is irrelevant, because there is no basis for stating that administrative negligence of the accused have any causative correlation with the death of the victim; (c) The verdict of judges assembly to sentence with 10 month stay in prison was imprroper because there is a justifier reason to make the accused free of Criminal charge.

**Keywords: malpractice, medical, negligence, Criminal**

## A. Introduction

Tha liability system of medical malpractice has two main objectives are as follows: ***firstly***, to give a compensation to the patient who underwent illness, permanent disability or maybe die because of medical negligence of the physician or health workers; and ***secondly***, to prevent physician or health workers negligent in doing his/her job. In fact, the system is sluggish and costly when implemented. The aim in providing compensation to the medical malpractice victims or his/her family was not achieved. On the contrary, the total amount of health service delivery became escalated but ironically enjoyed by those who are not the victim. Harris (2002),[1] reported his research to the physician community in USA that "fearness" based policy legal liability of medical malpractice cases had brought "the high cost and defensive health service delivery pattern" up. Physicians and health workers insure their medical services to face the lawsuit risk because of medical malpractice. The insurance premium and litigation cost will be taken into account under the health service delivery cost so as the total amount become escalated esceed the health service delivery cost itself.

Total amount of cases and verdicts those were sentence off had increased since the year 2008 and reached the peak level on 2012. After 2017 the amount became gradually decline to the lowest level on 2017. Even though the amount of cases had drastically decrease

[1] Daniel P. Kesler, *Evaluating the Medical Malpractice System and Options for Reform*, J Econ Perspect. 2011 Spring; 25(2): 93–110.

but its scale was the biggest instead of the previous years. The Total amount of litigation cost for medical malpractice cases reached out 17.8 USD.[2] How is the medical malpractice cases in Indonesia? The medical malpractice allegation cases those were reported to the Indonesian Medical Council in period of time 2006 – 2015 as much as 317 cases. 114 cases of them were general physicians, 76 surgeons, 317 obstetricians, and 27 pediatricians. At the working area of Indonesian Physician Associatin (IDI) In Central Java Province tere were 6 cases within period 2011 – 2014, one of them was medical malpractice allegation at General Hospital Snta Maria at Pemalang town.[3]

Medical malpractice allegation is based on the proposition "negligence" in doing medical practice that oftenly mentioned as "medical negligence". This proposition is based on the "*les ipsa loquitur*" principle, that is an indirect evidence which clues that "negligence" was happened. This matter is related to the special case that does not require proof because of its specific condition or situation. This means that the court does not know what really happened on the specific case about (i.e: medical malpractice). Medical malpractice allegation is based on knowledge about the cause of malpactice case itself.[4]

The term of malpractice gerercally is interpreted as a bad condition which causes of contradictory or wrong doing practice with the rules or standardized procedure. Malpractice could be happened in various profession likes: lawyer, public notary, physician. accountant, etcetera. There are two terms for fault which is done by the physician or helath workers those are: (1) medical malpractice ; and (2) medical negligence. Some of the experts state that medical malpractice is different with medical negligence, but this is debated by some law experts because difficulty in distinguishing between the both of them. This matter engenders general assumption that "all of the fault that are done by the physician or health workers could be categorised as medical malpractice".[5]

Basically, coverage and f medical malpractice is wider than medical negligence. Medical malpractise consists of two dimensions: (1) Legal dimension; and (2) ethical dimension. Legal dimension consists of thre aspects, those are: (a) Criminal aspect; (b) civil aspect; and (c) administrative aspect. Complexity and broadness of the scope of medical malpractice engender some differences in the perception amongst physicians fellow, law experts and practitioners, and the community. In practice, those perception differences are simplified to be simple practical definition that based on "negligence" doctrine, where the physician or health worker is suspected "negligent", so as the patient becomes more ill, does not cure, or even die.

Simplification of definition encourages the implementation of Criminal approach in countermeasuring the medical malpractice. In Indonesia, the handling of madical malpractice cases which caused patient's death is based on the proposition "negligent that caused another person die" as regulated in Article 359 of Indonesian Criminal Code (KUHP). In practice, the negligence doctrine in this article is generally applied to various cases which causes the death of anybody, in example: negligence due driving in drunk, unlocking the gun safety so as burst and hit somebody until dead, forget to close the railroad crossing bar so as dead because of runned over by the train, etcetera. The Article No. 359 Indonesian Criminal Code is a common article which applied on the basis of "negligence" that has also general characteristic.

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[2] Jefrey F. Driver, *Medical Malpractice Tren Review*, Standford University, 2017, hlm. 15.

[3] Setyo Trisnadi, *Perlindungan Hukum Profesi Dokter Dalam Penyelesaian Sengketa Medis*, Jurnal Pembaharuan Hukum, Volume IV No. 1 Januari - April 2017, hlm. 25.

[4] Bryan A. Garner, *Black›s Law Dictionary*, Ninth Edition, 2009, st. Paul. MN : Publishing. Co, h. 1425

[5] Muhammad Hatta, dkk., *Legal Position of Medical Malparctice in Indonesia*, Medwell Journals, ISSN: 1818-5900, 2017

Pasal 359 KUHP adalah pasal umum yang diterapkan atas dasar dugaan adanya unsur "kelalaian" yang juga bersifat umum. Basically, the negligence which regulated in this article is concerning deed or action with known risk and effect and could be prdicted exactly by the doer. It means the doer knows with certainty if negligent in doing or not doing a special deed, it is known that any predictable risk or effect will be happened.

That matter is different with specific condition or situation which happened on medical practice which is done in conciously, planned and prepared aiming to to save the patient's life or treat the disease. There is no intentionally motive at all to make a any fault at all. There is no another condition, situation or incident that could be equated or analogous with medical practice. Medical practice is a unique and specific condition, situation, and practice that could not be found in the other professions. The happening negligence in medidical environment also has specific and unique characteristic, so as the implementation of Article 359 of Indonesian Criminal Code (KUHP) on medical malpractice case is not proper due applying the generic substance to the unique and specific ones.

Compared with the countries those applying common law system like the United State of Amerika, there are fundamental gap on theoretical and empirical domain. The common law adherents countries do not apply Criminal approach, while Indonesia does so in handling medical malpractice cases. That discrepancy is quite important to be analyzed because it has implication for unreachable substatntive justice due to obscurity of law, sepecially associated with "negligence" doctrine.[6] The aim of this study is analyze the legal position ole medical malpractice in Indonesia in order to make a legal renewal in providing the human rights based legal protection for the physicians and health workers.

This study is a qualitative legal research with normative juridical approach, whre maedical malpractice cases are higlighted from enacted statute perspective (law in books). The study was using the secondary data in the form of Supreme Court's verdict No. 365.K/Pid/2012 as the analytical object. Analysis and interpretation technique which was using in this study is comparative analysis with inductive syllogysm.[7]

## B. Research Questions

1. How is the implementation of Article No. 359 of Indonesian Criminal Code on medical malpractice cases?
2. What is the legal effect of the implemetation of Article No. 359 Indonesian Criminal Code for physician or helath worker who is suspected to do medical malpractice?

## C. Result and Analysis.

### a. Researc Result

**Kasus Posisi**

Accused I :. DEWA AYU SASIARY PRAWANI, MD
Accused II : HENDRY SIMANJUNTAK, MD
Accused III : HENDY SIAGIAN, MD

[6] Setyo Trisnadi, *opcit*. hlm. 25.

[7] Mukti Fadjar & Yulianto Achmad, Dualisme Penelitian Hukum Normatif & Empiris, Yogyakarta, Pustaka Pelajar, 2010, hlm. 107.

**First Indicment**:

The each accused. DEWA AYU SASIARY PRAWAN, MD (First Accused)), HENDRY SIMANJUNTAK, MD (Second Accused) and HENDY SIAGIAN, MD (Third Accused), in doing together or personally, on April 10th, . at 10 pm more or less, or at another time in the year 2010 at least, located in the operation/surgical room at Prof. Dr. R. D. Kandouw Malalayang Hospital, Manado City, at another place within the juridiction of state court of Manado city at least, had done or ordered to do and participate the medical practice (deed) CITO SECTIO SESARIA, which was due to their negligence caused the patient's death that was the victim SISKA MAKATEY.

The main summary of the deed of the accused that was assessed as negilgence are as folows:

1. The accused never convey to the patient or the relatives about the worst possibility of surgery.
2. The assused did not perform the supporting examinations likes: ECG test, x-ray test, and the other ones, meanwhile the bood pressure before anaesthetization was rather high: 160/70 so as the surgery was classified as surgery with high anaesthetical risk, and the general conditon of the patient was weak and high severity of illness.
3. HERMANUS J. LALENOH, MD as anaesthetist and witness in this case had asked the accused to inform to the patient's family about all of possibel risk that could be happened..
4. The result of post operation ECG test showed that the heart rate was 180 x/menit which was reported by DEWA AYU SASIARY PRAWANI, MD as ventricel tachycardy to the witness NAJOAN NAN WAROUW, the consultant of Obstetric and Gyneacology Department. The witness stated that herat rate 180x/minute is a fibrilation, that is a kind of hearth rhytm disorder.
5. The accused were negligent in handling the victim pre and during the operation/surgery so that caused the air embolism in the right ventricelThe embolus inhibited the entry of the blood to the lung and caused pulmonary failure and heart failure at the end.
6. Finally, the victim was dead due to air emboly at the right ventricel.
7. The deed of the accused is regulated and threatened with punishment as it was regulated within the Article No. 359 related to Article No. 55 clause (1) of Indonesian Criminal Code (KUHP).

**Second Indictment**:

1. The accused the have competence certification only but do not so for the medical practice license (SIP), and did not get officially and written handover to do the medical practice from the authorized specialist who has medical practice license (SIP) and rights to give consent.
2. The deed of the accused were regulated and threatened with punishment within Article No. 76 of Indonesian Statute No. 9 year 2004 on Medical Practice related to Article no. 55 clause (1) of Indonesian Criminal Code (KUHP).

**Third Indictment:**

1. That the signature of the victim's consent SISKA MAKATEY to be carried out an operation/surgey with anesthesia is not in accordance with the signature on the victim's ID Card (KTP), and the examination result of Criminal Laboratory states that the signature of the victim listed on the approval letter is false or falsified

2. That the deed of the accused as regulated and threatened with criminality in Article 263 clause (1)related to . Article 55 clause (1) of the Criminal Code

**Legal Considerations :**

1. That the defendant's actions have a causal relationship with the death of the victim SISKA MAKATEY as charged by the Public Prosecutor.
2. The Supreme Court overturned the decision of the District Court No. 90 / PID.B / 2011 / PN. MDO in 2011 which has decided that the defendants are "free" from criminal charges, and grant the appeal of the Public Prosecutor, and decide to try the case itself:

**Adjudicate:**

1. State the defendants DEWA AYU SASIARY PRAWANI, MD (Defendant I), HENDRY SIMANJUNTAK, MD (Defendant II), and HENDY SIAGIAN, MD (Defendant III) has been proven legally and convincingly to commit a criminal act "that because of his negligence caused the death of another person"
2. Menjatuhkan pidana kepada para terdakwa dengan pidana penjara masing-masing 10 bulan.

**b. Analysis:**

Based on the legislation that stipulates that the Supreme Court at the level of cassation has the right to cancel the decision or the determination of the courts of all judicial environments due to not authorized or exceeding the authority, wrongly applying or violating the applicable law and neglecting to fulfill the conditions required by laws and regulations that threaten negligence by canceling the relevant decision,[8] then in this context, the Supreme Court overturns the free decision of Manado District Court number 90/PID/.B/2011/ PN.MDO, against the defendants doctor Dewa Ayu Sasiary Prawani, doctor Hendry Simanjuntak, and doctor Hendy Siagian.

Judging from the provisions of Article 244 of the Criminal Procedure Code (KUHAP), that every decision of a criminal case at the last level of a court other than the Supreme Court, defendant or public prosecutor can submit a request for examination to the Supreme Court except for the free verdict, then the Supreme Court's decision in accepting an appeal, hearing itself and decide the case that has been decided "free" by the Manado District Court is inappropriate, goes beyond the authority and contradicts the law. On the other hand, the Minister of Justice's Decree Number 14- pw. 07.03 of 1983 concerning Additional Guidelines for the Implementation of the Criminal Procedure Code, namely attachment 19, confirms that an independent decision cannot be appealed, but if based on circumstances and conditions, by law , justice and the truth of the free decision can be requested for this appeal based on jurisprudence.[9]

Mahkamah Agung berpendapat bahwa hakim Pengadilan Negeri Manado salah menerapkan hukum karena tidak mempertimbangkan dengan benar hal-hal yang relevan secara yuridis, yaitu berdasarkan hasil rekaman medis nomor 041969 yang telah dibaca oleh

[8] Leden Marpaung, *Unsur-unsur Perbuatan Yang Dapat Dihukum (Delik)*, Jakarta, Sinar Grafika, 1991 , Hlm. 1
[9] M.Yahya Harahap, *Pembahasan permasalahan dan penerapan KUHAP*,.Edisi ke dua, Jakarta, Sinar Grafika, 2008, Hlm. 544.

saksi ahli dokter Erwin Gidion Kristanto.SH.Sp.F , bahwa saat korban masuk rumah sakit umum Prof.R.D. Kandou Manado. Keadaan umum korban adalah lemah dan status penyakit korban adalah berat. Sesuai dengan aturanPasal 253 Kitab Undang-Undang Hukum Acara Pidana (KUHAP), bahwa syarat Mahkamah Agung menerima permintaan kasasi adalah ada peraturan hukum yang tidak ditetapkan, atau diterapkan tidak sebagaimana mestinya, cara tidak dilaksanakan dengan benar menurut ketentuan undang-undang, dan melampaui batas wewenang pengadilan. According to the author, the decision of the panel of judges of the Supreme Court was right because the medical record was one of the conditions for doctors to take medical action, because in the medical record there was a history of the patient's disease, physical and laboratory diagnostic examinations, types of medical actions and therapies. Medical records are the basis for doctors to take action on their patients. If an action occurs in the form of negligence, it can be traced back through medical records. Medical records are also a proof that can be accounted for, because each doctor / dentist in carrying out medical practice is required to make a medical record.

The first element of negligence of the defendants was the failure to convey an explanation to the victim and / or his family about the worst possibility that could occur regarding the CITO SECTIO SESARIA medical action to be carried out. that the action is high risk to the worst consequences of death. This violates the provisions of informed consent, namely the the consent given by the patient or her family on the basis of an explanationabout the medical action to be taken against the patient.

Before an action to be taken on the patient, the doctor must provide input in the form of:

1. a full explanation of the procedure to be used in a particular medical action (which is still in the form of an attempt, trial) proposed by the doctor and the objectives to be achieved (results of efforts, trials)
2. an explanation of side effects and undesirable consequences that may arise
3. an explanation of the benefits that can be obtained by the patient
4. explanation of the duration of the procedure
5. explanation of the patient's right to withdraw consent without prejudice regarding the relationship with the doctor and his institution
6. prognosis regarding the patient's medical condition if he refuses certain medical measures.

The first omission element is related to other elements of negligence, namely: (a) Do not have a written approval letter from a specialist doctor who has a Medical Practice License (SIP) and has the right to give consent to the defendants to conduct CITO SECTIO SESARIA medical treatment, take into account that the defendants are residents who are still in the study period to obtain a specialist degree of Obstetrics and Gynecology; (b) Does not verify the signature of the patient's consent with her ID card which later proves that the signature is false.

These omissions even though they are wrong or violate or not in accordance with the provisions, the domain is administrative related to administrative procedures to smooth the

management of medical actions carried out on patients. In the medical malpractice classification described above, its position is administrative malpractice that is not directly related to the causes of death (causa mortis) of patients. The results of the autopsy stated that the cause of death of patients was due to an air embolism in the right ventricel of the heart which inhibited blood flow to the lungs, and resulted in lung function failure which later ended with heart failure.

Air embolism is classified as an iatrogenic risk that occurs due to complications from the patient himself with her disease, complications during medical action that cannot be predicted by the doctor, and not at all due to negligence. Consideration of the Supreme Court judge that the defendants were considered negligent in handling patients before and during the operation so that the patient had an air embolism in the right ventricel of the heart which caused his death to be inappropriate. Administrative negligence of the defendants as mentioned above is not directly related to the cause of death of the patient. The statement that "the actions of the defendants have a causal relationship with the death of the victim SISKA MAKATEY" is inappropriate and unclear. Whereas the proof of martyrdom caused the death of the victim because the air embolism in the right ventricle of the heart was correct, but it was not necessarily caused by the negligence of the defendants.

The air embolism that occurs in the victim is an iatrogenic condition where the defendants as doctors who run the CITO SECTIO SESARIA operation do not know and cannot predict whether there will be an air embolism or not, let alone the public prosecutor and judge. The consideration of the Supreme Court judge stating that the defendants' negligence caused the victim to die was a simplification of legal logic that emphasized formal law in pursuit of legal certainty, and ruled out the material legal aspects that "there is no crime without material evidence that can show perpetrator's mistake ". Air emboli which is considered as a result of "negligence" indicates that prosecutors and judges do not understand the essence of medical practice, especially air embolism whose nature cannot be known or predicted previously.

udges' consideration is based on mistaken beliefs that stem from a lack of understanding or lack of knowledge about iatrogenic conditions in a medical action or disease. The relevant theory in this case is the precautionary theory of the perpetrator and the consideration of the bad possibilities that will occur (assuming the consequences of his actions) these two elements are in the delic culpa. The defendant's inadvertence or negligence cannot be applied because the embolism case is something that cannot be predicted by the medical profession because this is a complication which is a medical risk in every doctor's actions.

In the practice of obstetrics and obstetric surgery the risk of embolism is a condition that is unpredictable due to complications that occur in the patient's body. One cannot be said to be negligent in doing or not taking action on an unexpected event, which is the condition that comes from the victim as a human being who has a different risk basis for each person so that the doctor in taking action will experience things that are different from this risk. Saying that air embolism is caused by the negligence of the defendants (doctors) is a form of public prosecutors and judges that stem from a lack of competence in interpreting material evidence of air embolism ". The consequence of the logic of the above thought is that the causality between administrative negligence of the defendants and the death of the victim is not proven.

If the causality relationship is not proven, then Article 359 of the Criminal Code cannot be applied, because the element of this article requires the existence of a causal relationship between the actions carried out causing the death of another person. The actions of the defendants did not cause the victim to die, but the death of the victim due to medical risk was a complication that occurred due to the victim's body's reaction. The logical consequence of the absence of a causal relationship between the negligence of the defendants and the death of the victim should be a justification or forgiving reason that acquitted the defendants of all criminal charges, so that it can be concluded that the decision of the Supreme Court Judge sentenced the the defendant is not right.

If traced back, the provisions of Article 359 of the Criminal Code which is based on the element of "negligence (culpa)" comes from the doctrine of "*culpa in causa*" which is interpreted as:

"Less / inadvertent / careless or negligent acts that cause the subject of the perpetrator to be in a critical situation to do or not to do something that is required or prohibited by law so that a certain consequence occurs".

Culpa in causa consists of two elements, namely: (1) careless or negligent deeds; and (2) critical situations caused by careless or negligent deeds. The doctrine of culpa in causa is the basic element that is used as the basis for making the formulation of the offense related to the consequences or results of negligent or careless deeds. The subject of the perpetrator can be blamed and therefore must be responsible for the critical situation or the consequences of the negligence. In Indonesia, the doctrine of culpa in causa is applied as "negligence (culpa)" which is used as a juridical justification for the existence of criminal proceedings from an act which is then used as the basis for making the formulation of the offense. Negligence (culpa) is used as a ratio decidendi or justification for judges in deciding cases. When the subject is considered "negligent" so that a victim dies whose cause is allegedly due to negligence, the subject can be blamed and can be held responsible for criminal responsibility. From the very beginning the application of the doctrine culpa in causa to Article 359 of the Criminal Code was definitively incomplete, but biased because: (1) only saw the consequences of actions; and (2) side with the victim. This emphasis on the consequences and partiality to the victims ignores the cause (causa) which is precisely the main factor which must exist in material existence. Is there really a negligence from the perpetrators who are the direct cause of the death of the victim so that the perpetrator can be blamed and held accountable for criminal responsibility? The formulation of the offense in Article 359 of the Criminal Code only looks at the "effect" or "material" aspect and ignores the "cause" or "formal" aspect of the deed.

In general events, the causal relationship between cause and effect is clear as in the case of drunk drivers who hit people to death, the formulation of the offense in Article 359 of the Criminal Code is still appropriate to be applied to fulfill the principle of justice for the victims. Ratio decidendi in the event can be clearly defined that: (1) there is indeed a driver's negligence (inadvertent) that causes the victim to die; (2) a causal relationship between causes (drunk driving) with consequences or critical situations (crashing until the victim dies); (3) critical situation (drunk driving) with the result of the victim being hit to death can be estimated or predicted; (4) the perpetrator knows and can predict the existence of a critical situation and its consequences for others and himself; and (5) perpetrators can prevent or not

commit "drunk driving" as ordered by law ". The definition and causal relationship between cause and effect on the event can be clearly and firmly formulated so that the formulation of an offense for "drunk driving" can be formulated in accordance with the principles of lex scripta (must be written), lex stricta (must be interpreted as read ), and lex certa (not multiple interpretations).

According to Pompe,[10] there are three conditions that can be defined and classified into negligence, namely: (1) can predict the occurrence of consequences (kunnen verwachten); (2) knowing of the possibility (kunnen der megolijkheid); and (3) can find out the possibility (kunnen kenen van de mogelijkheid). While according Van Hamel,[11] the implementation of omission offense contains two conditions, namely: (1) the subject does not make or make estimates of critical or emergency situations as ordered by law; and (2) the subject is not careful or acts carefully or does not act (drunk driving) as ordered by law. The principle of culpa in causa contains two elements, namely: (1) the omission (culpa) of the subject which is a "reproachable inner attitude", namely: (1) drinking alcohol and driving drunk and therefore being liable for criminal responsibility; and (2) the emergence of an emergency / critical situation "crashing a victim to death" which results in a criminal act.

On medical malpractice case in this study, the three conditions or prerequisites for applying the principle of culpa in causa were not met. Those are, the subject (doctor) (1) cannot predict whether "pulmonary embolism" will occur and when it will occur; (2) not aware of the possibility of pulmonary embolism; and (3) cannot know the possibility of pulmonary embolism. In terms of the subjective element of "inner attitude", there is no inner attitude of the subject (doctor) that can be reproached, because the inner attitude that underlies the doctor's actions is to save the patient's life. At the same time, the critical situation of "pulmonary embolism" is not the result of the subject's (doctor's) actions, but solely the result of the interaction between the general condition of the patient who is indeed weak, the condition of the disease, and complications during surgery (durante operatio) that cannot be estimated previously

The generalization of the application of the negligence principle in Article 359 of the Criminal Code on medical malpractice cases is violating human rights and denying the principle of justice which is precisely the ultimate goal rather than the making of legal norms. Any legal norms made must fulfill three basic principles, namely: (1) justice; (2) legal certainty; and (3) benefits.[12] The legal consideration of the Judges Panel of the Supreme Court which stated that "the defendant's actions have a causal relationship with the death of the victim SISKA MAKATEY as charged by the Public Prosecutor" can be as follows: (1) emphasizing the principle of legal certainty based on the analogy of events and generalization of the principle of culpa in causa, and at the same time put aside the principle of justice; (2) based on definitions, propositions, and formulations that are blurred or unclear; (3) there is no clarity regarding the causal relationship between administrative negligence charged with the

[10] Lihat: Sudarto (1075) dalam Soekamto, *Kajian Akademik terhadap Asas Culpa In Causa dalam Doktrin dan Yurisprudensi,* Ar Risalah Vol. 9 No. 23, 2011, hlm. 40.

[11] *Ibid.*

[12] Lihat Gustav Radbrugh dalam Bernard L Tanya, *Politik Hukum: Agenda Kepentingan Bersama*, Jakarta, Genta Publishing, 2010, hlm.2.

cause of the victim's death; (4) do an analogy of a case or incident which is absolutely not allowed when deciding a criminal case.

Based on the analysis of the verdict of the case for cassation No. 365.K / Pid / 2012, it can be concluded that the decision of the Supreme Court judges which ruled that the defendants were "guilty" because of their negligence caused the victim to die, and because he was sentenced to 10 months in prison was inappropriate and unfair. On the other hand, the decision of the Manado District Court judges that acquitted the defendants of criminal charges was more appropriate than the decision of the Supreme Court judges, because there was no proper legal basis for applying Article 359 of the Criminal Code to the defendants.

## D. Conclusions and Suggestions

### a. Conclusions

1. The Supreme Court has wrongly applied its authority by accepting an appeal for a case that has been decided freely by the Manado District Court. The decision of the Supreme Court is contrary to the provisions of Article 244 of the Criminal Procedure Code.
2. Decree of the Minister of Justice Number m-pw. 07.03 of 1983 concerning Supplement to the Implementation Manual of the Criminal Procedure Code which is used as the basis for accepting cassation requests on "free" decisions from the District Courts, is not appropriate for two reasons: (a ) There are no special or extraordinary things that can be used as a basis for receiving a cassation application; and (b) Ministerial Decrees may not conflict with laws and regulations which are of a higher level, namely Article 244 of the Criminal Procedure Code.
3. The legal consideration of the judges panel of the Supreme Court which stated that there is a causal relationship between the negligence of the defendants and the death of a victim was incorrect, and thus the decision of the judges panel impose a 10-month sentence on the defendants under the provisions of Article 359 of the Criminal Code wasincorrect.
4. The decision of the panel of judges of the Supreme Court only provided legal certainty for the case but did not provide justice for the defendants.
5. Defendants should be sentenced under criminal provisions in Article 76 of Law No. 9 of 2004 concerning Medical Practice because of administrative malpractice.

### b. Suggestions

1. Revision of Law No. 9 of 2004 concerning Medical Practices which have not specifically regulates the medical malpractice
2. Criminal law reform in the field of health and / or medical practice

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