

## Civil Liability of Hospitals for Tort Law of Swapped Babies: A Comparative Analysis Between Indonesia and Malaysia

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### Abstract

This study examines the civil liability of hospitals in cases of swapped babies by comparing the legal frameworks of Indonesia and Malaysia, particularly in relation to unlawful acts under Indonesian civil law and the tort of negligence under Malaysian common law. This study aims to analyze how both legal systems define negligence, establish liability, and determine forms of compensation, as well as to assess the extent of hospital responsibility for failures in newborn identification procedures. The findings reveal that Indonesia requires proof of unlawful acts, fault, loss, and causation under Article 1365 of the Civil Code, while Malaysia applies the elements of duty of care, breach of duty, damage, and causation. Indonesia limits compensation to material and immaterial losses, whereas Malaysia provides broader remedies, including special, general, and aggravated damages. Both jurisdictions, however, emphasize hospital accountability for ensuring patient safety and compliance with identification standards. The novelty of this research lies in its direct comparison of civil liability for swapped-baby cases between a civil law system and a common law system, a topic that has received little academic attention, thereby offering new insights into strengthening legal protection and hospital governance in both countries.

## INTRODUCTION

According to Law Number 17 of 2003, a hospital is a health service facility that provides comprehensive individual health services, including promotive, preventive, curative, rehabilitative and/or palliative services, by providing inpatient, outpatient and emergency services.<sup>1</sup> Hospitals as health service providers have legal responsibility not only for the medical actions carried out by their health workers, but also for the supporting and

<sup>1</sup> Pasal 1 Undang-Undang Republik Indonesia Nomor 17 Tahun 2003 tentang Kesehatan.

administrative services provided to patients.<sup>2</sup> In practice, this responsibility has not been fully implemented optimally, because many hospitals are still negligent in carrying out their obligations according to applicable operational standards, resulting in physical and psychological harm to patients and their families.<sup>3</sup> One form of hospital negligence that causes fatal losses is the exchange of babies after delivery.

A case of babies being swapped once occurred at a hospital in Bogor which was only revealed after more than one year since delivery.<sup>4</sup> In addition, there is also an allegation that the babies were swapped in Cempaka Putih, Central Jakarta, where the baby's body was exhumed due to the baby's length not matching the birth certificate.<sup>5</sup> A case of alleged baby swapping also occurred in Surabaya due to a discrepancy in administrative data arising from miscommunication from the hospital.<sup>6</sup> In Jitra, Kedah, Malaysia, a similar case occurred where parents noticed something was wrong after bringing their baby home from the hospital. After further examination, it turned out that the baby she was carrying was not her biological child.<sup>7</sup> In addition, there is also an alleged case of baby swapping that occurred in Shah Alam, Selangor, Malaysia due to an administrative error.<sup>8</sup>

An incident of babies being swapped due to hospital negligence can be categorized as an unlawful act. An unlawful act is a form of obligation that arises from the law as a result of

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<sup>2</sup> Saffa, Azzahra Saffa Nur Rachmalina Azza. "Pertanggungjawaban Pidana Perawat Di Rumah Sakit Pada Kasus Tertukarnya Bayi Yang Baru Lahir." *Jurnal Panorama Hukum* 9, no. 2 (2024): 219-230.

<sup>3</sup> Panggabean, Sunarwaty Putri Sari, Yoyon M. Darusman, Yuniar Fitriah, dan Bachtiar. "Analisis Konsep Keadilan, Kepastian Hukum dan Kemanfaatan dalam Kasus Bayi Tertukar di Bogor Berdasarkan UU Perlindungan Konsumen." *Jurnal IKAMAKUM* 2, no. 2 (Desember 2022): 898-906.

<sup>4</sup> Polisi Usut Dugaan Kelalaian RS Sentosa Bogor soal Kasus Bayi Tertukar". CNN Indonesia. January 27, 2023. <https://www.cnnindonesia.com/nasional/20230827150435-12-991080/polisi-usut-dugaan-kelalaian-rs-sentosa-bogor-soal-kasus-bayi-tertukar>

<sup>5</sup> Prastiwi, Devira. "7 Fakta Terkait Dugaan Bayi Tertukar di RS Islam Jakarta Cempaka Putih, Makam Dibongkar Polisi." *Liputan6*. December 19, 2024. <https://www.liputan6.com/news/read/5842517/7-fakta-terkait-dugaan-bayi-tertukar-di-rs-islam-jakarta-cempaka-putih-makam-dibongkar-polisi?>

<sup>6</sup> Wismabrata, Michael. Hangga, dan Khairina. "Fakta Kasus Dugaan Bayi Tertukar di RSUD Dr Soetomo, Bertemu Bayi Setelah 2 Hari hingga Rumah Sakit Janji Usut." *Kompas.com*. April 16, 2019. <https://regional.kompas.com/read/2019/04/16/08185851/fakta-kasus-dugaan-bayi-tertukar-di-rsud-dr-soetomo-bertemu-bayi-setelah-2?>

<sup>7</sup> M. L. Azma. "Bukan drama, ini kisah benar. Insiden tertukar bayi, taut silaturahmi dua keluarga." *SinarPlus – Sinar Harian*. June 17, 2021. <https://sinarplus.sinarharian.com.my/Kisah-Masyarakat/bukan-drama-ini-kisah-benar-insiden-tertukar-bayi-taut-silaturahmi-dua-keluarga>

<sup>8</sup> "Couples leave Malaysia private hospital with each other's baby in mix-up." *The Straits Times*. January 9, 2016. <https://www.straitstimes.com/asia/se-asia/couples-leave-malaysia-private-hospital-with-each-others-baby-in-mix-up>

human actions that violate the law, which are regulated in the Civil Code.<sup>9</sup> According to Rosa Agustina, an unlawful act is an act that violates the (subjective) rights of another person or an act (or mission) that is contrary to obligations according to law or contrary to what according to unwritten law should be carried out by a person in his/her interactions with all members of society, bearing in mind that there are justifiable reasons.<sup>10</sup> Provisions regarding unlawful acts (*onrechtmatige daad*) have been regulated in Article 1365 of the Civil Code (KUH Perdata), which states that every act that violates the law and causes loss to another person, requires compensation for that loss.<sup>11</sup>

Based on Article 46 of Law Number 44 of 2009 concerning Hospitals, The hospital is legally responsible for all losses arising from the negligence of health workers working under its auspices.<sup>12</sup> This provision is also reaffirmed in Article 193 of Law Number 17 of 2023, Hospitals are legally responsible for all losses caused by negligence committed by Hospital Health Human Resources.<sup>13</sup> In addition, Article 1367 of the Civil Code emphasizes the principle of responsibility for the actions of others (vicarious liability), namely that a person is also responsible for losses caused by parties under his responsibility.<sup>14</sup> In cases of medical negligence that causes harm, legal responsibility can not only be imposed on medical personnel personally, but also on hospitals as legal entities that employ and supervise these personnel.

Legally, this research is based on several legal provisions that regulate child protection, family civil relations, and hospital responsibility for the negligence of its health workers. Article 14 paragraph (1) of Law Number 35 of 2014 concerning Child Protection emphasizes that every child has the right to be cared for by his or her own parents, so that misidentification of a baby in a hospital is a violation of this substantive right.<sup>15</sup> Article 45 paragraph (1) of Law Number 1 of 1974 concerning Marriage requires both parents to care for and educate their children, so that the exchange of babies can disrupt the parents' obligations and has the potential to cause uncertainty regarding civil status which will impact the rights to

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<sup>9</sup> Gunawan, Widjaja dan Kartini, Muljadi. *Seri Hukum Perikatan: Perikatan yang Lahir dari Undang-Undang*. Jakarta: PT RajaGrafindo Persada, 2017.

<sup>10</sup> Agustina, Rosa. *Perbuatan Melawan Hukum*. Universitas Indonesia, Fakultas Hukum, Pascasarjana, 2003.

<sup>11</sup> Pasal 1365 Kitab Undang-Undang Hukum Perdata.

<sup>12</sup> Pasal 46 Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 tentang Rumah Sakit.

<sup>13</sup> Pasal 193 Undang-Undang Republik Indonesia Nomor 17 Tahun 2023 tentang Kesehatan.

<sup>14</sup> Pasal 1367 Kitab Undang-Undang Hukum Perdata.

<sup>15</sup> Pasal 14 Undang-Undang Republik Indonesia Nomor 35 Tahun 2014 tentang Perlindungan Anak.

maintenance, care and inheritance.<sup>16</sup> Furthermore, the institutional responsibility of hospitals is expressly regulated in Article 46 of Law Number 44 of 2009 concerning Hospitals, which states that hospitals are legally responsible for the negligence of health workers working under their supervision.<sup>17</sup> Thus, all these regulations form a normative basis that strengthens the legal reasons why the issue of hospital liability in cases of baby swapping needs to be analyzed in depth.

This research uses a normative legal research method, namely research that focuses on a legal rule or regulations which are then connected to the reality in the field.<sup>18</sup> The approach used is a legislative approach and comparative law. Data were collected through literature study and analyzed using descriptive qualitative methods, namely a method of researching a group of people, an object, or even a system of perception or current events that aims to describe the facts and phenomena investigated systematically, factually, and accurately. This approach produces descriptive data, namely an attempt to understand and comprehend events and their relationship to ordinary people in a particular study.<sup>19</sup>

The literature review used as references in this study includes various previous studies, such as research by Diah Arimbi, Indah Dwiprigitaningtias, and Zulfika Ikrardin (2025), which examined the legal construction of hospital liability for healthcare worker negligence that resulted in the exchange of babies. The results indicate that healthcare worker negligence can give rise to civil liability for hospitals as institutions with a duty to protect patients.<sup>20</sup> Research by Margaretha Kurnia, Marcella Elwina Simandjuntak, and Gregorius Yoga Panji Asmara (2024) also shows that the legal entity that runs the hospital is civilly responsible in the event of a baby being swapped.<sup>21</sup>

Existing research shows that there is no comparative study specifically comparing hospital civil liability in cases of baby swapping between Indonesia and Malaysia. Therefore, this study uses a comparative civil law approach, comparing different legal systems with the

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<sup>16</sup> Pasal 45 Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>17</sup> Pasal 46 Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 tentang Rumah Sakit.

<sup>18</sup> Amirudin & Asikin, Zainal. *Pengantar metode penelitian hukum*. Jakarta: Raja Grafindo Persada, 2004.

<sup>19</sup> Moleong, Lexy. J. *Metodologi Penelitian Kualitatif* (Edisi Revisi). Surabaya: Angkasa, 2001.

<sup>20</sup> Arimbi, Diah, Indah Dwiprigitaningtias, and Zulfika Ikrardini. "Pertanggung Jawaban Hukum Rumah Sakit atas Bayi Tertukar karena Kelalaian Petugas Kesehatan: Penelitian." *Jurnal Pengabdian Masyarakat dan Riset Pendidikan* 3, no. 4 (2025): 1271-1277.

<sup>21</sup> Kurnia, Margaretha, Marcella Elwina Simandjuntak, and Gregorius Yoga Panji Asmara. "Implementasi Pasal 193 UU 17/2023: Sejauh Mana Batas Tanggung Jawab Hukum Rumah Sakit dalam Peristiwa Bayi Tertukar." *Soepra Jurnal Hukum Kesehatan* 10, no. 2 (2024): 268-283.

aim of highlighting their similarities and differences.<sup>22</sup> Comparison of civil law in force between one country and another, namely focusing on analyzing or studying the differences and similarities between the civil law system in force between one country and the civil law system in another country.<sup>23</sup> By comparing legal arrangements in two countries with different legal systems (civil law in Indonesia and common law in Malaysia), this study can analyze the civil liability arrangements of hospitals in cases of baby swapping to identify the strengths and weaknesses of each legal system, and can encourage improvements in regulations, monitoring systems, and the implementation of hospital operational standards for the recurrence of similar cases.

## DISCUSSION

### Elements of Unlawful Acts in the Case of Swapped Babies in a Hospital According to Civil Law in Indonesia and Malaysia

An unlawful act (*onrechtmatige daad*) is the primary basis in civil law that allows a person to claim compensation for losses caused by the actions of another person. The term "*onrechtmatige daad*" originates from Dutch law and has over time been incorporated into the Indonesian Civil Code. Article 1365 of the Civil Code states that any act that violates the law and causes harm to another person, the party causing the harm is obliged to compensate for the loss. In this modern era, the definition of "unlawful" is not only limited to violations of statutory regulations, but also includes things such as violating norms of decency, social responsibility, and the principle of prudence that applies in society.

In the healthcare sector, hospitals are legally and ethically responsible for providing safe healthcare services that meet established standards. Negligence in postpartum infant identification procedures can be considered unlawful, as it violates the precautionary principle. This can lead to psychological, social, and legal harm to the family.

In analyzing the elements of unlawful acts in infant cases If the case is confused, Article 1365 of the Civil Code must be referred to. Four elements must be simultaneously met: the existence of an unlawful act, the element of fault or negligence,

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<sup>22</sup> Bogdan, Michael. *Pengantar Perbandingan Hukum*, diterjemahkan oleh Dirla Sri Widowatie. Bandung: Nusa Media, 2010.

<sup>23</sup> HS, Salim, dan Erlies Septiana Nurbani. *Perbandingan Hukum Perdata Comparative Civil Law*. Jakarta: PT RajaGrafindo Persada, 2014.

the element of the resulting loss, and the element of a causal relationship between the act and the loss. In the context of hospitals, these elements relate to laws and regulations governing health service standards and hospital standard operating procedures (SOPs) in medical practice.

The first element is the existence of an unlawful act. Since 1919, This unlawful element is interpreted in the broadest sense, namely including the following basic things:

- a) Actions that violate applicable laws.
- b) Which violates other people's rights guaranteed by law, or
- c) Acts that are contrary to the legal obligations of the perpetrator, or
- d) Actions that are contrary to morality (*goede zeden*), or
- e) Actions that are contrary to good attitudes in society to pay attention to the interests of others (*indruist tegende zorgvuldigheid, welke in het maatschappelijk verkeer betaamt ten aanzien van anders persoon of goed*).<sup>24</sup>

In this case, the case of the swapped babies is contrary to Law Number 44 of 2009 concerning Hospitals which requires hospitals to provide safe and quality medical services in accordance with Hospital service standards<sup>25</sup>. This obligation emphasizes that any form of negligence that results in harm to patients is not only an administrative violation but also violates civil law regulations, because it violates the patient's right to obtain correct identity and protection for babies born in hospitals. In addition, this action also violates Article 14 paragraph (1) of Law Number 35 of 2014 concerning Child Protection emphasizes that every child has the right to be cared for by his or her own parents, so that misidentification of a baby in a hospital is a violation of this substantive right.

The second element is error, whether intentional or negligent. In the healthcare world, common errors arise from negligence, such as administrative errors, such as incorrect data recording, failure to verify the identity of the mother and baby, or ignoring patient safety measures as per Ministry of Health guidelines. These omissions can lead to serious problems, such as the identity of the baby being exchanged after delivery.

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<sup>24</sup> Sari, Indah. "Perbuatan Melawan Hukum (PMH) dalam hukum pidana dan hukum perdata." *Jurnal Ilmiah Hukum Dirgantara* 11, no. 1 (2020).

<sup>25</sup> Pasal 29 Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 tentang Rumah Sakit.

The third element is the existence of loss. In cases of swapped babies, the loss incurred is not only material, but also immaterial, such as psychological trauma, damaged family ties, and even the risk of severing the biological connection between parents and children. These types of losses can be classified as immaterial losses, as stipulated in Article 1371 of the Civil Code, which can be used as a basis for claiming compensation for suffering or non-financial losses arising from unlawful acts. However, these losses cannot always be measured financially, but they are still substantial.

The fourth element is the cause and effect relationship between the actions with the loss. In the case of a swapped babies, this connection can be seen from various pieces of evidence such as hospital document archives, medical records, standard operating procedures (SOPs), and testimony from the parties involved, including who handed the baby to the wrong parents and how the identity verification process was implemented. If it can be proven that the loss arose due to the hospital's negligence in implementing the SOP, then the element of causality between the act and the loss has been fulfilled, so that civil liability can be held.

From these four elements, it can be seen that under the Indonesian legal system, a case of swapped babies is considered an unlawful act if it can be proven that the hospital was negligent in identifying the baby, causing harm to the family, and there is a direct connection between that negligence and the resulting harm. As a legal entity, the hospital can be held liable through a civil lawsuit for unlawful acts, which aims to compensate and provide psychological relief for those affected.

In Malaysia, the legal system adopts tort law which derives from common law. In the case of swapped babies, if we look at the doctrine negligence or negligence. Tort of negligence This has 3 main elements that must be proven by the plaintiff, namely the existence duty of care (obligation to exercise caution), the existence of breach of duty (breach of obligations), and the existence of damage or loss (loss) directly caused by negligence (causation).

The first element, duty of care, immediately appears when there is a legal relationship between the patient and the hospital. Private Healthcare Facilities and Services Act 1998 in Malaysia requires every health service provider to provide safe,

quality services that meet medical professional standards.<sup>26</sup> This is also related to patient identification, hospitals are required to ensure security mechanisms and procedures for verifying the identity of newborn babies, such as installing identity bracelets, recording medical records, and carrying out two-step verification (double identification check) before handing over the baby to the family. This obligation is not only legal but also moral. Therefore, failure to meet these standards constitutes a breach of the duty of care.

The second element is breach of duty, which means negligence in meeting generally accepted standards of medical care. This element refers to the Bolam Test in the 1957 case of *Bolam v. Friern Hospital Management Committee*, which is used to determine medical negligence of a health worker, if his actions are in accordance with the standards of the medical profession recognized by the professional body, then it is not considered negligent.<sup>27</sup> This doctrine was also used in the 2006 *Foo Fio Na v. Hospital Assunta* decision, which emphasized that hospital negligence is assessed based on the suitability of the action to the prevailing standards of medical practice.<sup>28</sup>

The third element is damage, which means the loss suffered due to negligence on the part of the hospital. In cases of swapped babies, the losses that arise are not only material losses, but also immaterial losses such as psychological trauma, disruption of family relationships with the baby, and uncertainty of identity which can impact the baby's civil rights.

The fourth element is causation, which is the direct causal relationship between negligence and the resulting harm. If a patient wants to win their case, they must prove a clear connection between the doctor's actions and the injury they suffered. Failure to prove causation in a medical negligence trial will result in the lawsuit being dismissed.<sup>29</sup> Therefore, if there is misidentification of a newborn baby, it must be proven that the negligence was on the part of the hospital, then the hospital can be held civilly responsible.

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<sup>26</sup> Private Healthcare Facilities and Services Act 1998

<sup>27</sup> *Bolam v. Friern Hospital Management Committee* Tahun 1957

<sup>28</sup> *Foo Fio Na v. Hospital Assunta* Tahun 2006.

<sup>29</sup> Hidayani, Poppy Putri, and Muhammad Hatta. "Medical Negligence Concept in Malaysia: A Legal Study." *Cendekia: Jurnal Hukum, Sosial Dan Humaniora* 1, no. 4 (2023): 298-314.



The concept of tort law in Malaysia and PMH in Indonesia basically has the same goal, namely protecting consumer rights and ensuring that there is responsibility from parties who cause losses.<sup>30</sup> Although the legal basis is different, Indonesia is based on Article 1365 of the Civil Code, while Malaysia is based on the tort of negligence principle derived from common law, the basic rules remain the same: a focus on patient protection. In the case of swapped babies, both systems require hospitals to accurately identify patients and to be held accountable for negligence.

### **Forms of Civil Liability of Hospitals in Cases of Swapped Babies According to Law in Indonesia and Malaysia**

Civil liability is a legal obligation that arises when a person or party commits negligence that causes another party to suffer a loss. In the health sector, this responsibility rests with hospitals as legal entities tasked with providing health services to the public. This is in line with Article 1365 of the Civil Code, which regulates the principle of unlawful acts, namely, "every unlawful act that causes harm to another person requires the person whose fault caused the loss to compensate for the loss." This rule serves as the basis for patients or their families if they wish to file a lawsuit when a health worker's error or negligence in hospital operational procedures occurs that results in harm.

In addition to the Civil Code, Law Number 44 of 2009 concerning Hospitals also serves as a legal basis that can be used as a reference. Article 129 letter b states that hospitals must implement a system that ensures patient safety<sup>31</sup>. Therefore, any deviation from standard operating procedures (SOPs), such as misidentifying a baby, can be considered a violation of legal obligations. A hospital's failure to fulfill this responsibility can result in subject to civil, administrative, and even criminal liability if there is an element of intent or gross negligence.

Furthermore, Minister of Health Regulation Number 11 of 2017 concerning Patient Safety in Hospitals emphasizes that all medical procedures must include proper patient identification.<sup>32</sup> Hospitals are also required to have clear healthcare systems and procedures, including patient safety standards and targets. With these regulations in place, the case of a

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<sup>30</sup> Notokusumo, Frederick Leroy, Jeshua Resa Loprang, dan Irene Puteri A. S. Sinaga. "Perbandingan Tanggung Jawab Hukum Pengelola Parkir dalam Kasus Kehilangan Kendaraan antara Perbuatan Melawan Hukum (PMH) di Indonesia dan Tort Law di Malaysia." *Jurnal Kritis Studi Hukum* 9, no. 11 (2024): 132–144.

<sup>31</sup> Pasal 29 Undang-Undang Republik Indonesia Nomor 44 Tahun 2009 tentang Rumah Sakit.

<sup>32</sup> Pasal 1 Peraturan Menteri Kesehatan Nomor 11 Tahun 2017 tentang Keselamatan Pasien.

swapped babies in a hospital constitutes negligence that could have been prevented through the effective implementation of a patient safety system.

From an administrative perspective, hospitals can be subject to sanctions if they fail to properly implement patient safety standards. Article 29 paragraph (2) of Law Number 44 of 2009 concerning Hospitals explains that hospitals can be subject to administrative sanctions in the form of warnings, written warnings, fines, and revocation of hospital permits. This means that the state has the authority to directly impose sanctions on hospitals that commit negligence, without having to wait for the family to file a civil suit in court.

In cases of swapped babies, the forms of compensation that can be claimed include material losses, immaterial losses, and restoration of the baby's identity status. Immaterial losses generally arise in the form of psychological trauma, loss of family comfort, and damage to the emotional relationship between parents and baby. Judges have discretion in determining the amount of compensation, taking into account the principles of justice and fairness. Therefore, under the legal framework in Indonesia, hospitals are responsible for the negligence of healthcare workers that causes the swapped babies, both as the direct perpetrator (direct liability) and as the party employing the healthcare workers (vicarious liability).

The parents or family of the swapped babies has the right to demand compensation, including material and immaterial losses, as well as restoration of the baby's identity. These immaterial losses can include psychological trauma and disruption of the comfort and emotional bond between parents and baby. In this case, the judge has the authority to determine the amount of compensation, taking into account the principles of justice and fairness. According to Indonesian law, the hospital must be responsible for the negligence of medical personnel under its auspices that causes babies to be swapped, both as the party directly involved and as the party that oversees its health personnel (vicarious liability).

In Malaysia, if a hospital is found to be civilly liable, forms of compensation include:

- a. Special damages are the actual costs incurred by the patient or his family.
- b. General damages, for losses suffered as a direct result of negligence.

- c. Aggravated damages are additional compensation given for losses suffered by the plaintiff to his feelings and dignity when there are aggravating circumstances that prevent the plaintiff from receiving adequate compensation.<sup>33</sup>

In cases of swapped babies, special damages cover the costs of re-homing the baby or restoring the baby's identity. General damages cover pain, suffering, and trauma. Aggravated damages cover more severe emotional suffering if the hospital handled the case poorly.

The civil liability of hospitals in cases of swapped babies demonstrates a fundamental difference between Indonesian and Malaysian law. In Indonesia, which uses a civil law system, these cases are reviewed through the tort law as stipulated in Article 1365 of the Civil Code. In this case, a hospital can be sued if proven negligent, violating legal regulations, or failing to meet health care standards. The injured party must prove the elements of the tort.

On the other hand, Malaysia, which uses a common law system, places cases This is a form of negligence under tort law. The plaintiff must prove the fulfillment of the elements of duty of care, breach of duty, damage, and causation. Malaysia also regulates more varied compensation, including special damages, general damages, and aggravated damages, while Indonesia limits compensation to material and non-material losses.

Despite differing legal bases, both countries still have regulations regarding hospital negligence in newborn identification procedures. Indonesia places greater emphasis on statutory provisions, while Malaysia relies on jurisprudence. This comparison demonstrates that both countries provide legal protection for patients and regulate hospitals to compensate for any losses incurred.

## CONCLUSION

Based on the analysis of the elements of unlawful acts under Indonesian law and the doctrine of tort of negligence in Malaysia, it can be concluded that both legal systems recognize that the case of swapped babies is a form of serious negligence by the hospital. In Indonesia, the fulfillment of the elements of Article 1365 of the Civil Code includes unlawful acts, fault, damage, and causality, indicating that negligence in identifying the baby is a violation of service standards and patient rights. In Malaysia, the elements of duty of care,

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<sup>33</sup> Loo Peh Fern, "RM8 Million Award in Medical Negligence Case – Excessive or Proportionate?" Skrine Insights & Alerts, 11 January 2024, <https://www.skrine.com/insights/alerts/january-2024/rm8-million-award-in-medical-negligence-case?>

breach of duty, damage, and causation in negligence are also fulfilled when the hospital fails to implement adequate standards for verifying the baby's identity.

From a civil liability perspective, both countries place equal importance on hospitals being held responsible for medical negligence and system failures. Indonesia limits compensation to material and immaterial losses as stipulated in the Civil Code and Law Number 44 of 2009 concerning Hospitals, while Malaysia provides a wider variety of compensation options, including special damages, general damages, and aggravated damages. This difference indicates that Malaysia provides greater scope for compensation for severe emotional suffering, while Indonesia prioritizes proportional recovery of losses in accordance with the principle of fairness.

Therefore, despite the differences in approach between the Indonesian civil law system and the Malaysian common law system, both countries share the same goal of providing legal protection to patients, ensuring patient safety standards are met, and ensuring legal accountability in the event of hospital negligence. The case of the swapped babies essentially demonstrates the importance of risk management. Compliance with Patient Operational Standards, patient identification, and the application of the precautionary principle are fundamental obligations of hospitals in both jurisdictions.

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