

Medical Malpractice: An Overview of the Patient Injury Bill

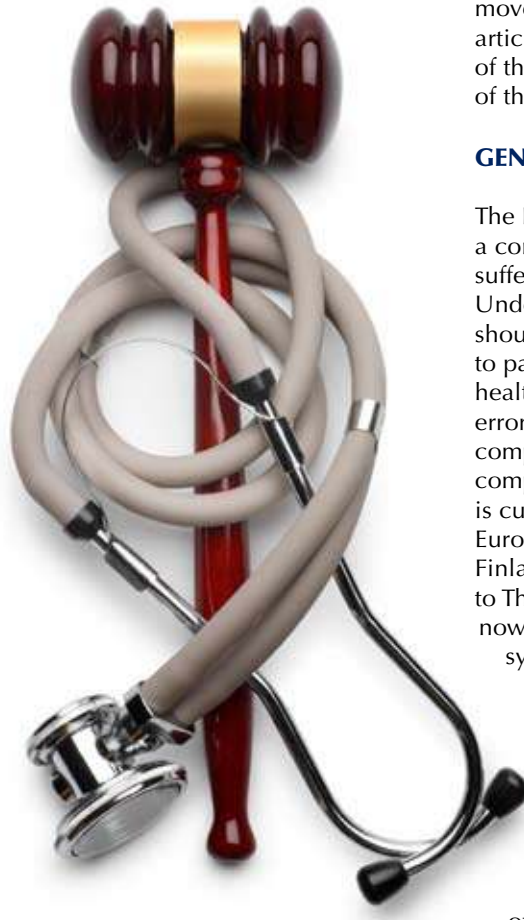
Written by: Thanawat Dilokvipakskul and Chitchai Punsan

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For several years now, the Thai government has been positioning the country as the medical hub of Asia, while at the same time trying to ensure that patients have access to medical facilities. Initiatives like the Universal Coverage Scheme, the Social Security Scheme and the Civil Servant Medical Benefit Scheme have been introduced to further this goal. Unquestionably, Thai patients have better access to modern medicine today than at any in time in the country's history.

While more people have greater access to healthcare services, healthcare personnel are required to work harder and stretch their resources thinner, spending less time with each patient. This results in an increase in the number of medical errors and, in turn, the number of disputes between patients and healthcare providers. Resolving these disputes through litigation is time-consuming, and there are frequently criticisms of the court rulings. Consequently, medical conflicts are growing and affecting confidence in Thailand's healthcare system.

In light of this, there has been an emerging movement in the country for some form of medical malpractice legislation. Various professional organizations (representing healthcare professionals) and NGOs (representing patients) have proposed draft legislation; there have now been a total of seven draft bills governing medical malpractice. Debate surrounds most aspects of the medical malpractice legislation, including its name – the draft law is commonly referred to as the Medical Malpractice Bill (the Bill), although a more appropriate name would be the



Patient Injury Bill to better reflect its Thai-language name and the no-fault system upon which the law is based.

The current draft garnered a great deal of attention from both local and international media outlets in July and August 2010, as healthcare experts forewarned of dire consequences that could result from the Bill. Nevertheless, the government seems determined to push ahead with the legislation. The draft presented by the Ministry of Public Health has passed through the Council of State and has been approved by the Cabinet. The legislation is now pending the Parliament's consideration. As the Bill

moves closer to being passed, this article will provide a general overview of the proposed provisions and some of the more contentious points.

GENERAL OVERVIEW OF THE BILL

The Bill is aimed at establishing a compensation fund for patients suffering injuries from medical care. Under this system, compensation should be paid in a timely manner to patients regardless of whether any healthcare provider has committed an error. This is referred to as a "no-fault compensation system" or a "no-blame compensation system." This approach is currently in place in a number of European countries, such as Denmark, Finland, Norway and Sweden. Similar to Thailand, the United Kingdom is now considering implementing a system based on this concept.

In addition to providing compensation, the Thai government hopes that the law will provide a mechanism to resolve conflicts between patients and physicians, thereby reducing the number of court cases concerning medical malpractice. The intent of the law is to promote good relations between patients and medical personnel, while also establishing a system to prevent occurrence of and provide compensation for healthcare-related injuries. The current draft Bill contains important provisions in a number of areas as summarized below.

Definitions. Section 3 of the Bill contains key definitions of the terms "Injured Patient," "Sanatorium," and "Healthcare Service." An "Injured Patient" is a patient who suffers injuries from healthcare services from a sanatorium. The term "Sanatorium" refers to a hospital, a clinic or any kind of sanatorium, whether it is run privately or by the state, that has

been properly registered. “Healthcare Service” means medical services including the art of healing, medicine, nursing, midwifery, dentistry, physical therapy, medical technology and pharmacy. On the basis of these definitions, in order to be protected under this Bill, a patient must have suffered injuries from medical services from any registered healthcare provider.

No-Fault System. Section 5 of the Bill provides that a patient who suffers injuries from medical care is entitled to receive compensation without proving fault. However, this entitlement is subject to the exceptions listed below.

Exceptions. The following exceptions are listed under Section 6 of the Bill:

- The injury is an ordinary consequence of the nature of the illness and the medical service was performed pursuant to professional standards;
- The injury would not have been avoidable despite performing the medical service pursuant to professional standards; and
- The injury does not affect the patient’s normal course of living after the medical process has been completed.

Ironically, although this is a no-fault system, the first and second exceptions require consideration as to whether a medical error or medical malpractice is involved. If there was no error, the patient cannot receive any compensation. In the case of the third exception, however, it can be interpreted that even though there was an error, the patient would not receive compensation if he or she has completely healed.

Compensation. Under the Bill, compensation payable refers to the same compensation for wrongful acts under Thailand’s Civil and Commercial Code. However, the Bill does not provide a clear explanation as to the criteria for considering the quantum of compensation.

Fund Establishment. The Bill calls for the establishment of a fund for the following purposes:

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- Patient compensation;
- Expenses for promoting a system to prevent injuries; and
- Expenses for development of an effective mediation system and good relations between patients and healthcare providers.

This fund will be derived from various sources including contributions from all registered sanatoriums, a transfer from the Universal Coverage Scheme, support from the government, donations and others. Importantly, the size of the fund is not specified in the Bill.

Committees. Under the Bill, several committees and subcommittees will be formed. The main committee, referred to as the “Medical Relationship Committee,” would be granted responsibility for laying out overall policies, performing administrative functions and appointing subcommittees to consider compensation for patients. In addition, the Bill empowers the Minister of Public Health to appoint committees to consider appeals from patients who are not satisfied with the ruling on compensation. All of these committees will be working side by side with the Department of Medical Services Support in handling patient complaints, compensation payments and other functions specified in the Bill.

Civil Court Cases. It is worth noting that the Bill does not prohibit injured patients from filing civil actions against healthcare providers. An injured patient will have the choice of whether to initiate a civil court case

or seek compensation under the Bill or both. If the injured patient chooses to pursue both options and ultimately wins the lawsuit, compensation under the Bill will still be paid and is considered part of the judgment award. Although the law is unclear, it appears that if the patient loses the court case, the patient will not be entitled to compensation as provided in the Bill.

Criminal Court Cases. Section 45 of the Bill provides for the possibility that healthcare providers could face criminal punishment for negligence. If the Court determines that a healthcare provider is at fault, the Court may take into consideration the healthcare provider’s records, professional standards, the healthcare provider’s guilty plea, relief and remedy provided to the patient, any compromise agreement made under the Bill, the patient’s wish to not demand punishment and other appropriate circumstances. Based on these facts, the Court will be empowered to reduce the degree of punishment or exempt the entire punishment.

Mediation and Good Relations Between Patients and Healthcare Providers. The Bill provides that the Department of Medical Services Support will be in charge of conducting mediation between patients and healthcare providers for the settlement of disputes other than compensation receivable under the Bill. Interestingly, the Bill also introduces the common law concept of a “without prejudice” negotiation process, meaning that any information

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exchanged during the mediation cannot be used as evidence in litigation.

Prevention of Injuries. Although the Bill was created based on a no-fault concept, one of the committees set up under the Bill will be charged with investigating the causes of patient injuries to ensure that identified hospitals implement improvement plans and report the improvement progress to the Department of Medical Services Support on a regular basis.

The general concept of the law is to create a system administered by an organization dealing with compensation for patient injuries. If this system is successful, the injured patients are likely to seek compensation through the system rather than by filing lawsuits.

CONTENTIOUS POINTS

The Bill has now become a subject of contentious debate among healthcare professionals in Thailand. Groups of doctors are claiming that this compensation system would ultimately increase lawsuits against medical professionals. Others are suggesting that although the law was designed to help poor and middle-class Thais, it could instead benefit foreign patients who use private hospitals. Some of these criticisms are explored below.

Committees. Some doctors are concerned that the Bill provides for relatively few representatives from

healthcare professionals sitting on compensation committees. This type of composition may create bias against healthcare providers. However, the Ministry of Public Health has countered by arguing that the law is not aimed at pointing out "faults"; rather, the main objective is to compensate injured patients.

Objective of the Law. Although the law is meant to foster good relations between patients and healthcare providers, a network of doctors believes that the law would instead establish further barriers between doctors and patients, as both sides will be motivated by self-protection. As a result, doctors may practice "defensive medicine" by performing unnecessary tests. Moreover, as hospitals and clinics will be forced to contribute to the fund under the Bill, there are concerns that the additional costs will ultimately be passed on to the patients. In the end, patients may be paying higher medical costs in order to support the system.

Compensation. Debate is ongoing regarding the quantum of compensation. The Bill states that its compensation methods should track the Civil and Commercial Code's tort provisions. These provisions allow for compensation to be awarded based on the injured person's social status, such as occupation, income and family dependants. Thus, patients from different backgrounds would receive different rates of compensation for the same type of injury. A group of activists has suggested that compensation should rely on the type

of injury, not on the injured patient's social status. However, the current Bill empowers committees to provide specific guidelines in awarding compensation. It is unclear how this issue will be resolved.

Lawsuits. Several healthcare experts are still questioning whether the law will indeed help reduce lawsuits against medical professionals. Some experts envisage that the law will instead encourage patients to bring more claims against doctors.

Definitions. A prominent doctor from a teaching facility contends that there are several unclear definitions in the Bill. One example is the term "Professional Standard." What exactly this term means and who is responsible for setting such standards remain undecided. It is known that different teaching facilities utilize different standards. Therefore, the law should provide for the establishment of a single set of standards acceptable to all prior to implementation. In addition, Section 3 of the Bill defines the term "Injured Patient" without defining the term "Injury." This creates confusion as to whether injuries must reach a certain threshold of severity prior to being recoverable under the law.

CONCLUSION

Despite these various contentious points, the Bill represents another step forward for Thailand's healthcare system. The Bill is meant to provide financial assistance to medical victims and resolve increasing conflicts between patients and medical professionals. Given the substantial debate that has surrounded the details of the legislation, the government faces a difficult road ahead in implementing such extensive public policy. The upcoming Parliamentary debate on the legislation will warrant close attention by patients, healthcare professionals and other stakeholders. ■

Thanawat Dilokvipakskul and Chitchai Punsan, Attorneys-at-Law in the Dispute Resolution Department at Tilleke & Gibbins, can be reached at: thanawat.d@tillekeandgibbins.com and chitchai.p@tillekeandgibbins.com