

IV. Out-of-Court Mediation: The Alternative to Medical Malpractice Litigation – Thailand Perspectives

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Introduction

Thailand is considered as one of the most popular medical tourism destinations in the world. Its healthcare professionals and facilities are known for excellent services in various disciplines such as plastic and reconstructive surgery, cardiac surgery, medical check-up and dental care. The Thai government has progressive policies in place to help the country attain the position of *“Thailand, a Hub of Wellness and Medical Services”*², within a ten year time frame. The strategic ten-year plan, which has been executed from 2016–2025, proposes to turn Thailand into a medical hub in four major areas: wellness, medical services, academics and products³.

Consequently, many private hospitals in Thailand have signed contracts with foreign governments and/or private companies to persuade their potential patients to obtain treatment in Thailand. As a result, their foreign client base has expanded during these past few years. These hospitals charge patients a fraction of what they would pay for similar services in their home country⁴ and, in some cases, offer additional leisure activities. This

1 Judge of the Office of the President of the Supreme Court, Thailand.

2 THAILAND BOARD OF INVESTMENT, THAILAND'S MEDICAL HUB, 1 (Office of the Board of Investment 2016).

3 The Cabinet meeting on Tuesday, September 13, 2016 available at <http://www.thaigov.go.th/index.php/th/cabinet-synopsis-/item/107241-the-cabinet-meeting-on-tuesday-september-13-2016?tmpl=component&print=1> (last modify Nov. 16, 2016).

4 Some procedures will cost the foreign patients 1/10th of the price it would take for similar medical procedures in the U.S., U.K. or Australia. Thai Hospitals here boast the latest technology, and are equipped with language translators and exclusive international wings to cater to foreign patients. Many doctors and physicians in Thailand have medical certifications from the U.K. and U.S., and attend to patients with consummate professionalism and great care.

latest form of outsourcing is called “*medical tourism*”⁵. The raising demand for medical tourism is not surprising as all human being need proper medical attention, but they may sometimes experience a long waiting period for the medical services in their home country⁶. Even in Australia, China, Japan, Nepal, Russia, and some European Countries, for instance, private companies have begun to reap some of the profits of this business by offering prospective medical tourism in the form of an exclusive package for medical treatment in a private hospital located in central Bangkok including trips to the Grand Palace, golf course and beautiful beaches⁷.

Litigation Claims on Medical Malpractice Cases

In the past, patients, in general, pay high respect to the doctors as medical treatment is one of the basic needs to every people. Most people believed that the doctors are caring and competent. Even in the events that the patients do not recover or even die, their family members may be reluctant to sue the doctors because they are either unaware of their legal rights or feel powerless to invoke their legal rights. As they still respect the doctors, therefore, it is also unlikely that they will question the doctor’s actions.

Nowadays, even though standard medical treatment should be rendered to those patients needed regardless of their nationalities, financial and educational background, there has been an increasing concern on the victims to medical malpractice. Since 1990, for example, over 3,000 ethics complaints have been filed against Thai doctors and hospitals, and in recent years, over 75 doctors in public hospitals have had malpractice suits brought against them resulting in at least 13 convictions. The complaints and a lawsuit rate are increasing in both civil and criminal claims⁸. These situations raise concerns about patient

5 Bumrungrad Hospital Public Company Limited, Investor Presentation August 2016, available at <http://bh.listedcompany.com/misc/PRESN/20160818-bh-investor-presn-august2016.pdf> (last modify Nov. 16, 2016).

6 Medical tourism in Thailand is growing at a yearly rate of 16%, while in financial terms the foreign medical services sector is expected to make a whopping 100 billion Baht. Currently, medical tourism makes up 0.4% of the GDP, while tourism overall accounts for 6% to 7%, the third most important economic driver in Thailand.

7 TOURISM AUTHORITY OF THAILAND: Medical Tourism, available at <http://thailandmedtourism.tourismthailand.org/index.php> (last modify Nov. 16, 2016).

8 JASON ARMBRECHT, Medical Malpractice in Thailand: Patient Rights in the Medical Tourism

safety and the adequacy of a compensation system. Although litigation is the traditional means of resolving medical malpractice disputes, it is extremely difficult to win such cases. In order to be successful in a claim of negligence against a doctor, the patient must prove that the doctor breached his or her duty of care to the patient, and that the doctor's act or omission materially caused physical and/or psychological damage to the patient. In many cases, patients often struggle to secure their own medical experts in litigation as doctors may be unwilling to testify against other doctors. Additionally, medical malpractice claims are difficult to prove as the doctors do not grant patients access to their medical records. Patients are routinely denied access to even basic information about their diagnoses and treatments. Without proper documentation, claimants will struggle to carry their burden of proof.

Foreign patients may face even more difficulties due to an unfamiliar court procedure; language barrier, long litigation period and etc. No one can refuse that civil litigation involves complicated and lengthy procedures. Thus, prospective patients should also be aware of possible legal issues. Nevertheless, the litigation between doctors and patients benefits no one. In light of these situations, the Ministry of Public Health is worrying that the tort system could decimate the understaffed health system by not only jailing competent doctors who make mistakes, but also by causing future doctors to quit medical school and current doctors to switch professions out of fear of malpractice suits.

One of the most important law reforms in Thailand which related to medical malpractice litigation was the Consumer Case Procedure Act B.E. 2551 (2008)⁹. The Act makes it easier for victims of medical malpractice in Thailand to file legal actions against medical providers¹⁰. Prior to the new Act, litigations against medical providers were difficult due to the burden of proof resting on the patients or patients' families and the costs and procedural burden of maintaining such legal actions. Under the current Act, on the contrary, the burden of proof has been shifted from the patient to the medical providers. One of the

Industry, available at <http://www.thailawforum.com/Medical-Malpractice-Thailand-3.html> (last modify Nov. 16, 2016).

9 The Act was published in the Royal Gazette Vol. 125, Part 38a, Page 32, dated 25th February B.E. 2551 in order to amend the Consumer Case Procedure Act (No.2) B.E. 2556 (2013). This Act shall come into force after the expiration of one hundred and eighty days from the date of its publication in the Royal Gazette (23 August 2008).

10 The medical providers in this article include doctors, hospital and the Ministry of Public Health.

landmark cases was ruled in 2015¹¹, the Supreme Court ruled two million Baht in compensation to a couple whose daughter suffered brain damage during the course of medical treatment. In this case, the couple's claim that the damage stemmed from the first doctor's failure to diagnose - tuberculous meningitis in time. Back in 2014, Tungsong Provincial Court sentenced a doctor to three years in prison without probation for the 2002 death of an elderly patient. In this case, the doctor administered a spinal anesthetic to the patient, who was admitted for appendicitis, which led to cardiac arrest and her subsequent death. The impact of these cases has drawn criticism over the determination of evidence and the court's judgment.

There can be little question that in many cases, especially where the damages are low, or are non-monetary (e.g. emotional), litigation of a dispute does not make sense¹². In fact, where the cost of litigating a claim may well exceed the amount of compensation to be paid to the patient, it is often very difficult for the patient to find a lawyer who is willing to represent him. Another problem with litigation is that it puts severe stresses on the ongoing relationship between doctors and patients. With the rise of managed care, the importance of preserving doctor and patient relationships has become of utmost importance. Doctors who have been accused of malpractice often perceive a negligence claim as an allegation of near criminal conduct. Likewise, patients who have been seriously injured are often highly emotional and in need of a process less formal than litigation in which they can discharge emotions, ask questions, and sometimes just be able to pose questions for which there may not be an answer. No patients wanted to sue their doctors. In the past, when these concerns have not been addressed in litigation, the doctor and patient simply go their own ways after the process is over. Actual medical malpractice lawsuits remain slow and lengthy, despite the Consumer Case Procedure Act B.E. 2551 (2008). Most of the cases are civil cases; fewer than 10 percent filed criminal cases.

Litigation is often not the best forum to resolve civil disputes. Further, as applied to the resolution of medical malpractice disputes in the age of managed care, these faults become glaringly obvious. Litigation is often the result of poor communication between the patient

11 The Supreme Court Case No. 12498/2558, *Kanokporn Tinning vs. Office of the Permanent Secretary Ministry of Public Health*.

12 DAVID T. CALDON, *Medical Malpractice Disputes in the Age of Managed Care*, available at <http://www.mediate.com/articles/caldon.cfm> (last modify Nov. 16, 2016).

and doctor as well as the hospital after a medical error. Doctor always not opens about what happened. Thus, litigation is more likely if patients and their family members feel that they have not received answers to their questions. Litigation becomes the point of no return for both doctors and patients. Not only do they result in large financial costs on the patients but they also dishearten doctors and hurt their morale. Additionally, litigation usually takes time and put patients in a position of disadvantage. Because of the growing of medical tourism business, the advantages and disadvantages of litigation between doctors and patients should be carefully evaluated. As the Thai courts begin to address more and more cases of medical malpractice, it is expected that judgment amounts will increase. Nonetheless, it is very difficult to find many landmark court decisions rule in term of medical malpractice between doctors and foreign patients in relation to the service provided by private hospitals. This is because the reputation of the hospital is their priority concern for those private hospitals. As a result, many private hospitals prefer to negotiate and in certain cases mediate with the patients or their family members.

In response to the situations as mentioned above and effort to promote Thailand as a hub of medical tourism, there are many discussions about the alternative to medical malpractice litigations and how to balance the desire of human and victims' rights groups to protect the legal rights of patients who claim to be the victims of medical malpractice.

Out-of-Court Mediation in Medical Malpractice Disputes

While there are still discussions on the best alternative to medical malpractice, medical malpractice litigations in many cases still undergo. During these past few years, the Court of Justice of Thailand is trying to promote the use of alternative dispute resolution especially in the form of “**Court-Annexed Mediation**” in order to solve the problem. Mediation is another mean for dispute resolution whereby a neutral and impartial third party called “the mediator” is present to facilitate communication and negotiation between the parties so that amicable settlements can be agreed. The reason behind the successful mediation process is that it is the way of exchanging information about adverse events, giving an apology, and paying compensation. Another benefit of using mediation includes a prompt, less expensive resolution, party control over decision making and settlement agreements that are more

practical and can include non-monetary compensation, such as a promise to make health system improvements. In addition, because mediation communications are confidential, the process encourages more candid and less strategic communications¹³. In Thailand's hierarchically structured society, saving face is extremely important, especially for those in high profile professions such as doctors or surgeons¹⁴. When a doctor finds out that a medical malpractice claim has been filed, it is typically an extremely emotional, heart wrenching experience. Although the Court-Annexed Mediation is one of the alternatives to resolve the dispute, this process will be occurred after the medical malpractice claims was filed to the court. The cases may be referred to the court's mediation center only if both parties voluntary agree to mediate. Thus, the parties would have the option to either mediate, or refuse to mediate as they decide to go to trial. Once a claim is filed, instead of having an opportunity to talk with the patient, the doctor always receives advice from his lawyer that he should not speak to the patient or anyone else about it. Thus, the doctor is thrown into an adversarial system in which legal attacks are defended on legal grounds. Experts for both sides then reconstruct what the doctor lived through based on the cold reality of records. In many cases, when the court asks the parties as to whether they would like to mediate, the response would understandably be negative.

Currently, there are discussions to introduce a more prompt and informal way to mediate medical malpractice disputes in terms of using the so called **“Out-of-Court Mediation”**. When a medical malpractice arises, the consequences may affect not only a patient but his or her family members. So, if such matter can be dealt with at the early stage, the effect may be managed. As a result, an early stage of mediation is a better alternative means to settle malpractice claims than litigation. The Out-of-Court Mediation program will take place before the patients or their family members file a lawsuit against doctor or medical providers. An experienced mediator will assist the parties by facilitating the process. By listening patiently to the patients, mediating, providing redress, giving comprehensive and equal care to the parties, the doctor can successfully eased the patients' anger and helped them understand that the incident was erroneous but unintentional. With this process, fewer

13 Vichai Ariyanuntaka, *Court-Annexed ADR in Thailand: A New Challenge*, 56 Part 2 Thai Bar Law Journal 198-209, (June 2000 (B.E. 2543)).

14 Jason Armbrecht, *supra* note 8.

patients or none will file lawsuits against the doctors and medical providers. Instead, they even praised for the efforts. In addition, the hospital also established a public relations mechanism to reduce negative publicity by analyzing the media's needs; giving all facts to reduce the unknowns and undue attentions; and expediting redress for the victims. The process will be accompanied by prompt care and response as well as proper, transparent and honest case management and follow-up. This will allow the doctor and patient relationship to heal. The Out-of-Court Mediation program is not a panacea for the problems a doctor faces as a result of a medical malpractice claim. However, it can be a much more humane and effective means of resolving a claim than a trial precisely because it presents opportunity for direct communication between the doctor and patient. The Out-of-Court Mediation program also enables the parties to understand more fully the litigation process, to evaluate the risks of going to trial, and to participate more meaningfully in the discussion of whether or not to settle the claim. That is, the Out-of-Court Mediation process provides information that serves as an informed basis for decision-making.

The used of the Out-of-Court Mediation program can be done successfully by setting up an "Out-of-Court Mediation Section" in the Office of the Judicial Affairs, Office of the Judiciary; or setting up similar center in the Ministry of Public Health and hospitals. The patients and their family members will be introduced to the center before the case proceed to trial. The process is to facilitate settlement and weed out frivolous cases before the potential claimant make it to trial. Doctors and medical providers will benefit from the mediation approach as well. In addition to the preservation of the doctor and patient relationship, the mediation process will allow patients, or their family member to seek out answers, or at least pose questions, which are often more important to grieving parties than any monetary recovery. Further, even in cases where a settlement cannot be reached and the party proceeds to a court judgment, the doctor and medical provider will also benefit from the established precedent regardless of the outcome. Where the doctor is vindicated in the professional practices, established precedent will serve to discourage similar claims. Where the doctor and medical provider loses at trial, it will be able to improve patient care, and accurately plan for future costs.

As far as the medical tourism is concerned, the medical malpractice dispute is even a more complicated one. The private hospitals should be transparent about the benefits and

risks of treatment. It can be said that the private hospital has special ethical obligations in this regard, because some medical travellers seek advanced or experimental treatments that are not yet available in their home countries. There is a fine line between providing hope for people with desperate medical problems, and exploiting their desperation for profit. The used of Out-of-Court Mediation program can also benefit to medical tourism as private hospitals often concern on their reputation while traveller patients and their family members do not want to experience a long and unfamiliar dispute settlement.

This Out-of-Court Mediation program may become a model of successful case management for medical malpractice victims. If this program could be emulated by the related government agencies and private hospitals, there would be an automatic reduction of patient-doctor conflict and medical malpractice lawsuits, with the Out-of-Court Mediation process acting as a supporting mechanism to facilitate prompt and all-inclusive redress. Maintaining confidentiality and a collaborative attitude between doctor and patient are important values that underlie the Out-of-Court Mediation program. For other reasons, doctors and medical providers care about professionals' image and regulations. Likewise, patients do not usually want social stigma attached to their disease or suffering. Also, in the Out-of-Court Mediation program, the parties can communicate, negotiate, and decide a settlement among themselves with the assistance of an experienced mediator. Conceivably, the doctor and patient relationship will largely be preserved after the mediation.

Statistically, there are approximately 1.3 million cases filed annually in the court of first instance throughout the country. Approximately, six hundred-thousand cases out of these 1.3 million cases are civil cases. The Court-Annexed Mediation program results in settlement approximately 85% of the time¹⁵. The Out-of-Court Mediation program will weed out certain frivolous claims before they actually go to trial. Compared to the time required for depositions and trial, mediation typically requires less time out of the office for a doctor. When settlement is not reached, the parties have not given up any rights, and they may proceed through the litigation process as if the mediation did not occur. This cost is generally minimal in comparison to going forward with litigation. Another benefit is that patients and family members can learn, often for the first time, exactly what happened to

15 STATISTICS DIVISION, THE PLANNING AND BUDGET DEPARTMENT, OFFICE OF THE JUDICIARY, Annual Judicial Statistics, Thailand 2015 (B.E. 2558), (Office of the Judiciary 2015).

them or their loved ones and begin to understand the complexities and uncertainties of medical care. These are the kinds of communication that allow healing for both patients and doctors and can lead to a repaired relationship.

Conclusion

In trying to resolve medical malpractice disputes, alternative dispute resolution can be efficient vehicle that bring all the parties concerns to discuss and try to find a solution that can both agree. The Out-of-Court Mediation program maintains the more efficiency as an alternative for dispute settlement, while still protecting the procedural rights associated with litigation for patients. Although mediation is not a perfect solution to the problems associated with the growing number of medical malpractice claims, however, it is one of the effectively alternative to litigation. It allows for doctors and medical providers to maintain a cost effective alternative dispute resolution process, and it does not infringe upon the patient's right to trial. The process provides the doctor with an opportunity to hear directly from the patient and to speak directly to him. In addition, the parties can assure that their personal interests are considered and that they can participate meaningfully in the resolution of the claim. These opportunities are not available in a trial. The litigation process is a painful one for all concerned. The Out-of-Court Mediation program is an alternative that can help doctors resolve claims and preserve some semblance of their own humanity while continuing to care for patients. For medical tourism business, the Out-of-Court Mediation program will be a solution which bridges that gap faced by doctors and medical providers between making a sound business decision, and an ethical one.

(Judge of the Office of the President of the Supreme Court, Thailand.)