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Newsletter

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Overview of Medical Malpractice Claims: Useful Information for Healthcare Professionals and Insurance Companies in Thailand

Medical negligence lawsuits involve complex and evolving issues, with characteristics that are quite different from general negligence or tort cases. It is therefore crucial for both healthcare professionals ("HCPs") and insurance companies to know what constitutes medical negligence or malpractice and legal aspects of the ensuing lawsuit.

Elements of medical malpractice that differ from those of general tort or wrongful acts include: the HCP's duty, the breach of standard of care, the injury sustained by patients, and the causation between the breach of duty/care and the injury. These elements are considered when determining whether the relevant HCPs should be held liable for such injuries. In Thailand, common cases of medical malpractice often involve child-birthing incidents, negligence, misdiagnosis, drug allergies, substandard treatment, and faulty equipment. Currently, there are no specific substantive laws that deal directly with medical malpractice claims. As such, in reviewing and deciding issues involving medical malpractice claims, the Thai courts generally apply the Civil and Commercial Code on tort ("CCC").

This article focuses on precedents set by a certain Supreme Court judgment rendered in 2022 (the "2022 Ruling") as elaborated below.

Patients' rights as consumers

There appears to be a recent spurt in lawsuits concerning medical professional or establishment liability, claiming remedy for injury or suffering caused by medical negligence. Increasing lawsuits could stem from the consumer protection trend following enactment of the Consumer Protection Act B.E. 2522 and subsequently the Consumer Case Procedure Act B.E. 2551 (the "CCPA"). Prior to the 2022 Ruling, various decisions of the President of the Appellate Court rule that a medical negligence lawsuit based on the plaintiff's injury suffered after having received medical treatment at a private hospital is a 'consumer case' as defined by the CCPA.

Accordingly, the 2022 Ruling holds the private hospital, as a service provider, liable for damages arising from medical negligence in relation to such failed or problematic treatment as claimed by the plaintiff.

Burden of proof

The general rule as warranted by the law on evidence is that the burden of proof is cast upon the party who asserts a matter or alleges the existence of a fact. However, such general rule does not apply to negligent tort cases where certain facts of the matters leading to the claims are within the exclusive knowledge of the tortfeasors, such as negligent tort cases including medical malpractice cases. The existence of injury sustained by a medical malpractice claimant generally leads to a presumption that there is an abnormality in the underlying medical treatment/services and that the injury is derived from the negligence of the tortfeasors or the relevant HCPs. Based on such a rule, the burden of proof in a case of medical malpractice claim with respect to the extent of the negligence or malpractice shall be cast upon the HCPs. The provision of Section 29 of the CCPA is in line with the rule. As such, in the 2022 Ruling the court determined that the HCPs burden of proof in such point in the dispute as to whether the patient suffered the injury (allergic symptoms) directly or as a proximate consequence of the alleged malpractice.

What can be claimed

In light of the CCC, the Thai court is empowered to grant a monetary award to a successful medical malpractice claimant who suffered an injury to their body or health. Such award generally includes reimbursement of expenses incurred in connection with the injury so sustained, as well as damages for total or partial disability to work, for the present as well as for the future, such as transportation costs to the hospital for required treatments, losses of earning / work opportunity / career growth on account of disability to work. In a case where the alleged incident has caused a death, in addition to funeral expenses, any person having been deprived of legal support from the deceased may also claim a compensation therefor. In general, the court shall determine the manner and the extent of the compensation according to the circumstance and the gravity of the alleged medical malpractice. As such, in a case of treatment which has led to a medical malpractice lawsuit, a claim for a refund of fee paid for such original treatment is likely rejected by the court as it is regarded as a remuneration for the treatment in question, and not a basis for determining the amount of compensation payable to that suffering patient.

Subsequent adjustment to the award amount

Certain injuries sustained from negligence or wrongful acts may be latent by nature, making it impossible to ascertain the actual consequences of the injury at the time of being reviewed by the court. As such, the court is empowered under the CCC to reserve in the judgment the right to revise such judgment with respect to damages amount for a period not exceeding two years. However, such reservation could be fixed for a period up to 10 years under the CCPA in a case of a medical malpractice claim against a private hospital. The purpose of this mechanism is to ensure that the compensation to be awarded adequately reflects compensation for the actual damage suffered by the plaintiff / patient, considering factors such as the time required for bodily injury to heal or the potential worsening of the patient's condition.

When a claim can be barred by prescription

According to the CCC, a claim for damages arising from wrongful acts is barred by prescription after 1 year from the day when the wrongful act and the person bound to make compensation became known to the injured person or 10 years from the day when the wrongful act was committed. However, if the alleged incident of medical malpractice involves an intake or injection of a certain substance or medication administered to the patient or injured person, a prescription period of 3 years under Section 13¹ of the CCPA shall apply. The 2022 Ruling projects an interesting view on this issue, where the HCPs injected a biomolecular substance into the patient, resulting in the patient experiencing negative symptoms after the first injection, and such symptoms got worsen increasingly after following injections. Even though the onset of the symptoms is apparent right after the first injection which indicates minimal or untraceable substance accumulation in the patient's body, the court is of the view that the manifestation of further symptoms may be delayed when considering that such symptoms continue to exist after a treatment of almost 2 years. Based on the court's rationale given in this case, the 3-year prescription period under Section 13 of the CPPA will likely be applied to a case of similar scenarios.

If you have any questions related to the topic raised in this briefing, please contact the authors listed in the left-handed column.

¹ Section 13 In the case of damage caused to life, body, health, sanitary as a result of the substance accumulated in the body of a Consumer, or in a case where it takes time for the symptom to appear, the Consumer or the person having the power to file a lawsuit on the Consumer's behalf must exercise the right to claim within three years as from the date of knowing of such damage and the liable Business Operator, but not exceeding ten years as from the date of knowing of the damage.

This publication is intended to highlight an overview of key issues for ease of understanding, and not for the provision of legal advice. If you have any questions about this publication, please contact your regular contact persons at Mori Hamada & Matsumoto or Chandler MHM Limited. If you should have any inquiries about the publications, or would like more information about ChandlerMHM Limited, please contact bd@mhm-global.com.

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