

# UPDATE



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## MEDICAL TECHNOLOGY & HEALTH CARE

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# MEDICAL MALPRACTICE

Contributed by: DFDL in Thailand

Thailand's medical industry has become known worldwide for its high quality and relatively inexpensive service; so much so that insurance companies in developed countries have begun to provide coverage for policyholders to have their operations performed in Thailand's top-notch private hospitals. A visitor to Bumrungrad Hospital, for example, would be forgiven for thinking they were in Dubai, Delaware or Dusseldorf. As with any of those jurisdictions, we expect the majority of patients walk away from Thailand's hospitals completely satisfied with the medical care received and the procedure's results. However, on rare occasions a patient is dissatisfied, and sometimes that dissatisfaction is merited as the result of negligence on behalf of the doctor.

Medical malpractice can be defined as professional negligence by an act or omission of a health care provider in which the treatment provided falls below the accepted standard of practice in the medical community and causes injury or death of the patient. This includes the failure to correctly diagnose, failure to provide the necessary treatment, as well as the failure to warn the patient of possible health risks.

In Thai law, medical malpractice lawsuits can be brought in both civil and criminal court. Instances of medical malpractice are considered "wrongful acts" under section 420 of the Civil and Commercial Code, and must be brought within one year from the date in which the injury became known to the victim. According to legal provisions that address the medical industry, a doctor must deliver his or her "best practice" to the patient. If the doctor fails to do so, this could be grounds for prosecution. Best practice does not mean the absolute best service or treatment, but instead rests on the best practice available at the time, including the ready accessibility of medications. If the facilities available at the time are unsuitable to provide adequate care, the law requires that the doctor transfer the patient to a more sufficient hospital.

In a criminal case, medical malpractice falls under sections 288-305 of the Thai Penal Code as offences against life and body. The statute of limitations to bring a criminal suit is dependent on the severity of the injury; ranging up to 20 years in the case of a patient's death. Examples of the relevant sections and their corresponding penalties are listed below:

- (1) Section 291: negligent act which has caused death
  - Imprisonment not more than 10 years and a fine of not more than baht 20,000
- (2) Section 300: negligent act which has caused grievous bodily harm
  - Imprisonment not more than 3 years and/or a fine of not more than baht 6,000

(Grievous bodily harm is, *inter alia*, causing deafness or blindness; cutting of the tongue; loss of genital organs or productive ability; loss of an arm, leg, hand, foot, finger or any other organ; permanent disfigurement of the face; abortion; permanent insanity; infirmity or chronic illness; infirmity or illness causing the victim to be in severe bodily pain for over 20 days or unable to follow the ordinary pursuits for more than 20 days)

- (3) Section 390: negligent act which has caused bodily harm, or mental harm
  - Imprisonment not more than one month and/or a fine of not more than baht 1,000



Those who are members of the Thai universal healthcare system under the National Health Security Act B.E. 2545 (2002) who have suffered as a result of potential medical malpractice have the right to file a request for “payment for initial support,” which can also be described as “no-fault compensation” because payment to rectify an alleged incident of medical malpractice can be received without an official admission by the doctor or hospital that any wrongdoing took place. The Sub-Committee on Determining Initial Support Payment does an internal inquiry and awards patients compensation, provided that they received the medical care in question from one of the hospitals within the universal healthcare system. This option is only available to those within the universal healthcare system who qualify for such compensation; all others must pursue rectification through the judicial system or directly with the doctor or hospital. Even after filing for, and receiving “payment for initial support”, patients who think they were the victims of medical malpractice still have the option of seeking additional remedy through the civil and/or criminal courts.

The compensation rates for incidents of medical malpractice that took place from 1 October 2012 onwards are listed below (for prior incidents, rates are 50 per cent of those listed):

Death or Permanent Infirmity:	not more than THB 400,000
Disability or loss of organs:	not more than THB 240,000
Chronic disease or illness:	not more than THB 100,000

The primary oversight body for the medical industry is the Medical Council of Thailand. The Council is comprised of 18 doctors; half of whom are given seats based on their positions in the Ministry of Health, directorships of health in the Navy, Air Force, Army, and Police, as well as those who are deans of prominent medical schools. The other half of the Council is elected from the general membership; consisting of every registered doctor in Thailand as well as practitioners in a number of other medical fields recognised by the Council. The medical industry in Thailand is a self-regulating profession, and as such, tends to raise questions of impartiality, which are voiced by the Thai Medical Error Network and other related organisations.

When a patient claims that they were the victim of medical malpractice, the Council first investigates the claims against the doctor(s) in question in order to determine whether malpractice did occur. The Council can then alert the police to make a possible criminal investigation, and will provide the patient with the information gathered in their inquiry so that the victim can begin the process of pursuing legal recourse. Once a patient’s claim is substantiated by the Medical Council of Thailand, most often the affected party and the doctor or hospital will negotiate a settlement out of court; otherwise at this point, both parties will begin preparing for trial.

If the case proves successful, awards are calculated based on actual quantifiable harm such as lost income both present and future, medical and rehabilitation costs. Unlike their Western counterparts, punitive damages are not awarded by Thai courts for medical malpractice cases. However, the resulting compensation for actual



damages can be quite significant (though still well below what might be obtained in many Western jurisdictions). In a landmark 2012 medical malpractice case involving a mother who died after being left unsupervised under anaesthesia following the birth of her son, the court awarded an unprecedented 8 million baht life-maintenance package to the family of the victim. The sum included compensation for the husband, the son, two brothers, the deceased’s parents, all legal expenses, and the traditional funeral costs with consideration to the deceased’s social status. Although it is uncommon for accusations of medical malpractice to make it all the way through the court system without a settlement being negotiated somewhere along the way, when they do, the awarded damages can be substantial.

The vast majority of medical procedures in Thailand are successful and all parties are satisfied. If this wasn’t the case, Thailand would not be one of the top medical tourism destinations in the world. However, given the sheer number of patients entering hospitals for either necessary or elective medical procedures, mistakes are all but inevitable. Medical malpractice legislation is designed to provide a redress when this does occur; giving the victim (and perhaps his or her family) the compensation they rightfully deserve.

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