

Abstract

Nowadays, the problems about medical malpractice litigations seem to become more and more serious everyday. These problems, especially in criminal litigations, destroy the good relationship between medical practitioners and patients, and cause damage in the system of country's public health service. Therefore, there are attempts to solve these problems by legal measures such as the Medical Council of Thailand's proposal to exclude doctors' negligence from criminal liability and make doctors have criminal liability only in the case of intention and gross negligence.

In Thai Penal Code, there is no specific provision about doctors' criminal negligence. Therefore, the general principle of negligence in Thai Penal Code section 59 "To do an act by negligence is to commit an offence unintentionally but without exercising such care as might be expected from a person under such condition and circumstances, and the doer could exercise such care and is not do so sufficiently" has to be applied to judge the doctors' negligence. However, the principle of the doctors' negligence and their standard of care are still uncertain. As a result, it is necessary to study the doctors' principle and the standard of care in criminal negligence in other countries to compare with the principle in Thailand in order to find the appropriate doctors' standard of care and to consider the idea of excluding doctors' negligence from criminal liability.

The consequences of the study demonstrate that in Common Law countries, such as the USA and England, criminal negligence need to be grosser than civil negligence. In other words, the criminal negligence needs to be "Gross Negligence" or "Recklessness." On the contrary, in Thailand and other Civil Law countries, there is no substantive difference between civil negligence and criminal negligence in the degree of gross. Hence, the concepts in civil and criminal negligence are quite similar and there is no need for gross negligence in order to establish criminal liability.

In the case of doctors' standard of care, Common Law countries widely accept that, in order to establish criminal liability, the doctors' actions need to be gross

negligence or recklessness. Therefore, the standard of care, which is used to determine whether doctors act by criminal negligence, is the "Subjective Standard." This standard has been using in determining whether the actor act recklessly in "Recklessness" under the USA's law and England's law.

On the other hand, the "Objective Standard" is normally used in Civil Law countries to determine whether the doctors act negligently. However, in some circumstances, the subjective standard may be used to determine the doctors' actions too. For example, in Germany, the doctors' standard of care in criminal negligence is the objective standard. However, in the case that the doctor has more or less skill than ordinary doctors, the subjective standard has to be used in judging this doctor's action as a complementary for the general standard.

In Thai criminal law, the actor's standard of care is in Thai Penal Code section 59. In order to consider whether the actor acts by negligence, it is necessary to consider whether the actor exercises due care as might be expected from a person under such condition and circumstances or not. If the actor fails to do so, the actor's conduct will be considered as negligent action. In the case of doctor's negligence, the doctor has to exercise standard of care as expect from competent doctors under the same condition and circumstances. It can be seen that this standard is similar to other Civil Law countries' standard of care in criminal negligence.

Considering the controversial issue about excluding medical negligence from criminal liability, the Civil Law concept, such as Thailand's concept, does not require gross negligence to be considered as criminal offences. Therefore, the criminal negligence under Thai law and other Civil Law countries' laws is not limited only gross negligence. Moreover, in some Civil Law countries, professional negligence is considered to be aggravated model, which means the doctors have to receive higher punishment if they fail to exercise standard of care in their profession. Hence, the proposal to exclude medical professional negligence from criminal punishment by adopting the Common Law's concept, which use for every person's conduct, not only for doctor's conduct, seems to be inappropriate. Therefore, the problems in medical

malpractice litigations should be resolved by other measures such as using conciliation or establishing the fund to provide compensation for injured persons from medical errors. The measures mentioned above will help to provide appropriate remedies for injured persons from medical errors and will help to reduce the medical malpractice litigations at the same time.