

THAI CULTURAL ATTITUDES TO LIABILITY LITIGATION

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Abstract

This paper describes attitudes to liability claims in Thailand, and especially the influence of national culture, heavily pervaded by Buddhism. Thai people are culturally disposed to forget and forgive. If misfortune happens to them they will blame themselves or ascribe it to their bad luck or karma

The legal liability system in Thailand will be examined. It has many similarities to the civil law in other countries which base their system on common law as well as statutes. The litigation process tends to take a long time compared to those countries, and if an award is made against the plaintiff, the amount is small. Many cases are settled out of court, by negotiation. Tighter laws affecting personal and company liability to others obviously affect the design of and demand for corresponding insurance products, as do media reports of litigation cases.

Every day, newspapers report liability litigation cases. This is an indicator of an increased claims consciousness and willingness to litigate, and also affects that process by raising awareness of the possibilities. A wider set of influences on what seems to be a change in the knowledge and awareness of the Thai people to liability loss will also be examined, including the increasing number of Thais who have lived abroad in other cultures. This indicates a weakening of Thai traditional culture.

Turning now to liability insurance, Products Liability, Directors and Officers Liability, Professional Indemnity, Employers Liability and Motor Liability insurance will be examined. There is an increasing awareness of the need for various types of liability insurance. However, many types of coverage are not yet available in every insurance company because of limited expertise.

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Introduction

Liability (casualty) insurance is a sophisticated type of coverage, and tends to be a late development in a country's insurance history. It can then grow rapidly as awareness spreads of the possibility of claiming for alleged infringements of personal or company rights.

This line of insurance is intimately connected with a country's legislative system and its judicial process, not only whether laws exist relating to liability but also whether they are enforced, and the quality and speed of such enforcement through the courts. It is also intimately connected to the country's social culture, its prevailing attitude of give and take, tendencies to blame others for misfortunes, the level of litigiousness, and the size of awards made to successful claimants. These are important aspects of liability insurance, and come together in an interactive mix. Furthermore, each aspect is in a state of change in most countries, due to the forceful effects of globalisation and economic competition.

The purpose of this paper is to describe and analyse the situation in Thailand. Very little is published about the insurance business in Thailand, yet it is an experienced market in a large country with rich cultural influences on behaviour. And it is in a state of rapid change, but with the older systems and influences still having considerable effects.

Culture affects most aspects of life, and attitudes to liability claims in Thailand are no exception. The national culture is strong, well defined in a complex interacting structure, and heavily pervaded by Buddhism. Thai people are culturally disposed to forget and forgive. If misfortune happens to them they will blame themselves or ascribe it to their bad luck. This has meant that Thailand is a relatively non-litigious society. Consequently the need for liability insurance has been relatively low, and thus the provision of such insurance is not yet fully developed. Of course Thailand has long had a legal system, based on statute and common law precedents, and liability insurance has long been available, but the development of law and insurance has had its own national characteristics. As Thai people are not claims conscious or litigious, liability insurance is undeveloped. Court awards tend to be small, indemnity limits are premiums are low. But strangely, there is considerable competition amongst insurers for the limited demand (AXCO, 2000).

Let us now consider in more detail Thai culture and how it affects claimants' attitudes, and the development of the Thai legal liability system and the provision of insurance. As with every society in this rapidly changing world, culture, legal systems, and insurance are changing.

Thai Culture

The influence of a culture on social behaviour is well known and increasingly recognised. The culture into which we are raised forms an influential conditioning for our development as actors within society. It is the intangible learned material, conscious and unconscious, which informs and shapes our conventions and customs, the cement that binds people as a recognisable group and which manifests itself as systems of belief, attitude, knowledge and values (Sasitharan, 1995). Culture is the shared ways groups of people understand and interpret the world; it directs our actions, and is thus the context within which things happen (Trompenaars, 1993). It is the collective programming of the human mind which distinguishes one human group from another (Hofstede, 1981). Thus the culture of a country produces a set of likely behavioural responses to situations and people. Some responses are the same as in other cultures, some are different.

Each culture is fashioned by prevailing beliefs (Valdes, 1986). In Thailand the most pervasive influence is Buddhism, and many authors and researchers see Thai society as resting on this religious base (Pongsapich, 1998). Podhisita (1998) identifies the extent to which a number of key Buddhist concepts and beliefs are actually operative in the daily lives of Thais, and that there is little to say about Thai culture if we take Buddhism away - it is so pervasive.

Five aspects of Thai culture, derived from Buddhism are especially relevant to the issues of litigation: hierarchical status, *karma*, *bap*, *chai yen* and *kreungchai*; which provide a significant key to understanding how the Thai see their world (Podhisita, 1998). The Thai world is eminently hierarchical. "Thais are quite sensitive to age and seniority in their everyday social interaction so that they can use ... appropriate behaviour ... and perhaps the most interesting aspect of the Thai hierarchical view of society is that one's status in the hierarchical system is believed to result from accumulated past karma in the form of *bun* (merit) and *bap* (demerit" (Podhisita, 1998: 43).

Karma is a store of rewards and punishments which must be enjoyed or endured. The central tenet of Buddhist faith is that the world and things in it are in a constant state of flux. Nothing is permanent, for change is a natural law. The Thai view of life is frequently influenced by the belief that numerous things or events which happen in their lives are beyond their control. They often attribute the cause of events to the natural law of cause and effect, and a man's nature is limited by his *karma* (Komin, 1998).

Bap, demerit, adds to one's karmic burden. Individuals frequently account for events and experiences in their lives in terms of their relative store of merit ... garnered through past lives as well as the present one. *Bap* thus has connotations of fatalism (Kirsch, 1977). Thais also explain things using logic and scientific explanations, but when these prove unsatisfactory, they readily accept karmic explanations as an alternative. Accidents, misfortunes, are often so causally complex that they can be considered as bad luck, or the result of one's karmic debts, *bap*.

The third concept, *chai yen* (cool heart) is highly valued by Thais, and means not being anxious when confronting problems, not getting angry easily, the ability to suppress one's emotions. One must face all situations with the smile of normality and handle them with prudence and care (Podhisita, 1998). Facing loss, even ostensibly by another's fault, the commonly used phrase is *mai pen rai* (which can be translated as 'never mind'). If there is a perpetrator then he will reap what he has sown in later harm and misfortune, and one should not add to his inevitable karmic burden with revenge or redress. Equanimity is a cultivated achievement, directly related to the Buddhist doctrine of detachment.

The fourth concept to be examined here is that of *kreungchai*. This means an extreme reluctance to impose on anyone or disturb his personal equilibrium by direct criticism, challenge or confrontation. In a social context, *kreungchai* provides a set of unwritten, but widely understood and relatively rigid rules by which interpersonal behaviour is governed (Lithgow, 2000). "Thais are essentially a self-accepting people. . . . there is a high level of acceptance of events an ability to move on after problems rather than analysing them and trying to work out why they occurred" (Lithgow, 2000: 245). It is connected with *bap*, and submitting to the effects of past *karma*.

What all this means is that Thais are culturally constrained from taking action against another who is connected with an event which does them harm. Obviously this is not a total constraint, litigation does happen, but to a lesser extent when compared to some other culturally different countries.

However, culture is pragmatic, it serves a purpose, and is subject to change. Thailand is not immune to the tides of Western culture which sweep over the world, mainly because of American economic dominance and superpower status. But the economic development of Thailand is also a potent factor. The changing nature of Thai culture is evident from empirical research, and which points to a pluralistic character for modern Thailand (Pongsapich, 1998). The research data came from a sample of 2,500 subjects from all segments of society. This reveals that "most but not all Thais accept the values that are of the essence of the fundamental Buddhist inspired world view, but there are considerable discrepancies between segments of the populations". Change is most evident among the urban and younger male Thais. However these are "differences in degree only, and both rural and urban Thai place high value on obedience and meekness" (Komin, 1998).

The research found that, in general, Thai people still hold a fatalistic attitude. Such an attitude increases with age and decreases with education. Avoidance of face to face conflict and suppression of negative feelings are still typical characteristics, with a slight change in the urban group (Komin, 1998).

The culture affecting litigation runs alongside the sociology of risk, the perception of risk, how people live with risk and are prepared to pay for ways of reducing or managing risk (Blondeau, 2001). Let us now examine some aspects of the legal system Thailand, including laws affecting liability.

Aspects of the Legal System in Thailand

The Thai legal system is a civil law system with influences from English common law (as also in Singapore and Hong Kong). There is a Supreme Court, with an Appeals Court below this and a Court of First Instance below that, consisting of the Civil Court and Minburi Court in Bangkok, and a court in each Province (with both civil and criminal jurisdiction). The more populous Provinces have more than one court. The third category consists of District Courts which have jurisdiction over small cases (about US\$1,000). There is not a jury system: all cases are heard and decided by one or more judges. Costs incurred by the winning side are borne by the loser.

The litigation process take a long time compared to many countries. Furthermore, if an award is made against the plaintiff, the amount is small especially for loss of life, pain and suffering, loss of future income. As an example, in a case concluded in 2003 the plaintiff sued for 70 million Baht but the court awarded him 2 million - and it took him 10 years to get even this amount.

A new arbitration law came into effect in 2002, superseding an Act of 1987. The new law is based on the Model Law on International Commercial Arbitration developed by the United Nations Commission on International Trade Law. The new law brings Thailand into line with 30 other nations around the world, and covers legal contractual relationships. There is also voluntary arbitration in the absence of a contractual relationship, such as a liability claim, known as Alternative Dispute Resolution (Srangsomwong and Teoh, 2003). Arbitration is not popular, even though the Insurance Commissioner encourages it.

There is Statute of Limitations. For civil claims based on willful or negligent damage to persons or property it is one year from the date of the act and/or the name of the perpetrator becomes known to the injured party, but in the latter case not more than 10 years from the date of the act.

Regarding Employers Liability risks, Thailand became a member of the International Labour Organisation (ILO) in 1919, and since 1939 the government has intervened to legislate for both worker safety and worker compensation. The first Factory Act, to impose safety standards and regulations, was passed in 1939, and has since been revised many times. Many other safety laws and regulations have also been introduced and then revised to meet new conditions (Charoensri, 2003). There has been a no-fault workers compensation scheme since 1972.

Increased Litigation

Every day, newspaper report liability litigation cases. This is an indicator of an increased claims consciousness and willingness to litigate, and the media also affects that process by raising awareness of the possibilities. There is a wider set of influences on what seems to be a change in the knowledge and awareness of the Thai people to liability loss, including the increasing number of Thais who return from studying or working abroad, having been influenced by the culture of that country. There is also the pervasive influence of daily news through the Internet or foreign stations via cable TV.

Defamation is both a civil and a criminal offence (Section 326 of the Thai Penal Code), and even if a case does get to court, a prison sentence is rare, and thus it is mostly treated in practice as a civil offence. Defamation suits have increased significantly in the past few years, and often it is politicians who sue critics, similar to the long example of Singapore where the ruling party sues opposition leaders in order to bankrupt them. In most defamation cases there was no intention to defame. Many defamation cases in Thailand are later withdrawn by the plaintiff after the disenchanted defendant has responded with a counterclaim. There is much negotiation out of court.

Another worrying development is that consumers who sue for bad products or services are in turn counter-sued for defamation or unfair complaint. The counter-suers include estate developers and hospitals. A spokesman for the Law Society said that a special consumer court was needed, and countersuits should not be used to intimidate consumers. A consumer court and an independent body for consumer protection are in the Constitution but have not yet been established (Assavanonda, 2006).

Since 1993 there has been compulsory third party motor insurance in Thailand, the government's Department of Insurance publicising the cover and explaining the compensation process for claimants. Such developments increase public awareness of the possibility and practicalities of looking to others for compensation when accidents occur (Lawrence, 2003).

It is interesting to consider litigation in other countries for comparison. Australia, Britain, Eire, and USA all experienced increasing litigation and court awards, leading to increased premiums. In some, action has been taken to control this escalation.

Litigation In Four Other Countries

In Australia, a liability insurance crisis had been developing since 2001, with sharply increased premiums which were adversely affecting small businesses, the tourism industry, and other groups. Much of the problem lay in personal injury incidents: greedy claimants, professionally

assisted by lawyers, and confirmed by judicial generosity in court awards. Without government action the trend would have worsened. The government of Western Australia, and of the Commonwealth of Australia, after investigation passed laws which provide for 'structured settlements' where the emphasis is on need, over time, and not greed now (Firms, 2005).

Not surprisingly, plaintiff lawyers do not agree with these changes and have been campaigning against them. The Insurance Council of Australia (ICA) publicises its own views, supporting legislation, reminding Australians that all the State and Commonwealth governments have agreed the need for reform, and that the reforms are working (Asia Insurance Review, News, July 2006, p24).

In Britain there is a vigorous debate about liability claims. Many argue that Britain has seen an enormous growth in litigation, encouraged by lawyers' ubiquitous advertisements encouraging people to make claims and offering a no-win no-fee service (McCarthy, 2001). The days of relatively cheap premiums and easy profits have long gone, thanks to a combination of more risks, more claims, and higher awards (Newman, 2001). In 2002 average employers liability premiums rose by 50%, and in 2001 claims (including expenses) had exceeded income by 20%. (Higney, 2003). Since then the trend in premiums and claims has sharpened, bodily injury claims increasing by 117% in eight years, from 1992 to 2000 (Baker, 2004).

However, the total insurance claims frequency for this 1992-2000 period rose by only 3% and the claims severity by 6% (Baker, 2004). Furthermore, the media report cases brought, and seldom mention them again if the court rejects the claim. An analysis by Lewis et al (2006) found that whilst the number of personal injury claims had increased since the early 1970s, that increase was largely caused by a surge in disease claims (not accidents as the media assert.) The average cost of compensation has risen in recent years considerably more than the rate of inflation (for several reasons including changes in the law, and precedent setting common law decisions about calculations).

A UK parliamentary enquiry decided in February 2006 that there is no compensation culture, for reasons similar to Lewis et al (2006). But the all-party committee did approve government plans to regulate 'claims farmers', organizations which act as brokers referring claims to lawyers (Yahoo News, yahoo.com, March 1, 2006). The Compensation Act, 2006, regulates claims management companies, and their fee systems, through the Financial Services Authority. It is still felt that many genuine claimants fail, that the system is too costly, slow, and undervalues rehabilitation, and the Association of British Insurers has put its views to the government (Guy, 2006).

A worrying development is that criminal gangs deliberately crash into innocent motorists in order to claim huge amounts of insurance liability compensation. Insurers estimate that there are 10,000 such crashes a year (Daily Mail, London, 21 May 2006).

In the Republic of Ireland (Eire), the government, through voter and business pressure, took action about complaints of high premiums and costs in liability insurance. Investigation revealed that legal costs accounted for 40% of the overall costs of liability claims, and general damages were exceedingly high. A Personal Injury Assessment Board was established by law in December 2003 to make assessments of general damages (where liability is not at issue). It produces a book of quantum, as a guide. It also has reduced the importance of lawyers in personal injury claims (Greenford, 2006).

In USA the nature and size of liability awards reached obscene levels which nobody seemed to be able to control because the problem arises out of a jury system enshrined in the US Constitution (Stenberg, 1989). A jury consists of 12 citizens, randomly chosen from the adult populace, with a system of challenge by the plaintiff's or defendant's lawyer which is regularly abused and makes the system even more obscene. Certain cities are known to be pro-plaintiff or pro-defendant.

Examples of outrageous awards in USA are hardly necessary as they are well reported around the world. These include \$3 billion awarded to a life-long smoker against a tobacco company. In personal injury cases (which attract the biggest nonsense awards) the plaintiff compensates his lawyer with about 30% of the amount awarded. This type of contingency fee would be considered unethical or impermissible in many countries.

Liability Insurance

Liability insurance in Thailand is not a big account, compared to motor and property. Its statistics get lost in the Miscellaneous account, and thus a database for this class of business is unstable. The leading insurer is the well-managed Bangkok Insurance Company (part of Bangkok Bank Group). Most insurers are known to write a small portfolio of this business. Reinsurance is arranged under Miscellaneous Accident Surplus Treaties. The larger policies are arranged through brokers, with local agents being the distribution channel for the rest. Rating is non-tariff, and varies from 0.15% to 0.25% applied to traditional factors such as wages or turnover.

Products Liability Insurance Consumer protection is relatively undeveloped in Thailand. The Consumer Protection Law, 1979, incorporates a manufacturer's liability for defective products, but only to actual purchasers. Also, a plaintiff could not sue direct but had to proceed via the government. A wide range of defences was available. Cases could take years through the courts, and thus Product Liability suits have been rare, and most manufacturers insure only their export exposure. Policies include a local jurisdiction clause. Those with worldwide jurisdiction are placed with local American companies, or in the international facultative market. Products Guarantee policies are not available.

Policies are available on a claims made or occurrence basis, with indemnity limits usually not exceeding US\$250,000. The most frequent buyers are local subsidiaries of foreign multinationals, who also want higher indemnity limits. With local firms, retailers are the majority buyers, especially bigger shops and those that deal with foreign tourists.

However, a new product liability law, in 2006, makes huge changes. Previously a claimant would have to plead tort or breach of contract provisions in the Thai Commercial and Civil Code. But the new Act introduces 'strict liability', the burden of proof being on the defendant. Its definition of 'product' is very wide, including buildings and services. Other parties linked to the manufacturer can be jointly sued and cannot contract out of this responsibility. There will be no juries. Awards can include mental anguish. And punitive damages can be awarded (up to four times the actual damages). Any injured person can sue, even if they were not the purchaser or user of the product, and recognized consumer groups can also sue. Class action is introduced, as well as contingency fees for lawyers (Ramirez, 2006).

Professional Indemnity There are no compulsory insurance requirements and consequently little demand, although this too is changing, with increased regulations and awareness of good corporate governance which is producing an extra demand for D&O insurance.

Architects and engineers insure only for contractual obligations. The legal basis for PI claims could be negligence or other forms of tort. PI is sold mainly to doctors, engineers and accountants. The Thailand Medical Council is encouraging its members to buy this insurance. Some private hospitals buy malpractice cover, but government hospitals generally self-insure. In medical cases, the patient has to prove medical malpractice, but it is difficult to get another doctor to testify for the plaintiff. Thai culture also inhibits patients from claiming, out of respect for such a highly regarded person as a doctor.

For a PI case to proceed, the plaintiff must deposit with the court 2% of the amount claimed from the defendant. This is to deter frivolous plaintiffs. A PI claim will take a long time to proceed through the courts, so for most cases negotiation is preferable to litigation.

Some insurers will only sell PI insurance to doctors and no other professions. The sale of PI will inevitably cause the number of claims to rise, as most people believe in the deep-pocket syndrome of insurers, and that it is not the doctor they are suing but an insurer, thus removing the cultural inhibition of respect. Foreign professionals involved in some of Thailand's huge infrastructural projects usually buy their PI insurance in the global market.

Directors & Officers Liability (D&O) Insurance Some Thai organizations are required to buy D & O coverage in order to protect the interest of the shareholders. The need of this type of insurance arose in 1997 when many financial institutions had to close down due to

mismanagement or fraud. D&O insurance is not compulsory, but the Institute of Directors encourages it, and there is pressure also from Independent Directors. There is now increased liability on Directors under the Companies Act.

Thus there is an increasing awareness of the need for various types of liability insurance. However, many types of coverage are not yet available in every insurance company because of limited expertise. Muang Thai Insurance was among the pioneers in introducing D&O insurance and has made it one of their specialities.

Employers Liability Insurance There is a compulsory No-fault workmens compensation scheme, dating from 1972 and revised in 1994. Organisations with more than 10 employees must contribute a percentage of the payroll to a Fund managed by the Department of Labour, the rate varying according to the type of industry. Firms with less than 10 employees may take out a voluntary insurance policy with private insurers for the same level of benefits as the Fund. Employers in the state scheme may also buy insurance for extra benefits. There are six types of benefit: Death, Total & Permanent Disability, Dismemberment, Temporary Disability, Medical Costs, and Industrial Retraining. There is a formula for calculating each benefit, based on the national minimum agreed daily wage, or a specified maximum amount (Charoensri, 2003). Few workers take advantage of their rights to sue an employer for additional compensation as Thailand is not a litigious country (AXCO, 2000). Employers Liability insurance is not generally bought, because of the existence of the Workmens Compensation Scheme.

Third Party Motor Insurance Another compulsory liability scheme in Thailand is third party motor insurance, which came into effect in October 1993, by the Protection for Motor Vehicle Accident Victims Act of 1992 (BE 2535). All motor vehicles in Thailand (except State vehicles) must be insured against accidents which cause bodily injury or death (but not property damage) (AXCO, 2000). This is not a legal liability insurance, as claims are paid irrespective of liability to a motor accident victim, including those in the vehicle (Insurance in Asia, 1996). Thus compensation is paid on a No-fault basis with no need to establish negligence. The insurance cover protects the driver as well as passengers people getting into or out of the vehicle, and pedestrians or cyclists. Victims in another vehicle would be covered by that vehicle's insurer. The Act also makes provision for a Victim Compensation Fund for victims of uninsured drivers (Lawrence, 2003).

Compensation is paid by the insurer on a no-fault basis, and the law prescribes fixed amounts (which can be altered by Ministerial Regulation). The amounts payable are intended to provide immediate relief to victims. The amount of compensation is quite low, but is being gradually increased, and the maximum liability of the insurer for any one victim includes a sub-limit for medical treatment or funeral expenses, the balance being compensation for injury or death. Receiving compensation does not preclude a victim from pursuing a bigger settlement by claiming on the grounds of negligence in the civil courts.

The Department of Insurance helps claimants, by setting up a nationwide network of 76 offices to increase efficiency in settling claims. All motor insurers must participate, and the cost is borne by them. With the exception of motorcycle business, the Act business is profitable. This is due mainly to the Thai culture of avoiding confrontation and of accepting one's *karma* (Lawrence, 2003).

Changes and Trends

With democratization and a free market economy Thai society has changed: new classes have emerged who are more vocal and expect justice and equality (Bangkok Post editorial, 11 December 2005, p3).

There has been a sharp increase in lawsuits against doctors according to the Medical Council of Thailand (Bangkok Post, 9 January 2006, p4). The number increased from 20 - 30 in 1997 to 280 in 2005. The Council said that there should be a ban on filing criminal charges against doctors for malpractice, establish a fund to assist victims, and set a ceiling on compensation.

In February 2006 a boy's family was awarded Baht 4.4 million for dental malpractice (Sinprasert, 2006). In April 2006 a police complaint was made against a doctor, and a claim made for Baht 3 million, because of alleged childbirth malpractice (Khuenkaew, 2006). Also in April, a network of patients asked the World Health Organisation to examine iatrogenic illnesses in Thailand, claiming malpractice (Samabuddhi, 2006).

The New Products Liability Act will change liability insurance considerably, especially its 'strict liability' and contingency fees provisions. Policy wording needs revising and a rating system designed to accommodate these new factors for which there is no claims experience. It will make manufacturers and their partners seriously consider product defectiveness, and force them into adequate risk management practices. It will, inevitably, lead to a big increase in claims.

However, Ramirez (2006) 2, reminds us that "differences in the actual application of the law in Thailand, the judicial system, and Thai culture itself will likely contribute different practical outcomes" than in other countries. He gives as an example that there has been historically less cultural and political emphasis on litigation.

There will, in any case, be a natural increase in Thailand in the demand for and supply of liability insurance, because of a growing propensity to claim. This happens in any country with a growing economy and thus increasing wealth, and is subject also to the changing sociology of risks, new technologies and a higher state of complexity in the way we live (Blondeau, 2001). There will be an extension of new liability risks in nearly every field, with higher expectations

by consumers, shareholders, and employees, producing increasingly complex liability disputes (Kessler, 2001).

Competition has increased between liability insurers, even though many have no reliable statistical database. With more litigation it is obvious that more insurance will be sold, more claims will be made, and compensation amounts will also increase. With universities producing more and more legal graduates each year, there will be a lot of hungry lawyers willing to follow the no-win no-fee example from Western countries, which ironically are at last taking action to limit this.

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