Causation and the liability for non- disclosure of risk in Sri Lanka; vindicating rights of patients by lightening principle of causation

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Abstract- Informed consent is considered as one of the corner stones in medical practice and it is a socio legal obligation of medical professionals. Failure to disclose risk is considered as one aspect of medical negligence. Obligation to disclose risk was introduced by the Bolam principles in United Kingdom and has been subjected to later developments which has taken place in all over the world.
Doctrine of informed consent deals with the doctor's duty to inform the patient before proceeding with the treatment. Professional autonomy is now moving to the direction of patient's autonomy. Patients have a legal right to self-determination. Patients should allow to engage in critical decision making regarding their body and he can refuse the treatment, if he does not receive adequate information. Accordingly, consent should be obtained by the doctor after providing all necessary information to the patient. However, in informed consent cases, it is a big barrier for the patient to prove that the failure to disclose information regarding the recommended treatment has led to cause the injury. Following the qualitative research method this paper aims to discuss the evolution of the law of informed consent. Furthermore, this will examine the application of the test of causation in informed consent cases, while raising the necessity of lightening, moderating and sometimes even to depart from the requirement of causation cautiously by the judiciary, to vindicate patient's rights in informed consent cases in Sri Lanka.

Keywords: causation, consent, disclosure, patient, risk

INTRODUCTION

Doctors are obliged to give information for patients regarding the treatment which they hope to undergo, and patients have the right to decide whether to undergo the treatment or not, considering the risks, benefits, and alternatives. Informed consent is a major area of medical malpractice and every medical practitioner should obtain consent of the patient to avoid liability before a treatment. According to the doctrine of informed consent, patients need information about the nature of medical treatment, its risks, and the feasible alternatives, to make an intelligent choice regarding whether or not to undergo the treatment (Sharma, N.D., 2015). According to law of negligence doctors owes a duty of care towards patients. This duty of care includes medical practitioners to take all reasonable steps and care regarding the treatment which is recommending and also regarding the provision of information to the patient.
Informed consent is a voluntary and explicit agreement made by an individual who is sufficiently competent or autonomous, on the basis of adequate information in a comprehensible form and with adequate deliberation to make an intelligent choice (Aveyard, H., 2002). Doctor owes a duty of care towards the patient not to cause any harm or damage to him/ herself and is liable for the occurrence of errors or errors of judgements. It is the duty of the doctor to obtain the voluntary consent of the patient before performing the procedure.

Every human being has a right to self- determination. According to Article 1 of the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and in rights. Article 3 states that everyone has right to life, liberty, and security. Persons have a right to be free from torture (Article 5) and free from arbitrary interference with privacy, family, home, honour and reputation (Article 12). Further, Article 1 in International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights deals with person's right to self- determination.

Accordingly, if a doctor treats the patient without the patient's consent, it may amount to arbitrary and unlawful interference of the body and life of that person. Individuals have a right to take decisions regarding their life and body. To grant the voluntary consent, it is necessary for the patient to receive adequate information. Sufficiency of information may vary with the knowledge and the understanding of each patient. Further the information where the doctor feels as insignificant, may feel by the patient as significant and material to make an informed decision about the body.

There can be situations where the doctor was not negligent, and the doctor has treated the patient with due diligence. However, if the doctor has negligent in disclosing a small risk to the patient and unfortunately as a result, if the patient has been affected by that risk, a problem arises whether the patient could bring an action against the doctor, based on negligence of disclosing risk to the patient. In such a situation, according to the application of the traditional but for test in causation, patient must prove that the doctor's failure to disclose the small risk has an adequate causal link with the harm caused to the patient (Liyanage, U.S., 2008). Even the doctor has negligently failed in providing sufficient

information to the patient, if the patient is unable to prove that the failure to provide information has materially contributed to cause the final harm, patient's claim may fail in the court. It negatively affects patient's autonomy and right to self- determination and on the other hand it may be an arbitrary interference with the patient's body. So, there's a necessity of lightening and moderating the traditional requirement of causation to vindicate patient's rights in a negligent disclosure case, vigilantly and attentively by the judiciary in needy circumstances.

OBJECTIVES

This paper aims to discuss the evolution of the law of informed consent. Following the above discussion, this paper will further examine the application of the test of causation in informed consent cases, while exploring the need of lightening and regulating the requirement of causation, cautiously by the judiciary, to vindicate patient's rights in informed consent cases in Sri Lanka.

METHODOLOGY

Following the qualitative research approach, this paper reviews past literature and books, analyses case studies and statutes in the area of medical negligence particularly with reference to the informed choice of patients. This paper discusses the evolution of the law of informed consent in different selected jurisdictions highlighting the requirement of departing from the requirement of causation carefully by the judiciary, to vindicate patient's rights in informed consent cases in Sri Lanka. Reforms to the Sri Lankan law is proposed in the light of analyzed case studies, academic expressions and identified best practices around the world to make a balance between interest and rights of the medical professionals and the patients.

EVOLUTION OF THE DOCTRINE OF IFORMED CONSENT AND THE APPLICABILITY OF TEST OF CAUSATION

Informed consent is the process by which the treating health care provider discloses appropriate information to a competent patient, so that the patient may make a voluntary choice to accept or refuse treatment (Appelbaum, P.S., 2007). The consent should be given with full knowledge of the risks involved, probable consequences and the alternatives. The doctor or the healthcare provider must provide and disclose sufficient information to the patient or to the guardian to declare the consent. In modern medical practice, doctrine of informed consent is paramount important and the doctor must disclose the material risks inherent in the treatment and the patient should give the consent with full understanding (Mayberry, M.K., and Mayberry, J.F., 2002).

Doctrine of informed consent initially litigated under the principle of battery (Moore, G.P., et al, 2014). However, the concept of informed consent is now litigating under the field of negligence. If the doctor has acted in negligence in obtaining the consent of the plaintiff, it could be questioned under negligence malpractice. In such a situation, the patient must prove as similar to the elements of a negligence claim, that the doctor has failed to obtain the consent after informing necessary information, breach of duty as a prudent reasonable doctor, and the injury has caused as a result of the failure of disclosing the risk.

Recent trend in UK Law is that, if the doctor has failed to comply with this requirement it may give rise to a tortious liability. According to the Bolam principle introduced in *Bolam* v *Friern Hospital Management Committee* (1957) 2 All ER 118, a doctor is not liable if he has acted in accordance with practice accepted by responsible body of peer professionals. However, going beyond this, there are several recent UK and Australian cases which alarms to other countries regarding the necessity of recognizing the informed consent in a broader perspective.

In the case of *Bolam* v *Friern Hospital Management Committee*, McNair judge declared that "a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way around, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view" ((1957) 2 All ER 118 at p. 121)

In accordance with the principles introduced in the Bolam case, duty of care must be judged according to the prevailing behaviour and the medical opinion at the time when the incident occurs. Accordingly, if the doctor has failed to disclose relevant necessary information to the patient or the guardian, peer professionals can decide whether it is below the expected level of standard or not.
According to the dictum of McNair Judge in Bolam case, if a person wants to recover damages for the failure to provide relevant information and warning to him/herself, he should prove that the failure constitutes negligent. Further to prove the element of causation, he has to prove that if the doctor has provided required information and warnings for him, he would not have given the consent to undergo the treatment. This clearly demonstrates the burden which a patient has, in an informed consent case.
In *Bolitho* v. *City and Hackney Health Authority* (1997) 4 All ER 771, a mother sued the hospital for the death of her two-year-old son due to respiratory failure and cardiac arrest. Liability was denied by the doctor saying that, even if she has attended, she would not have done anything and it has been upheld by responsible body of peer professionals. When delivering the judgement, Lord Browne- Wilkinson declared that the court should analyze each situation by applying logical analysis test

and the risk analysis test. Firstly, court must apply the logical analysis test to assess whether the opinion of peer professionals is structured, reasoned and defensible. Then the risk analysis test to assess the magnitude of the risk, comparative risks of alternative interventions treatments, seriousness of the consequences and the ease by which the risk might be avoided etc. Out of these two tests, the risk analysis test also relates to the option where a patient has to accept or reject the treatment of the doctor and it is closely related with the informed consent of the patient.

In *Maynard* v. *West Midlands Regional Health Authority* (1985) 1 All ER 635 as well as in another English case named *Sidaway* v. *Board of Governors of Bethlem Royal Hospital and the Mausley Hospital* (1985)1 All ER 643, Lord Scarman stated that,
"a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion…."

In this case, when considering the non-disclosure of risks to the patient, court stated that, doctors have no duty to elaborate remote risks to patients. In this case, the slight risk, which the doctor did not explained, materialized and the court by applying the Bolam principle dismissed the appeal. In this case Lord Bridge rejected the application of the principle of informed consent stating that, the principle of informed consent provides an insufficient weight to realities of doctor patient relationship and without judging the most suitable treatment to the patient, because of the application of the informed consent principle, the doctor has to think about the way of the best communication mode of the risks to the patient. Lord bridge pointed out the risk of the application of the principle of informed consent harshly, due to the knowledge and the communication gap between the doctor and the patient which can lead sometimes to feel that, even the information which is not significant to the doctor may be significant to the patient. Lord Scarman in this judgement stated that, the doctor has a duty to inform material risk to the patient and the materiality depends on facts of each case.

According to the evolution of case law jurisdiction it is important to exercise extreme care by doctors when dealing with patients regarding the provision of information to the patient. Doctors must be very well cautious regarding the provision of comprehensive information with warnings to the patient, even about very small risks and possible outcomes may occur, and whether the patients have fully understood the information provided and, they should be given adequate time to take a decision based on the information provided.

Law should balance rights and competing interests of the parties in the society. Informed consent is a huge burden and a weightage for doctors, as it needs to spend more time on deciding which information may be significant to each patient rather spending time on deciding the most appropriate treatment. It may vary with the understanding and the knowledge of each patient. Moreover, if the judge is given the discretion finally to decide what a reasonable person would consider as significant information to avoid a significant risk, then the law may be unpredictable in such a situation. Further if the patient's condition has not occurred due to the negligence of the doctor as well as if it is a risk which may occur very rarely, it is hard to find a justification of deviating from established and existing principles of negligence to impose liability.

CAUSATION AND INFORMED CONSENT

According to common law, there are two requirements in causation. First is the factual causation and the second relates to the appropriate scope of liability for the consequences of the negligent conduct (Carver,T., and Smith, M.K., 2014). Causation is one of a factor which needs to be proved in a medical negligence claim. It is a big obstacle when it comes to an informed consent case. After proving that the patient has not been provided adequate information by the doctor and he has not given the consent to run the risk of the treatment, the patient has to prove that, inadequate disclosure is the proximate cause of the injury where he/she is suffering. Further it must be followed by an objective criterion, which establishes that a reasonable prudent patient would not have undergone the treatment if he/she has been informed regarding the risk. Hence, establishing the requirement of causation is a huge obstacle for the patient in an informed consent case.

McNair judge in Bolam v. Friern Hospital Management Committee (1957)1 WLR 582) stated that, a doctor is not negligent if he has acted in accordance with the practice accepted by peer professionals. However, in Bolitho v. City and Hackney Health Authority (1998) AC 232, the court was given the power to reject the medical peer's opinion to do justice by applying logical and risk analysis tests. In Sidaway case (1984) QB 493, claimant's argument was that, if she has been warned, she would have refused the treatment that make her disable. Focusing to the 'reasonable doctor's opinion, court rejected the application of prudent patient test in this case.

In *Chappel* v. *Hart* (1993) MLR 223, the surgery carried by the doctor had an inherent risk and Dr. Chapperl failed to advice the said risk to the patient. As a result, Mrs. Hart consented to undergo the treatment and suffered a damage. Patient's argument was that, Dr. Chappel had been negligent in failing to warn the risk to her and if he has been warned she would not have undergone this damage and if she has been informed, she would have taken steps to perform it by an experienced surgeon or else may not undergo the surgery. In this case, the court

upheld the fact that the injury has resulted but for the breach of duty of the doctor. Here the doctor has a duty to warn the risk and the doctor has negligently failed to inform the foreseeable risk to the patient and as a result the patient has not consented to run the risk. The court held that the requirement of causation has been proved.
In this case confusions arose with regard to causation. Here it was found that, if the patient had been informed the risk, she would not have refused the surgery, but would have postponed the procedure to be performed by an experienced doctor. The court upheld that the undisclosed risk is material and there's a probability of avoiding the risk by postponing the surgery. Therefore, the court upheld that the test of causation was proved and the patient would not suffer the harm, if the surgery was done in a later date. By analyzing the requirement of causation in this case, High Court of Australia accepted the claimant's argument and stated that the court can override the principles of causation to vindicate the rights of plaintiffs, but with cautiously (Liyanage. U., 2008). Justice Gaudron, Justice Kirby and Justice Gummow was on the view that, even causation is an essential factor in an informed consent case, application of the but for test in its original form may create absurdities and irrationalities. The traditional but for test refers to whether the doctor's breach of duty is the cause for the claimant's damage. However, if it is clear that the claimant would not have undergone the injury, but for the defendant's breach of duty, the court has to consider it in detail, analytically by also considering policy reasons (Chappel v. Hart (1993) MLR 223). Especially in a risk disclosure case, doctors have to be well aware of giving a risk disclosure and a warning to patients which is expected as a prudent patient in the society by also considering the policy reasons and other risks.

In *Chester* v *Afshar* case (2002)3 All ER 552, the patient claimed that the doctor has failed to warn her the small risk of cauda equana. The patient argued that she was not given substantial information about the risk to take a good decision. She further raised her arguments that the doctor's negligent failure to warn the risk has deprived her right to seek any other treatment to avoid from facing the treatment.

The court in this case considered the negligence of provision of information regarding the nerve damage to the patient. Further the court considered whether the doctor's omission has a causal link between the resultant harm. Under negligence, when proving the requirement of causation, patient has to prove that if sufficient and substantial information was received, he would have refused the treatment. In the aspect of causation, court applied the but for test to measure out whether the failure to inform the risk to the patient has directed to cause the harm. Here the claimant had to undergo a surgery which carries a 1-2% risk of worsening the patient's situation even it performed without negligence. The surgery was performed and it worsened her situation. The claimant's argument was that if she had been warned, she would not have taken the decision to undergo the surgery and will take time to consider the available options. The House of Lords decision in this case was not unanimous. Majority decision came in favour of the patient. Here in this case some judges tried to strictly apply strict legal principles while others re trying to deviate them to do the required justice and fairness considering policy matters (Heywood, R., 2005).
Lord Bingham in this case stated that,
"… a claimant is also not entitled to be compensated, and a defendant is not bound to compensate the claimant for damage not caused by the negligence complained of".
Lord Hope further stated that,
"… the function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done, the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds, therefore I would hold that the test of causation is satisfied in this case. The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So, I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty". Accordingly, in this case majority of the judges accepted that the patient has established the causal link between the failure to warn the risk and the nerve damage where the patient has undergone and held that the doctor was liable.

However, in Chester case the court concentrated more on the necessity of respecting autonomy and dignity of a patient. The court is on the view that causation has been proved by policy grounds of assuring and respecting patient autonomy (Tay,C.S., 2007). In this case judges emphasized the necessity of departing traditional causation requirement, to vindicate rights of patients. According to Lord Hoffman in this case, Chester has to prove that if the surgeon adequately warned her, she would have avoided or reduce the risk by not undergoing the surgery. She failed in proving this thing and declared that she will undergo the same procedure in the future and the medical evidence suggested that the risk of cauda equina happens even it performed in a later date by another surgeon (Tay, C.S., 2007). Accordingly, she failed in proving that the doctor's breach of duty resulted her loss. And under traditional strict but for test under causation the doctor was not liable. However, she proved similarly in Chappel case that if she received substantial information, she would not have the operation at that time. Then the court has to decide the possibility of the occurrence of the small inherent risk, if the treatment has been delayed to another date.

Chance of a small risk eventuating is highly connected with the timing and circumstances of the surgery. Accordingly, delaying the treatment or changing the surgeon and the clinical settings may reduce the probability of materializing the small risk (Tay, C.S., 2007). According to Lord Steyn, "but for the surgeon's negligent failure to warn the claimant of the small risk of serious injury, the actual injury would not have occurred when it did and the chance of occurring on a subsequent occasion was very small".

Lord Hope in this case by taking a more broader approach stated that, medical negligence and informed consent cases needed to be considered in a wider perspective and causation is only one subsidiary and an additional matter which exists in that broad picture.

The majority decision of this case suggests that courts can depart from strict legal principles which governs causation since medical disclosure is not a static science (Tay, C.S., 2007. Consequently, the court, reflecting on the reasonable expectations of the public society accepted that the breach of doctor's duty to warn has resulted the injury. Therefore, it can be argued that if the injury is the result of the very risk that she should have been warned about and if the chance of occurrence of an injury on a subsequent occasion is very small, court can deviate from traditional causation requirements in information disclosure cases to vindicate patient's rights in a broader perspective by considering that the breach of duty caused the injury. The doctor has a duty to warn the risk. And on the other hand, it is essential for the patient to make an informed choice. In this case court emphasized and stressed the necessity of moving away from causation principles to some extent to protect patient's autonomy in informed consent cases.

In an Australian case, *F* v. *R* (1984) 33 SASR 189, court expressed an idea regarding the extent of information which needed to be disclosed to the patient in a normal and a complex situation. The Court stated that the amount of information which is necessary to be provided depends on the nature of the treatment, nature of the matter, patient's desire, and other surrounding factors. If the doctor has failed to disclose a material risk then it can be considered as breach of duty of care by the doctor. And if a reasonable person in the patient's position, if warned the risk will attach significance to it, then the risk must be considered as material.

In another Australian case, *Rogers* v. *Witaker* (1992) 67 ALR 47, High Court of Australia stated that, a doctor owes a duty of care to disclose information to the patient about the recommended treatment and the duty of care expected is similar to an ordinary skilled medical practitioner exercising that special skill. Rogers case imposed an obligation upon medical practitioners to disclose all inherent, material risks to patients and according to the majority decision of the case, risk is material if in the circumstances of the case, a reasonable person in the patient's position, would be likely to attach significance to it, if warned or if the medical practitioner should be reasonably aware that the patient, would be likely to attach significance to it if warned of the risk (Carver,T., and Smith, M.K., 2014).
UK judgement in *Montgomery* v. *Lanarkshire Health Board* 2015 UKSC 11, raised the standard of reasonable test from reasonable doctor to reasonable patient. Bolam principle says that the doctor cannot be found negligent if he has acted and has declared information in accordance with a practice accepted by responsible body of medical men skilled in that art. This case changed this approach and came up with a new principle saying that, prudent patient standard in lieu of professional judgement is now the yardstick of duty of care.

With the change of this yard stick, a question arises whether it is reasonable to expect doctors to predict what patients want to know taking into consideration individualistic characteristics, needs, priorities and concerns of each patient. Nevertheless, Case law shows that the more patient centred approach has been taken by courts when it comes to negligent disclosure cases.

Negligence is the basic criteria which uses to measure inadequate disclosure cases. Adequacy of the doctor's disclosure and proving the causal link in such a case has become problematic. Disclosure cannot be solely determined on Bolam principle as well as on the prudent patient standard of disclosure introduced in Montgomery case, However, doctors have an obligation to adopt a patient centered approach in information disclosure cases and courts have to objectively assess whether the information which is significant to a reasonable patient have been disclosed, on logical and risk analysis basis. When determining adequacy of information provided and the causal link between the injury and the negligent disclosure, courts should follow an objective assessment criteria and has to deviate from traditional test of causation in needy circumstances.

APPLICATION OF INFORMED CONSENT AND CAUSATION IN SRI LANKA

Sri Lankan society considers that medical profession is a noble profession. Though number of accidents and injuries happens due to negligence of medical practitioners, reported cases are very rare in Sri Lanka due to attitudes and lack of knowledge of people. Though Sri Lanka has ratified several international conventions, right to life, patient's right to body and self-determination have not been given express recognition by the 1978 Constitution in Sri Lanka.

In the Supreme Court case of *Priyani Soyza* v. *Rienzi Arsekularathna* (2001) 2 Sri LR 293, law of medical negligence was reviewed by Sri Lankan courts, even without directly referring to the principle of informed

consent. However, the necessity of establishing the causal nexus between the negligence and the injury was highlighted in this Sri Lankan case. In this case, justice Dheeraratne stated that the expected duty of care from the medical practitioner is what is expecting from a reasonable doctor in that art. This demonstrates that when determining whether the patient has given a chance to make an informed choice or not is determined by the Bolam principle in Sri Lanka (Liyanage, U.S., 2008).

In Sri Lanka doctors can perform a surgery without patient's consent in an emergency. However, in normal situations doctors need to obtain the consent of the patient or the guardian prior to the treatment.
Duty to warn the material risk could be both proactive and reactive. Proactive duty requires disclosing information to the patient by the doctor where he/ she thinks as material to a reasonable patient and reactive duty requires the doctor to provide information in response to patient's questions (Carver,T., and Smith, M.K., 2014). In Sri Lanka, even though the doctors owe a duty under the law as well as under Code of ethics to obtain the consent of the patient prior to the treatment, a communication gap exists between the patient and the doctor, especially due to attitudes and several other reasons. There is no adequate discussion between the doctor and the patient or guardian before signing the written consent form (Liyanage, US, 2008). Therefore, it is hard to identify whether the doctor has breached his duty of disclosure of all material risks prior to the treatment and whether the test of causation has been proved.

DISCUSSION AND ANALYSIS

Doctors are under a duty to inform their patients about the risks and benefits involved with the medical procedure. This is called the informed consent. If the doctor fails to get the consent from the patient, patient can sue the doctor for medical malpractice. Concepts of human right and patient autonomy has led physicians to the requirement of obtaining consent from the patient. Today patients have a right to be informed regarding the disease and the treatment and he has the right to self - determination. Informed consent has both an ethical value as well as a legal value. Ethically this can be justified from concepts of human rights and legally can be questioned under physical assault.

On the other hand, if the patients tend to bring more and more lawsuits against doctors, it will affect the doctor patient relationship adversely. In this case, doctors will tend to take decisions to avoid litigation rather than doing best for the patient. They will recommend more procedures to follow up, to show that they did everything that they could do to the patient. Also because of potential liability, there will be a shortage of doctors. The fear of malpractice liability has guided doctors to practice defensive mechanisms. Doctors will conduct tests and procedures not for furthering the diagnosis of the patient, but to avoid litigation. In this case doctors will provide care to their patients, which they think that will help to avoid law suits rather than paying more attention to patient's needs. Assurance behavior and Avoidance behavior are the two types of defensive medicine. As an assurance behavior doctors use to prescribe unnecessary drugs, additional tests, follow-ups, and referrals to a specialist to show that the standard of care has been met and under avoidance behavior doctors avoid high risk, invasive procedures and treating high risk patients.

In today's world, great emphasis is placed on human rights. Universal Declaration of Human Rights (1948) recognized right to health as a human right (Article 25). According to Article 6 of International Covenant on Civil and political Rights (1966), every human being has the inherent right to life and this right shall be protected by law. These perspectives were supported by International Covenant on Economic Social and Cultural Rights (1966) by asserting the right of everyone to enjoy the highest attainable standard of physical and mental health (Article 12). South African supreme law, the Constitution says that everyone has right to life and right to freedom and security (South African Constitution (1996), Article 11 and 12) also everyone has right to access to health care services within available resources (Article27(1). As a common wealth country, Sri Lankan Constitution does not recognize right to life as a fundamental right. Right to health care services has not directly protected as a fundamental right by the Sri Lankan Constitution.

An American judge, in *Schloendorff* v *Society of New York Hospital* (1914) 105, NE 92 in his judgement states that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault". A question arises here regarding what factors have to be disclosed to the patient and how to decide whether there's a breach of duty of care by the doctor with regard to disclose or non-disclosure of facts. Courts time to time gave restricted interpretations on this aspect and sometimes judges have given liberal and broad interpretations in sake of patient's rights. In modern world, patient has a right to be informed even a small injury. Significance of the risk and whether the risk is small or serious have to be decided by the courts, depending on facts of each case. Case law jurisdiction have moved away from professional standard to reasonable patient standard in negligent disclosure cases. Examples could be drawn from UK as well as Australian cases, in which the courts have deviated from traditional causation requirement to vindicate patient's rights. This could be detrimental for medical professionals from their side. However rather relying on a leaflet or a small form, if there can be have an understandable dialogue between the patient and the doctor, for the patient to make an informed decision and if comprehensive and understandable information have

been exchanged between the doctor and the patient, courts can decide whether to depart from causation requirement or not, to balance rights of each parties.

Standards of risk disclosure and the extent where the patient needs to prove the causation factor has not been dictated by a statute or by the judiciary in Sri Lanka. Adequacy of the information provided could be measured by courts using Bolam test as well as going beyond that using logical and risk analysis tests according to Priyanie Soyza case. Ideology of the principle of informed consent expects that the patient centered approach should be adopted, when measuring the standard of care as well as causation. It is the duty of the medical practitioner to empower and allow the patient to make the decision regarding their body. Deviating from the professional standard to prudent patient standard and departing from traditional but for test may create absurdities and it may lead to uncertainties in informed consent cases. However, court can justify it by highlighting the necessity of protecting patient's rights without exposing them to a preventable injury. If the disclosure of information to the patient is highly detrimental to the patient, doctor has a valid excuse to prevent from discussing information with the patient and even such a situation the court can depart from causation test when discussing the liability of the doctor.

Best interest and welfare of the patient should be the paramount factor in an informed consent case. In Montgomery, court declared that, the therapeutic exception cannot be used by doctors to prevent a patient from making an informed choice, even if the doctor consider that it is against the best interest of the patient.
The main objective of seeking the consent of patient is to uphold and respect the patient's autonomy. The philosophical concept behind this is the right based element. Law can't be remained in static. The law should change with the changes which take place in the society to provide the best answer for arising questions.

In Chappel and Chester cases, the court concluded that patient's rights and autonomy should be vindicated in informed consent cases, by taking a modest departure from traditional causation principles. Courts can cautiously override traditional causation principles and can base their decisions on policy considerations to provide justice and fairness to patients. On the other hand courts have to be aware not to allow the law to be an unsustainable vehicle for fraudulent claims *Chester* v *Afshar* case (2002)3 All ER 552 at 597 and also not to open floodgate of claims.

CONCLUSION

Disclosing information is not a precise and a specific thing in all circumstances. To minimize the risks, it is necessary to alter and modify the principles associated with informed consent to some extent.

Therefore, it can be argued that if the injury is the result of the risk that a person should have been warned about and if the chance of occurrence of an injury on a subsequent occasion is very small, court can deviate from traditional causation requirements in information disclosure cases to vindicate patient's rights in a broader perspective also by taking into matter the policy considerations. The doctor has a duty to warn the risk. Correspondingly, it is essential for the patient to make an informed choice. Necessity of moving away from causation principles in needy circumstances to protect patient's autonomy in informed consent cases is essential by the Sri Lankan courts by using judicial activism is essential to vindicate patient's autonomy and their rights. The new judicial opinions will lay down guidelines for future conducts of doctors and may lead the doctors to take the consent from patients more seriously before treatments.
Therefore, court must concentrate more on the necessity of respecting autonomy and dignity of a patient. In addition to the formal requirements of a negligent action, policy grounds of assuring and respecting patient autonomy must be considered by the judges when there's a necessity to depart from traditional causation requirement, to vindicate rights of patients by justifying the reasonable patient approach.

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