A CRITICAL ANALYSIS OF EXCLUSIONARY CLAUSES IN MEDICAL CONTRACTS

Thesis submitted in partial fulfilment of the

requirements for the degree

Doctor Legum (LLD)

in the Faculty of Law

University of Pretoria

By

Henry Lerm

under the supervision

of

Prof Dr PA Carstens

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SUMMARY

A CRITICAL ANALYSIS OF EXCLUSIONARY CLAUSES IN MEDICAL CONTRACTS.

By Henry Lerm, Submitted in partial fulfillment for the degree Doctor Legum in the Department of Criminal Law , Faculty of law, University of Pretoria, under the supervision of Prof Dr P.A. Carstens.

The aim and object of this thesis was an investigation into the validity of exclusionary clauses in medical contracts. No other area of law has posed the need to undertake an investigative study as much as exclusionary clauses in medical contracts as covered by this thesis. This was brought about by the hardship and prejudice which the weaker contracting party (the patient) has to endure after entering into a written contract with the stronger contracting party (the hospital or doctor). The latter often exploit their position of strength in the contractual relationship. A further factor that moved the writer to embark on this thesis stems from the fact that despite the harsh and unfair consequences which often flow from these agreements, the South African courts have often shown a great reluctance, if not resistance, to change the common law position. The common law position that has emerged throughout the years is that the principles of freedom of contract and the sanctity of contract have been placed on a judicial pedestal. Principles and values, including, fairness, reasonableness and good faith have not been high on the courts' judicial thinking. Instead, freedom of contract and the sanctity of contract have almost been mesmeric and axiomatic in the South African courts' judicial thinking.

Besides the South African courts' clinging to the freedom of contracts ethos, the courts have also been accustomed to adjudicating these types of contracts by considering purely contractual principles. It is especially, post the introduction of the Constitution, that courts have been encouraged to part with the stereotyped judicial thinking in interpreting contracts or provisions of contracts. In this regard, contracts and contractual provisions need to be interpreted against the Constitution and the values enshrined in the Bill of Rights. Besides

freedom of contract, courts are encouraged very strongly to consider principles of fairness, reasonableness and good faith, as well.

What is also advocated in this thesis is that the courts adopt a multi-layered approach in adjudicating the validity of exclusionary clauses in medical contracts. Principles in other fields of law, including, normative ethics in medical law, foreign and international law, statutory enactments, delictual concepts such as the duty of care and constitutional values ought to be considered, as well.

A paradigm shift in the interpretation of contracts or contractual provisions is therefore advocated. Because of the South African courts' inconsistencies in dealing with this challenge, it is also suggested that, perhaps, the time is ripe to introduce legislation to give clear guidelines as to how to approach this often thorny issue. Whatever form it takes, change right now is much needed!!

LIST OF KEY TERMS

Exclusionary Clauses.

Unequal bargaining position.

Public interests.

Unconcionable-ness

Status of the contracting parties.

Integrative approach.

Inalienable right.

Access to the courts.

Medical and normative ethics.

Exclusion of professional liability.

Legislative reform.

Ethos of contractual freedom versus fairness and reasonableness.

Doctor/hospital-patient relationship.

Just and fair results in contract.

Inequality in contract.

Inalienable rights in terms of the Constitution.

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ABSTRACT

This thesis examines the validity of exclusionary clauses in medical contracts, more especially, hospital contracts in which the healthcare provider exonerates itself against edictal liability arising from the negligent conduct of its staff, resulting in the patient suffering damages. In assessing whether these types of clauses should be outlawed by our courts, this thesis attempts to synthesize six major traditional areas of law, namely, the law of delict, the law of contract, medical law and ethics, international and foreign law, statutory law and constitutional law into a legal conceptual framework relating specifically to exclusionary clauses in medical contracts in South Africa. This thesis highlights systemic inconsistencies with regard to the central issue, namely, whether these types of clauses are valid or not, especially, given the fact that the practice of exclusionary clauses or waivers in hospital contracts has hitherto traditionally been assessed within the framework of the law of contract. The alignment of the various pre-existing areas of statutory and common law with the Constitution highlights that an inter-disciplinary and purposive approach under the value-driven Constitution, brings about a less fragmented picture in assessing the validity of these types of clauses. This approach accords with the new solicitude of the executive, the judiciary, the legislature and academia to transform the South African legal system not only in terms of procedural law but also substantive law. This has resulted in the alignment with constitutional principles and the underlying values to test the validity of these types of clauses, alternatively, contracts.

Whereas pre-constitutionally the assessment of disclaimers in hospital contracts was done against the stratum of antiquated principles, namely, freedom of contract and the sanctity of contract, ignoring values such as reasonableness, fairness and conscionability, post-constitutionally, because the values that underlie the Bill of Rights and which affects all spheres of law, including the law of contract, concepts such as fairness, equity, reasonableness should weigh heavily with the decision-maker. In this regard, broader medico-legal considerations, normative medical ethics and the common law principles of good faith, fairness and reasonableness play a fundamental role in the assessment of contractual provisions, including the practice of disclaimers or exclusionary clauses in hospital contracts. This thesis critically examines how these types of clauses or contracts ought to be adjudicated eventually against the background of such alignment. It concludes

that the entering into a hospital contract, in which the patient exonerates a hospital and its staff from liability flowing from the hospital or its staff's negligence causing damages to the patient, would be inconsistent with the Constitution and invalid. In the old order in which traditional divisions of law have been encouraged, a fragmented approach resulted in legal in congruencies which, in turn, created turbulence and a lot of uncertainty. This approach is apposite to that which the new constitutionally based legal system, aims to achieve. The rights in the Bill of Rights which are interconnected and which influences all spheres of law, including contract law, offers a fairer basis upon which, the validity of contracts, or contractual provisions, can be measured than, the pure contract approach. In this regard, although contracts or contractual provisions in the past may have been unfair and unreasonable, the courts, however, refused to strike them down purely on this basis. The law of contract, as a legal vehicle for adjudicating the validity of exclusionary clauses or waivers in hospital contracts, is therefore not ideal. This is primarily due to the antiquated approach the South African courts have always taken in this area of law. The law of delict, statutory law and medical law, standing alone, also does not provide a satisfactory answer. What is needed is an integrated approach in which the traditional areas of law are united and wherein constitutional principles and values, give much guidance and direction. Alternatively, should the unification of the traditional areas of law not be possible in bringing about fair and equitable results, the introduction of legislative measures may very well be indicated.

PREFACE

Few issues in the law of contract seem to have received so much attention from academic commentators [1] as the question whether exclusionary/exculpatory clauses or waivers in medical contracts should be declared invalid and unenforceable? Many people question the validity of such exclusionary clauses. A compendium of aspects are raised by them when assessing these types of clauses with reference to the common law of contract and delict, constitutional law, medical law and medico-legal considerations, including, ethics, statutory law and foreign/international law.

In so far as the common law aspect is concerned, many commentators [2] advance the view that despite the traditional approach in contract law, in which the doctrine of freedom of contract and the sanctity of contract trump the concepts of good faith, fairness, reasonableness and conscionability in contract, in democratic societies today in which consumer protection plays a fundamental role, the first mentioned doctrine can no longer occupy its jurisprudential pedestal. The pendulum has swung internationally from a milieu in which the classical theory, wherein the attitude was adopted that the less interference with an individual's exercise of the right and power to contract, the better, to a milieu in which a greater emphasis is placed upon the achievement of just and fair results. [3]

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1 The recent scholarly opinions are contained in various journal articles including Carstens and Kok "An assessment of the use of disclaimers by South African hospitals in view of Constitutional demands, Foreign Law and medico-legal considerations" (2003) 78 *SAPR/PL* 430; Van den Heever "Exclusion of Liability of Private Hospitals in South Africa *De Rebus* (April 2003) 47-48; Jansen and Smith "Hospital Disclaimers: Afrox Healthcare v Strydom" (2003) *Journal for Juridical Science* 28(2) 210, 218; Tladi "One step forward, two steps back for Constitutionalising the Common Law: Afrox Healthcare v Strydom" (2002) 17 *SAPR/PL* 473, 477; See also Cronje-Retief The Legal Liability of Hospitals (2000) Unpublished LLD Thesis Orange Free State University 474; Naude and Lubbe "Exemption Clauses - A Rethink occasioned by Afrox Healthcare Bpk v Strydom (2005) 122 *SALJ* 444; Pearmain "A Critical analysis of the Law and Health Service delivery in South Africa" An unpublished LLD Thesis University of Pretoria (2004) 492ff; Bhana and Pieterse "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox Revisited" (2005) 122 *SALJ* 865 at 888 Lewis "Fairness in South African Contract Law" (2003) 120 *SALJ* 330; Brand "Disclaimers in Hospital Admission Contracts and Constitutional Health Right: Afrox Healthcare v Strydom *ESR* Review Vol 3 No 2 September 2002 published by the Socio-Economic Rights Project University of the Western Cape; Hopkins "Exemption clauses in contracts" *De Rebus* June 2007 22, 24. For the traditional views expressed by academic writers see Gordon, Turner and Price *Medical Jurisprudence* (1953) 153ff; Strauss and Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (1967) 317ff; Strauss *Doctor, Patient and the Law* (1991) 305; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 103. For the more recent academic writings see Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 288, 290.

2 See the persuasive argument advanced by Bhana and Pieterse (2005) 122 *SALJ* 865.

3 See Tladi (2002) 17 *SAPR/PL* 473 477. See also the strong views expressed by Sachs J in the Constitutional

Put differently, contract law has moved from an era in which the freedom of contract required that commercial transactions ought not to be unduly trammelled by restrictions being placed on that freedom, to an era, in which simple justice is sought between contracting parties. It is especially, the bargaining strength of the parties concerned which has played an influencing role in the change in contractual philosophy. Whereas the classical law of contract and the period since the advent of standard term contracts had shown little regard for the bargaining strength of the parties concerned, notwithstanding, the inequality that a weaker party may face in the contractual relationship, in the new changed climate greater emphasis is placed on the inequality of bargaining strengths as means to provide consumer protection and to curb forms of exploitation. [4] Other attempts made to curb the unrestricted freedom include the broadening of the roles of good faith, the principles of fairness and reasonableness and the less restrictive use of public policy to declare contracts or contractual provisions unenforceable where public interests is violated. To this end it is widely advocated that where a contract or contractual provision offends against public interest, the courts should utilize their paternalistic power by striking down or declaring invalid such contracts or contractual provisions, as means to protect the weaker contracting party. [5]

The above mentioned advocacy, it is submitted, accords with the philosophy that the legal convictions of the community calls for fair dealings in contract to ensure the basic equity in the daily dealings of ordinary people. [6] In so far as contracts in a medical context, in which the hospital and/or its staff attempt to relieve themselves from liability for negligence, is concerned, a strong case is made out that, as the parties do not stand upon equal footing of equality, the weaker party, usually the patient, would be in a disadvantageous position

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Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 66 of the judgement.

4 As the patient is deemed to stand in an unequal bargaining position in relation to the hospital, true consensus is not possible as the patient is often incapable of negotiating the terms of her admission under the circumstances. For that different views see Van der Merwe et al *Contract - General Principles* (2003) 274, 275; Bhana and Pieterse (2005) 122 *SALJ* 865 at 888; Van den Heever *De Rebus* (April 2003) 47-48; Jansen and Smith *Journal for Juridical Science* 2003 28(2) 210, 218; Tladi (2002) 17 *SAPR/PL* 473, 477.

5 See Woolfrey "Consumer Protection - a new jurisprudence in South Africa" (1989-1990) 11 *Obiter* 109 at 119-20. See generally Aronstam *Consumer Protection, Freedom of Contract and the Law* (Juta, Kenwyn (1979) 16-17. See further McQuoid-Mason "Consumer law: the need for reform" (1989) 52 *THRHR* 32; Lewis (2003) 120 *SALJ* 330; Bhana and Pieterse (2005) 122 *SALJ* 865 and articles quoted therein.

6 The majority judgement in the Constitutional Court case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) expresses the view that the general sense of justice of the community calls for simple justice between the contracting parties. See pages 32-33. In his minority judgement in the *Barkhuizen case* Sachs J also calls for *"reasonable and fair dealings which the legal conviction of the community would regard as intrinsic to appropriate business firm/consumer relationships in contemporary society."*

when entering into the contract with the hospital, such clauses are unenforceable, being contrary to public policy. It is also contended that as the practice of medicine and all its associated protocols, practices, ethical codes and standards are affected with public interest, any attempt to permit the relaxing of standards or the destruction of the safeguards by way of contract, would be offensive to public policy and unenforceable. [7]

From a delictual perspective when dealing with the doctor/hospital's general duty of care, it needs to be emphasized that besides the duty of care owed to the patient in contract, similarly, the doctor/hospital also owe their patients a duty of care in delict which arises quite independently of any contract, or may exist side by side with the contractual obligation. [8] The duty of care which the doctor/hospital has to exercise towards the patient is very much influenced by the ethics and codes of the profession, as well as the statutory regulations, which especially, the hospital is dependent on for the obtaining and maintaining of its license. [9] Members of the medical profession and hospitals are therefore expected to respect honour and observe the standard of care and may be held liable in law for their failure to observe the duty to take care.

But, despite the duty of care which is expected to be observed, South African law as well as the other jurisdictions, namely, the United Kingdom and the United States of America, recognize circumstances in which the doctor/hospital's duty of care may be limited or

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7 See Bhana and Pieterse (2005) 122 *SALJ* 865 at 888; Van den Heever *De Rebus* (April 2003) 47-48; Jansen and Smith 2003 *Journal for Juridical Science* 28(2) 210, 218; Tladi (2002) 17 *SAPR/PL* 473, 477.

8 See generally Gordon Turner and Price (1953) 108. The authors opine that the doctor's liability for delict is not dependent upon the existence of a contract between the parties at all. See also Strauss and Strydom (1967) 266; McQuoid-Mason and Strauss (1983) LAWSA Volume 17 151; See also Claassen and Verschoor (1992) 118; Van Oosten (1996) 57; See further Dada and McQuoid-Mason (2001) 22; See further Strauss (1991) 36-37. See further Strauss "Duty of Care of Doctor towards Patient may arise independent of Contract" *SA PM* Vol 9 155 2 (1988). For case law see *Correira v Berwind* 1986 (4) SA 60 66; *Van Wyk v Lewis* (1924) (AD) pp. 443-444; 455-456; *Collins v Administrator Cape* (1995) (4) 73, 81; *Buls v Tsatsarolakis* (1976 (2) SA 891 (T) 893.

9 International writers, including South African writers, are *ad idem* that the practice of medicine in modern times is still very much influenced by medical ethics which sets the standards of behaviour and conduct to ensure the patient's welfare. The codes include the Hippocratic Oath and the Geneva Declaration 1968. See generally Jones Medical Negligence (1996) 18; Mason and McCall-Smith *Law and Medical Ethics* (1991) 439-446; Ficarra "Ethics in Legal Medicine" A chapter dedicated in Sanbar, Gibokhy, Finestone and Leglang *Legal Medicine* (1995); Skegg *Law Ethics and Medicine* (1988) 8; Cronje-Retief (2000) 25; Strauss (1991) 24-25; See further the more recent writings of Carstens and Kok (2005) 78 *SAPR/PL* 450. For a discussion on the conduct expected of medical practitioners in terms of the Health Professions Act 56 of 1974 and the Health Professions Amendment Act 89 of 1997 and the subsequent new Regulation published as per GN 7 of GG 29079 dated 4 August 2006 whereby the rules specifying the acts or omissions in respect of which disciplinary steps can be taken by the professional board and council. See also Carstens and Pearmain (2007) 264-268. The regulations published in the Government Gazette on the 1st February 1980 No 2948 No 6832 regulate the degree of care and skill which must be maintained by private hospitals in maintaining a license. See s25 (23).

excluded. They include the recognized defences of *volenti non fit iniuria* and voluntary assumption of risk. [10] For, these defences to succeed certain requirements must first be met *inter alia* consent must be free and voluntary. etc. It must be recognized by law and not regarded as *contra bonos mores*. [11] South African legal writers have throughout the years identified several factors which sway the legal convictions of the community in denouncing certain conduct, even where one of the parties may have consented to an act.

The factors identified include the nature and extent of the interest involved the motives of the parties and the social purpose of the consent. It is especially, the so-called `contracting out of liability cases' which influence societal convictions. In this regard the academic writers have often used societal convictions in outlawing these types of clauses as being against community interest or *contra bonos mores*. [12]

Since the Constitution of the Republic of South Africa [13] is the supreme law of the Republic, all law, be that the common law; be that the statutory law is subordinate to the

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10 For a discussion on the traditional grounds of justification for medical interventions in which informed consent play a significant role see Carstens and Pearmain (2007) 879-906; See also Strauss "Toestemming tot Benadeling as verweer in die strafreg en die deliktereg" (Unpublished LLD Thesis, Unisa, 1961) 48ff; Van Oosten "The Doctrine of informed consent in medical law" (Unpublished LLD Thesis, Unisa, 1989) 14ff.

11 For a comprehensive discussion on all the requirements see Carstens and Pearmain (2007) 879-906; See also Strauss (Unpublished LLD Thesis, Unisa, 1961) 48ff; Van Oosten (Unpublished LLD Thesis, Unisa, 1989) 14ff; Neethling et al *Law of Delict* (2005) 98ff; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 93ff; Van der Walt and Midgley *Delict: Principles and Cases* (1997) 68ff.

12 The writers Gordon, Turner and Price (1953) 188-189 as far back as 1953 raised eyebrows to the validity of the so-called "contracting out of liability clause" when they wrote: *"No practitioner should include in such a contract a term releasing him from any legal obligation to show due skill and care, for such conduct would be grossly unprofessional and deserving of disciplinary actions by the Medical Council. But even if a practitioner did purport to contract out of liability for malpractice, it may be considered at least probable that the courts would declare such a contract void as against public policy, leaving the patient's right to sue for damages unimpaired. In such a case it could be argued that society cannot allow a medical practitioner to take such an advantage of his patient in regard to whom he stands in a position of such power."*
For similar views expressed by the other legal writers throughout the years see Van Oosten "Medical Law - South Africa" in *International Encyclopaedia of Laws* (Ed Blanpain R) (1996) 88; Claassen and Verschoor (1992) 102-103; Strauss and Strydom (1967) 324-325. In more modern times and with reference to disclaimers against medical negligence in hospital contracts several writers opine that societal moral dictates would indicate: *" ..... disclaimers against medical negligence in hospital contracts would amount to an unreasonable/unfair/unethical acceptance on the part of a patient to contract to the possibility of harm in the form of personal injury/death resulting from medical malpractice by an attending medical practitioner (albeit in the hospital setting) who is ethically bound not to do harm."* See Carstens and Kok (2005) 78 *SAPR/PL* 450; Veatch *Medical ethics* (1989) 2-7; Beauchamp and Childress *Principles of Biomedical Ethics* (1994) 3; Mason and McCall-Smith *Law and Medical Ethics* (1994) 4.

13 Act No 108 of 1996.

Constitution. [14] In so far as the relationship between the Constitution and the law of contract is concerned, the same values that underlie the Bill of Rights and which affect the spheres of law in general are also said to affect the law of contract. [15] Whereas the freedom of contract and its corollary, *pacta sunt servanda,* in the pre-constitutional order played a significant role, since the inception of the new constitutional regime, although the courts leave space for the doctrine to operate, to a large degree its emphasis has been watered down. [16] Where contractual terms are in conflict with the constitutional values, even though the parties may have consented to them, the courts will decline to enforce such contractual terms where courts find them to be unfair and unreasonable. [17] It is also opined that freedom of contract when abused by the stronger party, resulting in unreasonable and unjust contracts, as is the case of exclusionary clauses in hospital contracts, would not be tolerated by the courts. [18] One of the strong arguments against such attempts should be that as they undermine the values of equality and dignity and are inconsistent with the values enshrined in the Bill of Rights, they should not be enforced. [19] A strong argument can also be made out on constitutional lines that besides the patient enjoying access to the healthcare services in terms of the Constitution, the nature of the services to be provided by the hospital and its staff to the patient ought to be compliant with the ethical and professional rules or codes, or by virtue of statutory regulations, namely, to exercise due care and skill.

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14 See Currie and De Waal *The Bill of Rights Handbook* (2005) 7-8 who note that: *"the Constitution, in turn, shape the ordinary law and must inform the way legislation is drafted by the legislators and interpreted by the courts and the way the courts develop the common law."* For the influence of the Constitution on the common law see Carstens and Pearmain (2007) 8-9; See further Pearmain (2004) 113ff.

15 See Hopkins "Standard-form Contracts and the Evolving idea of Private Law Justice: A Case of Democratic Capitalist Justice versus Natural Justice" *TSAR* (2003) 1 150 at 157. The writer holds the view that the values include openness, dignity, equality and freedom. The writer however, suggests that besides the aforementioned values, the courts must also broaden the values to include fairness and reasonableness. See also Cockerell "Private Law and the Bill of Rights: A threshold issue of Horizontality" *Bill of Rights Compendium* (1997). See also Christie *Bill of Rights Compendium* (1997) 3H.

16 See the dictum of Ngcobo J in the Constitutional Court judgement of *Barkhuizen v Napier* 2007 (5) SA 323 (CC); See also the comments of Sachs J who delivered the minority judgement.

17 This is a strong indicating principle expressed by Ngcobo J in the majority judgement of *Barkhuizen v Napier*.

18 See the comments of Ngcobo J in the *Barkhuizen v Napier* case with reference to *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

19 See the comments of the Supreme Court of Appeal in *Napier v Barkhuizen* 2006 (4) SA; 2006 (9) BCLR 1011 (SCA) in which the court stated that the constitutional values of equality and dignity may prove to be decisive when the issue of the parties' relative bargaining positions is an issue. But the court could not decide the issue due to lack of evidence. See also Christie *The Law of Contract in South Africa* (2006) 347.

Therefore the public in general has an expectation that when they are treated by the Hospital staff, they will be treated in a professional manner and in accordance with professional standards which will not cause the public harm. [20] Any attempt to compromise such professional standards by way of an exclusionary contract or waiver would therefore be invalid and unenforceable. [21] It is also argued that such a right to professional standards, which ought to be carried out in compliance with traditional medical codes and practices, ought to be regarded as inalienable. [22]

Besides the suggested inalienable right, it has also been suggested that to deny someone the right to access to the courts in terms of Section 34 of the Constitution, would also be in conflict with the values enshrined in the Bill of Rights. Put differently, it is argued that the right of access to the courts is a guaranteed right, founded upon the emphasized values in the new South African constitutional order. A strong argument is made out, namely, exclusionary clauses by their very nature runs counter to the foundational value in guaranteeing, to everyone, the right to seek the assistance of the courts. Exemption clauses prevent a potential plaintiff from suing a potential defendant in a court of law or in any other tribunal or forum. The enforcement of an exemption clause in a contract therefore has the effect that the doors of the courts are effectively closed to an injured party. To allow such a clause to stand would be unconstitutional and in violation of public policy and unenforceable. [23]

In assessing the validity of exclusionary clauses in hospital contracts the courts can also make use of constitutional aides, more particularly, Section 39. [24] This section has been

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20 Carstens and Kok (2003) 78 *SAPR/PL* 450; Veatch (1989) 2-7; Beauchamp and Childress (1994) 3.

21 Carstens and Pearmain (2007) 467-468. See Cronje-Retief (2000) 474; Van Heerden 2003 *De Rebus* 47 and quoted in Carstens and Kok (2005) 78 *SAPR/PL* 454; Naude and Lubbe (2005) 122 *SALJ* 444, 456.

22 Hopkins "Constitutional rights and the question of waiver: How fundamental are fundamental rights?" (2001) 16 *SAPR/L* 122 at 131 argues that given the means employed and the circumstances under which the person affects the waiver i.e. unequal position of the parties would violate human dignity during the contracting process. Human dignity is regarded by the writer together with the right to life as inalienable.

23 See the discussion by Hopkins *De Rebus* (June 2007) 22-25' See also the dictum of *Barkhuizen v Napier* 2007 (5) SA 323 (CC), in which the court held at P25 *"..... But the court will not let blind reliance on the principle of freedom of contract override the need to ensure ..... access to court."*

24 Chapter 2 of the Bill of Rights provides as follows:
"Interpretation of Bill of Rights"
39.(1) When interpreting the Bill of Rights, a court, tribunal or forum:
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and

designed to serve as an aide where it becomes necessary to develop the common law in the new constitutional order, especially, where neither the common law nor the statutory law gives clear direction. [25]

When regard is had to foreign law, it is especially, the American contractual jurisprudence which could give guidance in developing the common law. Should the American common law be followed, it follows that, although all exclusionary clauses are not ***per se*** invalid and therefore unenforceable, but, where they are found to involve public interest they will not be held to be valid. [26] One such example is exclusionary clauses in hospital contracts. The following factors influence public interests, namely, as the medical profession and medical practices are covered by public regulations that involve health, safety and welfare, as well as medical ethics, standards of conduct or behaviour towards the patient, by the hospital staff, cannot be compromised. [27]

Private arrangements in the form of exculpatory clauses which aim to reduce a hospital or other healthcare provider's statutory or ethical duties should therefore not be tolerated. Any attempt by a healthcare provider, including hospitals, to use written contracts to limit or reduce liability for negligence have been struck down by the American courts as contrary to public policy as they affect the public interest. The American courts have also, on numerous occasions held that, as the services of especially hospitals, to members of the public, constitute a crucial necessity, the hospital and its staff's duty of care is therefore part of the social fabric and any compromise of such a duty, affects the public interests. [28]

(c) May consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights ....."

25 See Christie *Bill of Rights Compendium* (2002) 1A-21-1A-22; Currie and De Waal (2005) 160. See also the comments of Chaskalson P in the case of *S v Makwanyane* 1995 (3) SA 391 (CC).

26 In the following cases the American courts have held that where the activity complained of concerns business of a type generally suitable for public regulation or the party seeking exculpation performs a service of public interests, exclusionary clauses ought to be held invalid and unenforceable. See *Banfield v Louis Cat Sports Inc* 589 So. 2d 441 (1991); *Chicago Great Western Railway Company v Farmers Produce Company* 164 F. Supp 532 (1958); *Hunter v American Rentals Inc* 189 Kan. 615, 371 P.2d 131 (1962); *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968; *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 489 F. Supp 914 (1979); *Tunkle v Regents University of California* 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

27 *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968; *Ash et al v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 489 F. Supp 914 (1979); *Tunkle v Regents University of California* 383 P. 2d 441 (1963); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

28 See the leading case of *Tunkle v Regents of the University of California* 60 Cal. 2d 92, 32 Cal RPTR 37, 383 P2d

Another factor which according to the American common law influences the invalidity of exclusionary clauses in hospital contracts is that of the unequal bargaining position between the hospital and patient. The American courts have continuously held that a hospital and/or another healthcare provider and the patient stand in an unequal bargaining position. Because the hospital and/or other healthcare provider is of crucial importance to the general public, any attempt to exercise a superior bargaining power at the expense of the public must be stamped out. [29]

One of the other compendiums of aspects that need to be considered is, whether exclusionary clauses in hospital contracts ought to be declared invalid and unenforceable based on medico-legal aspects within the medical law context. This includes the influence of medical ethics. [30]

Commencing with the doctor/hospital-patient relationship, it is clear that this relationship has historically governed the behaviour of the parties *inter partes* and continues to do so today. [31] The relationship is therefore central to the practice of medicine. One of the core features of the relationship is the promotion and maintenance of medical standards in which *inter partes* the interests of the patient is advanced. Arising from the relationship is also an obligation and commitment not to deviate from the standard of conduct as means to do harm the patient in any way. [32] The nature of the relationship has also been shaped by a strong commitment to long-standing principles of medical ethics in which conscience and the intuitive sense of goodness, public conscience, responsibility and the Hippocratic Oath

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441; See also *Ash v New York University Dental Centre* 164 A.D. 2d 366, 564 N.Y.S. 2d 308; *Tatham v Hoke* 489 F. Supp 914 (1979); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

29 See *Tunkle v Regents University of California* 60 Cal 2d 92, 32 Cal RPTR 37 383 P. 2d 441 (1963); *Belshaw v Feinstein* 258 Cal App 2d 711, 65 Cal Rptr 788 (1968); *Olson v Molzen* 558 S.W. 2d 429 (Tenn. S. Ct. 1977); *Tatham v Hoke* 489 F. Supp 934 (1979); *Meiman v Rehabilitation Centre* 444 S.W. 2d 81 (Ky 1969); *Cudnick v William Beaumont Hospital* 207 Mich. App 378, 525 N.W. 2d 891 (1995).

30 See Strauss (1991) 9ff; Cronje-Retief (2000) 89ff; Jones *Medical Negligence* (1996) 18ff; Mason and McCall-Smith (1991) 14ff. See also Ficarra (1995) 147ff; Skegg (1988) 8; Beauchamp and Childress (2001) 1-7ff. Carstens and Kok (2003) 18 *SAPR/PL* 449-451; Carstens and Pearmain (2007) 601ff.

31 See Strauss (1991) 9ff; Cronje-Retief (2000) 89ff; Jones (1998) 18ff; Mason and McCall-Smith (1991) 14ff. See also Ficarra (1995) 147ff; Skegg (1988) 8; Beauchamp and Childress (2001) 1-7ff. Carstens and Kok (2003) 18 *SAPR/PL* 449-451; Carstens and Pearmain (2007) 601ff.

32 See Strauss (1991) 9ff; Cronje-Retief (2000) 89ff; Jones (1998) 18ff; Mason and McCall-Smith (1991) 14ff. See also Ficarra (1995) 147ff; Skegg (1988) 8; Beauchamp and Childress (2001) 1-7ff. Carstens and Kok (2003) 18 *SAPR/PL* 449-451; Carstens and Pearmain (2007) 601ff.

play a major role. [33] The relationship is also said to be founded upon trust and respect and which, together with normative ethics, influence the relationship. Normative ethics on the other hand, entail the responsibility of medical practitioners and hospitals to comply with standards of conduct, including moral principles, rights and virtues. [34] It is therefore the aim of this thesis to focus on the different fields of law and to do a comparative study with the two other jurisdictions and to provide the necessary dissertation , analysis and exposition of the South African law, English law and American law as a means to find answers to the primary question which forms the core of this thesis, namely, whether exclusionary clauses or waivers in medical contracts should still be enforced, alternatively, whether, owing to considerations of public policy in our present constitutional era, courts should not be compelled to refuse to give legal effect to these onerous terms. This work, it is submitted, will provide benefit to those judges who may in future wrestle with this legal problem as well as those whose lives are adversely affected by these clauses.

References in the text and the footnotes reflect the available and obtainable South African, English and American reported cases and published literature until 31 December 2007.

HENRY LERM
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33 Jones (1998) 18; Mason and McCall Smith (1991) 7 14-17; Ficarra (1995) 147ff; Veatch (1997) 21; Van Wyk and Van Oosten (EDS) Nihil obstat: *Feesbundel vir WJ Hosten/Essays in honour of WJ Hosten* (1996) 181; Steyn "The Law of Malpractice liability in Clinical Psychiatry" (Unpublished LLM dissertation Unisa 2003) 67-68; Carstens and Kok (2003) 18 *SAPR/PL* 449-451; Skegg (1988) 8; Hans *The imperative of responsibility* (1984) 6, 90-95; Van Niekerk "Ethics for medicine and medicine for Ethics" (2002) 21 (1) *SAFR.J.Philos 35*; Teff *Reasonable Care* (1994) 72; Giesen "From paternalism to self-determination to shared decision-making" (1988) *Acta Juridica* 107.

34 Strauss (1991) 9ff; Cronje-Retief (2000) 89ff; Jones (1998) 18ff; Mason and McCall-Smith (1991) 14ff. See also Ficarra (1995) 147ff; Skegg (1988) 8; Beauchamp and Childress (2001) 1-7ff. Carstens and Kok (2003) 18 *SAPR/PL* 449-451.

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TABLE OF ABBREVIATIONS

AJIL	American Journal of International Law
AJLM	American Journal of Law and Medicine
ALR	American Law Reports
BML	Businessman's Law
CILSA	The Comparative and International Law Journal of South Africa
CMAJ	Canadian Medical Association Journal
COL L Rev	Columbia Law Review
COLO L Rev	Columbia Law Review
ESR Review	Economic and Social Rights Review
HARV L Rev	Harvard Law Review
JBL	Journal of Business Law
LAL Rev	Los Angeles L Review
LAWSA	Law of South Africa
LQR	Law Quarterly Review
Mand L	Medicine and Law
Med'1 L Rev	Medical Law Review
Modern LR	Modern Law Review
SAJHR	South African Journal on Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SAPL/SAPR	South African Public Law/ Suid-Afrikaanse Publiekereg
SAPM	South African Practice Management
SAYIL	South African Yearbook of International Law

STELL LR	Stellenbosch Law Review
SA MERC LJ	South African Mercantile Law Journal
SAFR J Philos	South African Journal for Philosophy
SALRC	South African Law Reform Commission
THRHR	Tydskrif vir Hedendaagse Romeins Hollandse Reg
TUL LR	Tulane law Review
TSAR	Tydskrif vir Suid-Afrikaanse Reg
WIS L Rev	Wisconsin Law Review